[2020] IEHC 330

THE HIGH COURT
COMMERCIAL

Record No. 2020/151 COS

IN THE MATTER OF XTRACKERS (IE) PUBLIC LIMITED COMPANY

AND

IN THE MATTER OF THE COMPANIES ACT 2014 (AS AMENDED)

AND

IN THE MATTER OF A PROPOSAL FOR A SCHEME OF ARRANGMENT PURSUANT TO SECTION 449 TO 455 OF THE COMPANIES ACT 2014 (AS AMENDED)

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 18th day of June, 2020.

Introduction

1. This is an application by the Applicant company Xtrackers (IE) Public Limited Company (the "Company"), for orders under Section 453 of the Companies Act 2014 (the "2014 Act") in Part 9 of that Act, sanctioning a proposed scheme of arrangement between the Company and its shareholders.

2. As is clear from the extensive affidavit evidence before the court, and in particular, from the affidavits sworn by Michael Whelan in support of the application, the Company is an investment company with variable capital, which is authorised by the Central Bank of Ireland under the European Communities (Undertakings for Collective Investment in Transferable Securities) Regulations 2011 (as amended) as a UCITS.

3. The evidence demonstrates that the Company is structured as an open ended umbrella fund with segregated liability between its sub funds. Shares in the Company representing interests in the different sub funds may be issued from time to time by the directors. The Company currently has 68 sub funds, each such sub fund is differentiated by reference to a specific investment objective policy, currency of denomination and certain other features. A separate pool of assets is maintained for each sub fund and is invested in accordance with the investment objective and policy of that sub fund.

4. The sub funds are exchanged traded funds and certain of the share classes are listed on multiple stock exchanges around the world. Investors trade the Company's shares on those exchanges. The Company currently uses what is called the Central Securities Depository settlement system executing trades in the Company's shares and that is known as the CSD model. In circumstances where shares of a sub fund are listed on multiple stock exchanges around the world, each exchange will operate its own CSD. Where shares are transferred between exchanges and, therefore, between CSDs, this requires a realignment of shares between the relevant CSDs which can give rise to liquidity fragmentation and operational difficulties in settling trades and this is clear, in particular, from the affidavit sworn by Mr. Whelan on 22nd May 2020.

5. The purpose of the scheme the subject of the application before the court is to centralise the settlement of trading in participating shares of all sub funds in the International Central Securities Depository settlement model, known as the ICSD model. The ICSD model provides for centralised settlement in Euroclear Bank SA/NV and in Clearstream

Banking SA for shares traded across multiple stock exchanges. The proposed scheme the subject of this application seeks to adopt the ICSD model in place of the existing CSD model. The scheme will provide for the transfer of the legal, but not the beneficial, interests in the relevant scheme shares to the common depository's nominee, in consideration of the nominee agreeing to hold the scheme shares as nominee for the common depository.

6. The scheme the subject of this application is similar to a number of schemes that have previously been sanctioned by the High Court. Similar schemes were considered and dealt with by me in a judgment which I delivered in the case of *UBS ETFs plc* [2019] IEHC 860 ("UBS"). That judgment was delivered on 26th November 2019.

Procedural Background

7. The application now before the court is for sanction in respect of the scheme of arrangement. At an earlier stage of the statutory procedure, an application was made for the convening of a meeting of the relevant shareholders to consider the scheme. That application was made pursuant to s. 450 of the 2014 Act.

8. I dealt with that application on 27th January 2020. By an order made on that date, I ordered that a meeting of scheme shareholders would be convened and I made certain ancillary orders concerning the advertising and conduct of that meeting. In addition, at the request of the Company, I made an order pursuant to section 450(5) of the 2014 Act, directing that all of the Company's shareholders would comprise one class for the purpose of the scheme meeting. I made that order for the reasons set out in some detail in the affidavit which was before the court for the purpose of that application, which was sworn on behalf of the Company by Tom Murray on 21st January 2020.

9. In that order, I directed that the relevant scheme meeting be convened for 2nd March 2020 and I directed that certain advertisements and notices be provided in respect of that meeting to the members of the Company by 4th February 2020.

10. The scheme meeting and associated Extraordinary General Meeting ("EGM") were both held to approve the scheme on 2nd March 2020. However, there were certain issues in relation to the notification to scheme shareholders who hold their shares through the CREST system. Those errors were set out and brought to the attention of the court in another affidavit sworn by Tom Murray on 31st March 2020. The directors of the Company believed that, in light of those errors, it would be inappropriate to proceed to ask the court to sanction the scheme based on the votes cast in favour of the scheme at the scheme meeting on 2nd March 2020.

11. The directors of the Company believed that, in the interests of fairness to all shareholders, it would be preferable for a new scheme meeting to be convened and held in order to provide an opportunity for all shareholders, including those who may not have been formally notified of the scheme meeting held on 2nd March 2020, to cast their vote for or against the proposed scheme at a new scheme meeting.

12. A further application was made to me, and by another order made on 1st April 2020, I directed that a new scheme meeting be convened for 21st May 2020. That application was made at the height of the Covid 19 pandemic and, in those circumstances, it was necessary for the Company to obtain additional directions from the court in relation to the holding of the scheme meeting and the new EGM required to consider the scheme.

13. In light of the travel and other restrictions necessitated by reason of the Covid 19 crisis, the Company sought, and I granted, special directions concerning the conduct of the meetings permitting those meetings to be held remotely, where necessary, by live teleconference. I also directed that a new scheme meeting be conducted in as briefly a manner as was reasonably practicable and that the number of attendees at the new scheme meeting would be as limited as possible. The scheme circular directed to be provided to the scheme shareholders in respect of that new scheme meeting contained a statement directing the scheme shareholders to vote by electronic proxy and noting that physical attendance at the meeting would be severely constrained and that there was no guarantee that the scheme shareholders would be permitted entry.

14. It was also provided that the scheme shareholders would be able to listen to the formal business of the new scheme meeting by way of teleconference.

15. In addition, I also made, of my own motion, an order under Section 179 of the 2014 Act, in respect of the new EGM required and I gave similar directions concerning the holding of that meeting. I did so as I was satisfied that it was neither practicable, nor desirable, for the EGM to be held in the customary manner or in accordance with the Company's constitution. That was an order which I made on the application of the Company in light of the very difficult circumstances which existed due to the Covid 19 pandemic.

16. The new scheme meeting and the new EGM were both duly held on 21st May 2020, and the requisite majorities were obtained at those meetings, in particular at the scheme meeting. The Company now applies for sanction in respect of the scheme.

Sanction of the Scheme of Arrangement

17. I now turn to consider the approach which the court has to take in considering an application for sanction in respect of a scheme of arrangement. The approach to be taken by the court, and the test to be applied by the court in deciding whether to sanction a scheme, is now well established in this jurisdiction and has been considered and applied in several judgments of the Irish courts, including *Re Colonia Insurance (Ireland) Ltd.* [2005] IEHC 115 ("*Colonia"), Re Depfa Bank plc* [2007] IEHC 463 ("*Depfa*"), *Re Ballantyne plc* [2019] IEHC 407 ("*Ballantyne*"), *SCISYS Group plc* [2019] IEHC 904 ("*SCISYS*"), *UBS and Re Allergan plc* [2020] IEHC 214 ("*Allergan"*). The test was summarised by me in a judgment recently delivered in the case of *Allergan*, that judgment having been delivered on 11th May 2020. At paragraph 11 of my judgment in that case, I said as follows:

> *"The test to be applied by the court in deciding whether to sanction a scheme of arrangement is well established and has been considered and applied in a number*

of recent judgments of the Irish courts. In Re Colonia Insurance (Ireland) Ltd, the High Court (Kelly J) set out the test to be applied in the case of a scheme of arrangement in relation to a solvent company. The test was subsequently applied to takeover or acquisition schemes, such as the scheme at issue in the present case, Re Depfa Bank plc and Re SCISYS Group plc. The test has also been applied to schemes of arrangement providing for corporate restructuring in other situations (Re UBS EFTs) and to schemes of arrangement concerning insolvent companies (Re Ballantyne plc). I am satisfied that the test set out in Colonia and referred to, and applied, in those other cases is the appropriate test to be applied in considering the company's application for court sanction in respect of the proposed scheme and I apply it here."

18. I continued on paragraph 12 of my judgment in *Allergan*:

> *"In summary the test requires the court to be satisfied that the following five requirements have been fulfilled, namely, that:*
>
> 1. *Sufficient steps have been taken to identify and notify all interested parties;*
> 2. *The statutory requirements and all directions of the court have been complied with;*
> 3. *The class of members (in the case of a scheme of arrangement between the company and its members) has been properly constituted;*
> 4. *There is no improper coercion of any of the members concerned; and*
> 5. *The scheme is such that an intelligent and honest person, being a member of the class concerned, acting in his or her interest, might reasonably approve of it."*

19. I went on to note at paragraph 13 of my judgment in *Allergan* that:

> *"In addition to those five requirements, the court must also be satisfied that the scheme is not ultra vires the company the subject of the application. That might be the case where the scheme at issue involved the sale of the entirety of a company's undertaking, in circumstances where there was no power in the company's constitution permitting such a radical alteration in its position (for example: Re Oceanic Steam Navigation Co. Ltd [1939] CH 41 ("Re Oceanic Steam"))."*

20. As I noted in *Allergan*, there was no question of that arising in that case, nor is there any question of the scheme being *ultra vires* the Company in the present case.

21. It is necessary for me now to proceed to consider each of the five requirements, or criteria, of the test which I have just summarised.

(1) Steps to identify and notify interested parties

22. The first point to note here is that, as indicated earlier in this judgment, the first scheme meeting gave rise to certain difficulties, in that the directors were not satisfied that all of the relevant shareholders had been properly notified and that led to the Company's application to convene a second or fresh scheme meeting. I have already referred to that application and the directions made in relation to that meeting.

23. I have been provided with a very extensive body of evidence, consisting of numerous affidavits, which, together, persuade me that an enormous amount of care has been taken to ensure that the directions given, regarding the convening of the new scheme meeting, have been complied with and that all shareholders have been duly and properly notified of the fresh scheme meeting. As I say, the affidavit evidence is very persuasive in that regard and I am completely satisfied on that evidence that all of the relevant shareholders have been duly and properly notified of the scheme meeting.

24. The affidavit evidence demonstrates that the membership of the Company comprises, firstly, Clearstream Banking AG and, secondly, shareholders who hold their interests through CREST (and there are some 586 of these). In terms of the evidence demonstrating that the appropriate steps have been taken to identify and notify interested parties, I refer to the following:

25. The order that I made on 1st April 2020, provided that advertisements be placed in respect of the new scheme meeting in each of Iris Oifigiúil, the Irish Times and the Financial Times (International edition). I have been provided with affidavit evidence in the form of an affidavit of Conor O'Donnell sworn on 22nd May 2020, which demonstrates clearly that those requirements were complied with and, not only that, the Company placed further advertisements in respect of that meeting in 12 other European publications which were not specifically required by the order, but were nonetheless done.

26. The second point to note on the evidence is that Ciarán Fitzpatrick of State Street Funds Services Ireland Limited has sworn an affidavit on 21st May 2020. His affidavit clearly demonstrates that due notification of the scheme meeting was provided to Clearstream.

27. The third point to note is that Barry Saville of Computershare Investor Services Ireland Limited, which acts as CREST registrar, swore an affidavit setting out the steps taken to identify and notify those members holding their shares through CREST as of the relevant record date, and again, that evidence demonstrates clearly that those steps were taken.

28. Finally, in terms of the evidence on this issue, Diarmuid Dawson of Innovative Print Solutions Limited swore an affidavit on 19th May 2020. That company provides secure printing services for the Company. Mr. Dawson’s affidavit provides evidence as to the printing and posting of the scheme circulars to the members holding their shares through CREST. Mr. Dawson's affidavit clearly demonstrates the number of circulars posted, namely 586 circulars, and proof of postage.

29. I am satisfied on the basis of all of this evidence that proper notice of the fresh scheme meeting was provided, as required by the terms of the order made on 1st April 2020.

(2) Compliance with statutory requirements and court directions

30. The second requirement that must be fulfilled is that the statutory requirements and court directions must have been complied with. The statutory requirements which have to be complied with before a scheme of arrangement can become binding on the members are set out in s. 453 of 2014 Act.

31. Under s. 453(2) there are three requirements.

32. First, there must be a special majority of those voting at the meeting voting in favour of the scheme. A special majority is the majority in number representing at least three fourths in value, and that term is separately defined in the 2014 Act.

33. Second, notice of the passing of the resolution at the scheme meeting and that an application would be made to the court in relation to the scheme, must be advertised in at least two daily newspapers circulating in the district where the registered office or principal business of the company is situated.

34. Third, the scheme must be sanctioned by the court and that is the purpose of this application by the Company.

35. In respect of the first of those statutory requirements, Mr. Whelan has provided extensive evidence demonstrating compliance with that requirement, and, in particular, has demonstrated that the requisite special majority has been obtained in support of the scheme.

36. 13 scheme shareholders attended at the scheme meeting and 13 voted in favour of the scheme. One of those who voted in favour of the scheme also voted against the scheme, reflecting the different interests held by that shareholder. The requisite majority in number, therefore, voted in favour of the scheme.

37. 92.3% approximately of those voting, representing 99.964% in value, based on the net asset value, in accordance with the previous order of the Court, voted at the scheme meeting in favour of the scheme.

38. Turning now to the second of the statutory requirements in s. 453(2). Conor O'Donnell swore an affidavit on 22nd May 2020 in which he demonstrates that the relevant advertisements were published in each of the Irish Times and the Irish Daily Mail, both in relation to the approval of the scheme and the intention of the Company to seek sanction in respect of the scheme. Those two statutory requirements have, therefore, been satisfied.

39. The third statutory requirement is that the scheme must be sanctioned by the Court and, as I have indicated, that is the purpose of this application.

40. In terms of the directions made by the Court, at this point the relevant directions are those made by the court in the order of 25th May 2020. Under that order, the Company was required to advertise the date of the sanction hearing, no later than 1st June 2020 in each of The Irish Times, the Financial Times, UK and European edition, and in Iris Oifigiúil. The evidence demonstrates that those directions were complied with and that advertisements were published in each of the Irish Times, Financial Times, UK and European edition, and in Iris Oifigiúil on 29th May 2020. The evidence also demonstrates that advertisements were also placed in 12 other European newspapers, and that evidence is to be found in the second affidavit of Conor O'Donnell, sworn on 16th June 2020.

41. In those circumstances, I am satisfied that all of the directions made by the court in its various orders have been complied with.

(3) Class of members properly constituted

42. The third requirement is that the class of members must have been properly constituted. As was pointed out in the submissions and as is clear from the evidence before the court, in my order of 27th January 2020, I made an order pursuant to s. 450(5) that all holders of the scheme shares were to comprise one class for the purposes of the scheme meeting and that meeting was convened and took place on that basis. I did not make any fresh order when the further scheme meeting was convened, but it is clear that the meeting was convened on the same basis as I had previously directed in the order of 27th January 2020.

43. The evidence before the court at that stage consisted of the affidavit of Mr. Murray, to which I have referred earlier. I was satisfied, on the *ex parte* application of the Company, that it was appropriate to direct that the scheme shareholders meet as a single class under s. 450(5). I am also satisfied, having considered all of the evidence now put before the court, that no new evidence has come to light or has been presented to the court which would persuade the court that a different approach should be taken in terms of the class of shareholders. Nonetheless, because that was an ex parte application, it is necessary for the court to give fresh consideration to the issue on this application.

44. The legal principles applicable to class composition have been discussed in a number of the authorities and they were perhaps most recently considered by me in my judgment in *Allergan*, where I stated at paragraph 30 of that judgment:

> *"As discussed by me in UBS and in SCISYS, the leading statement on the question of the class composition of meetings is that made by Bowen LJ in the English Court of Appeal in Sovereign Life Assurance Company v Dodd [1892] 1 QB 405, where he stated:*
>
> > *'It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it 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'."

45. As I noted at paragraph 31 of my judgment in *Allergan*:

"*That test has been considered and applied in numerous subsequent cases. The relevant principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in Re UDL Argos Engineering Ltd [2001] HKCFA 54, by the English Court of Appeal in Re BTR plc [2000] 1 BCLC 740 and Hawk Insurance and by Lloyd J in the English High Court in Re Equitable Life Assurance Society [2002] EWHC 140.*"

46. The test was also approved in this jurisdiction by Laffoy J in the High Court in *Re Millstream Recycling Ltd* [2009] IEHC 571.

47. Again, as I have noted, it was approved and applied by me in *UBS, SCISYS* and, most recently, in *Allergan*. At paragraph 32 of the judgment in *Allergan*, I stated:

> *"The proper focus is on the legal rights possessed by the members of the company. If those rights are not so dissimilar as to make it impossible for the members to consult together with a view to their common interest, then it is appropriate to treat the members as a single class."*

48. I am satisfied on the evidence in this case that it is, and was, appropriate for the scheme shareholders to meet as a single class.

49. Under the terms of the scheme, the rights of all shareholders will be varied in precisely the same manner. They will retain a beneficial interest in the scheme shares with the legal interest transferring from a CSD participant or nominee, to the common depository nominee. The differences between the rights of the shareholders, which, in essence, relate to their rights in various sub funds, are not in any way affected by the operation of the scheme. The scheme does not propose to vary any of the specific rights attaching to particular share classes or sub funds of the Company. Instead, the scheme provides only that the legal ownership of all shares in the Company be transferred to the common depository's nominee. I am satisfied on the evidence that each shareholder is being treated identically. In those circumstances, the Company felt it appropriate that the scheme shareholders should form part of one class. I accepted that at the *ex parte* stage of the process in January 2020 and, having reconsidered it again at this stage of the process, I am satisfied that it was the appropriate approach to take.

50. I accept that all of the members of the Company are, and should be, treated in the same way under the scheme. I accept that there is a significant similarity of rights among all members of the Company, and that they can, therefore, consult together with a view to their common interest. While shares in different sub funds may have a different value and that might give rise to the suggestion that there should be different classes, that is an issue that I considered in *UBS*. I was satisfied that it did not afford a good basis for

directing that separate classes of shareholders should meet and I am satisfied that the same considerations apply here.

51. While no objection has been taken by any member to the fact that the scheme meeting was conducted on the basis of a single class of members, nonetheless it was, I think, appropriate that I reconsider the issue as part of this application. As I noted previously in, for example, *Allergan* at paragraph 28:

> *"An applicant would be 'entitled to feel aggrieved' if the court, in the absence of any opposition and of its own motion, were to reach a different view as to the appropriateness of the class composition to that reached at the earlier stage of the process."*

52. Nonetheless, since the court is not a rubber stamp, it was necessary for me to reconsider the position on this application and having done so I am satisfied that the class composition was correct. No new evidence has come to light since my earlier consideration of this point at the *ex parte* stage, and, on the evidence, there is no basis for treating the scheme shareholders as other than a single class.

(4) Coercion

53. The fourth requirement is that there must have been no coercion of the members in respect of the approval of the scheme. This issue has also been considered in a number of the earlier judgments, and was considered most recently in *Allergan*, and, as noted at paragraph 37 of my judgment in that case:

> *"... every scheme in a sense involves an element of coercion where a dissenting member may be bound by the scheme, notwithstanding its opposition to it. However, what this particular requirement is focused on is improper coercion or pressure by one group or section of members on another, similar to the oppression of a minority interest in a company."*

54. I am satisfied on the evidence that there is no question of any coercion in the present case, so this requirement has clearly been satisfied by the Company.

(5) Approval by intelligent and honest person

55. The fifth and final requirement is that the court must be satisfied that the scheme is such that an intelligent and honest person, being a member of the class concerned, acting in respect of his or her own interests, might reasonably approve of it.

56. That test has been considered and discussed in numerous Irish and other cases, and was discussed in some detail in the judgment I delivered in the case of *Ballantyne*. However, it is unnecessary, I think, to consider those cases in any detail in this judgment.

57. The test was most succinctly put by Kelly J. in the *Depfa* case in the way in which I have just summarised it. Again, the court does not act as a rubber stamp in considering whether to sanction a scheme that has been approved by the members, even where the approval is by an overwhelming majority.

58. However, as I pointed out at paragraph 38 of my judgment in *Allergan*:

> *"That said, however, the court will be slow to reach a different view in respect of the scheme to that reached by experienced persons involved in the relevant market or industry, relevant to the company who voted in favour of it."*

59. And as I also noted in *Allergan*, Parker J., in the case of *Re Ocean Rig UDW Inc*.(18th September 2017, Grand Court of the Cayman Islands, Parker J.), with respect to a creditor scheme, stated:

> *"The court should be slow to differ from the vote, recognising that it is the creditors who are clearly the best judges of what is in their commercial interest. However, the court is not a rubber stamp in this regard even where the scheme has the support of an overwhelming majority of the creditors who are to be subject to it. The court can differ from the vote, but only if it is satisfied that an honest, intelligent and reasonable member of the class could not have voted for the scheme, and in that regard the court's own view as to whether the scheme is reasonable or even the best scheme is not relevant." (para. 89)*

60. Replacing the word "*creditors*" there with "*members*", that is the test which I propose to apply in considering this requirement.

61. A number of matters are clear in relation to this requirement.

62. First, the scheme has received an overwhelming level of support from the scheme shareholders. I have already referred to the percentages in favour of the scheme.

63. Second, the scheme was one recommended by the directors of the Company and the rationale for the scheme was clearly identified by the directors and communicated to the members in advance of the scheme meeting.

64. Third, there are undoubtedly significant advantages to the scheme in the views of the directors and those advantages and the rationale for the scheme were very clearly set out in the scheme circular and have been identified in the affidavit evidence before the court.

65. Fourth, it is clear on the evidence that there is no material prejudice to members of the Company, in circumstances where the sole object and effect of the scheme is to transfer the legal title in respect of the relevant shares to the common depository nominee.

66. I am also satisfied on the evidence that the scheme is fair and equitable and I have no hesitation in concluding that the scheme is one which an intelligent and honest person, being a member of the class voting at the meeting, acting in his or her own interest, might reasonably approve of it.

67. So I am, therefore, satisfied that all of the five requirements summarised earlier have been fulfilled by the company.

Additional Matters to be Considered by the Court

68. Before confirming my sanction in respect of the proposed scheme, there are two additional matters that have been brought to my attention that are relevant in terms of the order that will be made. These are issues which have not previously arisen in applications such as this so it is necessary to expressly deal with them in this judgment.

(1) Outstanding condition

69. The first concerns the condition referred to at paragraph 44.1.6 of Mr. Whelan's affidavit of the 22nd May 2020. At paragraph 44 of his affidavit, Mr. Whelan stated:

> *"Implementation of the scheme is conditional on the satisfaction of a number of conditions. One of those conditions, namely that set out at paragraph 44.1.6, is that the relevant agreements necessary to facilitate the scheme, including agreements with the common depository and Euroclear Bank SA/NV, must have been agreed in advance of the implementation of the scheme."*

70. As of the date of that affidavit on 22nd May 2020, that condition had not been satisfied.

71. Mr. Whelan swore his second affidavit on 16th June 2020. At paragraph 7 of that affidavit, Mr. Whelan confirmed that the condition in paragraph 44.1.6 of his earlier affidavit had still not been satisfied. However, he stated at the end of paragraph 7 that the relevant agreements the subject of that condition will be in place by the effective date of the scheme.

72. The position is, therefore, that there is one condition, apart from those that are relevant to the court's sanctioning of the scheme and the delivery of the scheme order, that remains outstanding. I think that can be addressed by including an appropriate condition in the final order to be made to the effect that the scheme order would not be delivered to the Registrar of Companies until the condition referred to in Paragraph 44.1.6 of Mr. Whelan’s affidavit has been fulfilled. I will discuss that with counsel at the end of this judgment, but I do not think it is a reason not to proceed to sanction the scheme. That issue can be addressed by an appropriate condition in the order.

(2) Modification of the Scheme

73. The second matter that needs to be considered is that there is a modification proposed to the scheme which arises in the following circumstances.

74. It is pointed out by the Company that the scheme provides for a degree of flexibility. Clause 6 of the scheme, which is headed "*Modification*", provides as follows:

> *"The company and the common depository's nominee may jointly consent on behalf of all persons concerned to any modification of or addition to this scheme or any addition that the High Court may approve or impose."*

75. That flexibility was also evident in the resolution put to the scheme meeting directed on foot of my order of 1st April 2020. The resolution put to that meeting and approved by that meeting was as follows:

"That the scheme, in its original form, or with or subject to any modifications, additions or conditions approved or imposed by the High Court, be agreed to."

76. In his second affidavit, sworn on the 16th June 2020, Mr. Whelan points out that the Company proposes that the scheme be modified pursuant to Clause 6 of the scheme, so as to permit the court to set the effective time for the scheme. The specific modification sought by the Company is the addition of the words "*as fixed by the High Court in the scheme order*" in the definition of "*Effective date*" in the scheme. The reason for seeking this modification, which is solely directed at the implementation of the scheme, is to ensure that the scheme becomes effective after trading hours on Friday 3rd July 2020.

77. Mr. Whelan has explained in his second affidavit why it is desirable that the scheme should become effective and, in that regard, that the transfer of the legal interest in these shares should occur pursuant to Clause 2 of the scheme to the common depository's nominee after trading hours on Friday the 3rd July 2020.

78. As pointed out by counsel, if this were not to be provided for, the scheme would be effective and the transfer of legal title would occur within the trading day, since s. 454 of the 2014 Act appears to give effectiveness to a scheme on its delivery for registration to the Registrar of Companies.

79. It does seem to me, however, that, notwithstanding the provisions of s. 454 of the 2014 Act, a modification of the type sought by the Company can be made, provided that it is not a material amendment to the scheme after its approval at the relevant meeting.

80. Section 454 of the 2014 Act provides in subsection (1), that:

"Where a scheme order is made, the company shall cause a copy of it to be delivered to the Registrar within 21 days after the date of the making of the order. The scheme order shall take effect immediately upon such delivery of that copy."

81. However, the scheme, representing as it does a statutory contract, could itself provide for the date on which it is to come into effect in accordance with its terms. Therefore, it seems to me that the scheme could make provision itself for an effective date being fixed, as provided for in the modification proposed by the Company, and that there is no bar in s. 454 of the 2014 Act to that modification being sought by the Company.

82. It is necessary, however, to consider whether the modification is a material amendment to the scheme which might preclude the court from sanctioning a scheme containing that modification, without requiring the scheme shareholders to give further consideration to the modification. Counsel has helpfully drawn my attention to a detailed commentary on modifications to schemes in the publication Bardell, Palmer and Wilkinson, "*Butterworths Takeovers: Law and Practice*" (2nd Ed.) (2015)

83. While that text deals with takeovers by a scheme of arrangement, it seems to me that the principles are equally applicable to other schemes of arrangement, such as the one at issue in the present case.

84. At paragraph 12.109, the authors give consideration to the question of modification of a scheme and to whether a modification gives rise to a requirement that affected members or creditors, as the case may be, may need to be consulted in relation to the modification. The authors state as follows:

> *"In scrutinising whether any amendment to the scheme may be made or has been suitably addressed, the courts will consider whether the amendment might conceivably have led shareholders to act differently in relation to the exercise of their votes. Given that the statutory provisions require that the scheme be approved by the relevant members, it is hard to make any material amendment to a scheme after its approval at the relevant court convened meetings, unless the amendment is beyond question in the interests of those members; for example, an increase in a purely cash offer by a bidder."*

85. Reference is made by the authors of that publication to the judgment of Blackburne J. in the High Court (Chancery Division) of England and Wales in *Re Allied Domeco plc* [2000] 1 BCLC 134. In that case, a scheme for the reorganisation of part of the business in question, which was a retail pubs and drinks business, was altered between the relevant meetings and the court sanction application, in such a way that the identity of the purchaser was changed. The disappointed party objected to the confirmation of the scheme at the sanction hearing, but that opposition was rejected by the court.

86. It should be said immediately that, in that case, the court did require an undertaking from the Company that a new shareholder approval for the disposal to the new purchaser should be sought by way of special resolution. So, to that extent, the case is somewhat different to the present case.

87. However, it seems to me that the modification which is sought here is of an entirely different order. I am not satisfied, firstly, that the modification makes a material amendment to the scheme. And, secondly, it seems to me that the amendment is, beyond question, in the interests of the members. I do not believe, therefore, that it is necessary to reconsult the scheme shareholders at all. In that regard I take account of the following matters:

88. First, the proposed modification does not in any way affect the substance of the scheme as explained to and voted upon by the scheme shareholders.

89. Second, the modification is one which concerns the mechanism of implementing the scheme by permitting the effective time to be moved from the delivery of the court order sanctioning the scheme to a time later on in the evening of 3rd July 2020.

90. Third, no scheme shareholder is in any way prejudiced by the modification. I accept the evidence of Mr. Whelan that the purpose of this proposed modification is to better implement the wishes of the scheme shareholders to accept the migration from the CSD to the ICSD settlement model. I am satisfied that there is no adverse effect or prejudice on any of the scheme shareholders and no material amendment to the scheme.

91. Fourth, in agreeing to the scheme, the scheme shareholders did through Clause 6 authorise the Company and the common depository's nominee to agree modifications, subject to the approval of the court. I agree with the submission advanced by the Company that it is difficult to see how the difference between the original definition of "*effective date*" and that now proposed could conceivably have led members to take an alternative position on the resolution proposed at the scheme meeting.

92. I am satisfied beyond any doubt, therefore, that there is no material amendment to the scheme, that the amendment is beyond question in the interests of the members and there is no need to reconsult the members. The scheme as so modified can be sanctioned.

Conclusion

93. For all of those reasons, I am prepared to sanction the scheme as so modified, subject to the inclusion of an appropriate condition dealing with compliance with the outstanding condition referred to in paragraph 44.1.6 in Mr. Whelan's first affidavit. It seems to me, subject to the final wording being provided by the Company, that I should make lodgement of the scheme order with the Registrar of Companies conditional on compliance with that particular condition.

94. Accordingly, I will accede to the Company's application and sanction the scheme as modified, with that condition. I will give liberty to apply.