



Neutral Citation Number: [2024] EWHC 3169 (Ch)

Claim No: CR-2022-000983

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

The Rolls Buildings
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date: Monday 2nd December 2024

Before:

MR. JUSTICE ADAM JOHNSON

**IN THE MATTER OF VTB CAPITAL PLC (IN
ADMINISTRATION)**

**IN THE MATTER OF THE COMPANIES ACT 2006
and
IN THE MATTER OF THE INSOLVENCY ACT
1986**

**(1) STEPHEN ROLAND BROWNE
(2) DAVID PHILIP SODEN
(JOINT ADMINISTRATORS OF VTB CAPITAL
PLC (IN ADMINISTRATION))**

**Claimants /
Applicants**

**MR. ADAM AL ATTAR KC (instructed by Weil, Gotshal & Manges (London) LLP)
appeared for the Claimants/Applicants.**

Approved Judgment

(In Private)

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd.,
2nd Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.

Telephone No: 020 7067 2900. DX 410 LDE

Email: info@martenwalshcherer.com

Web: www.martenwalshcherer.com

IN PRIVATE

MR. JUSTICE ADAM JOHNSON :

1. The question I have to address is whether to make an order permitting a distribution by Administrators pursuant to paragraph 65(3) of Schedule B1 of the Insolvency Act.
2. The background has some complexity, but the matter comes before me urgently on a short hearing, and so I need only give a brief description.
3. The company in administration is VTB Capital plc (*“the Company”*), which entered administration following the introduction of sanctions against Russia. It is ultimately owned by a Russian entity, VTB Bank. It has assets in this jurisdiction but also in Russia. The Russian assets have been referred to as *“Trapped Assets”* because the Administrators are unable to collect them. They include securities held with the Central Depository of the Russian Federation, referred to as the National Settlement Depository (or *“NSD”*).
4. Both VTB Bank and another entity called NCH are among the Company’s creditors. Meanwhile the Company has its own cross claim against VTB Bank, which I am told is worth roughly £630,000.
5. The Company via its Administrators has proposed a scheme of arrangement (*“the Scheme”*). However, on 4 September 2024, both VTB Bank and NCH returned their voting forms, casting votes against the Scheme in its current form. Those Scheme creditors between them have sufficient voting power to vote down the Scheme. In the event, the Scheme meeting was adjourned and will be reconvened on 30 January 2025. A sanction hearing is now listed for 6 February 2025. In the meantime I understand the discussions continue, with a view to amending the relevant terms of the Scheme, and possibly securing the support of the present main dissenting creditors.
6. In the meantime, however, there is evidence that VTB Bank has been progressing its own claims in Russia against the Company and has recently taken enforcement steps against the Company’s assets in Russia.
7. Two claims are on foot in St Petersburg and one in Moscow, and on 2 October 2024, the NSD wrote to the Company notifying it that Company assets totalling circa £40 million had been transferred to VTB Bank in partial satisfaction of a judgment obtained against the Company. To the Administrators’ knowledge, there remains circa £17 million in cash and securities at the NSD.
8. Perhaps of more concern, there is also evidence that VTB Bank is undertaking its own proposed restructuring. The proposed restructuring entails a transfer to a new company of VTB’s assets and liabilities to unfriendly counterparties amounting to up to RUB 170 billion roubles (circa £1.34 billion) and this is due to take place by the end of 2024.
9. The Administrators are concerned that further executions against the Company’s assets in Russia will prejudice its creditors generally, as would any counterparty restructuring that denied the Company the benefit of insolvency set off by reason of a fracturing of the mutuality of claims. Therefore, the Administrators seek permission to distribute at this time.

IN PRIVATE

10. Insolvency Rule 14.24(1) makes it clear that insolvency set-off in an administration takes place on the date on which the administrator gives notice of intention to distribute. David Richards J (as he then was) referred to this principle in HMRC v Football League Ltd [2013] 1BCLC 285, at paragraph [90], having at paragraph [89] held that the *pari passu* principle of distribution likewise applies from the time the distribution is permitted in an administration and a notice of intention to distribute is issued.
11. Once triggered, insolvency set-off is automatic and self-executing, with the effect that any mutual debts are set-off without more having to be done, even if calculation of the balance (or of the debts themselves) should be the subject of later dispute or resolution, whether by judgment or settlement. It follows that if permission to distribute is given now, and appropriate notice is served, then insolvency set-off will be available and the Company will get the full value for its claim against VTB Bank and only any remaining balance may be proved against the Company (see Stein v Blake [1996] AC 243, at pages 249G 250B, page 255A B and page 258F G).
12. The *pari passu* rule will also apply. It is thought that might facilitate operation of the hotchpot principle, i.e. the principle compelling creditors to give credit against a distribution from the company's estate for the value of assets of the company appropriated by that creditor. This may have important effects given the recent enforcement activities of VTB Bank I have mentioned.
13. As His Honour Judge Norris QC (as he then was) made clear in Re MG Rover Belux SA/NV (in administration) [2006] EWHC 3426 (Ch), the discretion given by paragraph 65(3) of Schedule B1 is entirely at large.
14. Drawing on the guidance given by HHJ Norris, however, I would comment as follows on the present case.
15. To begin with, the evidence served by the Administrators makes clear that they intend to make the first distribution after either the Scheme is sanctioned early next year, or it becomes clear that creditors will not support the Scheme, in which case the Administrators will distribute in accordance with the provisions of the Insolvency Rules 2016. Thus, although the Administrators are not in a position to make any distribution immediately, it is clear that that will happen, on any view, in the near future.
16. That conclusion is reinforced by a number of other matters. The Administrators' proposals approved in March 2023 are for a distribution in administration. The Administrators are promoting the Scheme as a means of distribution. The Administrators consider that they will be in a position to distribute some £175 million. The court in an earlier judgment of Richard Smith J, on 10 October 2024, extending the Administrators' terms of office, has already recognised that the administration is effectively "*in distribution mode*". No creditors objected either to the extended term of the Administrators or indeed to the distribution application when originally put forward as part of the Scheme.
17. All such matters, in my view, make it clear that it is only a matter of time before a distribution is actually made and the relevant timescale is intended to be a relatively short one.

IN PRIVATE

18. As to the propriety of the Administrator's objectives, insolvency set-off is a substantive part of insolvency law. From the perspective of English law, there is nothing unjust in bringing insolvency set-off into play as between the Company and its creditors. In English law set-off is regarded as a matter of substantive justice (see Re HIH Casualty and General Reinsurance per Lord Hoffmann at [2008] UKHL 2021, paragraphs [15] to [17]). In the present context it seems to me the question of whether to permit the distribution should be looked at from the perspective of the creditors' interests as a whole. In my view, the fact of the general estate being better off by reason of the application of insolvency set-off, even if it comes at the expense of a particular creditor, is a factor in favour of granting permission rather than against it. The same is true of maximising the application of the hotchpot principle, since that also is a rule intended to benefit creditors as a whole.
19. Taking all these points into account, I think it right to grant the permission sought. I will do so in the terms sought by the Company, which include that this judgment remains private until notice of intention to distribute has actually been given. That limited restriction is, in my view, justified since publicising the judgment earlier would carry the risk of further enforcement or other activity in Russia, which might then defeat the object of the application. For essentially the same reason, I have been content for the present hearing to take place in private.
20. The order will include a liberty to apply for the benefit of creditors meaning that any creditor who wishes to dispute the permission to distribute can do so before any distribution is actually made without the need to appeal out of time. It seems to me that that structure strikes a fair balance between, on the one hand, the interests of creditors generally, who will receive maximum benefit from application of the insolvency set-off and of the *pari passu* principle if permission has been properly given; and, on the other hand, the interests of any individual creditor who may wish to challenge the validity of that permission, even if doing so will not have the effect of unwinding operation of the insolvency set-off, which as I have explained above (see at [11]) is automatic and self-executing once notice of an intention to distribute is given.

(Proceedings continued, please see separate transcript)