



Neutral Citation Number: [2021] EWHC 716 (Ch)

Case No: CR-2021-000281

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

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

Date: Thursday 25 March 2021

Before :

MR JUSTICE SNOWDEN

IN THE MATTER OF GW PHARMACEUTICALS PLC
AND IN THE MATTER OF PART 26 OF THE COMPANIES ACT 2006

Michael Todd QC (instructed by Slaughter and May) for the Company

Hearing date: 15 March 2021

Approved Judgment

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be 10 a.m. on 25 March 2021.

.....

MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN:

1. On 15 March 2021 I heard an application by GW Pharmaceuticals plc (“the Company”) for an order convening a meeting of its members (the “Court Meeting”) for the purposes of considering and, if thought fit, approving a scheme of arrangement under Part 26 of the Companies Act 2006 (“Part 26”, the “CA 2006” and the “Scheme”).
2. In addition to routine matters, Mr. Michael Todd QC, who appeared for the Company raised a particular question as to how certain members of the Company should be counted at the Court Meeting for the purposes of the headcount requirement in Part 26. The point also had implications for proxy voting at the same meeting.
3. At the end of the hearing I indicated that I would make the order sought by the Company subject to certain modifications. I indicated that I would give my reasons in writing, which I now do.

Background

The Company and its Shares

4. The Company was incorporated in England and Wales on 15 February 2001. It is involved in the development of new pharmaceutical products from its proprietary cannabinoid product platform.
5. Between 28 June 2001 and 5 December 2016, the Company’s ordinary shares of £0.001 each (the “Ordinary Shares”) were listed on the Alternative Investment Market (AIM) of the London Stock Exchange.
6. On 7 May 2013, the Company entered into a Deposit Agreement with, inter alia, Citibank N.A. (the “Depositary”) pursuant to which the Ordinary Shares can be traded as American Depositary Receipts (“ADRs”) on the NASDAQ Global Market (“NASDAQ”). Under the Deposit Agreement, one American Depositary Share (“ADS”) represents 12 Ordinary Shares. Holders of an ADS are entitled to direct the votes attaching to each Ordinary Share represented by that ADS. The ADSs are registered with the United States Securities and Exchange Commission, exclusively listed on NASDAQ, and evidenced by ADRs issued by the Depositary.
7. As at 4 March 2021, the Company had 986 members and its ordinary issued share capital was £378,313.928 divided into 378,313,928 Ordinary Shares, all of which are fully paid up. Of the issued share capital, the Depositary holds 368,655,648 Ordinary Shares, representing 97.4% of the existing issued share capital of the Company.

The Scheme

8. The purpose of the Scheme is to provide for the acquisition by Jazz Pharmaceuticals UK Holdings Limited (“Bidco”), a wholly owned subsidiary of Jazz Pharmaceuticals Public Limited Company (“Jazz”), of the entire issued share capital of the Company (the “Scheme Shares”). On 3 February 2021, Jazz and the Company jointly announced that they had reached an agreement on the terms of a recommended acquisition of the Scheme Shares by Bidco.

9. As is conventional, the Scheme provides for the Scheme Shares to be transferred to Bidco or as it elects. The consideration for each Scheme Share is: (a) a cash amount to or for the account of each Scheme Shareholder of US \$16.66⅔ (sixteen dollars, sixty-six and two-thirds cents) without interest (the “Cash Consideration”); and (b) the fraction of an ordinary share in Jazz (rounding to the nearest millionth of a share) calculated using an exchange ratio determined by reference to US \$1.66⅔ (one dollar, sixty-six and two-thirds cents) and the share price of Jazz (the “Share Deliverable”). Holders of the Scheme Shares (other than the Depositary) will also be entitled to elect to receive a sterling alternative to the cash consideration due to them in USD (including both the Cash Consideration and cash in lieu of fractional entitlements to Jazz ordinary shares pursuant to the Share Deliverable), pursuant to a currency election facility.
10. The Company has a number of stock plans under which further shares in the Company may be issued in connection with the exercise of options prior to the effective time of the Scheme (the “Stock Plans”). Under the Scheme the Stock Plans will be cash-settled or converted into an option to acquire shares in Jazz as follows:
 - i) Outstanding Stock Plans held as at the date of the Transaction by employees and directors to purchase either ADSs or Ordinary Shares will vest on the sanction of the Scheme and be automatically exercised. The holders of those Stock Plans will receive a cash payment equivalent to the value of the option based on the Cash Consideration and the Share Deliverable.
 - ii) Stock Plans granted to employees on or after the date of the Transaction will become vested on the date of the sanction of the Scheme: (a) 1/3 as cash settlement, and (b) 2/3 converted into an option to acquire ordinary shares in Jazz, half of which will vest on the first anniversary of the original grant date and half of which will vest on the second anniversary of that date.
11. A general meeting of the Company (the “General Meeting”) will be held immediately following the Court Meeting with a view to amending the Articles of Association of the Company (the “Articles”) so that: (a) any shares of the Company issued (other than to Bidco and its associates) prior to the Scheme record time will be bound by the Scheme, and (b) any shares in the Company issued to any person (other than to Bidco and its associates) after the Scheme record time will be transferred to Bidco in consideration of the payment and transfer of consideration as if those shares had been Scheme Shares.

Jurisdiction, Class Composition and the Explanatory Statement

12. I summarised the matters which need to be considered at a convening hearing in Re ColourOz 2 Investment LLC [2020] EWHC 1864 (Ch), [2020] BCC 926, [52]-[53].
13. As a matter of jurisdiction, the Company is a “company” for the purposes of Part 26 as it is incorporated in England. I am also satisfied that the Scheme, which is a conventional takeover scheme, falls within the scope of Part 26 for the reasons given by Mann J in Re Jelf Group plc [2015] EWHC 3857 (Ch).
14. I recently summarised the well-known authorities in relation to class composition in the context of a members scheme in Re PA Consulting Group [2021] EWHC 29 (Ch) at [22]. I am satisfied in this case that it is appropriate to convene a single meeting of the Company’s members. Each member of the Company will receive the same

consideration for its Scheme Shares, being the Cash Consideration and the Share Deliverable. The only difference between members is the availability of a currency conversion facility to holders of Scheme Shares other than the Depositary. I accept Mr Todd QC's submission that this potential difference in the currency in which the Cash Consideration might be received is not sufficient to require fragmentation of the class.

15. At a convening hearing the Court also has the opportunity to consider (in very broad terms) the form of the explanatory statement: see Re ColourOz (supra) at [123]. I am satisfied that the Explanatory Statement in relation to the Scheme, which is included in a Proxy Statement prepared to comply with US regulations, contains the essential elements one would expect to see in such a statement.

Communications and the Court Meeting

16. The Company has made a number of proposals for communications with its members (and, via the Depositary, with the ADS holders) about the Scheme, which are set out in the witness statement of Dr. Geoffrey Guy in support of its application. I am satisfied these are appropriate in the circumstances.
17. The Company proposes that the Court Meeting should take place virtually. Dr. Guy's witness statement explains how it is envisaged that the meeting will be held using the LUMI platform. This includes arrangements for voting and participation by members, but not by the ADS holders. In the current circumstances dictated by the pandemic, I am content that the Court Meeting should be held as proposed. The evidence for sanction should include an account of any difficulties encountered in holding the Court Meeting by virtual means.

Voting by the Depositary and proxies at the Court Meeting

18. As indicated above, the main issues debated before me at the convening hearing arose from the Company's proposals for voting by proxies and by the Depositary at the Court Meeting.

The issue

19. It is of course possible for a member of the Company to split its vote on a poll taken at a general meeting of the Company, voting some of its shares for a resolution and some against. I understand that this is how the Depositary routinely gives effect to the instructions that it receives from the underlying ADS holders at general meetings of the Company.
20. Further, and in accordance with Article 22.1 of the Company's Articles of Association and section 324(2) CA 2006, a registered holder of Ordinary Shares is entitled to appoint multiple proxies for a general meeting of the Company, provided that each proxy is appointed to exercise the rights attached to a different share or shares. Each proxy can then attend, speak and vote at the meeting. Conventionally, such a facility may be used by a member that acts as a trustee or nominee for a number of beneficial owners to appoint each of those beneficial owners as a proxy, thereby enabling them to attend and speak at the meeting, and vote their individual beneficial shareholdings in accordance with their own wishes and interests.

21. The Company proposed that I should give a similar direction in relation to the appointment of proxies for the Court Meeting, namely that a holder of Scheme Shares should be permitted to appoint multiple proxies, provided that each proxy is appointed to exercise the rights attached to a different share or shares (the “Proxy Direction”). The Company’s reason for proposing that I should adopt such an approach in relation to the Court Meeting would appear to be one of consistency, so that a member can appoint the same proxy or proxies for the Court Meeting and the General Meeting that immediately follows it.
22. Since votes at general meetings of the Company are almost invariably taken by way of a poll which looks only at the value of shares voted, the splitting of votes by a member or the appointment of multiple proxies generally causes no complication or difficulty in ascertaining the result of the vote at general meetings. However, the possibility that a single member might split its vote or appoint multiple proxies at the Court Meeting raises an issue over how to count the vote of the member for the purposes of the “majority in number” or “headcount” test in section 899(1) CA 2006. That issue is particularly relevant to the Depository, which is a single member of the Company but which holds 97.4% of the Scheme Shares.
23. The Company’s proposal to deal with the issue is that I should give a direction that for the purpose of the majority in number test under Part 26 CA 2006, the Chair of the Court Meeting shall treat a holder of Scheme Shares that casts a vote both for and against the Scheme as voting in favour of the Scheme if such holder casts more votes for the Scheme than against the Scheme, and otherwise that it should be treated as voting against the Scheme (the “Headcount Direction”). That direction will apply whether such votes are cast directly by the member splitting its vote, or by multiple proxies on its behalf.

Background: the law and practice

24. The underlying objective of a court meeting is to determine fairly the views of the class as to the interests of the class: Re Dee Valley Group plc [2017] EWHC 184 (Ch) at [44]. It is also well-established that the Court has the inherent power to give appropriate directions as to how a court meeting should be held: see Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385 at 395-396; Re RhythmOne plc [2019] EWHC 967 (Ch) at [14]; Re Dee Valley Group plc (supra) at [50].
25. Recognising the realities of the way that interests in shares and debt are now often held through intermediaries, the modern practice of the Court is to give directions which aim to ensure voting at a court meeting is representative of those with the underlying economic interest at stake in the scheme: see e.g. Re Noble Group [2018] EWHC 2911 (Ch) at [162]. Although plainly desirable, that approach has given rise to difficulties with the headcount test under Part 26. Different solutions have been suggested to this type of problem in a number of cases.
26. In relation to creditor schemes where bonds are held through custodian arrangements, in recent years it has become common practice to avoid the problems of the headcount test by treating the underlying beneficial owners of bonds held in global form as contingent creditors of the company, provided that the terms of the relevant debt instrument give them the right to call for a definitive note: see Re Castle Holdco 4 Ltd [2009] EWHC 3919 (Ch), [22]- [24]; Re Noble Group [2018] EWHC 2911 (Ch), [2019]

BCC 349, [161]-[164]. This allows the underlying beneficial owners of bonds, who are the persons with the real economic interest in the scheme to participate in voting directly. Care must, however, then be taken to ensure that there is not double-voting in respect of the same debt by the custodian and the underlying beneficial owners.

27. However, that solution is not available in the context of a members scheme. Persons with a right to become members of a company cannot be treated as members of that company: see Re Compania de Electricidad de la Provincia de Buenos Aires Ltd [1980] Ch 146, 183. Evans-Lombe J summarised the position in Re Abbey National Building Society plc [2004] EWHC 2776 (Ch) at [13]:

“...In an application for the sanction of a scheme of arrangement the only persons concerned are shareholders in the company in question, as shown on its register at the material time. Where an individual has invested money with an institution to acquire shares for his benefit that institution will be the shareholder in the relevant company and it will be that institution which will be consulted over any scheme of arrangement. The institution will have the authority of the beneficial owner, the investor in the institution, to vote as the institution thinks appropriate on such schemes of arrangement.”

28. Consistent with that position, in the instant case, the documents to be circulated by the Company make it clear to the ADS holders that they should give instructions to the Depository to vote on their behalf, but if they wish to participate individually at the Court Meeting, they should, without delay, seek to convert their ADSs into actual Scheme Shares and be registered as members of the Company.
29. An alternative approach frequently adopted is that suggested in Re Equitable Life Assurance Society (No 1) [2002] BCC 319. A creditors scheme was proposed to compromise mis-selling and other claims of policyholders in a life assurance company. Some policyholders held their claims against the company as nominee or trustee for others. Lloyd J noted, at page 326, that he had been asked to direct that a particular scheme policyholder might vote different parts of the voting value of a particular policy in different ways. He noted that in the case of ordinary voting at company meetings, shareholders could cast votes attaching to different shares different ways. Lloyd J then continued:

“[Mr. Moss QC] urges me to conclude that the general terms of s. 425 permit the court to direct that in calculating the majority by value, the proportion represented by the value of the claims of the creditors voting in favour, the court can direct that a particular creditor may vote both for and against, or may vote in part one way and abstain as regards the balance of the debt and that the same could apply logically to members, if the scheme were promoted in respect of members.

It seems to me that Mr Moss's submission is justified. The wording of the subs. (2) is general. It is certainly true that if one were reading it at a first reading, it might not occur to one that, of the however many numbers of creditors there might be in the

particular class according to a headcount, you could find one of those, or any given number of those, voting different ways in respect of different parts of his claim.

However, reviewing the section in the context of the widespread practice of nomineehip and trusteeship, both for debt, for example bonds, and rights under policies, many of which are held by trustees, for example under group pension schemes and, likewise, in respect of shares, especially in an increasingly paperless securities world, it seems to me that it would be inappropriate to construe these general words as not permitting a particular member or creditor to cast different parts of the value of his claim or his membership rights in different ways.

That does, in a sense, produce an oddity, because if you had, let us say, in an extremely simple case, ten members, one of whom wished to cast a split vote, you would really have to count that person on the headcount both for and against. So you would have on the face of it 11 members voting. But since that person would be on both sides of the head count, both in the ‘yes’ and the ‘no’ lobbies, that makes no difference to the calculation of the majority in number, whereas it permits an appropriate way to achieve and calculate the true majority in value.”

30. Lloyd J therefore directed that a nominee which split its vote should be regarded as having voted once for and once against the scheme for the purposes of the headcount test. This approach was followed by Barma J in the Hong Kong Court of Appeal in Re PCCW Limited [2009] 3 HKC 292 at [193].
31. That approach was, however, not followed by the Royal Court of Jersey in Re Computer Patent Annuities Holdings Ltd [2010] JRC 011. The membership of the company in question comprised 18 nominee companies holding shares for 305 beneficial owners. In addressing the issue that this caused for the application of the headcount test for a scheme under Jersey law, the Court noted at [18]-[20]:
 - “18. The company proposed two alternative solutions:-
 - (i) For the purpose of determining whether the majority in number of members present and voting has approved the scheme, any scheme shareholder voting unanimously either for or against the scheme shall be allotted one vote, and any scheme shareholder voting both for and against the scheme shall be allotted one vote for and one vote against the scheme. If a majority in number of the above votes are cast in favour of the scheme, a majority in number will be deemed to be constituted.
 - (ii) Alternatively, for the purposes of determining whether the majority in number of members present and voting has approved the scheme, each scheme shareholder

shall be allotted one vote, which vote will be subdivided into fractions of a vote in accordance with the number of that scheme shareholder's underlying beneficiaries. If the scheme shareholder votes entirely in favour of or against the scheme, one vote shall be counted. If the scheme shareholder is instructed to vote and does vote partially in favour and partially against the scheme, the fraction of a vote representing the number of underlying beneficiaries who instructed the scheme shareholder to vote in a particular way will be counted for and against the scheme. If a majority in number of the above votes are cast in favour of the scheme, a majority in number will be deemed to be constituted.

...

19. The first alternative could lead to absurd results: if for each scheme shareholder a majority of beneficial owners vote in favour, with one voting against, the 90% threshold could be exceeded without a majority in number. There is also a risk of deadlock in the event that all of the nominees split their votes, even if the underlying beneficial owners are overwhelmingly in favour of the proposal.

20. The Court therefore agreed with [counsel] that the second alternative was to be preferred in that it effectively looks through the nominee companies to treat each beneficial owner as if he or she were a shareholder and thus will properly reflect their respective wishes in respect of the scheme."

32. The Royal Court's solution, therefore, involved a single member being 'split' for headcount purposes according to the proportions in which underlying beneficial holders instructed it to vote on the scheme. If, for example, the voting instructions received were 66.6% for and 33.3% against, the member would be counted as two-thirds for and one-third against for the purposes of the headcount test.
33. This approach was not followed by the Royal Court in the subsequent case of Re Atrium European Real Estate Limited [2019] JRC 198 because the company was unable to identify the underlying beneficial holders of shares.

Discussion

34. It is apparent from the decision in Equitable Life that the Court can permit a holder of Scheme Shares to split its vote at the Court Meeting. I also see no reason why the Court ought not to be able to permit the appointment of multiple proxies by a Scheme Shareholder, provided that each proxy is appointed to exercise the rights attached to a different share or shares. Such directions mirror those at general meetings of the Company and will enable a nominee or trustee (including the Depositary) properly to reflect the views of the underlying beneficial owners of the Scheme Shares (including the views of the ADS holders), at least so far as value is concerned. I therefore consider it appropriate to give the Proxy Direction sought by the Company.

35. In relation to the Headcount Direction, Mr. Todd QC submitted that I should not follow the approach of the Royal Court of Jersey in Computer Patent Annuities. I accept that submission. I do not consider that it is right to split-up or fractionalise members of the Company for the purposes of the headcount test.
36. Section 899 (1) CA 2006 requires a majority in number of the “members or class of members”. Under section 112 CA 2006 the members of a company are defined as the subscribers and the other persons who agree to become members, and whose names are entered on the company’s register of members. Although it is undoubtedly possible to have joint or multiple members holding a share or shares, such persons are generally regarded as a single member (i.e. a unitary concept): see e.g. section 113(5) CA 2006. So far as I can see, there is no suggestion in the CA 2006 that it is possible to have a fraction of a member.
37. Mr. Todd QC did not submit that the solution adopted by Lloyd J in Equitable Life was wrong, and indeed he was content for me to adopt a similar solution if I considered it inappropriate to give the Headcount Direction. I agree that, depending on the facts, the Equitable Life solution may be an appropriate one for the Court to adopt when giving directions for a court meeting under Part 26. It has been adopted many times in other scheme cases, and in this case it would reflect to some extent the approach that would be adopted by the Company to counting the vote of a person holding multiple proxies on a show of hands at a general meeting under Article 21.1(a)(iii) and (iv) of the Articles.
38. However, Mr. Todd QC submitted, and I accept, that the Headcount Direction is a more appropriate solution to adopt for the Court Meeting on the facts of the instant case, for the following reasons:
- i) The approach in Equitable Life could result in there being more voters for the purpose of the headcount test than there are actually members of the Company. Whilst I do not think that this has the same conceptual problem as fractionalising a member, as Lloyd J recognised, it would be an “oddity”. The proposed Headcount Direction avoids that result.
 - ii) Since it is almost inevitable that the Depositary will receive some instructions both in favour of and against the Scheme, the approach in Equitable Life is likely to result in 97.4% of the Scheme Shares having no effect on the outcome of the headcount test. The Depositary will be regarded as having voted once in favour and once against the Scheme, making its overall position neutral. The same would apply to any other members of the Company holding Scheme Shares as trustee or nominee that might wish to split their votes or appoint multiple proxies. Since it is at least possible that there could be a very low turnout among members other than the Depositary, who only hold a total of 2.6% of the Scheme Shares, this approach could give those other members a disproportionate influence on the outcome at the Court Meeting.
 - iii) By contrast, the Headcount Direction enables the Depositary (and any other members holding as trustee or nominee who might be required to split their vote) to have at least some effect on the result of the headcount test. Whilst the Headcount Direction may only add one head to the count in respect of the Depositary and each other member that split its votes or appointed multiple

proxies, it at least has the consequence that the result of the headcount will be more representative of the views of the persons having the overwhelming majority by value of the underlying economic interest in the Scheme.

39. I recognise that adopting the Headcount Direction may improve the prospects of the Scheme achieving the necessary majority in number at the Court Meeting. If and to the extent that any issues arise in this respect which might be said to have affected the result of the Court Meeting, or otherwise go to the fairness of the voting on a dissenting member, the Court will still be able to deal with these issues at the sanction hearing when exercising its discretion.

Conclusion

40. For the reasons that I have given, I made the convening order on the basis sought by the Company, including the Headcount and Proxy Directions.