

Neutral Citation Number: [2020] EWHC 3565 (Ch)

Case No: CR-2020-004439

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMPANIES COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 9 December 2020

Before :

Sir Alastair Norris

Re :

**In the Matter of Petra Diamonds US\$ Treasury
PLC**

Tom Smith QC and Stefanie Wilkins (instructed by Ashurst LLP) for the Claimant

Hearing dates: **9th December 2020**

APPROVED JUDGMENT

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Judgment by **SIR ALASTAIR NORRIS**

1. The Petra group of companies, under its ultimate parent Petra Diamonds Limited ("PDL"), is a diamond mining group which supplies gem-quality rough diamonds to the world market. In recent times it has accounted for about 2.6% of the world's diamond production, about 2.2% by value. It operates from mines in South Africa and in Tanzania which are held within separate operating companies. These operations were acquired in the period between 2007 and 2011 and were the subject of a heavy investment programme to overcome previous underinvestment. However, in 2019 there was a significant decline in the price of rough diamonds of the order of 19%. This reduced revenue and created severe pressure, principally because it led to a closure of the revolving credit facility and a consequent knock-on effect on the liquidity.
2. Accordingly, the PDL group must undergo a restructuring to reduce its debt, to increase its liquidity and to raise new money. The alternative to such a restructuring is that one or more of the group members would be bound to enter into an insolvency process. There are three processes in prospect: (a) there might be a business rescue under South African law with a moratorium and a forced sale of the business as a going concern within that insolvency process; (b) there might be a business rescue which took the form of a phased winding-up; or (c) there might be a straightforward liquidation. I will briefly refer to those possibilities as the "insolvency scenarios".
3. In outline, the group's present funding consists of the following five strands.
4. First, there is a ZAR 500 million working capital facility provided by ABSA Bank and Firstrand Bank. There is, because of the liquidity pressures to which I referred, unpaid interest in respect of this facility.
5. Secondly, there is a ZAR 400 million revolving credit facility provided, again, by ABSA Bank but this time with Nedbank. I will call this "the Existing RCF". There is also, because of liquidity pressure, unpaid interest under this facility which, as I have indicated, has effectively closed.

6. The third strand is a ZAR 683 million term loan facility which is extended to the minority shareholders in the mine operating companies but which is available to the group.
7. Fourthly, there are some general banking facilities amounting to about ZAR 1 billion.
8. Under the prevailing intercreditor agreement the foregoing facilities are all secured on a first ranking priority basis *pari passu*. I will call these "the First Lien Facilities".
9. Then, fifthly, there is a US\$650 million series of notes with a 7.25% coupon issued in April 2017 and maturing in May 2022. I will call these "the Existing Notes". They were issued by Petra Diamonds US\$ Treasury Limited ("the Company"), a wholly owned subsidiary of PDL incorporated in England and Wales and having its COMI here. The Existing Notes themselves are governed by New York law and they are listed on the Irish Stock Exchange and tradeable through the usual clearing houses. The Company failed to pay the interest due on the Existing Notes on 1 May and on 1 November 2020. These Existing Notes rank behind the First Lien Facilities. In the insolvency scenarios the recovery would range from about 32% of the face value of the Existing Notes down to nil.
10. With this in prospect, in June 2020 the Company began negotiations with an ad hoc committee of its lenders. The Company as a result is proposing a scheme of arrangement under Part 26 of the Companies Act 2006 in relation to the Existing Notes alone. The group is also proposing a consensual restatement of the First Lien Facilities, but those arrangements do not form part of the scheme.
11. The scheme itself is straightforward. First, \$650 million Existing Notes will be released and discharged. Second, the holders of the Existing Notes will receive US\$145 million worth of new notes ("New Notes") issued pro rata according to their holdings of Existing Notes. These New Notes have an extended maturity, being five years from the date of issue, and carry an enhanced rate of interest; 10.5% payable in kind for the first two years and thereafter 9.75% in cash. They will have essentially the same security package as the Existing Notes. Third, in place of the balance of

the Existing Notes, i.e. those not reinstated by New Notes, the holders of Existing Notes will receive equity. New shares amounting to 56% of the total equity in PDL will be distributed to the holders of Existing Notes pro rata.

12. Fourthly, US\$30 million of new money is to be raised. Each Existing Noteholder is entitled to subscribe new money rateably according to their holding of Existing Notes. Any subscription rights not so taken up will be made available to other subscribing Existing Noteholders, rateably according to their contribution to the new money.
13. Fifthly, US\$150 million of new notes will be distributed to the contributors of new money, rateably according to their contribution. In addition, a contributor of new money will receive a rateable allocation of an additional tranche of new equity in PDL equal to 35% of the total equity in PDL. So, to summarise: PDL will be issuing new equity amounting to 91% of its total equity, of which 56% will be allocated to the holders of Existing Notes in that right and a further 35% will be allocated to those holders of Existing Notes who contribute new money.
14. The application before me is for the grant of an order convening a meeting of the holders of Existing Notes to consider and, if thought fit, to approve this scheme. It is necessary to focus on the issues relevant to that application and to leave for the sanction hearing many broader questions, including above all the “fairness” of the scheme. The approach of the court to making a convening order is well settled. It is conveniently summarised in the Practice Statement of 26 June 2020. In summary, I am at this hearing concerned with jurisdiction questions identified by the company or raised by any scheme creditors, with scrutinising the arrangements for ascertaining the will of the scheme creditors and with identifying any “roadblock” in the way of the scheme. I will consider these matters under a number of separate headings.
15. First, notification to participants sufficient to enable them to attend this hearing. The Practice Statement Letter was distributed through various channels on 17 November 2020 and the terms of the scheme were posted on the scheme website. A notice of this hearing was contained in those

communications. Although no scheme creditors have attended the hearing, I am satisfied that they have had sufficient and informed opportunity to do so. Indeed, so far as the company knows, no scheme creditor has raised any objection to the scheme set out in the Practice Statement Letter.

16. The second matter I must address is to identify the relevant creditors. It is clear that the holders of Existing Notes are properly regarded as contingent creditors and so “creditors” within the meaning of the CA2006 with whom a compromise or arrangement may be made: see Castle Holdco 4 Ltd [2009] EWHC 3919.
17. Third, it is equally clear that the scheme is a “compromise” or “arrangement” with those creditors within Part 26. The outline of the scheme shows that this is not a surrender or forfeiture of rights of the holders of Existing Notes and that there is the requisite element of “give and take” between the holders of the Existing Notes and the Company.
18. The fourth question is one concerning class composition: how are those creditors to meet to consider the arrangement that is being proposed? The approach is well settled and familiar and I do not intend to recite very well-known authorities or to add my own summary to the many that already exist. It is necessary only to direct myself by reference to the principle stated by Lord Justice Bowen in Sovereign Life [1892] 2 QB 573 at 583, namely that scheme creditors should meet together unless their rights are so dissimilar as to make it impossible for them to consult together with a view to their common interest. Many applications and elaborations of this principle were summarised by Hildyard J in Re Primacom Holdings [2013] BCC 201 at [44] to [45]; and I direct myself accordingly.
19. As a starting point, the present rights of all holders of Existing Notes arise under a single indenture and are identical; and in any of the insolvency scenarios they would be modified in the same way. Likewise the rights available to the holders of Existing Notes under the proposed scheme are also identical. So that they can meet together as a single class.

20. But the Company has rightly said that it is necessary to ask whether there are any detailed features of the scheme that could cause that single class to fracture. I would emphasise that a decision at the convening hearing that the class should not fracture does not predetermine the answer to the question whether the outcome of the single meeting may be relied upon at the sanction hearing as being truly representative of the views of the creditors. The outcome of the meeting is always up for review. Helpfully, five features have been identified.
21. The first feature is the “new money” provisions. Not all Existing Noteholders will subscribe for new money. Those that do receive a very significantly enhanced return on their Existing Notes. But subscription of new money is an opportunity that is open to all; and it is a genuine opportunity, because the class to which the offer is addressed consists of those who subscribe to or purchase corporate bonds. They lend money to companies. Moreover, the opportunity to benefit from subscription of new money has been maximised, because (i) the right to participate is, under the scheme, assignable and (ii) the new money notes are to have a minimum denomination of US\$1,000 (compared with the minimum denomination of the Existing Notes of US\$200,000). Thus, there is evident encouragement to Existing Noteholders at all levels to participate. These features mean that I can adopt the approach taken by Snowden J in Re Noble [2019] BCC 349 at [102] to [106] and hold that the provisions relating to new money do not fracture the class.
22. The second feature is the benefits which arise under a “lock-up agreement” relating to the negotiation of the scheme. Those who had agreed to support the scheme by 1 2020 are entitled to an extra allocation of New Notes equal to 1% of their Existing Notes locked up. In fact, 94.92% of the Existing Noteholders have acceded to this agreement. But the fact remains that not all Existing Noteholders have entered into the “lock-up”. Once again, this was an opportunity that was open to all. It is a matter for the holder of an Existing Note to decide whether to commit to the scheme or to retain flexibility and freedom. It is an entirely genuine choice. I will accept and follow the

reasoning of David Richards J (as he then was) in Re Privatbank [2015] EWHC 3299 and hold that such a “lock-up agreement” per se does not fracture the class.

23. As a secondary reason, I would hold that the “lock-up fee” is not at a level where it is obviously material to the decision of a holder of Existing Notes whether or not to support the scheme at the scheme meeting. An analysis of the returns available, both by reference to the face value of the Existing Notes and by reference to the current trading value of the Existing Notes, has been produced. It discloses a huge range, but within that huge range the “lock-up” fee is relatively insignificant. I shall follow the approach set out in Re Noble Group [2019] BCC 349 at [149] to [151] and hold that this feature does not of itself fracture the class. Of course, it may in the event prove to be of greater significance at the scheme meeting than now appears and that can be reviewed at the sanction hearing in the light of the outcome of the scheme meeting.

24. The third feature are the “backstop fee” and a “restricted period fee” (or “work fee”) provided to members of the ad hoc committee. These arise under separate arrangements not dependent upon the success of the scheme. A fee of 1% of the value of the Existing Notes as at 1 December 2020 will be paid to members of the ad hoc committee (in an additional allocation of New Notes) as compensation for their inability to trade Existing Notes during the negotiation of the scheme. The ad hoc committee also agreed to underwrite or “backstop” the whole of the new money for a fee of 5% of the new money. On the evidence, this is a commercial underwriting fee. It will be paid by reference to the contribution to the shortfall by pro rata allocation of £1.5 million worth of New Notes. As Snowden J said in Re Noble at paragraph [131], payments made to some creditors independently of the scheme and not dependent on the scheme taking effect ought not to weigh in the consideration of class composition. These arrangement are not dependent upon the scheme taking effect because although the consideration I have referred to under each arrangement is an additional allocation of New Notes, in the event that the scheme does not proceed a cash alternative will be applied. On the evidence, the fees in each case are at a commercial level or at a level which

has previously been found acceptable by the court. Having examined them, I am satisfied that they are not disguised extra consideration. They are not obviously material in the context of the scheme as a whole. But once again, depending on the outcome of the scheme meeting, these matters can be reviewed at the sanction hearing.

25. The fourth feature identified was that advisers, both legal and financial, to the ad hoc committee will by agreement be paid by the Company. Again, these arrangements arise under separate agreements. In my view they constitute reimbursement of expenses incurred in part at least for the benefit of all holders of Existing Notes. They do not represent some clear bonus to the ad hoc committee members; nor do they constitute in truth any disguised consideration. I do not consider that these fracture the class either.
26. The fifth, and final, feature drawn to my attention is that the scheme confers some nomination rights upon the four largest noteholders, whoever they might be; rights to nominate an executive director. I considered this sort of arrangement recently in Re Pizzaexpress Financing 2 PLC [2020] EWHC 2873 at paragraph [44], and I would take exactly the same approach in this case. First, the right is, I think, simply a function of the size of the holding. The scheme itself does not dictate who shall have the nomination right. Anyone can qualify by getting an appropriate holding of equity. Second, it is not, I think, a material feature in the overall consideration of the scheme because it does not confer any element of control. All it does is facilitate the appointment of non-executive directors who will (when appointed) owe duties to all stakeholders in PDL.
27. That concludes my consideration of the fourth question, class composition. The fifth question is the matter of jurisdiction. I must consider whether it is obvious (i) that the court has no jurisdiction or (ii) that there is some feature of the scheme which means that the Court will not, at the sanction hearing, regard it as effective. As to jurisdiction over the Company, this is entirely straightforward. The Company is incorporated in England and Wales and does in fact have its COMI here. So far as the scheme creditors are concerned, the question always arises in relation to scheme creditors who

are domiciled in another Member State of the EU whether the court can exercise jurisdiction over them.

28. The path is well-trodden and I shall follow it. It is clear that the Recast Insolvency Regulation (EU) 2015/848 does not apply. It is an open question whether the Recast Jurisdiction and Judgments Regulation (EU) 2012/2015 does apply or not. The practice is to assume that it does apply, and then to seek to identify some provision within it which allocates jurisdiction to the UK. In the instant case the gateway is Article 8. I shall follow the course I took in DTEK Finance [2106] All ER (D) at [18]-[25]. In my judgment the presence of a single defendant in the UK, coupled with the expediency of avoiding conflicting decisions by having creditor rights addressed in a single jurisdiction under a mechanism which, in order to be effective must bind all, confers the relevant jurisdiction. In fact, there are about 15% by value of the holders of Existing Notes domiciled in the UK. Whether, the court having accepted jurisdiction, it takes the view that the jurisdiction can properly be exercised in the light of the outcome of the scheme meeting can be reconsidered at the sanction hearing.
29. As to the scheme creditors generally, I have at present no reason to think that the scheme will not be regarded as effective in any material jurisdiction and I note that evidence addressing this question will be before the judge at the sanction hearing, when the question can be considered in detail.
30. Sixthly, I should say that there is no defect in, “blot” upon or obvious roadblock in the way of the scheme. The scheme contains entirely conventional provisions in relation to the release of guarantors (in order to avoid “ricochet” claims) and to the release of those who have advised in relation to the scheme. There are no unusual provisions in the scheme itself which even now be seen to present a roadblock.
31. Lastly, I must scrutinise the arrangements that are proposed for the holding of the scheme meeting. The timetable is somewhat tight in view of Christmas and New Year holiday periods but is in my view sufficient. I can, in particular rely, on a provision in the convening order which enables the

meeting chairman to accept late votes, a power which I would expect the chairman to exercise if at all possible. The meeting is to be convened for 8 January, with account letters demonstrating an entitlement to vote to be lodged by 5 January 2021. The meeting itself is to be held electronically, and it is clear that those making the arrangements have taken into account the views expressed by Trower J in Re Castle Trust Direct [2020] EWHC 969 at [42] to [43]. Whether those arrangements were, in the event, adequate to achieve a fair representation at the meeting will be reviewed at the sanction hearing.

32. In all the circumstances, I propose to make a convening order in the form in which it has been placed before me. It includes a restriction upon access to some confidential material, a matter to which I have given independent consideration, but am satisfied is warranted. I shall order accordingly.