Neutral Citation Number: [2018] EWHC 2663 (Ch)

Case No: CR-2018-005470

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

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

Date: Wednesday, 25th July 2018

Before:
MR. JUSTICE HENRY CARR
- -

IN THE MATTER OF HOUSE OF FRASER (FUNDING) PLC

AND IN THE MATTER OF THE COMPANIES ACT 2006
- -

Digital Transcription by Marten Walsh Cherer Ltd.,
1st Floor, Quality House, 6-9 Quality Court, Chancery Lane, London WC2A 1HP.
Telephone No: 020 7067 2900. Fax No: 020 7831 6864 DX 410 LDE
Email: info@martenwalshcherer.com
Web: www.martenwalshcherer.com
- -

MR. DAVID ALLISON QC, MR. RICHARD FISHER and MR. MATTHEW ABRAHAM (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Company**

- -

Judgment Approved

MR. JUSTICE HENRY CARR:

1. This is an application by House of Fraser (Funding) PLC ("the Company") which is an entity within the House of Fraser group. The Company seeks an order pursuant to section 899 of the Companies Act 2006 for the sanction of a Scheme of Arrangement which is proposed by the Company.

2. The background to this matter was set out in detail by Birss J who heard an application to convene a single meeting of Scheme Creditors on Wednesday, 4th July 2018. That judgment is at [2018] EWHC 1906 (Ch). Birss J explained that:

> "The House of Fraser group is facing a liquidity crisis. The scheme is part of what has been described as an 'amend and extend' restructuring arrangement relating to the principal financial instruments issued by two entities within the group, with obligations which are cross-guaranteed by a number of other group companies. The intended effect of this part of the restructuring is first to extend the maturity dates for the relevant

> instruments, and any claims under the related guarantees, to a common date in 2020; second, to amend the security provisions to enable, if necessary, a further supersenior class of debt to be issued by the company or other group members; third, to implement amendments which relate to the change control provisions in the relevant financial instruments in order to facilitate a sale transaction and further investment in the group; and fourth, to make some other relatively minor amendments which bring the positions under the two principal financial instruments more closely aligned with one another."

3. The Scheme is proposed on an "interconditional" basis with a parallel Scheme of Arrangement to be proposed by a Scottish group company, House of Fraser (Stores) Limited ("the Scottish Scheme Company") and to be approved by the Scottish courts. The Scottish Scheme, together with the Scheme Restructuring, is a matter for the Scottish courts and I understand the sanctions hearings in respect of those matters are to be heard tomorrow. Neither the Scheme nor the Scottish Scheme write off any existing debt.

4. This hearing is very urgent because if the Scheme is not effective before Monday 30th July 2018, then a non-payment event of default and acceleration is likely to occur in respect of the Senior Facilities Agreement, causing cross-default and acceleration of the Notes and other contractual obligations of the Company. In such a scenario, the evidence shows that it is likely that the Company (and various other companies in the Group) will be forced into a formal insolvency process.

5. The financial difficulties of the Group are well known. In summary the events leading up to the restructuring are as follows. As a result of a number of factors, the Group has seen a deterioration in revenues, net profit and cash flow. Action taken by the Group has been unable to tackle the seismic shift in the retail market and the directors of the Company have concluded that the business has reached a stage where it is no longer able to meet the ongoing costs of the trading business in its future format without further investment and a restructuring. In the light of those difficulties, and in order to meet a substantial, near term forecasted funding deficit, the Company intends to propose a Scheme Restructuring as part of a wider restructuring and recapitalisation of the Group, including in relation to its leasehold estate, financial indebtedness and ownership structure.

6. Turning now to the substance of the application, section 899 of the Companies Act 2006 provides as follows:

> "(1) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement.
>
> (2) An application under this section may be made by –
>
> (a) the company,

> (b) any creditor or member of the company,
>
> (c) if the company is being wound up or an administration order is in force in relation it, the liquidator or administrator.
>
> (d) if the company is in administration, the administrator.
>
> (3) A compromise or arrangement sanctioned by the court is binding on –
>
> (a) all creditors or the class of creditors or on the members or class of members (as the case may be), and
>
> (b) the company or, in the case of a company in the course of being wound up, the liquidator and contributories of the company."

22. In *Re Telewest Communications (No.2) Ltd.* [2005] 1 BCLC 772, David Richards J (as he then was) stated the principles to be considered by the court when deciding whether to sanction a Scheme of Arrangement at [20] to [22]:

> "20. The classic formulation of the principles which guide the court in considering whether to sanction a scheme was set out by Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819 by reference to a passage in *Buckley on the Companies Acts*, which has been approved and applied by the courts on many subsequent occasions:
>
> 'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.
>
> The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'
>
> 21. This formulation in particular recognises and balances two important factors. First, in deciding to sanction a scheme under section 425, which has the effect of binding members or creditors who have voted against the scheme or abstained as well as those who voted in its favour, the court must be

> satisfied that it is a fair scheme. It must be a scheme that 'an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve.' That test also makes clear that the scheme proposed need not be the only fair scheme or even, in the court's view, the best scheme. Necessarily there may be reasonable differences of view on these issues.
>
> 22. The second factor recognised by the above-cited passage is that in commercial matters members or creditors are much better judges of their own interests than the courts. Subject to the qualifications set out in the second paragraph, the court 'will be slow to differ from the meeting'."

7. In light of this judgment there are three questions to be answered at the sanction hearing: (1) whether there has been compliance with the statutory requirements; (2) whether the class was fairly represented and the majority acted in a *bona fide* manner; and (3) whether the Scheme is appropriate in that the Scheme is one which a creditor could reasonably approve.

8. Compliance with the statutory requirements involves three sub-issues: (1) whether the statutory majorities were obtained by the Company; (2) whether there has been compliance with the terms of the Meeting Order; and (3) whether the class in respect of the Scheme was properly constituted.

9. First, as to the requisite statutory majority, the Scheme Meeting was conducted in accordance with the Meeting Order made by Birss J and was held at the offices of Freshfields. 55 Scheme Creditors voted in favour of the Scheme representing 100% by number and 100% by value of the Scheme Creditors present in person or by proxy at the Scheme Meeting. The 55 Scheme Creditors comprised two out of the four total Lenders and 53 Noteholders out of an unknown total number. The 55 Scheme Creditors that voted represent 87.77% by value of the total Scheme Creditors entitled to vote at the Scheme Meeting.

10. Since then no creditor has objected and in my view it is clear that the requisite statutory majorities both in number and value were obtained at the Scheme Meeting.

11. Secondly, I am satisfied that the Scheme meeting was summoned and convened in accordance with the Meeting Order.

12. Thirdly, Birss J was satisfied at the Convening Hearing that a single class of creditors was appropriate. His reasoning is set out in detail at paragraphs 21 to 34 of his judgment. Although this court needs to satisfy itself at the Sanction Hearing that it has jurisdiction to sanction the Scheme, the Practice Statement requires creditor issues to be determined at the Convening Hearing: see, for example, the observations of Chadwick LJ in *Re Hawk Insurance Company Ltd.* [2002] BCC 300 at [21] and the observation of Snowden J in *Re Global Garden Products Italy SpA* [2017] BCC 637 (Ch) at [43]. In particular, Snowden J said:

> "As regards the correct constitution of classes, I accept the point made by Mr. Dicker that if a judge has heard full

> argument at the Convening Hearing and has decided on the appropriate constitution of classes, it is not ordinarily appropriate for a different judge at the sanction hearing to take a different view of his own motion in the absence of any creditor appearing to contend that the classes were not correctly constituted."

13. No creditor has appeared at this hearing to contend that the classes were not correctly constituted and, in the light of the detailed reasoning of Birss J, I see no reason to take a different view on this issue.

14. As to the *bona fides* of the statutory majority, as I have explained, all Lenders and Noteholders voting at the Scheme Meeting, voted in favour of the Scheme. It was unanimous. There was a high turnout and no one has since objected.

15. There is no suggestion that the Scheme Creditors were not fairly represented by those voting at the Scheme Meeting or that the statutory majority were acting other than *bona fide*. Therefore I conclude that this criterion is satisfied.

16. As to whether the Scheme is appropriate, the question is whether the Scheme (as part of the wider Scheme Restructuring) is one that an intelligent and honest person, a member of the class and acting in respect of his/her interest, might reasonably approve. In the present case the Scheme represents an alternative to formal insolvency in respect of the Company, as a result of which the creditors would recover far less than would be the case should the Scheme be sanctioned. An overwhelming majority of the Scheme Creditors in total amount have given their approval to the Schemes.

17. I recognise that although I am not bound by the outcome of the Scheme Meeting, the court should be slow to differ from the Meeting unless there is any reason to conclude that those voting were not acting in the interests of the class or that there was some other defect or impediment in the Scheme. The Scheme Creditors are invariably the best judges of what is in their commercial interest: see, for example, the observations of Hildyard J in *Re Apcoa Parking Holdings GmbH* [2015] Bus LR 374 at [129].

18. In the present case there is no reason to believe that the Scheme Creditors who approved the Scheme did not act in the interests of their class and every reason to conclude that they did and there is no defect or impediment in the Scheme becoming effective.

19. I then turn to the question of jurisdiction and recognition. Jurisdiction was considered by Birss J who concluded that the court had jurisdiction under the Recast Judgments Regulation in the event that it were to be applicable to the Scheme. He said at paragraph 19:

> "I can say now that, in common with many other schemes that have been promoted in recent years, I will approach the question of jurisdiction by making an assumption which many of my colleagues and indeed I have made in other cases. If I make the assumption that the relevant EU Regulation applies and that the scheme creditors are to be treated as defendants

> under the Regulation, then since there are UK-based scheme creditors, it follows that if the EU Regulation applies then the court does have jurisdiction."

20. It may be that this question, which is currently undecided, will, in an appropriate case, have to be decided. This is not an appropriate case and it is not necessary to decide the question. I shall make the same assumption as did Birss J. Therefore, I am satisfied that the court has jurisdiction.

21. In relation to recognition and international effectiveness David Richards J (as he then was) said in *Re Magyar Telecom BV* [2014] BCC 448 at [16]:

> "The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose …"

22. In the present case I am so satisfied. In particular, the Company is a Company incorporated in England. The Company's assets are predominantly situated in the UK with a few assets located in Ireland and the majority of the Scheme Creditors, by value, are based in the UK with English-governed debt. I also note that the Company has, out of an abundance of caution, sought and obtained US law advice in relation to the recognition and enforcement of the proposed amendments under the Scheme in the US because the Notes are governed by New York Law. That opinion confirms, amongst other things, that a US Bankruptcy Court would recognise and enforce the amendment to the Notes provided for by the Scheme Restructuring in circumstances where recognition is sought under Chapter 15 of the US Bankruptcy Code. The US opinion provides that a condition of Chapter 15 recognition of the Scheme on the US is that one or more individuals of the Company is designated to act, and determined by the English court to be authorised to act as a "foreign representative" within the meaning of section 101(24) of the US Bankruptcy Code.

23. The Company, by way of a Board Resolution passed on 18th July 2018, has appointed a Mr. Elliott as the foreign representative of the Company. I am asked to declare and record that Mr. Elliott is a foreign representative within the meaning of section 101(24) of the US Bankruptcy Code. Similar orders have been sought and obtained for numerous other Schemes of Arrangement and I shall so declare.

24. For these reasons I consider that it is appropriate for this court to sanction the Scheme and I shall make an order in terms of the draft order.

This transcript of judgment has been approved by Mr Justice Henry Carr