Case No.: CR-2020-000377

Neutral Citation Number: [2020] EWHC 1447 (Ch)

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

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

Friday, 13 March 2020

Before:

THE HON. MR JUSTICE FANCOURT

IN THE MATTER OF
SIRIUS MINERALS PLC

MR ANDREW THORNTON appeared on behalf of the Applicant company
MR GAVIN PALMER appeared in person in opposition to the claim

Hearing date: 13 March 2020

Approved Judgment

Digital Transcription by Epiq Europe Ltd,
Lower Ground, 18-22 Furnival Street, London, EC4A 1JS
Tel No: 020 7404 1400
Web: www.epiqglobal.com/en-gb/ Email: civil@epiqglobal.co.uk
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MR JUSTICE FANCOURT:

1. Sirius Minerals plc is a mining company that had worldwide interests but for the last few years has concentrated all its resources on the construction of a state of the art polyhalite mine near Whitby in North Yorkshire, with underground mineral transport system connections to Teesside Docks.

2. The company has approximately 7,020,200,000 ordinary shares of a quarter of a penny each. As at 28 February 2020, it had 4,628 registered members. It is clear on the evidence that a number of these members are nominees for beneficial owners of shares, typically stockbrokers or self-invest pension fund nominees, ISA companies and the like. The number of registered members therefore conceals the fact that it is believed that tens of thousands of small investors acquired a beneficial interest in shares in the company held by such nominees.

3. The company is believed to have a particularly large following from small and relatively unsophisticated investors in Yorkshire and elsewhere in the north of England. Many of these would have bought their shares in an offering in 2019 at a price in excess of 20 pence per share. If the scheme of arrangement that is before me is sanctioned by the court, those investors will receive only 5.5 pence per share. If the scheme is not sanctioned, they may receive significantly less or nothing if the company goes into administration.

4. Various concerns about this state of affairs have been expressed in writing and in person in court today.

5. I have read letters from Mr Cliff Waite of the UK Individual Shareholders Society (ShareSoc). The concerns that he expresses are that the vote at the meeting that agreed to accept the offer of 5.5 pence per share was not representative of the views of the beneficial owners of the shares, the problem being that unless such beneficial owners either instructed their nominee and the registrar to transfer a share into direct ownership or the nominee or contacted the beneficial owner and asked how it should vote his shares, or the owner knew to tell the nominee how to vote, the choice of the beneficial owner would not be reflected in the vote on the resolution to approve the scheme. As Mr Waite pointed out, it takes some time to achieve a transfer of a single share to the beneficial owner, a point that was confirmed in court today by Mr Gavin Palmer, who spoke as a member of the company who opposes the scheme. He said it took him ten days at a time well before the deadline imposed by the scheme to effect a transfer. This is said by Mr Waite to put a major obstacle in the way of shareholder democracy and, as he put it in correspondence, amounted to a gross disenfranchisement of individual shareholders. He said:

   > "It is a comment on the law and the way nominees and company advisors tend to interpret it. It has to change, and we continue [to request] the Government and [the] Law Commission to do so."

6. There is indeed a strong movement now to change the law in this respect, and I recognise a genuine issue about shareholder democracy, but the court must take the law as it is, not as it might be if changes are made in the future.

7. Mr Palmer was formerly a director of ShareSoc but, as I have said, appeared as a member of the company, having acquired one or more shares within the last month or so. He advanced powerful arguments about the unfairness of the way that the scheme has operated to prevent, as he suggested, tens of thousands of real shareholders from having a vote. He also made a number of allegations about impropriety at the company and especially about the failure of its board to raise funds that were needed; but there was no evidence before me about any such breaches of duty. Mr Palmer suggested that there are two classes of shareholders, one that is registered and given information and the ability to vote on the scheme, and another much larger class that is not registered and does not receive information about the scheme or the ability to vote.

8. Mr Palmer pointed out that although some publicity was put out by the company about the scheme so that shareholders could exercise their right to vote, and although the company operated a very good and efficient service in responding to enquiries that were made of it about the ability of beneficial owners to vote on the scheme, nevertheless most beneficial owners did not find out about the scheme in time: they did not read the social media posts that the company placed or did not read the advertisements in the national and local newspapers that the company placed; and the nominee owners of their shares did not contact them to tell them about the scheme and ask how they should vote. There were some instances in which beneficial shareholders did instruct their nominees how to vote or indeed in at least one case, of nominees apparently contacting their beneficiaries, and in such cases (assuming that there were differing instructions from various beneficiaries) the nominee was recorded as voting both ways at the court meeting, with a number of shares voted each way, but it seems likely that the majority of beneficial owners did not exercise that right.

9. Mr Palmer further says that it was wrong that the company did not supply to ShareSoc an Excel spreadsheet of the beneficial owners of the company's shares, so that contact could be made with them directly in time to allow them either to transfer a share to entitle them to vote in their own right or to give instructions to their nominee holder.

10. In addition to the criticisms and concerns expressed by Mr Waite and Mr Palmer, a number of other individual beneficial shareholders' concerns are expressed in a volume of correspondence which Mr Thornton, who appeared on behalf of the company, carefully took me through. The main complaints made were that the price offered was too little, that the effect was to cause grievous loss to people who could not afford to lose their investments, and that the position about the voting rights of beneficial owners of shares was unclear.

11. Having summarised in that way the objections that have been voiced to the scheme, I must now turn to the circumstances in which the scheme is proposed and to the outcome of the court-directed meeting of the company on 3 March this year.

12. The position of the company is that the continuation of its current business depends entirely on satisfying its substantial financing requirements. At this stage of the development of its business, it has little if any income stream. At the end of April 2019 the company launched its plan to secure finance for stage two of the development. Before that announcement, the share price was 21.9 pence. By the end of August 2019 the company had £180 million of unrestricted cash and at that point decided to scale down its development work to allow for a strategic review and to explore funding

options. This slowdown and strategic review were announced publicly on 17 September 2019. Immediately prior to that, the share price stood at 10 pence. After that, it fell to somewhere between 3 and 4 pence.

13. The company initially sought to achieve about $600 million of funding for the immediate next phase of its development, having identified a need and possible source of a further $2.5 billion thereafter. Initial attempts to secure the next tranche of funding were unsuccessful. Available equity funding would not be sufficient. The government, despite requests, apparently declined to support the company's needs, and a possible consortium of lenders (according to the evidence before me) imposed conditions that the company either could not meet or could not satisfy in time. By the end of 2019, the company had just under £60 million of free cash left and knew that it would be likely to run out of cash by about the end of March 2020.

14. On 6 January 2020, Anglo American plc made an indicative bid for the entire share capital of the company at the price of 5.5 pence per share. The shares were to be acquired by Anglo American Projects UK Ltd (Bidco). The offer period opened on 8 January 2020. Prior to that announcement, the three-month volume-weighted average share price had been 3.4 pence, and on 7 January was 4 pence. The offer of 5.5 pence was therefore at a significant premium to the prevailing share price but much lower than the share price had been earlier in 2019.

15. It is therefore understandable, particularly in view of the fact that many shareholders would have bought their shares when the share price was at or in excess of 20 pence, that there is a significant degree of dissatisfaction on the part of small shareholders or beneficial owners of shares with the directors of the company and with the price offered by Anglo American plc. However, the higher share price of the company in 2019 depended on its ability to finance its development. Without new finance the company will very likely go into administration at the end of this month. Despite the endeavours of the directors of the company to obtain alternative finance and to release greater value for its members, the only offer on the table as things stand is that of Bidco at 5.5 pence.

16. Accordingly on 29 January 2020 the company issued a claim under Part 26 of the Companies Act 2006 for an order that it convene a meeting of members to approve a scheme of arrangement between the company and the holders of scheme shares, that is to say all the ordinary shares of the company, which would be acquired by Bidco at 5.5 pence. On 5 February this year Insolvency and Companies Court Judge Mullen gave directions for such a meeting of a single class of members. Approved scheme documents were sent to members on 7 February, and the court meeting was held on 3 March in London.

17. At the meeting a number of members (24 out of the 26 present) spoke and raised concerns or objections of varying kinds to what was being proposed. One of those spokesmen was Mr Palmer. Following a debate, a vote was taken. 812 out of the 1,314 members present in person or by proxy voted for the resolution to approve the scheme. 502 members voted against. The votes in favour represented over 80 per cent of the value of the shares voted, so the statutory requirements of 50 per cent of shareholders voting and 75 per cent of value were both achieved. It is material also to note that 27.7 per cent of all members of the company voted, which is a relatively high

percentage for such court meetings and no doubt reflects the degree of controversy surrounding the scheme.

18. On the application of the company for the court to sanction this scheme under section 899 of the Companies Act, I must first be satisfied that the statutory requirements in connection with the holding of the court meeting have been complied with and that the required majorities have been obtained. On the evidence before me, there is no doubt about that. The meeting was properly held in accordance with the court's directions, and the scheme documents and voting forms were sent to the members. For the statutory purposes, it is the registered members to whom the documents must be sent, not the beneficial owners of the shares.

19. Mr Thornton reminded me that a member of a company is the person who is registered as a member under section 112(2) of the Companies Act 2006. The register is a register of members, not of beneficial owners of shares. The voting rights of a public limited company are that every member has a vote (section 284(3)) and a scheme under Part 26 of the Act is made between a company and its members. It is therefore the members who are to be sent the documentation and the voting papers for the scheme, even if it were the case (about which there is no evidence in this case) that a company has the name and contact details of all beneficial owners of its shares.

20. Although there was a delay of some hours, which Mr Waite criticises in reporting the outcome of the vote, the vote was regularly taken and there is no evidence to suggest that anything improper occurred in counting the proxy votes or the shares that were voted in person at the meeting, or in the analysis of the votes actually cast prepared by the chairman of the meeting, Mr Scrimshaw, which was reported to this court in his report dated 9 March 2020. At one point in his arguments, Mr Palmer asked the court for an adjournment so that further evidence could be produced by the company of the change in the register of shareholders between 6 February and 28 February of this year. He suggested that that would show how many beneficial shareholders had not been notified of the scheme. I could neither follow the logic of that nor see its relevance to the question of whether the scheme should be sanctioned in accordance with the law as it stands. I therefore grant no adjournment.

21. The next matter that I must be satisfied about is that the class of members was fairly represented at the court meeting by those who attended and that the majority of those voting were doing so bona fide and not for some collateral reason that does not represent the interests of the class. Contrary to Mr Palmer's argument, the ICC Judge correctly determined in this case that there is only one class of members for the purpose of Part 26 because all registered members have the same rights under the company's constitution and all will have the same rights under the scheme. From the sizeable number of speakers and votes against the resolution at the court meeting, I think I can be satisfied that members in the same class with the same rights but with differing opinions were fairly represented at the meeting. The turnout in person and by proxy was high, relatively speaking, so in terms of numbers of votes there was a large proportion of all the members who expressed their choice. The dissentient voice was clearly heard, as reflected by the total number of those voting against the resolution.

22. The fact that many beneficial shareholders did not have the opportunity to vote is not directly relevant to an assessment of fair representation of members, because beneficial shareholders are not members for the purposes of Part 26 of the Act. If sufficient

numbers of beneficial shareholders had given instructions to their nominees to vote against the scheme, the outcome of the vote might have been different, but the company cannot be blamed for that. As the law stands, it had no obligation to communicate with the beneficial owners of its shares. Even if it had informed all the beneficial shareholders, there is no knowing what the outcome of the vote would have been if they had all taken the opportunity to vote. Those who now object may well not be representative of the silent majority. There is, in short, no reason not to take the 27.7 per cent of members who did vote as representative of the class.

23. There is no suggestion that the members who voted in favour of the resolution were acting other than bona fide or were acting oppressively. They were clearly voting to salvage such value as could be salvaged when there was no alternative offer or funding, and the consequence of rejecting the scheme could well have been insolvency and a substantially worse outcome. It is worth noting that one director of Anglo American plc, Mr Ashby, purchased over 833,000 shares early in 2019 at a price of 30 pence per share. He, like the other directors, voted in favour of the resolution. His vote, which triggers a large loss on those shares, reflects the fact that the only available alternative to the company at that time was much worse.

24. Those observations also seem to me to answer the next requirement of which I must be satisfied, namely that an intelligent and honest person who is a member of the class acting in his own interests might reasonably approve the scheme. He might because he seems, regrettably, to have had little realistic alternative if he wanted to preserve some of the value of his shares. Other shareholders might take a different view, but that is not the relevant test.

25. I am satisfied that there is no other legal impediment to or defect in the scheme.

26. Mr Waite raised a concern about lack of clear instructions about the name to be inserted into the voting forms, and Mr Palmer argued that the forms were confusing and unclear, but the company has confirmed to Mr Waite that no votes were rejected on the basis that the wrong name was inserted and only two votes were rejected and that was on the basis that no sufficient indication of a vote one way or the other had been given. There is no evidence about the outcome of the court meeting having been adversely affected by any of the forms or documents being confusing.

27. Bidco's parent company, Anglo American plc, acting by Mr Thornton for this purpose, has offered an undertaking in the usual way to be bound by the scheme and to pay the purchase price, and all necessary regulatory approvals have been obtained and resolutions of the company passed to alter its articles of association.

28. In those circumstances it is appropriate for me to sanction the scheme, and I will do so.

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

Lower Ground, 18-22 Furnival Street, London EC4A 1JS
Tel No: 020 7404 1400
Email: civil@epiqglobal.co.uk

This transcript has been approved by the Judge