Case No: 7492 OF 2008/CR-2008-000012
CR-2018-003713

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

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

Date: 18/06/2018

Before:

MR. JUSTICE HILDYARD

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Between:

IN THE MATTER OF LEHMAN BROTHERS INTERNATIONAL (EUROPE) (IN ADMINISTRATION) AND IN THE MATTER OF THE COMPANIES ACT 2006.

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MR. DAVID ALLISON QC and MR. ADAM AL-ATTAR appeared for Wentworth.

MR. WILLIAM TROWER QC, MR. DANIEL BAYFIELD QC and MR. RYAN PERKINS appeared for The Administrators.

MR. PETER ARDEN QC and MS. LOUISE HUTTON appeared for LB Holdings Intermediate 2 Limited (In Administration) and its Administrators.

MR. ROBIN DICKER QC and MR. RICHARD FISHER appeared for Senior Creditors Group.

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Approved Judgment

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MR. JUSTICE HILDYARD :

1. Having adjourned the matter for my further consideration after a one-day hearing, first to last Friday, and then, whilst a particular issue was checked, over until today, the purpose of this hearing is to give my decision whether or not this scheme should be sanctioned.

2. I shall get straight to the point. After careful consideration, especially as to the position and interests of the various Wentworth entities, I have concluded that the court should sanction the scheme.

3. In view of the significance of this, and in the context of an administration which has been in being for nearly a decade and has involved multiple proceedings of very considerable value and complexity, which in many cases are still ongoing, I have felt it right to give short reasons now and to hand down a full judgment hereafter in elaboration. I understand all parties to have expressed approval of this course.

4. What I say now, therefore, should be read subject to that more developed and comprehensive judgment to come. This considerably briefer synopsis is provided with a particular eye to the imminence of a hearing of an appeal from my own decision in Waterfall IIC in the Court of Appeal, due to commence on 3rd July, and an intended application under Chapter 15 in the United States of America to be made (as I understand it) tomorrow. Both courts seem to me to be entitled at least to this brief summary.

5. In reaching my conclusion I have, as is now customary and in my view correct, adopted the three-stage approach originally set out in the 1957 addition of Buckley on the Companies Acts and quoted and approved by Mr. Justice David Richards, as he then was, in *Re Telewest*.

6. The first stage, then, is to consider whether the provisions of the statute, and in particular Part 26 of the Companies Act 2006, have been complied with. In that regard the most important issue is usually, and certainly is here, the question whether the scheme has been approved by the requisite statutory majorities at class meetings properly constituted.

7. Further to the decision in *re Hawk*, the applicable *Practice Statement* provides that issues as to class composition are to be addressed by the court at the convening hearing, which in this case took place on two days ended on 11th May. But any decision then is still subject to review.

8. In this case, in the absence of further objections additional to those advanced at the convening hearing, I initially invited no further submissions on the point from those appearing before me, all of whom supported the scheme and the class composition that I had directed. Nevertheless, I have carefully, and to some extent anxiously, reconsidered the issue to satisfy myself that the class meetings I have directed by my order of 11th May were appropriately constituted.

9. That reconsideration prompted me, for example, to invite further written submissions last Friday, with particular reference to the lock-up agreement, the commitment by both Wentworth and the Senior Creditor Group under it to elect not to pursue adjudication

of their claims for higher interest, and the arrangements between Wentworth and the SCG for a consent fee payable to the SCG.

10. More generally I have revisited the question, which was at the heart of the matter (and the objections put forward by Counsel for certain creditors in May) and which has continued to cause me more than pause for thought, which is the interests of the Wentworth entities and, especially in this context, whether those entities in reality have, or should be treated as sharing in, legal rights which when looked at together are different from those of other higher rate interest creditors, such as to require their exclusion from the higher rate interest creditor class or to fragment it.

11. I have ultimately satisfied myself, in circumstances which I have earlier outlined in my short statement of reasons for my decision in May, that the class composition proposed then, and which formed the basis for the class meetings I directed, was indeed appropriate, at least for the purpose of the first stage of enquiry and thus for the purpose of being satisfied as to jurisdiction.

12. I have then also satisfied myself, on the basis of the evidence of the chairman of each class meeting, that the meetings held pursuant to my order of 11th May were duly held on 5th June in accordance with the directions given, that the meetings were sufficiently well attended, and that at such meetings the requisite statutory majorities, both in number and value, were obtained.

13. As it seems to me in summary, the statutory preconditions for jurisdiction under Part 26 and for the sanction of the court of the scheme accordingly have been satisfied.

14. The second stage requires the court to consider whether each relevant class was fairly represented by those who attended the meeting and to address whether the majorities expressed a class view, or whether it appears that instead the majority voted to promote, not the interest of the class, but some interests of their own adverse to the class. Corporate democracy is one thing, coercion quite another.

15. There is no issue in respect of two of the class meetings, the SCG meeting and the Subordinated Creditor meeting where (unsurprisingly) all creditors voted in favour. Nor, given the majorities, achieved, does there seem to me to be any substantive issue as to the 8% creditor class meeting. The issue really is as to the higher rate creditor class.

16. For similar reasons to those that have caused me to be especially careful to review the jurisdictional issue of class composition, that aspect of the matter has been a particular concern to me in this case. At this second stage, broader considerations are in play than an assessment of legal rights. Even if, as I have accepted, the Wentworth entities are not to be aggregated and treated as one in determining their strict legal rights as against the company, the fact of their very close association is evident, and so too, in consequence, is the fact that the Wentworth entities have, as it were, a foot in the camp both of the higher rate interest creditors (who benefit from the highest rate of interest achievable) and the sub-debt holder (who benefits from suppressing the interest rate recoveries). In other words, what some Wentworth entities lose on the roundabout another may gain on the swings.

17. Inevitably, the question arises as to whether the Wentworth entities in reality therefore have a "special interest" so different and so antipathetic to the class interest that their vote should be entirely ignored or greatly discounted. If ignored, without the Wentworth entities, the requisite statutory majorities would not have been achieved. In such circumstances, it has been urged and I would accept that, at the very least, the court should sceptically review the apparent majorities and not be overly swayed by their apparent result; and it should pay heed to the interests of those out of step with the regiment.

18. There is, however, as it has seemed to me, a danger in going from one extreme of accepting the step of the regiment to the other extreme of assuming that those out of step with it are themselves the expression of the class interest. That is particularly so in a case such as this, where the interests of creditors have become polarised in respect of particular issues and their shared interests in the overall outcome have become obscured by the dust of individual battles.

19. I should make clear that this is not, in my perception of it, a case such as many schemes are, where although the court is never a rubber stamp, it may very well have little real reason to do other than fall in with the step of the regiment. I have felt it especially important in particular to satisfy myself that the Wentworth entities' other interests have not been the driving force or dominant causative reason for the way they voted and that the results of the class meeting do provide proper evidence that the scheme is such that a sensible man of business might reasonably approve it as being in the best interests of the class.

20. I have had very much in mind also the specific points made on behalf of opposing creditors, and not least the point made on behalf of Goldman Sachs that if the Wentworth votes are excluded the statutory majority and valuable not have been achieved, the votes in value in favour on that basis being some 62%.

21. However, as it seems to me that is only part of the story or equation. For example, the numerical majorities reflect, in my view, the fact that looking at the whole matter the scheme is plainly capable of being viewed, and was viewed by most, as being in the interests of the class and indeed of the creditors as a whole.

22. I have been especially influenced in this context by considering the alternative of the continuance for many years more of litigation, with the inevitable result that the administration cannot be concluded. Whilst this comparator is not the answer of itself, as sometimes the comparator of insolvency liquidation is presented to be in the context of other schemes in different circumstances, it does have to be borne in mind.

23. That is particularly so given the fact that now that all admitted provable claims have been paid in full, there is (as it were) no principal outstanding and the creditors across the board are no longer entitled to any further statutory interest, and will thus be out of their money, without compensation for not having its use, for potentially many years until the administration is concluded.

24. Furthermore, the other proceedings which the scheme is intended to conclude, including the *'Lacuna'* application and the '*Olivant'* application, could materially adversely affect creditors in the relevant class and as a whole.

25. In summary, and not without anxious consideration, I have concluded that the results of the meetings reflect the interests of the several classes and not simply or even predominantly the coercive power of the self-interested majority.

26. All these factors are relevant also to the third stage, at which the court must consider the overall fairness of the scheme. In my full judgment I intend to go through each of the various objections, including especially those advanced, seven in all, by Deutsche Bank, though ultimately it withdrew them, leaving others to adopt them at least in part.

27. I have been especially concerned to assess both the fairness and the robust or practicality of the adjudication process established by the scheme. My concern in that context has once more been the greater in light of the special position of the Wentworth parties and of the SCG, not least having regard to the fact that both have opted for an enhanced one-off 2.5% settlement premium, rather than adjudication and therefore have a reduced or no interest in it, and Wentworth's sub-debt is contracted with special consultation rights in the process of assessing certification. I have also had to bear in mind the consent fee agreed between Wentworth parties and the SCG.

28. There are, furthermore, features of the adjudication process itself which have given me pause for thought and especially the provisions precluding any oral hearing and foreclosing any appellate process. I have had to bear in mind that creditors such as GSI have appealed and have the benefit of an imminent hearing date in respect of arguments that could greatly increase their interest entitlement if they succeed, whereas the scheme and its adjudication process cut off that entitlement, adopt principles suggested at first instance against which they have sought to appeal, and substitute a one-off paper only process.

29. I have also sought to question the practical robustness of the adjudication process. As an example, one of the matters that caused me to adjourn from Friday was to make sure that the proposed adjudicators were aware of the process in full and in all its detail, including the provision for adjudication without oral hearing and without giving reasons, in respect of issues which could include issues of bad faith or at least perversity, which has struck me as unusual and may even be unparalleled.

30. As I say, these are all matters of substance. I have reviewed them with care. But suffice it for to present purposes to say that I have in the end concluded that the adjudication process and the scheme taken together are not so unfair as to require or persuade the court to withhold sanction.

31. Echoing the hallowed words therefore, I have been persuaded that the court should not refuse sanction to that which the majority of creditors have approved, in circumstances where the scheme is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve.

32. Finally, as to the question of the international application of the scheme of sanction, I shall be very brief once again, leaving this aspect to further elaboration in a full judgment.

33. In summary, on this aspect of the matter there is, as I see it, little in this scheme, to cause real difficulty. There is no doubt that LBI(E) is a company within section 895(2) of the Companies Act 2006. The court has, in numerous cases, addressed the

application or not of the Recast Judgments Regulation, and its interplay with EU Insolvency Legislation, and has reached an accommodation, if it does apply, as to the recognition of its jurisdiction to approve the scheme.

34. Further, it is not a necessary prerequisite that I should be satisfied that in each and every jurisdiction in which the scheme may have or be sought to be applied that it would be recognised. But I note the reassurance that in the United States, where it may be particularly important that it should be recognised and enforced, that it is intended that there should be an application under Chapter 15 as I have previously mentioned.

35. In all those circumstances and whilst again I will deal with this matter in the fuller judgment, I do not think that it is necessary to identity any particular aspects of concern in this particular aspect of the matter. Accordingly, I consider that this scheme should be sanctioned and I do not personally perceive that there should be matters as regards the international effectiveness which should detract from that course.

(For proceedings see separate transcript)