IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2020] EWHC 3534 (Ch)

No. CR-2020-002986

Rolls Building
Fetter Lane
London, EC4A 1NL

Thursday, 19 November 2020

Before:

SIR ALASTAIR NORRIS
(Sitting as a Judge of the High Court)

IN THE MATTER OF **TISO BLACKSTAR GROUP SE PLC**

MR S. HORAN (instructed by Paul Hastings (Europe) LLP) appeared on behalf of the Applicant.

A P P R O V E D J U D G M E N T

(v i a S k y p e)

SIR ALASTAIR NORRIS:

1 Tiso Blackstar Group SE PLC ("Tiso") is an English registered societas Europaea governed as to specific matters by EU Regulation 2157/2001 and Council Directive 2001/86/EC ("the SE Regulation") and as to all else by the Companies Act 2006. It is a holding company. Although in European corporate form and registered and managed in England, its operational subsidiaries conduct their business entirely in Africa and, in particular, in South Africa, where most of its shareholders are resident. It is listed on the Johannesburg Stock Exchange.

2 Through disposal and liquidation of assets, it is much reduced in size. The listing is costly to maintain and, of late, the market in the shares has been illiquid, meaning that one of the principal advantages of listing is not being obtained. Holders are locked in. There is pressure for Tiso to take steps to remedy that position. It wishes to enter into an arrangement with its members to facilitate the exit of some of those members from Tiso by means of a cash payment and the cancellation of their shares; in short, a "cash out".

3 The mechanics are that each shareholder will be offered an election. Shareholders who wish to continue being shareholders must make a "continuation election". Those who do not wish to remain shareholders can make an "exit election". Those who fail to make any election at all will be deemed to have opted to make an "exit" election and their shares will be cashed out. Those making or deemed to make an "exit" election receive a cash payment of ZAR4.15 per share, which is something over a 60 percent premium to the recently traded price immediately before the announcement. The 60 percent premium represents a repayment of the nominal amount plus an asymmetric allocation out of the distributable reserves i.e. a disproportionate allocation in favour of exiting shareholders. The payment that must be made to those making or deemed to make an "exit" election is funded by the sale by a subsidiary of its holding in a private company called Kagiso Tiso Holdings

Proprietary Limited ("KTH"). Sufficient numbers have already committed to making a continuation election to make it clear that there are sufficient reserves to pay all exiting shareholders without the need to scale down. The scheme provides for the cancellation of up to 59.8 percent of the scheme shares. Before the launch of the scheme commitments to make "continuation" elections had been received from 42.54 of the scheme shares so that a full distribution to exiting shareholders can be made.

4 The scheme therefore involves a reduction of capital and that is an element that will require separate consideration. If the scheme and the reduction of capital are sanctioned, then TISO will delist from the Johannesburg Stock Exchange and will migrate from England and Wales to Luxemburg in consequence of Brexit. The imminence of Brexit means that the window of opportunity is small and there is pressure to implement the delayed arrangements rapidly. Nonetheless, with the assistance of a full skeleton argument, I consider that I have had the proper opportunity to subject the arrangement to the appropriate degree of scrutiny and my delivery of an *ex tempore* judgment is not as the result of pressure to produce an answer to comply with the company's timetable.

5 The approach of the court to a sanction hearing is well established and oft repeated. There is no advantage to be gained from my reiterating it. I have been referred to the relevant summaries of that approach by David Richards J, as he then was, in *Telewest* [2005] 1 BCLC 772 at [20]-[22] and by Morgan J in *TDG* [2009] 1 BCLC 445 at [29]. I would, however, emphasis two general points. The first is that it is role of the court to conduct an independent scrutiny, not simply to give effect to the outcome of the relevant statutory processes. Secondly, the absence of objection to the scheme does not relieve the court of that burden. Having made those points, I turn to the relevant issues that emerge from the application of the settled approach to sanction.

6 First, I am satisfied that I have jurisdiction to consider the scheme promoted by an English registered societas Europaea under Part 26 of the Companies Act 2006. Secondly, I am satisfied that the scheme puts forward what is properly regarded as an "arrangement" with all of the relevant elements of "give and take" that are required. That will be apparent from my summary of the object of the scheme and its mechanics. Thirdly, I am satisfied that there has been compliance with the statutory conditions and substantive compliance with the terms of the convening order of ICC Judge Mullen dated 22 July 2020.

7 There are two small points. The first relates to the record date. This was earlier than the ten business days required under the directions order. That was because the database by reference to which the position as at record date was determined is only updated on the last Friday of each month. That used for the circulation of the circular was dated 26 June 2020 being the last available when making preparations to post the circular out on 31 July. In fact, a further edition was produced on 24 July but that showed no change from the position disclosed on 26 June. There were 16 new holders of shares recorded under the STRATE system (to which I will come) but they will have received automatically the material that was being circulated.

8 The second small point is that emails were not sent containing the relevant website link to those who had specified email as an *additional* means of communication. This is not material. The announcement was itself made on the website, was circulated via the JSE news service, was advertised in business papers in both the UK and in South Africa, and was posted to every registered shareholder and underlying shareholder in the STRATE scheme. Therefore, there is no real risk that any holder who had specific email as an additional means of communication will not have learned about the scheme. So I am satisfied with compliance with the statutory conditions and substantial compliance with the terms of the convening order.

9 Fourthly, I am satisfied that the meeting was correctly constituted according to established principles. This was gone into at the convening hearing and I do not intend to revisit those matters at this hearing. Issues arising from class composition do nonetheless fall to be considered as part of the "fairness" exercise to which I will later come.

10 Fifthly, I am satisfied that at the scheme meeting, the requisite majorities were obtained. 77.45 percent by value of the scheme shares voted at the scheme meeting were in favour of the scheme. 94.4 percent by number of the registered shareholders attending and voting were in favour of the scheme.

11 Sixth, I am satisfied that the scheme members were fairly represented at the scheme meeting. There are some 269,994,681 shares in issue being the scheme shares. There were, at the date of the scheme meeting, some 223 registered shareholders. Of those, 16 were members of the management and I shall have to comment on that later. There were some 1,352 underlying beneficial owners of shares held under the STRATE system. This is the JSE's electronic clearing and settlement system: shares traded under it are dematerialised and held by a single registered nominee. 7.6 percent of the registered shareholders attended the scheme meeting: they were those holding certificated shares together with the STRATE nominee. These attending registered shareholders held 87.6 percent by number of the scheme shares. That is, in my opinion, a satisfactory turnout; somewhat better than is usual for listed companies.

12 Three matters call for comment. The first is whether the certification of some 2.6 percent of the scheme shares held by the 16 management members constituted a manipulation of the head count test of the type identified in *Dee Valley Group PLC* [2015] 55 Ch. I do not think it does. The 16 management members materialised the shares which they held in a management incentive scheme. They were shares which they in any event had the right to vote. They were existing beneficial owners of the shares. The object of certification was to

ensure that there would be a scheme meeting attended by members other than the registered nominee holder under the STRATE scheme. The certification opportunity was afforded equally to all other beneficial owners, i.e. those who held dematerialised shares under the STRATE scheme. They all had the chance to do likewise. It was a real opportunity extended to them, clearly stated in the scheme's circular and with sufficient time to take advantage of it. But nobody did so.

13 The certification of the shares held beneficially by the 16 management representatives was designed to overcome the challenge presented by the peculiar shareholder profile of Tiso which consisted of (i) inactive legacy registered shareholders who remained members following an earlier listing of the company; and (ii) those active shareholders who held their shares in nominee form through the STRATE system. This, in my view, was an entirely proper procedure, and not an abusive procedure.

14 The second matter on which to comment is to elaborate further on the listing of the shares on the Johannesburg Stock Exchange. Most of these are traded through the STRATE scheme, an electronic clearing and settlement scheme. Some 97 percent of the scheme shares are held in his dematerialised form. This means that for the purposes of the scheme meeting, these dematerialised scheme shareholders cannot directly cast a vote. The vote must be cast by the nominee. As is usual in these cases, the nominee would cast one vote for the scheme and one against it, representing those dematerialised shareholders who take differing views about the scheme. The attendance at the scheme meeting has to be viewed in that light and that is why there is a disparity between the number of persons attending and the high value of the shareholdings voted at the meeting.

15 The third matter on which to comment is the meeting itself. The scheme meeting took the form of a physical meeting in London (although the chairman attended remotely) notwithstanding the large South African shareholder base. But London was where TISO

general meetings were customarily held; and there was in place a conference call facility to enable shareholders to participate in the meeting (although it could not be used to cast a vote at the meeting). That facility went unused. Apart from one objector, there was no correspondence with any scheme shareholder. For these reasons, I am satisfied that the scheme members were fairly represented at the scheme meeting.

16 Seventhly, I am satisfied that I can rely on the outcome of the meeting. I have already considered whether there was "headcount" manipulation. There was sufficient information provided to the members to enable them to take a considered view about the proposal. The material was fairly presented with full disclosure given of matters requiring disclosure. There was adequate time for consideration. The circular was sent out on 31 July 2020, many weeks before the scheme meeting. There is no evidence of any minority oppression. There was one significant objector, that is Kasigo Asset Management ("KAM"). It objected (i) to the delisting, on the ground that delisting would prevent it henceforth holding Tiso shares (because of the terms of its investment mandate); and (ii) to the cancellation payment, which it considered undervalued the shares.

17 The first of those objections relates to the commercial not legal interests of KAM. The position in which KAM finds itself results not from the terms of the scheme but from matters outside the scheme, namely the nature of its investment mandate. The second objection relating to value is simply a differing view about value that is not supported by an independent valuation by BDO. It is right to observe that the share price has risen following the announcement of the scheme; but this largely seems to be a function of the operation of a thin market in which trades between investment management sub-funds have a disproportionate effect upon market pricing. A volume sale of the holdings of existing shareholders' who wish to exit would greatly depress that price. In the circumstances, KAM's view and its failure to achieve traction is not evidence of minority oppression but

simply evidence of the general body of shareholders taking account of their commercial interests in forming their view. I am therefore satisfied that the votes cast were cast *bona fide*.

18 I should, before leaving this topic, comment upon directors' interests which were fully disclosed in the circular and were held not to fracture the class. They fall for consideration at the sanction hearing in relation to their possible impact on voting. Directors are interested in 26.55 percent of the shares. They voted unanimously in favour of the scheme and on the whole made "continuation" elections. They have therefore supported an asymmetric allocation of the distributable reserves in favour of exiting shareholders. Their intention so to do was disclosed in the circular. Two directors are effectively purchasers under the KTH sale (which not part of and is not dependent upon the scheme) and they are also a minority on the board of a charity which holds 12.2 percent of the scheme shares. I am satisfied that these considerations (also disclosed in the circular) did not influence the outcome of the scheme meeting. The relevant directors simply did what they disclosed they were going to do.

19 Eighthly, I consider the scheme to be a fair one such as can reasonably be entered into by ordinary class members from the standpoint of their ordinary class interests. I have in mind the classic formulation in re *In re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 409 made by Lindley LJ who indicated that the court could generally rely on scheme members who are properly informed and able to express their views at a properly conducted meeting to be the best judges of their own commercial interests. But, in this case, the Court can understand what lies behind the approval by so large a number of scheme shareholders. Although only certificated shareholders can vote, the holders of both certificated and dematerialised shares can elect what to do with their shareholdings. The offer price is at a 70 percent premium to the 30-day volume weighted average price and a 53.7 percent

premium to the 60-day volume weighted average price before the announcement of the scheme. BDO Corporate Finance Propriety Limited has prepared a fairness report as is required by the Johannesburg Stock Exchange and has confirmed its conclusions in a letter dated 10 November 2020 following disclosure of the latest available accounts. They place a valuation range on these shares of somewhere between ZAR3.68 and ZAR4.06. It is therefore apparent that the proposed scheme provides something which a significant group of shareholders has been pressing for, namely an exit, and does so at a fair price. It leaves the continuing shareholders in a position to delist Tiso (thereby relieving it of the cost and burden of maintaining the listing) and adopting a status more consistent with its reduced size.

20 Ninthly, I am satisfied that there is no blot on the scheme, no technical defect, no public policy reason why the scheme should not be approved. There are two matters on which I should comment under this head.

21 First, the scheme has a reduction of capital as one of its integral elements. By section 641(1)(a) of the Companies Act 2006, a company cannot reduce its share capital as part of a scheme by which a person or a person and its associates acquire shares in the company (in each case other than shares already held by that person or its associates). The question is raised whether this section is engaged and whetherbthe capital reduction, which is an integral part of the scheme, is prohibited. In my view, the section is not engaged. It is true that following the delisting, the share register will be different. Those holders of dematerialised shares held through STRATE who make a "continuation" election will become certificated holders. But that is not in any real sense them "acquiring" shares other than shares already held by them. That is simply them obtaining the legal title to what they already beneficially own.

22 Further, looking at the strict words of the section, I do not think that there can be found a common acquirer or an acquisition by one offeror; nor do I think that the various acquirers can be considered to be "associates"" of other shareholders. Each is not connected with the other in the way that the definition of "associate" requires. Yet further, I do not think that the registration of beneficial interests is the mischief at which this section was aimed. The mischief at which the section is aimed is the use of cancellation schemes in takeovers whereby the shares in the target company are cancelled and the reserve so arising is applied in the issue of shares in the predator, a course undertaken for stamp duty reasons (see the illuminating comments of Snowden J in *Old Mutual PLC* [2018] EWHC Ch [29]-[33] and at [41]-[47]). So I do not think that the registration of previous STRATE beneficiaries constitutes an "acquisition" by them of shares; I do not think that the case literally falls within the provisions of the section; and I do not think that, in substance, it involves the mischief at which the section is directed.

23 One further matter calls for comment under this heading. I must, of course, consider not only the strict terms of the scheme itself but the wider arrangements which are proposed. As part of the wider arrangements, Tiso has made a "standby offer" to acquire the shares of those who desire to exit Tiso. The offer price is slightly lower than the scheme consideration. The existence of this "standby offer" with its multiple bilateral bargains does not obviate the necessity for the scheme. Under the "standby offer", only shares of those who have positively elected to accept the offer could be acquired; whereas under the scheme, the default position is the "exit" election. Passive shareholders are thereby not locked into an unlisted company and that unlisted company is not carrying the legacy of its earlier listing. So the scheme is still needed and will be effective to achieve a substantial objective.

24 I am satisfied that this is a scheme which ought to be sanctioned.

25 The scheme which I am invited to sanction differs in very minor respects from that put to the scheme meeting. There has had to be some inevitable adjustment arising from the fact that the progress of the scheme was slowed by a delay in obtaining a regulatory approval for one of its preconditions. There has consequentially been an adjustment to dates and to times and the insertion of some additional definitions to enable an application for the confirmation of the reduction in capital to be made at a separate hearing. None of these is of sufficient significance to give rise to the suspicion that shareholders would have voted upon the scheme differently had the amended scheme been before the meeting and not the original scheme. The correct approach is set out in *Aon PLC* [2020] EWHC 1003 at [16]-[18]. In the circumstances, I am prepared to sanction the scheme as it is put forward.

26 It will be necessary to hold a further hearing relating to that part of the scheme which relates to a reduction of capital. There are five factors which weigh in whether confirmation should be given to such a reduction. The court must first be satisfied that there has been a validly passed special resolution. The satisfaction of this condition is already recorded in the Court's order of 25 September 2020. Secondly, shareholders must be treated equitably in relation to the reduction. In the instant case, all shareholders are offered the same election, all shareholders receive the same consideration depending on the nature of their election, and the default position means that quiescent shareholders do not risk being locked into an unlisted company. That is all equitable treatment. Thirdly, there must have been a proper explanation to the members of what is proposed. The Explanatory Statement contains a full and sufficient explanation for the proposed capital reduction. Fourthly, the proposed reduction must not be to the detriment of creditors, i.e. there must not be a real likelihood that the reduction itself will result in an inability to discharge debts when due. The satisfaction of this condition has already been expressed in the judgment of the ICC judge on 25 September 2020; and my own review of the evidence confirms that position. Finally,

the reduction must be for a discernible purpose; and it is plain that that condition is met. It is, indeed, the central point of the scheme.

27 My provisional view is, therefore, that the reduction in capital element of the scheme should be confirmed; but it must await a final ascertainment of the extent of that reduction once the final time for election has expired. I will accordingly adjourn that element for further consideration until 2.00 p.m. tomorrow. But, otherwise, I approve the scheme.

CERTIFICATE

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