TRANSCRIPT OF PROCEEDINGS

Ref. CR-2019-006868

IN THE HIGH COURTS OF JUSTICE,
IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Neutral Citation Number: [2019] EWHC 3021(Ch)

The Rolls Building
Fetter Lane
London

Before THE HONOURABLE MR JUSTICE TROWER

IN THE MATTER OF

SMITH & WILLIAMSON HOLDINGS LIMITED

MR A THORNTON appeared on behalf of the parties

JUDGMENT
18th OCTOBER 2019, 11.25 – 11.55
Approved

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MR JUSTICE TROWER:

1. I am going to order a single meeting. I will explain why with some short reasons.

2. This is an application under section 896 of the Companies Act 2006 for permission to convene scheme meetings of the holders of A ordinary shares of 10 pence each in the capital of Smith & Williamson Holdings Limited ("the company") for the purpose of considering and if thought fit approving a scheme of arrangement.

3. The proposed scheme of arrangement is between the company, the A shareholders and the holders of the company's D ordinary shares of 10 pence each. In circumstances to which I will come, the company does not seek an order to convene a meeting of the D shareholders. The company's shares are not listed.

4. The purpose of the scheme is to enable the whole of the company's issued and to be issued share capital to be acquired by Tilney Group Limited ("TGL") and Symmetry Topco Limited ("STL"), both of which are companies within the Tilney group.

5. In the evidence, the acquisition of which the scheme forms an essential part is called the combination. The principal business of the Smith & Williamson group, of which the company is parent, is the provision of investment management, accountancy and tax advisory services to businesses, private individuals, families and intermediaries.

6. The Tilney group also carries on business in the wealth management sector and has become one of the United Kingdom's leading integrated private client and wealth management firms with over £25 billion of assets under management.

7. I have read letters to shareholders both dated the 21st of October from the chairman of the company and the chairman of Tilney, which explain what they consider to be the business synergies and benefits to shareholders which will be achieved by the combination. For present purposes, it suffices to refer to a short passage from the letter from Mr Andrew Sykes, the non-executive chairman of the company, writing to its shareholders on behalf of all the company's independent directors. The letter appears in the scheme documents and I quote:

> "*The Smith & Williamson independent directors believe that the proposed Combination delivers an attractive proposition for Smith & Williamson Shareholders. In particular*

- *the combination delivers an attractive premium valuation for Smith & Williamson business today;*
- *the Combination provides an opportunity for Smith & Williamson Shareholders to take a significant proportion of the Consideration in the form of cash;*
- *the Combination provides significant flexibility, via the Mix-and-Match Facility for Eligible Individual Shareholders (other than Restricted Overseas Shareholders) to express preferences as to whether they receive Consideration in the form of Cash Consideration, New Ordinary Shares or New Preference Shares (or a mixture thereof);*
- *holding equity in the Combined Group is expected to allow shareholders to benefit from the realisation of significant revenue and costs synergies commensurate with their ownership of the Combined Group; and*
- *that Smith & Williamson Independent Directors believe that the Combination will increase the likelihood of a successful IPO or other liquidity event in due course*."

8. In broad terms, the structure of the scheme is that each of the company's A shareholders will receive cash consideration from TGL, ordinary shares in STL and preference shares in STL in exchange for the transfer of their holdings of A shares in the company to TGL and STL. The value of the consideration is expected to be £9.73 per share (although that figure may change) and the first £45,000 of any consideration payable to shareholders will be in cash.

9. Thereafter, the consideration payable will be a mix of cash and shares, the make-up of which for individual shareholders will depend on whether or not they elect to participate in something called the mix and match facility, and if they do, what election they make. Default provisions will apply if an election is not made, and the precise entitlements under the default provisions will depend on the mix and match elections made by shareholders as a whole.

10. Immediately prior to the transfer, a flip-up will operate as a consequence of which LLP members within the Smith & Williamson group will be issued with A shares in exchange for the consideration they receive on the sale of their LLP shares to the company. Those A shares will then be transferred as part of the scheme.

11. The D shares are all held by a single shareholder, AGF Management Limited ("AGF"), which does not hold any A shares. The D shares carry certain additional rights

(such as anti-dilution protections and the right to appoint nominated directors). They are personal to AGF and automatically convert to A shares in the event of a transfer by AGF to any other party. The D shares are also to be transferred under the scheme. AGF has agreed to be bound by the terms of the scheme and the company does not, at this hearing, seek an order convening a meeting of the D shareholders.

12. In his submissions the company's counsel, Mr Andrew Thornton, explained that the scheme is the preferred structure for achieving the combination because the large number of members means that a wholly consensual transfer is not feasible and the company's articles of association do not include drag-along rights.

13. I should say something about the role of the court at a hearing to convene the scheme meeting between a company and its numbers.

14. In the normal course, the application is listed before an ICC judge for directions. The judge will be concerned to ensure that there are no obvious jurisdictional impediments to the sanction of the scheme in due course, but the principal matter which goes to jurisdiction, i.e. whether or not the meetings are correctly constituted as to classes, is the responsibility of the applicant and will only be lightly considered by the ICC judge at that stage. Its determination remains a matter for the sanction hearing.

15. More specifically, the practice direction, which applies to schemes of arrangement between a company and its creditors (*Practice Statement (Companies: Schemes of Arrangement)* [2002] 1 WLR 1345 ("the Practice Direction")), does not apply to member schemes. Furthermore, there is no established practice in the case of member schemes which adopts (reading members for creditors), the practice which is now adopted in relation to creditor schemes and most particularly, paragraph 5 of the Practice Direction. This provides that, "*In considering whether or not to order meetings of creditors ("a meetings order") the court will consider whether more than one meeting of creditors is required and if so what is the appropriate composition of those meetings*".

16. That does not, however, mean that the policy considerations which impelled the introduction of the Practice Direction in the first place, identified by Chadwick LJ in Re *Hawk Insurance Co Ltd* [2001] 2 BCLC 480, 513 at [19] to [21], may not have equal force in the case of some member schemes. There will be member schemes, although I suspect less often than in creditor schemes, where the nature of the proposed arrangements gives rise to class issues which it would be more appropriate to have determined at the first stage, i.e. the application to convene scheme meetings.

17. In such a case, there may be something to said for adopting the creditor scheme practice statement by analogy. This approach was adopted by Mr Justice Snowden in *In Re SAB Miller Plc* [2016] EWHC 2153 (Ch) at [20], from which it is apparent not just that paragraph 5 of the Practice Direction was adopted by analogy, but also that notification was given to the requisite shareholders as required by paragraph 4 of the Practice Direction.

18. In my view this approach reflects a pragmatic means for providing greater certainty as to outcome at an early stage. It minimises the prospects of a last-minute challenge to sanction on class grounds where members have had a full and fair opportunity to participate in the argument as to class constitution earlier in the process.

19. In the present case, Mr Thornton invites me to take a similar, but not identical approach. He explains that the company wishes to bring the class issues before a High Court judge at this stage, with a view to seeking comfort that the approach it intends to take to class constitution is appropriate. As he readily accepts, this is not precisely what occurred in the *SAB Miller* case, because in *SAB Miller*, the company had sent clear notification to its members, whereas in the present case, it has not.

20. Nonetheless, I can see that there is some utility in the court expressing provisional views at an early stage. This is more particularly so in a case such as the present where there is no reason to consider that the company has been anything other than full and open with the court and its members, and appears to have been scrupulous in drawing all relevant matters to the court's attention. But I must stress, that the views I shall express are no more than provisional and all that can be taken from this judgment is that I am satisfied that there is no obvious jurisdictional impediment to the sanctioning of the scheme in due course, if it is approved at the scheme meeting.

21. In particular, and because the Practice Direction does not apply even by analogy in the absence of full notification to members, a member who wishes to raise a class issue at the sanction hearing is likely to be able to do so without satisfying the court that he or she has good reason for not raising it at an earlier stage. I should also add that it may be that the judge at the sanction hearing will be more inclined of his or her own motion to revisit class issues in detail than would have been the case if the Practice Direction had applied or been applied in full by analogy at the stage of the convening hearing. These considerations point to the desirability in the future of notice being given if the court is asked to give a provisional view on class constitution at the convening stage.

22. Turning then to the issues which arise, I have considered the class issues which have been raised in Mr Thornton's skeleton and the evidence adduced from the company's group legal director, Ms Nicola Mitford-Slade. I remind myself of the approach which I am required to take. Mr Thornton has very helpfully set out five central principles in paragraphs 6.5 to 6.9 of his skeleton, each of which I accept and which I can summarise as follows.

23. The first principle is that the question of class constitution is answered by reference to differences in rights rather than differences in interests. The question as articulated by Bowen LJ in the well-known passage from *Sovereign Life Assurance v Dodd* [1892] 2 QB 573, 583 which was cited by Mr Thornton is whether the rights of the creditors (as in that case), or the members (as in this case), are so dissimilar as to make it impossible for them to consult together with a view to their common interests. If it is impossible separate class meetings are required; the test is impossibility.

24. The second principle, when looking at dissimilarity of rights, is that a comparison must be made between the rights which are to be released or varied under the scheme and the new rights, if any, which the scheme gives: Re *Hawk Insurance Co Ltd* (supra) at [30].

25. The third principle is that the mere fact that there are some differences between the rights of members does not of itself mean that they need to be placed in separate classes for the purposes of considering a scheme. As Mr Thornton submits, and I accept, a broader approach is to be taken and material differences can exist without separate classes being necessary for the purposes of complying with the *Sovereign Life* test.

26. The fourth principle, similar to the first, is that the question is one of similarity or dissimilarity of rights, not similarity or dissimilarity of commercial interests. Questions of commercial interest may go to fairness in due course, but do not affect the issue of class constitution.

27. And the fifth principle which I also accept is that it is important when the court is assessing questions of class that it does not adopt a narrow approach; in particular it must not look at the scheme in isolation from the other arrangements that are entered into at the same time.

28. Against that background, what are the potential class issues in this case? The first that has been identified arises out of the mix and match facility that I have already referred to. Where the holding of an individual shareholder entitles them to receive consideration in excess of £45,000, they are called an Eligible Individual Shareholder for the purposes of the

scheme and will be entitled to elect whether to receive their excess consideration, that is anything over and above £45,000, in cash, new ordinary shares or new preference shares.

29. There is something called the default consideration mix which will be applied in the absence of an election, but the mix and match facility allows Eligible Individual Shareholders to elect to vary that mix. This facility is not available to shareholders who are not Eligible Individual Shareholders which has the practical consequence that they will not be able to roll any part of their interest in the company into equity in STL.

30. This is said to be a provision which operates in a manner similar to customary provisions dealing with fractional entitlements on an all-share merger where those entitlements are satisfied in cash, albeit on a broader scale. It is submitted that in the same way that the approach to fractional entitlements will not normally give rise to class issues, so the same will apply to the operation and consequences of the mix and match facility.

31. I am not sure that the analogy with fractional entitlements is a wholly perfect one. I think that this particular provision goes rather further than what is essentially a pragmatic justification for the treatment of fractional entitlements. In particular it is clear that the blend of consideration available to A shareholders who are Eligible Individual Shareholders and those who are not is different.

32. However, I agree with Mr Thornton that, where there is a change in the way in which the same consideration is constituted (or (e.g.) an acquisition of the ability to control the appointment of one or more directors), which flows from the number of shares that a member holds rather than a difference in the rights that attach to each individual share, it is likely that the difference between his position and those who do not have such an entitlement will be one which goes to the enjoyment of the same rights rather than any difference in the rights themselves.

33. This is more clearly the case where the terms of the arrangement are such that the value of the consideration is or should be the same, even though the blend of assets by which it is made up may be different. On that issue, the company has established, anyway at this stage, that even if there were to be a difference in rights, that difference is not such that it is impossible for those who are and those who are not Eligible Individual Shareholders to consult together with a view to their common interest.

34. I should add that the mix and match facility is not available to Restricted Overseas Shareholders, being members where local laws may lead to penalties if the mix and match documentation is sent to them in that jurisdiction. There are very few shareholders who fall

into that category, but in any event my provisional view is that this is likely to give rise to differences flowing from the personal attributes of that member and is unlikely to give rise, without more, to a class issue, whatever the position may be in relation to fairness. To the extent that it goes to fairness, it is a matter for sanction, but in any event, the value of the scheme consideration available to them will be the same, even if the blend is different, and for that reason, no class issue is likely to arise.

35. The second potential class issue, I can deal with very shortly. It relates to certain management and incentivisation arrangements under which 3% of the share capital of Violin Topco Limited, being another entity in the new Tilney group, is reserved for allocation to key personnel. I agree that because it appears that no particular persons have yet been identified as eligible for these arrangements, because no assurances have been given to any particular individuals in relation to them and because it is not even certain that they will be introduced, a class issue is unlikely to arise. Certainly, there is no impediment to a single class meeting on these grounds at this stage.

36. The third potential issue relates to the effect of a document called the Nominee and Leaver Arrangements Deed and requires a little bit more explanation. Indeed, the submissions that I have heard this morning from Mr Thornton have concentrated on this issue to a much greater extent than any of the other questions that arise.

37. This deed relates to the position of Eligible Individual Shareholders who become what are called bad leavers. Bad leavers are employees who leave in circumstances in which they are not good leavers and good leavers are those who leave through retirement, death, ill-health, redundancy and the like as opposed to leaving in circumstances such as resignation.

38. Where a member who is an employee is a bad leaver, he or she is required to transfer their new shares, i.e. that part of the purchase consideration they receive under the scheme, whether received under the default arrangements or as part of the mix and match election, at a discount. There are also more stringent bad leaver default provisions which apply in relation to participants in two of the groups' share plans. All of these provisions were required by Tilney to assist in preserving the future value in the combined group by dis-incentivising combined group employees from becoming bad leavers.

39. The provisions and the way in which they work were first explained to members in a letter that was sent to shareholders on the 23rd of August 2019. It is fair to say that the way in which they work is a matter of some complexity, but it is clear that they are intended to reflect in broad terms the existing position under what are described as the current leaver

arrangements. Those current leaver arrangements give rise to four separate categories of affected A shareholder with different positions, examples of which are described in detail in the evidence.

40. I do not propose to go through the detail of that evidence, but I will read one paragraph in Ms Mitford-Slade's witness statement which summarises the position. She says at paragraph 113: "*While the New Leaver Arrangements do not precisely replicate the terms of the Current Leaver Arrangements, the underlying commercial purpose behind them is the same. Scheme shareholders who are employed or engaged by the Smith & Williamson group are already subject to the Current Leaver Arrangement and, in the Company's view, the New Leaver Arrangements should therefore be viewed as a development of an existing commercial principle rather than as a wholly new arrangement*." She then goes on and explains the position in greater detail.

41. This morning I have been taken through these provisions by Mr Thornton including a table setting out in some detail the effect of the clipping of shareholder rights in relation to different categories of leaver. I am satisfied, anyway at this stage, that this evidence is consistent with the submission made in paragraph 10.5 of his skeleton argument that the relevant members are still all considering the same question. The question in essence amounts to this: are they willing to accept what amounts to a broadly equivalent clip in the event that they become a bad leaver?

42. There are two points to make about that submission. It is said that the clip to which bad leavers may become subject is broadly equivalent for all of the members who fall into that category. However, it seems that some of the differences between the relevant members, when looked at in absolute terms pre-scheme and by reference to how their rights have been altered by the scheme, are more than insubstantial. To that extent, the comfort that I am able to give is qualified, but not in the sense that there is any impediment at this stage to the convening of a single scheme meeting.

43. Furthermore, I am prepared to say that, based on what I have already seen, it is unlikely that a class issue will arise. The difference in post scheme rights as between two groups of members sufficiently mirrors the difference in their pre-scheme positions when looking at the scheme as a whole. I emphasise "when looking at the scheme as a whole". Put another way, while in a number of respects materially different, the variation to which they have all been subjected by the scheme remains sufficiently similar and affects them all

in a sufficiently similar way that it is unlikely to be impossible for them to consult together with a view to their common interest.

44. In expressing that view, I place weight on the conclusions expressed in paragraph 120 of Ms Mitford Slade's witness statement, a conclusion which in my view is justified on the evidence that underpins it: "*However, when looked at in the round and with regard to the context of the overall transaction, the Company is of the view that the New Leaver Arrangements are reasonable in the circumstances and do not materially adversely affect any relevant Scheme Shareholders as compared to their current circumstances*."

45. Pausing there, the point made about reasonableness is likely to go to fairness, whereas the second part of that sentence (i.e. the comparison of rights inter se) also goes to the question of class. She then continues: "*In the Company's view, subject to the Court, the existing rights of A Shareholders and those proposed under the Scheme, do not vary sufficiently (before or after the Scheme) so as to necessitate the convening of separate class meetings of subcategories of A Shareholders*."

46. And then she goes on and explains why, "*This is in part because of the clear benefits of the transaction … for all A Shareholders, in part because certain A Shareholders, (including a significant proportion of those who would be subject to the New Leaver Arrangements) will benefit from the Full Discretionary Vesting or other accelerating awards under the Share Plans; in part because the Bad Leaver restrictions comprise just one of a significant number of rights and obligations attaching to the Share Consideration (combined with the fact that their relevance is to a large extent dictated by the post-scheme behaviour of the individual Scheme Shareholder) and finally because, as noted above, it's not possible to split the A Shareholders discretely by reference to the five categories of A Ordinary Shares currently in issue, given that any individual A Shareholder may fall within more than one such category*."

47. In my judgment these are all factors which support the company's conclusion that a single class meeting is appropriate in this case. I should stress, however, that the class issue as it relates to the bad leaver provisions is one of those points which is capable of looking very different when approached from a different perspective to that of the company. It is difficult for a judge at this stage to satisfy himself that he has taken into account all relevant considerations and that he has given appropriate weight to the factors which might count against the conclusion which is expressed in that paragraph. Nonetheless, I remain satisfied, largely for the reasons that are articulated in paragraph 120 of Ms Mitford-Slade's witness

statement as emphasised and explained in Mr Thornton's skeleton argument, that there are sufficient grounds for thinking that the members will not find it impossible to consult together with a view to their common interest, notwithstanding the issues that arise in relation to bad leavers.

48. The fourth potential issue relates to the acquisition by the company and one of its subsidiaries of an Irish accounting firm, which is described in the evidence as the Oracle SPA. Four of the sellers of the firm who were still engaged in the business of the group, received A shares in the company as part of the consideration for the sale and have a potential entitlements to further A shares as part of the future consideration, those shares all being forfeitable if they become bad leavers.

49. The company and Tilney wish to avoid the sellers acquiring more A shares after the scheme becomes effective. It is therefore proposed that the Oracle SPA be amended to ensure that the potential entitlement to some of the further A shares in the future (called the Third Anniversary Consideration), is accelerated so that they are issued prior to the scheme becoming effective, and the potential future entitlement to the remainder of the shares is then replaced with cash.

50. This would then mean that these two categories of share would be sold to Tilney under the scheme with the holders entitled to receive the consideration in cash and shares for which the scheme provides, but with likely differences, as I understand it, in the way in which the leaver provisions are then to be applied. However, those differences have not yet been agreed. They are, as I understand it, intended to replicate the entitlements of the other A shareholders under the scheme and will in any event comprise a *de minimis* proportion of the company's overall share capital.

51. It seems likely that this approach means that no class issue will arise. However, and more particularly because the arrangements have not yet been finalised, I am not in a position to do more than express that highly provisional view.

52. I also considered the fact that irrevocable undertakings have been given by a significant number of members to support the scheme - I think some 70.9%. The significance of such undertakings was considered by David Richards J in *Re Telewest Communications Plc* [2004] EWHC 924 at [53], where he concluded that such arrangements will not be class-creating where a bondholder (*Telewest* was a creditor scheme) would not have voted differently in the absence of the arrangement. I also note that in the context of creditor schemes, it has become commonplace for small consent fees to be paid in return for

such an undertaking, but even then, a class issue will not arise if, but only if, the evidence supports a conclusion that the fee was paid to facilitate early commitment and did not cause the creditor to change his view.

53. In the context of a member scheme in which irrevocable undertakings have been given and no collateral benefit is intended or paid, I have no reason to consider that it is even arguable that a class issue could be said to arise.

54. Having looked at the specific issues which arise one by one, it is also appropriate to step back and look at the arrangement as a whole. What is the totality of the position pre and post scheme and what is the real substance of the arrangement on which the members are required to consult together with a view to their common interest? In the absence of notification to members of this hearing, a final answer to the question can only be given at sanction, but it seems to me to be quite likely that at that stage, the company will establish that the members are well able to consult together in their consideration of the advantages and disadvantages of the scheme, and on that question, there is much more that unites them than divides them.

55. So, for those reasons, as I indicated at the beginning of this judgment, I propose to make an order giving permission to convene a single scheme meeting. There is a copy of the order in the bundle. Is there anything on that, Mr Thornton, to which you want to draw my attention?

MR THORNTON: Just the 14 day period that I took you to.

MR JUSTICE TROWER: Yes, I should add to what I have just said in my judgment that the order sought by the company in this case is for the notice to be sent to holders of the scheme shares at least 14 clear days before the date appointed for the court meeting, although I have been told that in practice, it is likely that 19 days notice will in fact be given. Even if that were not the case, I am satisfied on the basis of the evidence that I have seen as to prior notification and explanations given to holders of scheme shares, that a 14 day period is appropriate.

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.