Neutral Citation Number: [2021] EWHC 1418 (Ch)

Case No: CR-2021-000852

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

IN THE MATTER OF HURRICANE ENERGY PLC
AND IN THE MATTER OF THE COMPANIES ACT 2006

7 Rolls Building
Fetter Lane, London EC4A 1NL

Date: 25th May 2021

Before:

MR JUSTICE ZACAROLI

Tom Smith QC and Matthew Abraham (instructed by **Dentons UK and Middle East LLP**) for the **Company**
Stephen Robins (instructed by **Akin Gump LLP**) for the **ad hoc group of Bondholders**

Hearing dates: 21 May 2021

APPROVED JUDGMENT

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time for hand-down is deemed to be NB16 .00 pm on 25th May 2021.

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MR JUSTICE ZACAROLI

Mr Justice Zacaroli:

1. At the hearing on 21 May 2021 of an application by Hurricane Energy PLC (the "Company") to convene a meeting of creditors of the Company to consider a plan of reorganisation (the "Plan") under Part 26A of the Companies Act 2006 ("CA 2006"), I ordered that two meetings be convened: a meeting of the holders of unsecured bonds with a face value of $230 million constituted by a trust deed dated 24 July 2017 bonds (the "Bonds") issued by the Company (the "Bondholders"); and a meeting of the shareholders of the Company (the "Shareholders"). These are my short reasons for doing so.

2. The Company is an AIM listed company, the parent company of the "Hurricane Group" of companies. The Group carries on business in the oil and gas industry. It holds licences granted by the Oil and Gas Authority in relation to the exploration and exploitation of hydrocarbon resources.

3. The Company is the operator for licences held by other Group companies. It covers the costs of all employment contracts within the Group and guarantees a joint venture entered into by one of the Group companies with Spirit Energy Limited, relating to an area that is still in the discovery/exploration and appraisal stage.

4. The Company's sole source of debt finance is the Bonds. The Bonds mature on 24 July 2022, at which point the full amount ($230 million) will become due and payable. The Company has very few other creditors.

5. Although the Group has an interest in a handful of offshore exploration areas, and wells within those fields, the only active well is in an area known as Lancaster (the "Lancaster Area"). Oil production commenced there in 2019. At that time, there were positive projections for oil production from the Area. By September 2020, however, the Company's unaudited best estimates of reserves and resources were significantly reduced. As a result of this, and of changes to its oil production forecasts, low oil prices during 2020, projections as to future oil prices and a requirement to provide additional security for decommissioning costs, the Company anticipates that it will be unable to repay the Bonds on maturity next year.

6. The Plan is intended to address that problem by enabling the Company to continue to exploit the positive cash flows from the Lancaster Area for an extended period so as to maximise the return to the Bondholders.

7. It involves the following elements. $50 million of the Bonds will be released and the maturity date of the Bonds extended to 31 December 2024, in exchange for the allotment of shares in the Company, representing 95% of the fully-diluted shares following such allotment, and an increase in the rate of interest payable on the Bonds. This would enable an extended wind-down, potentially until February 2024, after which (in the absence of further investment) the Lancaster Area would be decommissioned, the remaining business wound-down and all third-party creditor claims settled.

Matters to be considered at this hearing

8. The matters to be considered on this application are: (1) the adequacy of notice of the hearing to members and creditors; (2) whether the court has jurisdiction to sanction the Plan; (3) whether certain threshold conditions have been satisfied; (4) the composition of the classes of creditors and/or members to be summoned to a meeting or meetings; (5) whether there is any roadblock to the sanction of the Plan and (6) practical considerations relating to the convening of the meeting(s).

9. This hearing is not the occasion to consider whether the proposed Plan is a fair one, or whether the court would be likely to exercise its discretion to sanction it in due course.

(1) Adequate notice

10. The Practice Statement (Companies: Schemes of Arrangement) [2020] 1 WLR 4493, requires persons affected by the Plan to be given notice of the convening hearing, sufficient to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the hearing.

11. The nature and degree of notice required depends on the circumstances of each case. The Plan, so far as it affects Bondholders, is straightforward. As I explain below, there are no issues as to the court's jurisdiction or as to the constitution of classes so far as creditors are concerned. In these circumstances, I am satisfied that the 21 days' notice given in this case to Bondholders (who were provided with the Practice Statement Letter on 30 April 2021) is sufficient.

12. The Company did not send the Practice Statement Letter to shareholders but did issue a regulatory news service announcement (an "RNS") on the same date that the Practice Statement Letter was issued, directing shareholders to the Company's website, where the Practice Statement Letter was published. For the reasons I develop below, the shareholders' rights are affected by the Plan. They are certainly persons who are "affected by the scheme", which is the language of the Practice Statement. They ought, therefore, to have been given notice.

13. While the RNS is not the same as notice being sent to each shareholder, I am satisfied that no prejudice is caused to shareholders by the lack of direct notice being sent. A number of shareholders have responded to the notice and raised concerns, which I refer to in more detail below, as to the financial information provided by the Company, the need for any reorganisation at this stage, and their wish to replace some of the board of directors before the Plan goes ahead. These concerns are matters which the court will need to address at the sanction hearing, but are not matters which go to the issues to be determined at the convening hearing (save potentially in respect of the threshold conditions, which I address below).

14. The only other issue to be determined at the convening hearing that directly affects the shareholders is whether the court should direct a meeting of shareholders to consider the Plan. In a letter dated 20 May 2021 from Rosenblatt, solicitors acting for an institutional shareholder, request was made for legal advice obtained by the board of directors of the Company and for numerous documents. The solicitors noted that their clients had not been invited to the convening hearing so did not intend to appear or be represented at the hearing. Their preliminary view was, however, that a meeting of shareholders ought to be convened. The rights of all shareholders are protected, so far as this issue is concerned, by my decision (explained below) to convene a meeting of shareholders as well as Bondholders.

15. For the avoidance of doubt, any shareholder who did not actually receive notice of the convening hearing will not be bound by paragraph 10 of the Practice Statement. In the unlikely event that they would wish to raise issues that are intended to be determined at the convening hearing, as opposed to matters going to the fairness of the Plan, they would be able to do so at the sanction hearing: see, for example, *Port Finance Investment Limited* [2021] EWHC 378 (Ch) at [50]-[51].

(2) Jurisdiction

16. The Company is incorporated in England and Wales. There is accordingly no doubt that the court has jurisdiction to sanction a Plan under Part 26A.

(3) Threshold conditions

17. By section 901A CA 2006, the court may only order meetings of members or creditors to consider a Plan if the following conditions are met:

> Condition A: the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern.
>
> Condition B: the compromise or arrangement is proposed between the company and its creditors, or any class of them, and its members, or any class of them, and its purpose is to eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties mentioned in Condition A.

18. The evidence adduced by the Company includes a report by PwC entitled "Restructuring Plan Relevant Alternative Scenarios". This contains a detailed analysis of the financial position of the Company. It concludes that there are two possible alternatives to the Plan. The first is an uncontrolled liquidation. The second is a controlled wind-down over the course of the next year (i.e. before the Bonds mature), during which time the Lancaster Area would continue to generate positive cash until the maturity of the Bonds. I discount the former, since there is no rational basis upon which either the Company or the Bondholders would precipitate a value-destructive liquidation.

19. PwC's conclusion is that the controlled wind-down is likely to lead to a recovery by the Bondholders of 66.6 cents in the dollar. This is based on projected production volumes and the forward curve of oil prices (being the industry estimates of future oil prices). This is subject to significant variables, including as to oil price, production volumes and costs. Having applied sensitivities within a reasonable range of uncertainty, PwC estimate a high illustration return to Bondholders of 79.5 cents in the dollar and a low illustration return of 36.9 cents in the dollar. In all cases, there is no return to shareholders.

20. The shareholders who objected in writing, or at the hearing, were highly suspicious of the financial information provided by the Company. For example, it was said that there was no explanation for the company having had US$87 million cash in October 2020, which went up in one month alone (December 2020) by US$19 million, yet five months on there is only US$127 million of cash. As to this, there is in fact an explanation in the evidence, namely that production was reduced in early 2021 for reservoir management purposes, that there was a natural decline, and an unscheduled well intervention in March 2021. Moreover the net cash position of US$127 million was as at the end of March 2021, only three months later. It is true that the reasons for the reduction in volumes in the first part of this year ought not to impact the projections for volumes going forward, but there is no suggestion that PwC's projections have been prepared on that basis.

21. Certain of the shareholders also objected that the extent to which production was estimated to be reduced at the Lancaster Area due to "water cut" was vastly exaggerated, that the forecasts were based on an underestimate of future oil prices, and that no proper explanation had been given for the very significant reduction in projections relating to the Lancaster Area (as between 2017 and 2020). It was also said that there was no reason to rush through this restructuring now, and that the board of directors had reneged on promises to engage with all stakeholders over plans for the future. It was submitted that the court should adjourn this application for some months, so that the shareholders had a chance to replace at least some of the board at an AGM scheduled for the end of June 2021, or a recently requisitioned EGM.

22. These are all matters which, if properly evidenced at the sanction hearing, would be relevant to the exercise of the court's discretion. In particular, the extent to which there is or might be value in the shares in any relevant alternative is likely to be of importance in determining whether it is appropriate to sanction a Plan that results in the current equity being diluted by 95%. The threshold for Condition A is, however, relatively low. It is enough that the Company is likely to encounter financial difficulties that may affect its ability to carry on business as a going concern. I am satisfied on the basis of the extensive review undertaken by PwC that this threshold is met.

23. As to Condition B, it is enough that the Plan is designed to *mitigate* the effect of the financial difficulties, for example by providing for an enhanced dividend to creditors over and above that which would be obtained in the relevant alternative: see *Re DeepOcean 1 UK Limited* [2020] EWHC 3549 (Ch), per Trower J at [48]. That is satisfied in this case. Under the Plan, the

extension of the maturity date of the Bonds is intended to enable a longer-term wind-down so as to facilitate production from the Lancaster Area being continued for an extended period before reaching its economic limit (potentially in February 2024). This would give rise to the possibility of full repayment of the (modified) Bonds and some measure of value in the shareholding. The Company rightly points out that this could only be achieved if the bareboat charter of a floating production storage and offloading vessel, essential to operations, is continued beyond its current expiry date in June 2022 and that, while negotiations are taking place, there is no certainty in this regard. The Plan, however, provides for the possibility of greater return to the Bondholders and, even if the bareboat charter is not extended, for a return that is no worse than in the relevant alternative.

24. For these reasons, I am satisfied that threshold conditions A and B are satisfied in this case.

(4) Classes

25. The test for class composition is well known: are the rights of creditors, both their existing rights and the rights conferred by the Plan, not so dissimilar as to make it impossible for them to consult together with a view to their common interest: *Sovereign Life Assurance v Dodd* [1892] 2 QB 573, per Bowen LJ at p.583 (as applied to a scheme under Part 26 CA 2006); and *Re Virgin Atlantic Airways* [2020] BCC 997, per Trower J at [45] (as applied to a Plan under Part 26A).

26. The Company proposed convening a single class meeting of all of the Bondholders. So far as the creditors are concerned, I am satisfied that it is appropriate to convene a single meeting of the Bondholders. They have the same existing rights and they are granted the same rights by the Plan. Although a high percentage of Bondholders have acceded to a lock-up agreement, there are no consent fees payable or any other incentive offered to any of them that might fracture the class. The fees of the ad hoc committee of Bondholders are to be paid by the Company in any event. This includes a success fee for one of the financial advisors to the committee. Its existence is disclosed in the Explanatory Statement. The circumstances (and the size) of that fee are similar to those of the financial advisors' fee in *Re Port Finance Investment Limited* (above). For the reasons given by Snowden J at [106] of his decision in that case, I am satisfied that it does not fracture the single class of Bondholders.

27. More difficult is the question whether a meeting of shareholders should also be convened. Section 901C(3) provides that every creditor or member of the Company "whose rights are affected by the compromise or arrangement" must be permitted to participate in a meeting ordered to be summoned under section 901(C)(1).

28. Shareholders are affected by the issue of new shares under the Plan in at least two ways. First, their pre-emption rights and rights relating to approval of allotments by directors (under the Articles and sections 549(1) and 561(1) CA

2006) are overridden by the Plan. Second, their shareholding will, as a result of the Plan, be diluted to 5% of its current value.

29. Mr Smith QC submitted that, notwithstanding the existing shareholders are being overwhelmingly diluted by the issue of new shares to the Bondholders under the Plan, their *rights* are not affected by the Plan.

30. He submitted that their pre-emption and other rights conferred by the Articles and sections 549(1) and 561(1) are removed by statute. Section 549(3A) CA 2006 disapplies section 549(1) in the case of anything done for the purposes of a compromise or arrangement sanctioned under Part 26A. Section 566A CA 2006 disapplies section 561(1) in the case of an allotment carried out as part of a compromise or arrangement sanctioned under Part 26A. Accordingly, it is the statute, and not the plan, that has affected their rights. Mr Smith submitted that there would have been no point in sections 549(3A) or 566A at all, if the contrary view was right, because you could always alter the rights of shareholders under a Plan. The whole point, therefore, of those provisions is that it allows an allotment to be carried out pursuant to a Plan without needing to have shareholders as parties to the Plan.

31. I do not accept this. While it is true, for example, that pre-emption rights are removed by section 566A, that is only if there is an allotment of shares pursuant to a Part 26A Plan. An allotment of shares can only take place pursuant to Part 26A Plan if the procedure under Part 26A is followed, including the provisions of section 901C. Put another way, section 566A only *potentially* disapplies section 561(1); they are *actually* disapplied if a Part 26A Plan (pursuant to which an allotment is to be made) is sanctioned by the Court; accordingly the pre-emption rights of shareholders are "affected by" a Plan which dilutes their shareholding, because it is the Plan which triggers the disapplication of their pre-emption rights under section 566A.

32. Mr Smith also submitted that section 901C(3) applies only where the "rights" of shareholders are affected, and rights are to be interpreted in the same way as in the authorities concerned with class composition – that is, rights against the Company as opposed to mere interests. He submitted that the contractual rights of the shareholders against the Company are not altered by the dilution of their shareholding under the Plan, it is merely their economic value that has changed.

33. There is more force in this argument, but I am not persuaded it is correct. "Affected by" is a phrase of broad ambit. It is far broader, for example, than "amended by" or "altered by". It does not form any part of the class composition test (which focuses on the *differences* in existing rights of creditors/members and the rights conferred on them by the Plan). It is an important part of the context of section 901C(3) that the fact that members are permitted to participate in a meeting summoned under that section does not mean that the Plan is dependent on a positive vote, by the requisite statutory majority, of those attending that meeting. That is because of the cross-class cram-down power under section 901G. It is also an important part of the context that section 901C does not apply to any group of creditors or shareholders who have no economic interest in the company: see section

901C(4). (While it is the Company' case that the shareholders would receive nothing in the relevant alternative, it does not submit that if – contrary to its primary contention – the shareholders' rights are affected by the Plan, they have no economic interest in the Company so as to engage section 901C(4)).

34. In this context, I consider the better view to be that the rights of shareholders (who are taken to have an economic interest in the company) to participate in the capital and profits of a company are "affected by" a Plan that would dilute such participation. This construction ensures that the views of shareholders whose economic interest in the company is directly and potentially significantly affected by the Plan are taken into account in the process mandated by Part 26A.

(5) Roadblock

35. As I have noted, a convening hearing is not the occasion on which the court considers the fairness of the Plan. The court will stop the process in its tracks at this stage by refusing to convene meetings only if there is an obvious problem with the Plan which would prevent the Plan being sanctioned in due course. The matters of concern raised by the shareholders are matters to be considered at the sanction hearing, but do not amount to such a roadblock that should prevent the meetings being convened. In particular, I do not think that the desire of certain shareholders to requisition a general meeting before the Plan is progressed any further is a reason to delay the convening of meetings. That does not prevent the shareholders contending at the sanction hearing (as was intimated by some of them) that there is no pressing need for a restructuring at this stage and for that reason the Plan ought not to be sanctioned.

(6) Directions

36. The meetings of Bondholders and Shareholders will take place on 11 June 2021. That is a period of a further three weeks from the date of the convening hearing. Notice is to be sent to all Bondholders via the clearing system and to all shareholders both via an RNS and by post.

37. As Mr Smith acknowledged, given that one can assume that the shareholders will not vote for the Plan, the more important date to consider is that for the sanction hearing. That is the occasion upon which the shareholders will have the opportunity to voice their concerns. It is to be listed for 21 June 2021, with a time estimate of 2-3 days. Shareholders will have until 9 June 2021 to file any evidence in opposition, if they so wish.

38. I consider that these time periods are fair and reasonable in all the circumstances.

39. The meetings will be held remotely, in light of continuing restrictions imposed as a result of the coronavirus pandemic, in accordance with the guidance of Trower J in *Re Castle Trust Direct* [2020] EWHC 969 (Ch). As usual, the court will require to be satisfied that creditors and shareholders who wished to do so were able to participate effectively in the meetings.