Neutral Citation Number: [2024] EWHC 2733 (Ch)

Case No: CR-2024-004416

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

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

Date: Monday, 28th October 2024

Before:

MR. JUSTICE TROWER

- -

Between:

IN THE MATTER OF LIGHT SA -
EM RECUPERAÇÃO JUDICIAL

- and -

IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

MR. TOM SMITH KC and MS. MADELEINE JONES (instructed by **White & Case LLP**) for the **Scheme Company**

- -

Approved Judgment

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

MR. JUSTICE TROWER:

1. This is an application by a Brazilian company, Light SA (the "Scheme Company") for an order pursuant to Part 26 of the Companies Act 2006 sanctioning a scheme of arrangement (the "Scheme") with two groups of creditors ("Scheme Creditors") holding notes (the "Notes") issued by two of the Scheme Company's subsidiaries, Light Energia SA ("Ligh Energia") and Light Serviços de Eletricidade S.A. ("Light SESA"), (together the "Note Issuers").

2. The Scheme Company is the guarantor of the Notes. The indenture under which the notes were issued was dated 18th June 2021. It is now governed by English law and is subject to the non-exclusive jurisdiction of the English court. The governing law was changed from New York law in June 2024 pursuant to a consent solicitation. The purpose of the change was to facilitate the Scheme. I am satisfied by evidence of an eminent New York and US law expert, Mr. Daniel Glosband, that the change of law from New York law to English law is effective under New York law.

3. The Scheme is part of a restructuring being implemented by a Brazilian judicial restructuring process ("RJ") which was approved by 99.4% of Scheme Creditors who voted. It was then approved by the Brazilian court on 18th June 2024 and became effective in Brazil two days later. The essence of the restructuring involves the raising of new capital by way of equity, a pass-down of the proceeds of the capital raised and the exchange of the existing notes. The essential purpose of the Scheme, as opposed to the restructuring more generally, is to ensure that the exchange of the Notes, involving as it does a release of the obligations under them, is given full effect under their governing law. This will facilitate the international enforceability of the restructuring.

4. On 29th July 2024, Richards J made a convening order, having determined that a single class of Scheme Creditors should be summoned to a single class meeting. His reasons for doing so are explained in a comprehensive judgment, the neutral citation of which is [2024] EWHC 2097 (Ch). The order he made directed that the Scheme meeting be held on 29th August 2024 or such other date as the Scheme Company may notify to Scheme Creditors. In the event, the Scheme Company initially notified the Scheme Creditors that the meeting would be held by a webinar on 4th September 2024. This was then adjourned or postponed to 13th September 2024 and then further adjourned or postponed to 17th October 2024. On that date, the Scheme was approved by 99.44% by value of Scheme Creditors present and voting, comprising 96.38% by value of all Scheme Creditors.

5. In his convening judgment, Richards J gave a helpful overview of the group of which the Scheme Company forms part (the "Group") and the terms of the Scheme itself. The evidence on which he based that description is also before me. I can summarise the position very shortly.

6. The Group's business is the generation (in the case of Light Energia) and distribution (in the case of Light SESA) of electricity in the states of Rio de Janeiro and Minas Gerais in Brazil. Both of the Note Issuers are regulated entities under Brazilian law. As such, they were not able themselves to apply for relief pursuant to the RJ. The consequence of this is that the restructuring has been proceeding through the medium of the Scheme Company.

7. The Group has been adversely affected by a number of extrinsic factors which have reduced its revenues and placed demands on its working capital. Those factors are described in the convening evidence of Mr. Rodrigo Tostes Solon De Pontes in his witness statement dated 24th July as follows:

> "(a) losses incurred due to widespread energy theft and illegal electricity diversion within the Group concession area, (referred to euphemistically as 'non-technical losses');
>
> (b) a decrease in legitimate energy consumption by customers of the Group;
>
> (c) the passage of legislation in Brazil requiring the Group to refund tax credits to certain customers;
>
> (d) the macroeconomic deterioration of the operational concession area of the Group; and
>
> (e) the COVID-19 pandemic."

8. There are two series of Notes which are the subject-matter of the Scheme: $200 million in principle issued by Light Energia; and $400 million in principle issued by Light SESA. Both series are due 2026 and bear interest at 4.375% payable semi-annually. They are stapled and cannot be separately traded, such that 66.7% of each holding comprises notes issued by Light SESA and 33.3% of each holding comprises notes issued by Light Energia.

9. The terms of the restructuring, which, as I have said, is now effective in Brazil, involves the Scheme Company raising R$1 billion to R$ 1.5 billion in new capital for distribution to Light SESA. The restructuring also involves an element with which the Scheme is primarily concerned, namely an exchange of the existing notes for new securities governed by Brazilian law. Noteholders who signed up to a Restructuring Support Agreement entered into with the Scheme Company on 28th June 2024 are also entitled to elect to have their new securities governed by New York law.

10. In paragraphs 12 and 13 of his convening judgment, Richards J explained the three options available to noteholders under the terms of the Scheme as follows:

> "12. Holders of Existing Light SESA Notes have essentially three options available to them:
>
> i) Option 1 is to elect to exchange their Existing Light SESA Notes for New Convertible Securities issued by Light SESA as part of what can be understood as a debt for equity swap. Holders electing to receive New Convertible Securities will also receive warrants over shares in the Scheme Company. If the Scheme is implemented, holders will be able to choose between New York law governed New Convertible Securities or Brazilian law governed New Convertible Securities. If the Scheme is not implemented, only New Convertible Securities governed by Brazilian law will be available. The New Convertible Securities convert into equity following the equity

> capital raise described in paragraph 9. The RJ provides for the number of New Convertible Securities to be scaled back if necessary. Where that scaling back applies, Noteholders will receive New Priority Light SESA Securities which are not themselves convertible, in place of some New Convertible Securities. Under the Scheme, if sanctioned, there will be a choice between New York law and Brazilian law New Priority Light SESA Securities, but only Brazilian law instruments will be available under the RJ if the Scheme is not sanctioned.
>
> ii) Option 2 is to elect not to participate in the debt for equity swap and so not to receive New Convertible Securities. In that case, Existing Light SESA Notes are exchanged for New Light SESA Securities, which rank junior to the New Priority Light SESA Securities that I described in connection with Option 1. Under the Scheme, but not the RJ, holders can choose between New Light SESA Securities governed by New York law and securities governed by the law of Brazil. Under the RJ only Brazil law New Light SESA Securities will be available.
>
> iii) Option 3 is to do nothing. A Noteholder exercising this option will receive the 'default option' which is likely to be materially disadvantageous, because it would result in a significant reduction in the principal amount of the Noteholder's securities.
>
> 13. There is less optionality in relation to the existing Light Energia Notes. Under the Scheme and the RJ, they are to be exchanged for New Light Energia Securities governed by New York law. The New Light Energia Securities will be unguaranteed and will not be stapled to the New Light SESA securities or the New Priority Light SESA Securities. That exchange will involve some of the interest on the Existing Light Energia Notes being capitalised and added to the principle amount of the New Light Energia Securities."

11. As Richards J went on to explain, the Scheme offers some benefits as compared to the restructuring. The first is that it offers all holders the ability to elect to receive securities governed by New York law. The second is that it improves the prospect of international recognition of the Scheme and in particular recognition of the cancellation of the existing Notes. While the RJ imposes a moratorium, it does not release the liabilities of the Note Issuers or the Scheme Company as guarantor under the existing Notes, a result which the Scheme seeks to achieve. This is a point to which I will return.

12. The approach to be taken by the court when considering whether to sanction a scheme of arrangement is long established and has been repeated by many judges over many decades. There is a helpfully concise summary in the judgment of Snowden J in *KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) in which he said at [16]:

> "The relevant questions for the court at the sanction hearing can therefore be summarised as follows:
>
> i) Has there been compliance with the statutory requirements?
>
> *ii)* Was the class fairly represented and did the majority act in a *bona fide* manner and for proper purposes when voting at the class meeting?
>
> iii) Is the Scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?
>
> iv) Is there some other 'blot' or defect in the Scheme? In the case of a scheme with international elements there is also the question of whether the court will be acting in vain if it sanctions the Scheme. This requires some consideration of whether the Scheme will be recognised and given effect in other relevant jurisdictions."

13. Turning first to compliance with the terms of the statute, section 897 of the Companies Act 2006 requires an explanatory statement to be sent to Scheme Creditors with the notice summoning the meeting. The statute requires the statement to explain the effect of the compromise or arrangement and also to give details of any directors' interests.

14. In the present case, the explanatory statement when sent on 5th August 2024 was not accompanied by all the documents referred to in it, although there is no doubt that, on its terms, it did actually explain the effect of the compromise or arrangement. The fact it was not accompanied by all the documents referred to in it was in part because some of those documents were not yet completed. Further, some of them underwent changes after the time at which the original documentation was sent out.

15. Those documents were not in the event circulated in their final form to Scheme Creditors until 8th October 2024 which was well after the notice and was only nine days before the Scheme meeting. I was taken through those changes by Mr. Smith and I read a description of the new material both in the form of a supplemental indenture and also as explained in the witness statement filed for the sanction hearing.

16. Although it was not straightforward to conduct a comparative exercise of how the changes between the version of the explanatory statement circulated when the Scheme meeting was originally called and the Supplement distributed on 8 October 2024 might affect the creditors' rights, I was able to satisfy myself that none of them do so in a material manner. I am also satisfied that further notifications that were sent out were sufficient to ensure that the Scheme Creditors had the effect of the Scheme fully explained to them in sufficient time prior to the Scheme meeting. For those reasons, I shall waive the failure to send everything which formed part of the explanation of the effect of the compromise or arrangement with the notice summoning the meeting.

17. This conclusion also relates to the next question which is whether the Scheme Company complied with the terms of the convening order itself. The order required the notification documents including the explanatory statement to be sent out at least 14 days before the Scheme meeting which was not done in the sense that the final version of a number of the material appendices were only made available nine days before the meeting. There were other small changes to the notification documents.

18. For similar reasons to those I have already given, I shall waive that breach. However, one aspect of the order which gave me some pause for thought was whether the order itself authorised the postponement of the Scheme meetings in the manner that occurred in this case. What happened was that the Scheme meeting was originally summoned for 4th September but the meeting was then postponed by notice on two occasions without first being opened in accordance with paragraph 4 of the convening order. Mr. Smith submitted that this course of action was a straightforward compliance with the terms of paragraph 1 of the order which made provision for a meeting on 28th August "or such other date as the Scheme Company may notify to the Scheme Creditors".

19. Ultimately, I was satisfied either that paragraph 1 of the order is to be construed so as to permit the Company to postpone the Scheme meeting after it has been called, or that any deficiencies in compliance with the order can be waived. However, I am bound to say that I do not think that in using the language that he used in the present case Richards J had in mind successive adjournments after the meetings had been called but before they were opened, effectively at the whim of the Scheme Company, albeit doubtless for good commercial reasons. I think he simply had in mind an alternative date to 29th August when the Scheme Company sent out its initial convening notice. Be that as it may, as I have indicated, to the extent that there was any non-compliance with the terms of the order, it seems to me that in all the circumstances of this case, that non-compliance can be waived.

20. I have read the Chairman's report of the Scheme Meeting. The evidence is that all the technical requirements of the order as to conduct of the Scheme meeting were complied with. So, for those reasons, there was sufficient compliance both with section 897 and the terms of the convening order to ensure that this aspect of compliance with the statute is satisfied.

21. The next aspect relates to class composition. In paragraphs 22 to 24 of his convening judgment Richards J considered questions of class constitution applying the well-established test to the effect that a class:

> "... must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

22. I agree with the Company's submission that there are no grounds to revisit the conclusion that there should be a single class meeting. It is not the court's practice to reconsider on its own initiative class issues which have been determined at the convening hearing, unless a Scheme Creditor wishing to raise a class issue did not attend at that stage and can show good reason for not having done so. In any event I think that Richards J was correct for the reasons he gave.

23. Another context in which class issues may – and I emphasise *may* – have to be revisited is where changes to the Scheme since the convening hearing have thrown up a class question. I should say that where that is the case, it is improbable that the explanatory statement would have a continued to be in the form or substantially the form of the draft exhibited to the evidence at the convening hearing, so to that extent the convening order would not have been complied with either. Having considered the changes to the explanatory statement in the present case this issue does not aise. Having been through the changes with Mr Smith, I am satisfied none of them has any impact on class questions and that, for those reasons, together with the reasons that were advanced by Richards J, the decision he reached as to class composition, remains sound.

24. The next aspect of compliance with the statute relates to the statutory majorities. Section 899(1) requires the Scheme to be approved by a 50% majority by number comprising 75% by value of creditors who voted in favour. At the Scheme meeting convened pursuant to the order of Richards J, 308 out of 310 noteholders comprising 99.4% by value voted in favour. This obviously amounted to clear compliance with the statutory majorities.

25. In reaching that conclusion, I have had regard to one aspect of the calculation of the majorities which I should mention. The Scheme is a noteholder scheme in respect of Notes established by an indenture originally governed by New York law. As is usually the case with such instruments, the creditor of the Note Issuers and the Scheme Company is therefore an entity known as Cede & Co., acting as nominee for the DTC which is the registered holder of a single global note. The Scheme provides for the Scheme Creditors to be the noteholders on the basis there are certain circumstances in which they are entitled to call for the issue of definitive notes in respect of their interests. They are therefore contingent creditors of the Scheme Company and the Note Issuers and they are the persons whose economic interests will be affected by the Scheme.

26. I was taken during the course of oral argument to the terms of the indenture which confirms that the contingent creditors analysis works in the present case. In circumstances in which the existing note trustee has agreed not to vote in the scheme (so as to avoid double counting), which is customary in schemes of this sort (see e.g., *Magyar Telecom BV* [2013] EWHC 3900 at [5]), I am satisfied that the Scheme Company was entitled to invite the court to call a Scheme meeting of the noteholders as Scheme Creditors. They were contingent creditors in respect of the liabilities under the Notes, the contingency being the occurrence of a circumstances in which they are entitled to call for a definitive note.

27. These majorities, when combined with the very high turn-out also demonstrate compliance with stage two of Snowden J's summary of the correct approach in *KCA Deutag*. The turnout was 94.38% of all Scheme Creditors, which is very high indeed. In my view, this amounts to good and substantial evidence that the class was fairly represented and in the absence of any contra indicators, as to which there are none, demonstrates that the majority was acting *bona fide* and for a proper purpose.

28. The majorities also demonstrate that the third stage in Snowden J's summary of the law is very likely to be satisfied, that is: is the scheme one which an intelligent and honest man acting in respect of his own interests might reasonably approve? As

Lindley LJ said in *Re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch 385 at 409:

> "If the creditors are acting on sufficient information and with time to consider what they are about, and are acting honestly, they are, I apprehend, much better judges of what is to their commercial advantage than the Court can be."

29. He then went on later in the same passage to say that the court ought to be slow to differ from the creditors:

> "It should do so without hesitation if there is anything wrong; but it ought not to do so, in my judgment, unless something is brought to the attention of the Court to shew that there has been some material oversight or miscarriage."

30. Quite apart from giving appropriate respect to the views of the overwhelming majority of Scheme Creditor, I think that there are obvious benefits to Scheme Creditors to be derived from the Scheme. The first is that they will all have the right to elect for New York law securities in place of those governed by Brazilian law, which is the more limited extent of their rights under the RJ. The second is that, if the Scheme is not sanctioned the old Notes will not be cancelled and creditors will have to exchange their Notes for new ones. This means that there will continue to be litigation risk from any dissenting Scheme Creditor seeking to vindicate their rights under the old Notes. This will be to the detriment of the Group with a knock-on downside for those Scheme Creditors who have effected an exchange.

31. The next stage in the *KCA Deutag* analysis is whether there is some blot on the scheme. The principal potential blot to which Mr. Smith and Ms. Jones drew my attention in their skeleton argument, was the issue of third-party releases. The Scheme Company is only a guarantor of the notes, but the Scheme makes provision for the Scheme Creditors' rights against the Note Issuers, which are not Scheme Companies, to be released. In *Re Noble Group Limited* [2018] EWHC 3092 (Ch) at [24], Snowden J explained the current state of the law as follows:

> "It is well established that the court has jurisdiction under Pt 26 CA [Companies Act] 2006 to sanction a scheme which includes a mechanism (usually the execution of a deed of release by an attorney appointed under the scheme) under which scheme creditors are required to release claims against third parties where such a release is necessary in order to give effect to the arrangement between the company and the scheme creditors. That test is most clearly satisfied where the scheme compromises debts which are guaranteed and where, absent such a release, pursuit of the guarantor by a scheme creditor would undermine the compromise between the creditor and the company: see *Re Lehman Brothers International (Europe) (No.2)* [2009] EWCA Civ 1161 at [65] (Patten LJ)."

32. It might be thought it is difficult to apply this principle in the current context because there would not normally be a ricochet claim by a guarantor, i.e. the Scheme Company,

against the principal debtors, i.e. the Note Issuers. If that is correct the necessity for the third-party release may be difficult to establish.

33. It is possible that the test of necessity does not require such a ricochet claim to exist in this type of situation. However, this unopposed scheme is not the occasion to decide that point. In order to overcome this issue in circumstances in which the Note Issuers are prevented by their regulatory status in Brazil from themselves promulgating a scheme, the Scheme Company and the two Note Issuers have entered into a deed of contribution providing for them each to contribute to the other in respect of their obligations under the existing indenture. It therefore has become necessary for the Schem Creditors' rights against the Note Issuers to be released in order to ensure that the consequential ricochet claims against the Scheme Company in respect of the same indebtedness are themselves extinguished.

34. This device has been used in other cases and will not normally be open to challenge whether on the grounds of sham or otherwise, see *Swissport Fuelling Ltd* [2020] EWHC 3413 (Ch) at [62] to [73]. I see no reason to doubt its use in the present case. It has the overwhelming support of creditors and is being utilised for a good commercial purpose in the creditor's best interests where the reorganisation of rights given effect by the Scheme could not otherwise be achieved without an adverse impact on the beneficial purpose for which the Scheme is being promulgated.

35. For these reasons, I do not think that the third party release mechanism is a blot on the scheme. I have also considered the release provisions in relation to professional advisors. They are in a well-established form and reflect what has been approved on many previous occasions, see in particular *re Noble* Group Limited [2018] EWHC 3092 (Ch).

36. The final matter is not really a point on blot. It goes to discretion and relates to the interlinked questions of whether the Scheme Company has a sufficient connection to this jurisdiction and whether the international effectiveness of the scheme has been established. Richards J considered the point at the convening stage but recognised that it was ultimately for determination at sanction. Therefore, he only asked himself the question whether there was a roadblock and satisfied himself that there was not. I agree with Richards J not just that there is no roadblock based on an insufficiency of connection but also that the connection in this case is indeed sufficient to justify the court in granting the relief sought.

37. It is now well established that English law debt will normally provide a sufficient connection to the jurisdiction for scheme purposes. No additional links are normally required anyway where (as in the present case) all of the Scheme debt is governed by English law: see for example *Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch). This is not, of course, surprising because in the context of a scheme the court is considering the reorganisation of creditor rights. It will normally be the case that creditor rights are only capable of being varied under the law which governs their debt.

38. One question which does arise, however, is whether the position is any different where the only reason that the debt is governed by English law is because the proper law was changed to English law for the purposes of the Scheme. In my view the answer to that question is "No". It has been done on many previous occasions: see most recently *Re*

Tele Columbus AG [2024] EWHC 181 (Ch). In the present case the change of law was effective under New York law and is being done hand-in-glove with a Brazilian restructuring. There may however be cases in which it is done for an abusive reason: see, for example, the discussion in *Apcoa* [2014] EWHC 3849 (Ch) at [251]. In that case, and in *Tele Columbus*, Hildyard J warned that it was important to ensure that a change of law to English law in this context was not exercised in a manner which is contrary to international principles of comity.

39. There is much to be said for this view, but as Newey J said in *Codere Finance* [2015] EWHC 3778 (Ch) at [18], where the scheme jurisdiction is able to achieve a result not available elsewhere, and that result is being utilised not for the purpose of evading liabilities but with a view to achieving the best possible outcome for creditors, there is no impediment to sanction. While the right characterisation of what has occurred may be forum shopping, it is good forum shopping. I agree with that view.

40. Turning then to questions of effectiveness, the basic principles were helpfully summarised by Norris J in *Re DTEK Energy BV* [2021] EWHC 1551 at [27]. He summarised the position in the following propositions: (i) the court will not grant relief which has no substantive effect and will require to be satisfied that the scheme will achieve its purpose; (ii), this means that there must be evidence that the scheme will achieve a substantial purpose in the key jurisdictions in which the company has liabilities or assets; (iii) certainty is not required but admissible and credible evidence that the court is not acting in vain must be provided. It must show a real or reasonable prospect that the scheme will be recognised and given effect.

41. In this case the main jurisdiction which matters is Bazil. There is evidence from a Brazilian lawyer, Mr. Antonio Reinaldo Rabelo Filho, that the Scheme will be recognised in Brazil. This is an unsurprising conclusion as it is being advanced in conjunction with the RJ and as it achieves the variation of a contractual right in accordance with the law governing the right, which for that reason alone will be recognised in most countries as being effective.

42. There is also evidence of New York law from Mr. Daniel Glosband as well. He says that the Scheme is likely to be recognised as having substantial effect in the US on grounds of comity. He also said that it might be recognised under Chapter 15 of the Bankruptcy Code if the Scheme Company were to have an establishment in England but Mr Smith said that would not be the case. It is possible that, in the light of a recent decision of the US Supreme Court (*Harrington v Purdue Pharma LP* No 23-124) concerned with Chapter 11, which was mentioned and discussed by Mr Glosband, this is an area which may require further consideration. However, the evidence of Mr Glosband on the point is clear: on the current state of the law, the better view is that third party releases may be given effect pursuant to Chapter 15 or principles of comity even though they may be denied effect in a Chapter 11 reorganisation.

43. In any event, as Mr. Smith pointed out during the course of his oral submissions, what really matters in this case is international effectiveness in Brazil rather than international effectiveness in the US. That is established as being likely by the evidence of Mr Rabelo.

44. Finally on this aspect of the case, Mr. Smith submitted that the overwhelming support for the Scheme demonstrated by the votes in favour is of itself a powerful

consideration when the court is considering questions of international effectiveness. Where more than 99% of creditors have actually voted in favour of the Scheme, it is most unlikely that, as a matter of practical reality, any Scheme Creditor will seek to challenge the Scheme in another jurisdiction where such a challenge might undermine in any way the integrity of the process..

45. For those reasons, I am satisfied that the international effectiveness of the Scheme has been established to the requisite standard and in the light of all the other considerations that I have explained during the course of this judgment, this is a Scheme which, in my view, should be sanctioned. I will so order.

(For continuation of proceedings: please see separate transcript)

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