Neutral Citation Number: [2024] EWHC 28 (Ch)

Case No: CR-2023-006824

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

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

Date: 12/01/2024

Before :

MR JUSTICE ADAM JOHNSON

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Between:

IN THE MATTER OF VELOCYS PLC
and
IN THE MATTER OF THE COMPANIES ACT 2006

- -
- -

Andrew Thornton KC (instructed by **Mayer Brown International LLP**) for the **Company**

Hearing date: 12 December 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 12 January 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR JUSTICE ADAM JOHNSON

Mr Justice Adam Johnson:

Introduction

1. This Judgment deals with an application by Velocys plc ("*the Company*") to convene a meeting of the holders of its Ordinary Shares of £0.01 each ("*the Scheme Shares*" and "*the Scheme Shareholders*" accordingly), for the purpose of considering and, if thought fit, approving, a proposed scheme of arrangement ("*the Scheme*") between the Company and the Scheme Shareholders. I granted the Company's application at a hearing on 12 December 2023 with reasons to follow. These are those reasons.

2. The matter is straightforward save for one unusual and important issue.

3. By way of background, the Scheme is a conventional members' scheme of arrangement designed to facilitate the acquisition of the Company by a bidder, Madison Bidco Limited ("*Bidco*"). Bidco is owned by various investment funds involved in the sustainable energy sector, who see attraction in the business of the Company, which operates in the field of international sustainable fuels technology.

4. The Scheme is intended to be unanimously recommended by the directors who have had the benefit of financial advice from Panmure Gordon UK Limited.

5. The Scheme is intended to facilitate the acquisition by Bidco of the entire issued and unissued share capital of the Company in exchange for the payment of cash consideration of 0.25 pence in respect of each Scheme Share.

6. In the ordinary course, the matter would be straightforward. Subject to the point I will mention below, I am quite satisfied that the relevant jurisdictional requirements are met and that in principle a meeting of the Scheme Shareholders should be convened.

The Issue

7. The issue however is this. An 8.3% interest in the Scheme Shares is held, indirectly, by a Mr David Davidovich, and Mr Davidovich has been designated as a UK assets freeze target under Regulation 5 of The Russia (Sanctions) (EU Exit) Regulations 2019 ("*the Regulations*").

8. Regulation 11 of the Regulations prohibits any dealing with funds or economic resources owned, held or controlled by a "*Designated Person*", such as Mr Davidovich. The concept of "*funds*" is broadly defined and includes "*financial benefits of every kind, including but not limited to … shares*".

9. "*Dealing with funds*" in likewise a broad concept and means:

> *" … transferring … using, accessing or otherwise dealing with them in any way which would result in any change to their … ownership, possession … or change that would enable the funds to be used, including portfolio management."*

10. Thus, the argument runs, neither Mr Davidovich nor those who hold his shares directly are presently able to vote in respect of them, because that would amount to "*use*" of his

"*funds*" under Regulation 11. Voting may also be caught by the restriction in Regulation 14.

11. Likewise, there can be no transfer of shares as contemplated by the Scheme, because that would amount to a "*dealing*" with Mr Davidovich's assets. Moreover and in any event, even if there could be a transfer, Mr Davidovich could not cannot receive any payment, because Regulation 12 prohibits the making available of funds to any Designated Person.

12. All this is obviously an issue in terms of the Scheme. Two particular difficulties arise: (1) there is the point that on the face of it, it is unlawful for anyone to cast votes in respect of Mr Davidovich's shares at any Scheme meeting; and relatedly (2) there is the point that operation of the Scheme involves Bidco acquiring the Scheme Shares and paying the transferors consideration of 0.25 pence for each Scheme Share received – but neither step is presently permitted in the case of Mr Davidovich's Scheme Shares.

The Proposed Solutions

13. As regards issue (1), the Company proposes to include the following provision in any convening Order made by the Court:

> *" ... the Chair of the Court Meeting shall have a discretionary power to disallow any vote purportedly cast by a Scheme Shareholder if advised that it would be unlawful for that vote to be cast (save that, in the event the Chair exercises that power, they shall report the same to the Court and the exercise of that power shall be without prejudice to the right of the relevant Scheme Shareholder to assert at the sanction hearing that their votes should have been accepted)."*

14. As regards issue (2), the Company has sought to accommodate the resultant difficulties within the terms of the Scheme itself.

15. To start with, it has submitted its own application for a licence from HM Treasury's Office of Financial Sanctions Implementation ("*OFSI*") to:

(a) deal in Mr Davidovich's shares in the Company to the extent reasonably necessary to transfer them to Bidco pursuant to the Scheme;

(b) pay the purchase price of Mr Davidovich's shares into a frozen account at a UK financial institution; and

(c) engage in any transaction necessary and ordinarily incident to the foregoing.

16. The licence application has not yet been granted, and may not be granted (if it ever is) before the Scheme becomes effective. To take account of that, the terms of the Scheme propose that any Scheme Shares held by a "*Sanctions Disqualified Shareholder*" will not be transferred until the later of: (i) the effective date of the Scheme; and (ii) the earlier of the date on which the OFSI licence is obtained or the date on which the relevant asset freeze or other sanctions are removed. If an OFSI licence is obtained prior to the date on which the relevant asset freeze or other sanctions are removed, at

that stage, the shares will be transferred to Bidco, with the proceeds being transferred to a frozen bank account until such time as the sanctions are not in place.

Convening Order

17. Against that background, it seems to me that two points of concern arise at the present (convening) stage, which are relevant to whether the Court should make a convening Order and to the terms of any such Order.

Roadblock

18. The role of the Court at the convening stage is a relatively limited one, but does involve the Court asking whether there is any jurisdictional or other roadblock which would unquestionably prevent the Court from sanctioning the Scheme in due course. This would plainly be the case, it seems to me, if the terms of the Scheme were to require or encourage unlawful activity.

19. I am satisfied here, however, that there is no such insurmountable roadblock, given both the intended provisions of the Order (see [13] above), and the features of the Scheme I have described (see [15] to [16] above).

20. The terms of the Order are intended to remove the risk of votes being cast in any manner which carries the risk of illegality. Insofar as there is any doubt as to whether the mere casting of votes is in fact caught by the Regulations (as opposed to transferring the Scheme Shares to Bidco for consideration), the terms of the Order preserve the possibility of the point being reopened at the sanction hearing, either by Mr Davidovich or those holding shares on his behalf. This structure seems to me to hold a fair balance between, on the one hand, the obvious imperative to avoid unlawful activity, and on the other, the need to treat Mr Davidovich fairly, insofar as he may have points to make about his entitlement to vote.

21. As to the operation of the Scheme itself, I am satisfied that the mechanism proposed is adequate to prevent the Scheme, even if approved, operating in a manner which contravenes the Regulations. The combined effect of the matters described at [15]-[16] above is that no Scheme Shares will be transferred until it is lawful for that to happen, and even if any such transfer becomes lawful (because a licence is granted), no funds will actually be made available to Mr Davidovich until it is also lawful for him to receive them.

22. In summary, there is in my opinion no obvious roadblock which should at this stage prevent the making of a convening Order.

Class Composition

23. The next issue is about class composition. Mr Davidovich, and those holding directly the Scheme Shares in which he is interested, are in a different position to the other Scheme Shareholders in two respects. First, they will very likely not be able to cast any votes in relation to Mr Davidovich's Scheme Shares. Second, the manner in which Mr Davidovich's interests are dealt with under the Scheme is different to the way in which the interests of other Scheme Shareholders are dealt with: the Scheme Shares held by the other Scheme Shareholders will be transferred to Bidco immediately, and

they will receive payment straightaway, if the Scheme is approved; Mr Davidovich's Scheme Shares may not be transferred immediately, however, and even if they are, he may well not receive any consideration in respect of them for some considerable time. Does the position of Mr Davidovich fracture the overall class, and call for two Scheme meetings?

24. In my opinion the answer is no, for the following reasons.

(i) To begin with, the question of class constitution is answered by reference to an analysis of members' rights rather than interests: see Sovereign Life Assurance Co v Dodd [1892] 2 QB 573, in which Bowen LJ held at p. 583 that creditors fall within the same class if their *"rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."*

(ii) Dealing first then with the likely inhibition on Mr Davidovich's ability to vote, this does not arise as a function of his rights as a shareholder. In terms of his entitlement to vote, his rights as such are the same as those of other Scheme Shareholders. His inability to vote arises from another source, namely the Regulations. I do not consider the fact that he is under a disability from that other source necessitates the creation of a separate class. It would be pointless to do so and would compound rather than solve the problem, because Mr Davidovich would still likely be unable to vote his shares, and the effect would be to create an additional and separate class which could never (assuming Mr Davidovich cannot vote) achieve the statutory majorities in favour of the Scheme necessary for sanction (see s. Companies Act 2006, s.899(1)). The effect would be to stop the Scheme in its tracks. In such circumstances in my opinion, it would be quite artificial to create a separate class containing Mr Davidovich's shares only. Instead, I think it sufficient to recognise that at the sanction stage, the Court will wish to be satisfied that the overall class of which he forms part was fairly represented and acted *bona fide* when voting, and that the Scheme overall is one that an intelligent and honest person might reasonably approve (see, for example, Re TDG plc [2009] 1 BCLC 445, per Morgan J). These safeguards should be sufficient to ensure that Mr Davidovich's interests are protected, even if he is not - as a result of matters extraneous to the Company - in a position to exercise his legal rights as shareholder.

(iii) The remaining point is that although Mr Davidovich has the same rights as other shareholders going into the Scheme, his rights coming out of it are different – i.e., the Scheme mechanics mean that he may well not be paid for some time. (For authority that the entry and exit points are the correct points of comparison, see Re Hawk Insurance Co Limited [2001] 2 BCLC 48, per Chadwick LJ at [30]).

(iv) On this issue, unlike that addressed immediately above, I think one must recognise that there *is* a difference between Mr Davidovich and the other Scheme Shareholders in terms of their rights. His rights on exit have had to be modified given the effect of the Regulations. All the same, in my opinion this does not fracture the class. That is because Mr Davidovich's rights on exit, although different, are not so different as to make it impossible for all members of the class (in theory at any rate) to consult together in their common interest. They all – Mr Davidovich included – would have to make the same basic economic assessment, namely whether to relinquish their existing £0.01 Ordinary Shares in return for a payment of 0.25 pence per share. In my opinion, the special arrangements affecting

Mr Davidovich, which may mean that in practice he is not in a position to receive any consideration for an extended period, do not alter the nature of that basic economic assessment in his case. To put it another way, it seems to me that Mr Davidovich's rights have been modified in the most limited form practicable, given the constraints he is under. Thus, I do not consider there is any fracturing of the class.

Conclusion

25. In light of those conclusions, and on the terms discussed with Mr Thornton KC during the hearing, which included an extended period of time before the Scheme meeting to allow Mr Davidovich to take legal advice if he wishes to, I will make an Order convening a single meeting of Scheme Shareholders, as requested by the Company.