Case No: CR-2020-002462

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES LIST (ChD)
NEUTRAL CITATION NUMBER [2020] EWHC 2452 (Ch)

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Fetter Lane
London EC4A 1NL

Wednesday, 5 August 2020

BEFORE:

MR JUSTICE TROWER

IN THE MATTER OR COLUMBUS ENERGY RESOURCES PLC

AND IN THE MATTER OF THE COMPANIES ACT 2006

MR MATTHEW PARFITT and MR PHILIP MORRISON instructed by Kerman &Co appeared on behalf of the Columbus Energy Resources and BPC

APPROVED JUDGMENT

(Via Skype for Business)

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(Official Shorthand Writers to the Court)

MR JUSTICE TROWER

1. This is an application by Columbus Energy Resources plc ("the Company"), an AIM-quoted oil and gas producer to sanction a scheme of arrangement (“the Scheme”) under Part 26 of the Companies Act 2006. Its purpose is to effect a takeover of the company by Bahamas Petroleum Co plc ("BPC").

2. The terms of the scheme are straightforward in their essentials. Scheme shareholders will transfer their shares in the Company to BPC in exchange for ordinary shares in BPC. The exchange price represents a premium to the Scheme shareholders of 11 per cent based on the closing price on 10 June.

3. The Scheme was approved by the statutory majorities at a meeting of Scheme shareholders held on 27 July 2020. The meeting was convened pursuant to an order made by ICC Judge Jones on 29 June 2020.

4. The role of the court on an application to sanction of arrangement under Part 26 is well-established. It is conveniently summarised by Morgan J in *Re TDG* [2009] 1 BCLC 445 at [29].

5. The first question is whether the provisions of the statute have been compiled with. This falls into a number of different parts.

6. First, I am satisfied that the requirements of the convening order were complied. In particular, the evidence establishes that the notice of the meeting, the Scheme Document, the Explanatory Statement and the Proxy Forms were sent to Scheme shareholders more than 21 days before the date fixed for the meeting (27 July).

7. I am also satisfied that the statutory majorities, being 50 per cent by number and 75 per cent by value, were achieved. The Chairman's report establishes that the votes in favour of the scheme constituted 89.15 per cent by number of Scheme shareholders present and voting in person or by proxy (74 out of 83) comprising 98.05 per cent by value. Slightly more than 238 million of the 243 million scheme shares which were voted at the meeting voted in favour of the scheme. The total turnout of 26 per cent of

all scheme shares was, relatively speaking, a high turnout for meetings of members of the Company.

8. The third aspect of compliance with the terms of the statute, relates to the question of whether what was approved amounted to a compromise or arrangement between the Company and its members. In my view there is a sufficient element of give and take for this aspect of the test to be satisfied: see *Re Jelf Group plc* [2014] EWHC 3857.

9. As to class constitution, the ICC Judge directed a single meeting of members and I am satisfied that he was right to do so. All of the Scheme shareholders have the same existing rights and all are being offered the same deal. In reaching that conclusion, I have regard to three issues in particular that have been drawn to my attention by Mr Parfitt for the Company.

10. The first of those issues is that the Scheme includes provision for the treatment of fractional entitlements which have the effect of giving some shareholders a marginally more favourable treatment than others. I agree that these differences are insignificant and do not fracture the class.

11. The second issue is that some shareholders gave irrevocable undertakings to vote in favour of the Scheme. I agree that these undertakings were not class-creating, largely for the reasons considered by David Richards J in *Re: Telewest Communications plc* [2004] EWHC 924 (Ch).

12. The third issue is that the Company's directors are being given certain additional rights and benefits. These were disclosed in the explanatory statement. They receive additional shares under the Scheme, as a result of the termination of their positions with the Company. I agree with Mr Parfitt's submission that these additional benefits are not class-creating. In part this is because they are immaterial in relation to the Scheme as a whole, but it is also because their entitlements flow from their loss of office, not from their status as shareholders. It seems to me that this is an extraneous interest which, while important for questions of fairness, does not affect questions of class constitution.

13. In these circumstances and applying the long-established test of whether the rights of Scheme shareholders are not so dissimilar as to make it impossible for them to consult together with a view to their common interest, I am satisfied that a single class was appropriate.

14. The matter which has caused the most debate at this hearing and was covered in most detail in Mr Parfitt's skeleton argument, is the form of the meeting that was held and, more particularly, whether it can have been a meeting if, as was the case, shareholders were not permitted to attend in person

15. The order which ICC Judge Jones made on 29 June 2020 was in the following terms:

> "AND IT IS ORDERED THAT in light of the current restrictions on social contact, public gatherings and non-essential travel due to the COVID-19 pandemic, the Meeting may be held without the physical presence of the Scheme Shareholders who shall be entitled to vote by return of their forms of proxy."

16. This order was made in the light of the following evidence from one of the Company's directors:

> "As described in the Scheme Document, the COVID-19 pandemic and the current Government restrictions on physical meetings …, means that it will not be possible, or indeed lawful, to hold the Proposed Meeting in the same way as a general meeting of the Company would have been held prior to such restrictions.
>
> …
>
> Shareholders will be told in the Scheme Document that they will not be given access to the meeting if they attend in person and will be encouraged to appoint the Chairman of the Meeting as their proxy. This means that it will not be possible for the shareholders to consult with each other at the Proposed Meeting itself, although they will have the ability to make their views known by exercising their proxy voting rights.
>
> At the date of this witness statement, the Corporate Governance and Insolvency Bill 2020 is in the final stages of its passage through Parliament. The proposed practical arrangements set out in the Scheme Document reflect the current draft of the Bill which restricts shareholders' rights to do anything other than vote at

meetings. It is likely that by the time of the Proposed Meeting, the Bill will have been passed into law, although this is not certain."

17. In the event, the Corporate Insolvency and Governance Act 2020 was enacted and came into effect very shortly before the order was made by ICC Judge Jones. Schedule 14 of that Act makes special provision for meetings of companies and other bodies. Paragraph 3 of Schedule 14 applies to three different categories of meeting, the second of which is, "A meeting of any class of members of a qualifying body" (paragraph 3(2)(b)). The definition of "qualifying body" includes by paragraph 1(g) of Schedule 14, "a company within the meaning of section 1(1) of the Companies Act 2006" and therefore extends to the Company in this case.

18. On the face of it this would appear to mean that paragraph 3 applies to meetings of members of a company or any class of members within the meaning of sections 896 of the Companies Act 2006, empowering the court, as it does, to order "a meeting of the members of the company or class of members of the company in such manner as the court directs". It would also follow that it applies to any meeting referred to in section 899 of the Companies Act 2006 for the purposes of determining whether the statutory majorities to approve a scheme have been achieved.

19. On the assumption that Parliament intended paragraph 3 to extend to such meetings, paragraph 3(7) of Schedule 14 requires Part 26 to take effect subject to its terms. The consequences are firstly that meetings summoned under section 896 of the Companies Act 2006 may be held, and any votes may be permitted to be cast, by electronic means or other means (paragraph 3(4)); secondly that the meetings may be held without any number of those participating in the meeting being together at the same place (paragraph 3(5)); and thirdly, that a member of the company does not have a right (a) to attend the meeting in person or (b) (and this is the critical point for present purposes) to participate in the meeting other than by voting or (c) to vote by particular means (paragraph 3(6)).

20. At first blush, paragraph 3(6)(b), ie the exclusion of the right to participate at the meeting other than by voting, is inconsistent with one of the principal purposes of a meeting of members summoned under section 896, which is to enable them to consult together for the purpose of determining whether or not to approve the Scheme. In the

standard wording of a convening order, such orders are summoned "for the purpose of considering and if thought fit approving a scheme". As I held in *Capital Trust Direct plc* [2020] EWHC 969 (Ch) at [42] in the context of a conclusion that a remote meeting of creditors was within the meaning of the statute, even where physical attendance was neither possible nor permitted:

> "… what is important for the purposes of a meeting to be held under Part 26 is that there can be said to be something sufficient to amount to 'a coming together' with the ability to consult."

21. In my view, it remains the case that, absent legislative intervention, the ability of creditors or members to consult together at a meeting is a central part of the process by which they approve a scheme of arrangement. In the normal course, the role taken by consultation in defining whether what occurs is to be characterised as a meeting, is reflected by the fact that the ability of creditors or members to consult together with a view to their common interest, is the long-established test for class constitution purposes. This is significant whether or not they do in fact consult, because the relevant question is their ability to do so (in the light of any divergence in their rights).

22. However, the statutory requirements for approval are simply that the statutory majorities are fulfilled. The statute itself does not explicitly require that consultation must be able to take place, save to the extent that it is inherent in the very concept of a meeting as that word is used. The statutory purpose of the meeting is not to consult but it is to determine by vote whether or not to approve. All other things being equal, consultation is a necessary part of the process, but is not the purpose for which it takes place.

23. It seems to me that what Parliament has done in enacting Schedule 14 is to alter what is required for an event to constitute a meeting within the meaning of section 896. It has done so by removing from members of a company what would otherwise be their right to consult whilst still at the same time providing that their participation at what is still capable of being a meeting as a matter of language, is to be limited to voting without consulting with each other before they do so. In my judgment, that is what paragraph 3(6)(b) of Schedule 14 does and it does it in relation to a meeting under section 896 as

much as it does in relation to any other meeting within the contemplation of paragraph 3(2) of Schedule 14.

24. There is one other matter which I should mention. There is no equivalent statutory provision for meetings of creditors summoned under section 896. It seems to me that the consequence of that is that the principles I considered in *Castle Trust* will continue to apply in that context. It may be thought odd that the requirements for what is capable of being a meeting should be different for creditors from those which now apply to members, but that is simply a consequence of the way in which the emergency and temporary legislation has been enacted. In particular, it is not in my view a pointer to the possibility that paragraph 3 of Schedule 14 is not intended to apply to meetings of members summoned under section 896 in the first place.

25. It will still be necessary for the court to give directions towards the achievement of the statutory purpose for which a meeting is to be held, ie, the member approval of the Scheme, and it will still be necessary for what is directed to take place to constitute a meeting as a matter of language. This remains the case even though the effect of paragraph 3 is to provide for the removal of what would otherwise be one of the essential incidents of a meeting.

26. In the present case, I am satisfied that this is what occurred. Members were not permitted to attend in person but a formal process attended by directors and some, albeit very few, shareholders was devised which complies with the terms of Schedule 14 and the order made by ICC Judge Jones. There was what section 896, having effect as it now does subject to paragraph 3 of Schedule 14 required, namely a meeting at which the Scheme was approved.

27. I should also add that it seems to me that in a case where what would otherwise be the rights of a member of the qualifying body to participate in a meeting other than by voting have been removed by operation of paragraph 3(6), it is particularly important for the Company to take sufficient steps to ensure that the terms of the Scheme, and in particular those terms on which it might be anticipated that shareholders would wish to consult, are fully and adequately explained. In the present case, this was achieved by a detailed explanatory statement which was supplemented by a number of other means

by which information was conveyed, including a question and answer document and attempts by the company to contact shareholders for the purposes of providing them with further explanations.

28. The remaining requirements summarised by Morgan J in *Re TDG* can be taken more shortly.

29. I am satisfied that the class of shareholders was fairly represented by those who attended the meeting, albeit subject to a participation which was limited to voting and voting alone. I am also satisfied that the statutory majority were acting **bona fide** and not coercing the minority so as to promote an interest adverse to those of the class they purport to represent. There are three particular reasons for this.

30. First, the evidence is that the turnout was high for the Company. It was several times greater than normal figures for its annual general meetings.

31. Secondly, the circular was full and detailed. I have considered the explanatory statement, and nothing indicates that members were voting on the basis of anything other than the materials that were put before all of them.

32. Thirdly, no member appears before me today to submit that collateral interests influence the majority vote and I am satisfied that the extent of the additional benefits received by directors in their capacity as directors or employees, are not such as to give rise to concerns about fairness.

33. I am also satisfied that an intelligent and honest person being a member of the class concerned and acting in respect of their own interest, might reasonably approve the Scheme. There are a number of reasons for this:

    a. it was subject to the unanimous recommendation of all the directors;

    b. there was, as I have already indicated, a full explanation in the explanatory statement and accompanying materials;

c. the Scheme received support from creditors which could properly be described as overwhelming;

d. there were plainly good commercial reasons for the takeover which has been facilitated by the Scheme; and

e. the shares that have been acquired by the new entity, BPC, were acquired at a premium to the value at which they had been trading on the market.

34. Finally, I am satisfied that there are no indications that there is any blot on the face of the Scheme.

35. For those reasons, I will sanction the Scheme and make an order in the terms sought by the Company.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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