

[2021] EWHC 1431 (Ch)

**CR-2021-000484**

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
INSOLVENCY AND COMPANIES LIST (ChD)**

**15 April 2021**

**Before:**

**Mr Justice Miles**

**IN THE MATTER OF OBRASCÓN HUARTE LAÍN, S.A.  
AND IN THE MATTER OF THE COMPANIES ACT 2006**

**Daniel Bayfield QC and Ryan Perkins (instructed by Linklaters LLP) for the Applicant**

**Hearing date: 15 April 2021**

**APPROVED JUDGMENT**

**MR JUSTICE MILES:**

1. This is an application by Obrascón Huarte Lain (the Company) for an order sanctioning its scheme of arrangement (the Scheme) under part 26 of The Companies Act 2006 (the 2006 Act) between the Company and certain of its creditors (the Scheme Creditors).
2. I have considered a number of witness statements made in support of this application and the earlier convening hearing. I shall draw on the helpful summary contained in the skeleton argument of counsel for the Company for the background facts.
3. The Company is incorporated in Spain. It is the holding company of an international construction and civil engineering group (the Group) which had over 20,000 employees last year. The Company's shares are listed on a number of stock exchanges in Spain. The Company and the Group have fallen into severe financial difficulties and are now experiencing a cashflow crisis.
4. On 15 March 2021 the Company failed to make coupon payments of €15.1 million that fell due on two series of unsecured debt securities issued by the Company (the Existing Notes). The Company failed to make those coupon payments because it had insufficient available cash.
5. The Directors of the Company consider that it and the Group are significantly over leveraged, and the Company and the Group are seeking to implement a comprehensive financing restructuring (the Restructuring). As part of the Restructuring, the Company has proposed the Scheme.
6. The purpose of the Scheme is to compromise the rights of the ultimate beneficial owners of the Existing Notes, who I shall refer to as the "Noteholders", save for certain Noteholders whose rights will not be compromised by the Scheme and will instead be dealt with consensually as part of the wider Restructuring.
7. The Noteholders whose rights will be compromised by the Scheme are the Scheme Creditors. Under the terms of the Scheme, the Existing Notes held by the Scheme Creditors will be cancelled and replaced with a new series of notes (the New Notes) issued by a new Spanish subsidiary of the company.
8. The New Notes will have a face value of €880 for every €1,000 of Existing Notes, and will have an extended maturity date and a different coupon structure. Unlike the Existing Notes, the New Notes will benefit from a package of security and guarantees.
9. I have considered the evidence and am satisfied on the basis of it that, absent the Scheme and the Restructuring, it is likely that the Company would be forced to enter into a formal insolvency procedure under Spanish law.
10. The Company and the Group are over-leveraged and critically short of liquidity. Formal insolvency proceedings would, on the evidence, provide a very poor return to

the Scheme Creditors, anticipated to be in the order of 8.8 to 12.4 per cent of the total funds owing to them. The poor return would arise from the destruction in value that would result from formal insolvency proceedings, together with the fact that the Existing Notes are unsecured and structurally subordinated to the other liabilities of the Group.

11. By contrast, if the Scheme and Restructuring are implemented, the directors consider that the Company and the Group will be restored to financial health. This will enable the Scheme Creditors to be paid in full on the New Notes, which will represent an 88 per cent recovery, measured by reference to the principal amount outstanding under the Existing Notes.
12. A convening hearing was held on 18 March 2021. Mr Justice Adam Johnson made an order giving the Company permission to convene a single meeting of the Scheme Creditors. The scheme meeting was held on 9 April 2021 (the Scheme Meeting).
13. The Scheme was approved by 99.8 per cent of the Scheme Creditors, by value of those attending in person or by proxy, comprising 358 out of the 360 Scheme Creditors who cast a vote.
14. The Scheme Meeting was attended by some 90.7 per cent of the Scheme Creditors by value. So there is overwhelming support for the Scheme.
15. I should say something more at this stage about the existing debt structure of the Company and the Group. The Company is the issuer of the Existing Notes, which are divided into two series:
  - a. a series of notes due to mature on 15 March 2022 with an interest rate of 4.75 per cent (the 2022 Notes). The 2022 Notes had an initial principal amount of €400 million, of which €322 million currently remains outstanding.
  - b. a series of notes due to mature on 15 March 2023 with a coupon of 5.5 per cent (the 2023 Notes). The 2023 Notes had an initial principal amount of €325 million, of which €269.9 million currently remains outstanding.
16. So the principal amount currently outstanding under the Existing Notes is some €592.9 million. The Existing Notes are the largest part of the Group's financial indebtedness.
17. The Existing Notes are governed by English law in all material respects. There are also asymmetric English court jurisdiction clauses in each of the relevant finance documents.
18. The Existing Notes are unsecured and do not benefit from any guarantees provided by other Group companies. They are structurally subordinated to the other liabilities of the Group.

19. The Group's other significant financial liabilities are as follows. First, the Company is a borrower under a Facility Agreement provided by six banks (the Lenders) and guaranteed by the Spanish Official Credit Institute (the ICO). This facility (the ICO Facility) was entered into on 30 April 2020 and guaranteed by the ICO as part of the Spanish Government's response to the Coronavirus pandemic. The drawn amount of the facility is currently about €93.7 million. That is also the amount of the current total principal amount of the facility (following the application of the proceeds of a recent sale of an asset; before which it was €130 million).
20. The Company is, secondly, an obligor under a number of facilities known as bonding lines (the Bonding Lines), which are provided by the Lenders. These allow the Company and certain other Group obligors to request the issuance of performance bonds by the Lenders for the benefit of the Company's contractual counterparties. Such arrangements are commonplace and an essential part of the construction business.
21. Third, a number of Group companies have entered into bilateral credit facilities with various lenders which will be unaffected by the Restructuring.
22. The Scheme affects the rights attaching only to the Existing Notes. It does not affect the other liabilities of the Company and the Group, which will be dealt with as part of the wider Restructuring.
23. One of the principal reasons for the Company's financial difficulties is its highly leverage. Its gross senior debt is equal to 8.7 times EBITDA. This has caused difficulties for the Company over several years and has prevented the Company from borrowing new money or increasing its Bonding Lines to finance its operations.
24. The Company has also suffered from a significant drop in demand in the construction sector. Difficult market conditions had already arisen in the Spanish construction sector in and before 2019, and these problems have been exacerbated by the pandemic, which has resulted in a further significant decline in demand for the Group's services.
25. In July and August 2020, the Group's credit ratings were downgraded by the rating agencies to reflect the high risk of default.
26. The Company has also been forced to spend large sums of money to address legacy problems on certain construction projects. It was also required to repay €73 million of notes which fell due in 2020.
27. As a result of these various problems, the Company is now facing a cash flow crisis. As already mentioned, on 15 March 2021, the Company failed to pay coupons on the Existing Notes of €15.1 million. The Company had insufficient cash to make this payment and meet its other liabilities, including payroll liabilities. The evidence shows that the Company will have little or no remaining liquidity by the end of April 2021.
28. The Group has also faced significant difficulties in renewing its Bonding Lines, which were due to expire in 2020. The Lenders have only been prepared to extend the

Bonding Lines on a monthly basis, pending the completion of the Restructuring. This has destabilised the Group's business and limited its ability to win new construction projects.

29. In June 2020, an ad hoc group of noteholders (the Ad Hoc Group) was formed to negotiate a restructuring of the Existing Notes. The Company had also entered into restructuring negotiations with its other financial creditors and stakeholders. The members of the Ad Hoc Group hold around 53 per cent of the Existing Notes.
30. On 20 January 2021, after several months of negotiations, the members of the Ad Hoc Group signed a lock-up agreement (the Lock-Up Agreement) under which they agreed to support a restructuring and are required to vote in favour of the Scheme.
31. The Lock-Up Agreement was publicly announced to the market on 21 January 2021 and was open to all Noteholders after that date, up to a date in February 2020, which I shall return to in a moment.
32. About 93 per cent of existing Noteholders by value signed up to the Lock-Up Agreement by that date. The Company has entered into a separate Lender Commitment Letter with the Lenders, which sets out the key commercial terms for the Restructuring in relation to those Lenders. The Lender Commitment Letter was entered into on 25 February 2021. On the same date, the Company and certain of its subsidiaries acceded to the Lock-Up Agreement.
33. I turn to say more about the Scheme, starting with the identity of the Scheme Creditors.
34. Like most modern debt securities, the Existing Notes are issued in the form of a "Permanent Global Note" representing the entire face value of each series of Existing Notes.
35. Each Permanent Global Note is held by a common depository. Beneficial interests in each Permanent Global Note are traded through Euroclear and Clear stream (the Clearing Systems). The participants in the Clearing Systems maintain book-entry accounts to which interests in the Existing Notes are credited.
36. The participants in the Clearing Systems may be the beneficial owners of their interests in the notes and/or may hold their interest in the notes, in whole or in part, on behalf of the beneficial owners. I use this term broadly, and in accordance with market practice, as the interests of the ultimate investors are held through a series of contracts rather than on trust.
37. The beneficial owners of the notes are contingent creditors for the sums due under the Existing Notes. As with many previous schemes of arrangement involving notes of a similar type, the beneficial owners are treated as the Scheme Creditors for the purpose of compromising the Existing Notes.

38. As part of the Restructuring, the Existing Notes held by the Scheme Creditors will be cancelled and exchanged for New Notes issued by a Spanish holding company at an exchange rate of 88 per cent.
39. The accrued and unpaid interest under the Existing Notes will be paid in cash, including the coupons that the Company failed to pay on 15 March 2021, as well as interest accrued from that date until the effective date of Restructuring, which is anticipated to occur in mid-May 2021.
40. The New Notes will, as I have already explained, benefit from a guarantee and security package. They will rank behind the ICO Facility and certain of the Bonding Lines but ahead of the other liabilities of the Group.
41. They will have a new maturity structure which will be the same for all Noteholders, with 50 per cent of the principal amount falling due for repayment on 31 March 2025, and the balance falling due on 31 March 2026.
42. The New Notes will bear interest at 5.1 per cent per annum, plus “payment-in-kind” interest, which is capitalised and added to the principal debt at a rate of 1.5 per cent up to 15 September 2023 and 4.56 per cent thereafter.
43. The Scheme operates by authorising the Company, the Security Trustee and the Information Agent to enter into certain restructuring documents as agent and attorney on behalf of the Scheme Creditors. The key restructuring document is the Restructuring Implementation Deed. Arrangements of this kind, where the Scheme Creditors make the Company their agent and attorney, have been approved in a number of other cases under Part 26 of the 2006 Act.
44. Clause 8 of the Restructuring Implementation Deed provides for a release of the professional advisers to the Company, the directors of the company and various other persons involved in the Scheme and the Restructuring from any liability arising out of the negotiation and implementation of the Scheme and Restructuring. This is a standard clause which has been approved in a number of other scheme cases.
45. There are some existing Noteholders who are not Scheme Creditors. These are investment funds, controlled by three investment managers, who have been appointed as Backstop Providers. The Backstop Providers are members of the Ad Hoc Group and hold some 43.82 per cent of the Existing Notes. It has been agreed that the Backstop Providers will convert their Existing Notes into a combination of shares in the Company and New Notes. To the extent that they receive New Notes, these will be provided at an exchange rate of 68 per cent, up to a certain value, and at 88 per cent above that value.
46. These arrangements will be effected outside of the Scheme, and the Backstop Providers are not Scheme Creditors. The effect of these arrangements is that the Backstop Providers are entering into a form of debt-for-equity swap with the Company as respects a certain amount of their Existing Notes. And this will reduce

the Company's debt by a larger amount than would be possible if all the Existing Notes were converted into New Notes at the exchange rate of 88 per cent.

47. The directors concluded that the arrangements with the Backstop Providers will therefore assist in de-leveraging the Company's balance sheet, and are necessary to achieve the objectives of the Restructuring.
48. The Backstop Providers will receive a fee for their role in the Restructuring, to be paid in the form of additional shares. This arrangement has been commercially negotiated by the Company. The arrangements concerning the Backstop Providers were fully disclosed in the Explanatory Statement for the Scheme.
49. Under the Restructuring, the Company will also raise new equity capital by way of a rights issue coupled with a private placement of additional shares with existing shareholders. This will enable the Company to raise between €42 million and €71.4 million of new equity.
50. Also as part of the Restructuring, the Bonding Lines will be extended (alongside a number of other changes to the Bonding Lines).
51. The evidence shows that it is necessary for various consents to be obtained from various contractual counterparties of the Group and certain conditions to be met before the Restructuring becomes effective.
52. I am satisfied that the consents are likely to be provided and, even if they are not provided, waivers are likely to be obtained from the relevant creditors.
53. Once the Restructuring has become effective, the Company can initiate a legal procedure in Spain, known as *homologación judicial*. The purpose of this procedure is to ensure that the steps taken in connection with the Scheme and the Restructuring are not liable to be unwound.
54. I turn to the procedural history. As I have said, the convening hearing took place on 18 March 2021 before Mr Justice Adam Johnson. He accepted the Company's submissions and made the convening order in the terms sought by the Company. He considered that it was appropriate for there to be a single class meeting. He noted that two potential class issues about the advisers' fees and the equality of provision of information had not been addressed in the Practice Statement Letter provided to creditors before the convening hearing. He accepted that these two potential class issues did not require the Scheme Creditors to vote in separate classes but stated at paragraph 35 that any Scheme Creditors who wished to argue otherwise would be entitled to do so at the sanction hearing.
55. These two points were specifically raised in the Explanatory Statement that was provided to Scheme Creditors before the Scheme Meeting, and they were informed that they would have the ability to advance arguments on these points at the sanction hearing if they thought fit.

56. In the event, no Scheme Creditor has sought to advance any such argument. And indeed, no Scheme Creditor has appeared before me to oppose the sanction of the Scheme.
57. The Scheme Meeting was subsequently convened in the manner directed by Mr Justice Adam Johnson. The chairperson of the Scheme Meeting, Mr Crosse of Linklaters, has prepared a report about the meeting. It took place remotely through a video conference on 9 April 2021.
58. I have already summarised the outcome of the Scheme Meeting. 360 Scheme Creditors voted at the Scheme Meeting in person or by proxy. 358 of them voted in favour of the Scheme, a majority in number of 99.4 per cent. The Scheme was approved by the majority in value of 99.8 per cent and the turnout was 90.7 per cent by value.
59. I am satisfied, on the evidence, that a proper meeting took place. There were no difficulties for participating creditors in their ability to hear, ask questions or express opinions at the Scheme Meeting and they otherwise did not have their ability to contribute to the business of the meeting impaired.
60. There were, however, some administrative problems that meant that a small number of Scheme Creditors - some 11 in total - were unable to vote at the Scheme Meeting. In summary:
  - a. One creditor, called Noteholder A in the evidence, did lodge the required paperwork but it was after the voting deadline had passed. The creditor, holding €100,000 of notes, would have voted in favour.
  - b. For nine other creditors, the necessary paperwork was not provided in time. This was not a result of any technological problem, or indeed any action on the part of the Company. Rather it was a consequence of inaction, it appears, on the part of the relevant account holders (Account Holders).
  - c. Of those creditors, eight are party to the Lock-Up Agreement. And the Account Holder has belatedly provided the paperwork for a vote in favour of the Scheme on behalf of each of the eight Noteholders.
  - d. Another noteholder, referred to in the evidence as Noteholder B, which was not party to the Lock-Up Agreement, through its Account Holder, also provided a belated vote in favour of the Scheme.
  - e. That leaves one other holder, referred to as Noteholder C, which holds some €200,000 of notes. The relevant Account Holder has not, it appears, been able to obtain the necessary paperwork from that noteholder, and it appears on the evidence that this noteholder may therefore not have taken reasonable steps to enable it to vote at the Scheme Meeting.



61. I am satisfied that the late submission of the voting paperwork in respect of these various noteholders was not the fault of the Company or the Information Agent. The Company has no control over the actions of the Account Holders acting on behalf of the Scheme Creditors. The Information Agent made various attempts to contact the relevant Account Holders and request that the necessary paperwork was provided. In any event, had the necessary paperwork been submitted in time, the majority voting in favour of the Scheme would have been still greater than they were.
62. The Company will take steps to ensure that the relevant Scheme Creditors are not prejudiced by the inaction of their Account Holders. The Company's intention is that if a Scheme Creditor has tried to vote on the Scheme but has been unable to do so as a result of delay on the part of the Account Holder, that Scheme Creditor should nonetheless receive any lock-up fee it would otherwise have been entitled to.
63. The Restructuring Implementation Deed also makes provision to address any problems that may arise from the Account Holder's failing to complete the paperwork that is required to distribute the New Notes to the underlying Scheme Creditors. In that event, the Scheme Creditors' New Notes will be transferred into a holding period trust for up to 12 months.
64. If any New Notes in the holding period trust still have not been claimed at the end of that period, then they will be sold and the net proceeds will be distributed to the relevant Scheme Creditor, provided that the necessary paperwork for that to take place occurs within the next six months.
65. In these circumstances, I am satisfied that the inaction on the part of the Account Holders acting on behalf of a small number of Scheme Creditors does not give rise to any impediment to the sanction of the Scheme.
66. I turn to the jurisdiction to sanction the Scheme. The relevant statutory provision is section 899 of the 2006 Act.
67. The approach of the court at a sanction hearing was helpfully summarised by Mr Justice Snowden in *Re KCA Deutag UK Finance Plc* [2020] EWHC 2977 Chancery, at [16]. He essentially set out four steps that arise on any application, and an additional question that arises in a scheme with international elements. I shall follow that helpful checklist.
68. I am satisfied, first, that the provisions of the statute have been complied with. The requisite statutory majorities, both in number and value, were obtained at the Scheme Meeting. The Scheme Meeting was summoned and convened in accordance with the convening order. The class of Scheme Creditors was properly constituted.
69. At the convening hearing, Mr Justice Adam Johnson considered the arguments about the constitution of the class and concluded that there should be a single scheme meeting. The two points which he said could properly be raised at this hearing, were highlighted in the Explanatory Statement, and there has been no argument addressed to me on either of them.

70. In the absence of any further argument, it would not be appropriate, in my view, to revisit his conclusions.
71. I am satisfied, secondly, that the class was fairly represented at the Scheme Meeting and that the majority acted bona fide. The Scheme was approved, as I have said, by 358 out of the 360 Scheme Creditors who cast a vote, representing 99.8 per cent by value of those voting and 90.7 per cent by value of all Scheme Creditors. There is nothing to suggest that the Scheme Creditors acted anything other than *bona fide*. I am satisfied that the Explanatory Statement provided the required information.
72. It is also to be noted that the Scheme was approved by a wide range of Scheme Creditors, including creditors holding notes in each of the two series, Scheme Creditors who were not members of the Ad Hoc Group, creditors who have not signed up to the Lock-Up Agreement and, of course, creditors who have.
73. I am satisfied, thirdly, that a Scheme Creditor could reasonably approve the Scheme. The starting point is that the overwhelming majority of Scheme Creditors have in fact approved the Scheme. That being so, there is a strong presumption that the Scheme is fair.
74. There is no absolute rule that the court must accept the verdict of the majority. The sanction of the Scheme is ultimately a discretionary matter for the court, but creditors may be expected to act commercially, rationally, and are better judges of their own interests than the court. And the high turnout and overwhelming scale of those in favour have strongly suggested that Scheme Creditors could reasonably approve the Scheme. There are also other reasons for reaching this conclusion.
75. The evidence shows that the estimated return in a formal insolvency proceeding, supported by the work of PwC, would be in the range of 8.8 per cent to 12.4 per cent of the total sums outstanding. By contrast, if the Scheme and Restructuring are implemented so that the business is able to continue operating in accordance with the directors' business plan, PwC has advised that the New Notes would be likely to be repaid in full.
76. In addition, the New Notes have the benefit of a comprehensive guarantee and security package.
77. I am also satisfied that there is nothing unfair in the fact that the Company has agreed to provide a lock-up fee to any Scheme Creditor who entered into the Lock-Up Agreement before the stated deadline of 8 February 2021.
78. The fee is equal to 2 per cent of the value of the Existing Notes owned by the relevant Scheme Creditor on what is called the "Record Date". It was available to all Scheme Creditors who acceded before the 8 February 2021 deadline. There are commercial benefits to the Company of securing the agreement of Scheme Creditors to support the Restructuring. The authorities show that there is nothing objectionable, in principle, about the payment of such fees, so long as they are fully disclosed and available to all creditors. Moreover, I am satisfied, as was Mr Justice Adam Johnson, that the fee in

this case is unlikely to have been material to the decision whether to vote in favour of the Scheme, given the very low estimated returns in an insolvency.

79. I am satisfied, fourthly, that there is no blot on the Scheme. This term is generally taken to refer to a technical or other legal defect in the Scheme. None has been suggested and I have not detected any.
80. I turn then to deal with the fifth element, namely, the international aspects of the Scheme.
81. I am satisfied, first, that there is a sufficient connection between the Company and this jurisdiction. The liabilities compromised by the Scheme are governed by English law and this has been regarded as giving rise to a sufficient connection in numerous cases. Further, there are asymmetric English jurisdiction clauses in each of the finance documents, and this has also been considered to give rise to a sufficient connection in a number of authorities.
82. Secondly, there is the question of international recognition. The court will not act in vain, and therefore will not generally make any order which has no substantial effect internationally.
83. There is no requirement for a scheme of arrangement to be effective in every jurisdiction worldwide, but the court is entitled to consider whether the scheme will be effective in key foreign jurisdictions.
84. The starting point is that the Existing Notes are governed by English law. That being so, it is inherently likely that the Scheme will be recognised abroad (see *Re Magyar Telecom BV* [2014] BCC 448 at paragraph 15).
85. Secondly, it is also relevant that an overwhelming majority of the Scheme Creditors have voted in favour of the Scheme and that a large majority of the Scheme Creditors were also party to the Lock-Up Agreement. These facts provide good evidence that the Scheme will achieve a substantial effect (see *Re KCA Deutag* at 33).
86. The Company has also obtained expert evidence that the Scheme is likely to be recognised in Spain, which is the jurisdiction in which the Company is incorporated. In this regard it has adduced the expert report of Professor Santiago Ripol Carulla on Spanish law. His report takes into account the fact that the schemes of arrangement are no longer capable of being recognised under the Recast Judgments Regulation in light of the departure of the UK from the EU. He explains that an order of the English court sanctioning the Scheme is likely to be recognised in Spain, and I see no reason to doubt his conclusions. I am therefore satisfied that the effect of the Scheme will be recognised internationally.
87. The Scheme has attracted the overwhelming support of its creditors. It is part of a Restructuring which is, in the view of the directors, the Lenders and the creditors of

the Company, necessary in order to return it to a state of financial health. I am satisfied that the Scheme should, in all the circumstances, be sanctioned.