Neutral Citation Number: [2021] EWHC 1617 (Ch)

Case No: **CR-2021-000520**

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: **29 March 2021**

Before :

Sir Alastair Norris

- -

Between :

In the Matter of Cardtronics PLC and the Companies Act 2006	**Claimant**

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- -

Andrew Thornton Q.C. (instructed by **Ashurst LLP**) for the **Claimant**

Hearing dates: **29th March 2021**

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APPROVED JUDGMENT

Sir Alastair Norris **Monday, 29 March 2021**
(**10:45** am)

Judgment by **Sir Alastair Norris**

1. Cardtronics Plc ("Cardtronics") was incorporated in England and Wales in March 2016 and as of September 2020 was the world's largest owner and operator of automated teller machines ("ATMs"), operating some 285,000 globally.
2. NCR Corporation ("NCR") is headquartered in Atlanta, Georgia and is now a global software and service provider to, amongst other businesses, financial, retail and hospitality enterprises. Amongst the services it offers are payment processing and the offer of ATMs and multi-function financial services kiosks.
3. On 25 January 2021 NCR agreed to acquire the entire issued and to be issued share capital of Cardtronics for a cash consideration of US$39 for each 1 cent share in Cardtronics. Although the merits of the proposed scheme are not a matter for consideration at this hearing, I would just point out that, to put the proposal in context, the offer is at a premium of 51% to the undisturbed share price prior to the announcement of a third party bid on 8 December 2020.
4. The proposed mechanism for the takeover is a scheme of arrangement under Part 26 of the Companies Act 2006 ("the 2006 Act") and for that purpose NCR UK Group Financing Limited ("BidCo") has been incorporated in England and Wales as an indirect, wholly-owned subsidiary of NCR. BidCo will acquire the Cardtronics shares which will be delisted from NASDAQ where they are presently traded. In the conventional way BidCo will give an undertaking to be bound by the scheme.
5. This is an application by Cardtronics to convene a meeting of the scheme shareholders with a view to seeking sanction in May or June. The function of the convening hearing is conveniently summarised in the Practice Statement of 26 June 2020 in three aspects. First, it is an opportunity to address jurisdictional questions raised by the company or by the scheme shareholders, particularly in relation to class composition. Second, it is an opportunity to scrutinise the arrangements for

ascertaining the will of the scheme shareholders. Thirdly, it is an opportunity to address any obvious "road blocks" that would render a sanction hearing without point. This third aspect is of no materiality in the present case.

6. I will begin with the jurisdiction questions. First, Cardtronics is plainly "a company" for the purposes of Part 26. Secondly, the transfer arrangement is plainly a "compromise or arrangement" within Section 895 of the 2006 Act. Transfer schemes are well-established. Whether the company's obligation to register the share transfers constituted the requisite "give and take" characteristic was recently reviewed in Re Jelf Group [2015] EWHC 3857 and was held to suffice.

7. Thirdly, as to matters of class composition, the approach of the court is so well-known and so frequently reiterated that in a straightforward case such as this there is no need for further repetition. There is a single class of shareholder, each member of which has at present identical rights and each member of which will receive identical treatment under the scheme, including, as I shall later note, a right to convert dematerialised share interests into certificated holdings. That single class need not be fractured. The transfer has the unanimous recommendation of the members of the board who voted. (One director did not participate, having recused himself on grounds of earlier involvement). Each director has given an undertaking to support the scheme. An undertaking to vote in favour of the scheme given without extra consideration does not fracture the class. Being a transfer scheme, it has no impact on creditors. Therefore, the proposal for a single meeting of all scheme shareholders is entirely satisfactory.

8. I turn to a scrutiny of the arrangements for ascertaining the will of the scheme shareholders. First, I am satisfied that an adequate period of notice has been given of the convening hearing. It is, of course, right that the requisite judgment of what is adequate has to be made on a case-by-case basis, but a "rule of thumb" of 21 days' notice has emerged. There is nothing in the complexity of this scheme that would have required any longer or further consideration by scheme shareholders of issues to be raised at this hearing. The Practice Statement letter was circulated on 8 March 2021 to

the beneficial owners of the economic interests in the Cardtronics shares: but by oversight it was not sent to the three registered shareholders until 15 March 2021. Those three registered shareholders were (i) the depository company through whom the economic interests are held, and (ii) two directors who had converted their holding into certificated shares. The registered shareholders had 14 days to consider matters prior to this hearing. But given their identity this shortened period is of no consequence. Secondly, I have considered the information in the Practice Statement letter, and it is entirely adequate for the purpose of enabling the addressees to identify any issues which ought to be raised at this hearing.

9. Thirdly, I have looked at the intended Explanatory Statement and whilst it is not my function to approve it, I have considered it in the light of the principles set out in paragraphs 14 and 15 of the Practice Statement of 26 June 2020.As matters stand, I see no obvious shortcoming in ait. But that provisional view will of course need review at the sanction hearing.

10. Fourthly, I have looked at the arrangements for participation at the scheme meeting. A physical meeting is not of course possible. What is required of an alternative in the case of meeting of members was considered recently by Trower J in Re Columbus Energy Resources Plc [2020] EWHC 2452. He held that the provisions of paragraph 3 of Schedule 14 of the Corporate Insolvency and Governance Act 2020 applied to a members' meeting under Part 26 so that (i) the essential right was to cast a vote by electronic means; and (ii) there needed to be only such a degree of interaction between members or proxies as was inherent in the concept of "a meeting" to consider the relevant issue, but there was no further specified requirement. I am satisfied that what is proposed meets these requirements. But again, it will be a matter for report and review at the sanction hearing in the light of the actual experience of the conduct of the meeting.

11. Fifthly, and this is the central issue of this hearing, I have considered the arrangements for voting at the proposed meeting. There are 45,254,025 Cardtronics shares in issue. They are currently traded on the NASDAQ market in the form of American Depository Receipts. Until 22 January 2021 there

was thus only one registered holder of Cardtronics shares. That was Cede & Co as nominee for the Depository Trust Company who held the shares on behalf of the ultimate beneficial owners of the economic interest in those shares.

12. For the scheme to be approved, it must be approved by the requisite statutory majority, namely a majority in number ("the numerosity test") and 75% by value. How this can be applied where a shareholder is a nominee for a beneficial owner has been the cause of some difficulty in the past. The court has an inherent jurisdiction to give directions as to how a court meeting should be held, as was established in Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385 at 395 following. Using that power, the court developed a conventional approach (following the decision in Re Equitable Life Assurance (No.1) [2002] BCC 319) of allowing (where there was a division of view amongst the beneficial owners of the shares) one vote to be cast by the registered member for, and one vote against, the scheme.
13. But in the case of a single registered share (as was the position here before the conversion by two directors of their ADRs into certificated shares) this does not generally reflect the weight of the votes cast "for" and "against" the scheme, gives undue prominence to the numerosity test and might simply produce stalemate. The practice has therefore recently developed of converting some dematerialised interests into certificated shares in order to enlarge the constituency of votes for the purpose of the numerosity test, but without, of course, affecting the value test.
14. On 22 January 2021 two directors converted one share, which each held in the form of an ADR, into certificated form. They therefore became members. It is important to note that this conversion right is available to all other holders of ADRs.
15. In consequence, there will now be three registered holders attending the meeting. If the scheme is unanimously approved by all of the holders of the economic interests, the voting at the meeting will be three in favour and nil against. If some of the holders of the beneficial interests vote against the scheme, the vote at the meeting will be three in favour and one against. But that only satisfies the

numerosity test: and in looking at the outcome of the meeting the court will also be informed as to the value of the underlying voting interests. I do not regard this as a manipulative share split but as simply providing a pragmatic solution to a problem arising from the way the shares are held and traded on an exchange. But I make four points.

16. First, it is not the only solution to the "single registered shareholder" problem. For example, giving the single registered shareholder only one vote but directing it to be cast according to the wishes of the majority of the persons on whose behalf the nominee holds shares was the solution approved by Snowden J in Re GW Pharmaceuticals Plc [2021] EWHC 716. Second, whether in principle the arrangement which I intend to approve in this case is capable of being fair needs to be assessed in the light of the availability of certificated shares to all the holders of ADRs. Third, at the sanction hearing it will be necessary to review whether the additional certificated shares have had a disproportionate influence on the outcome of the meeting. Fourth, and most fundamental, whatever solution is adopted the essential question is whether the Court feels able to rely on the outcome of the meeting as a true expression of the will of the members when the time comes for sanction.
17. I intend to approve in the instant case the adoption of the Re Equitable Life Assurance solution to the problem enhanced by the issue of additional certificated shares, an approach which can be reviewed at the sanction hearing.
18. I will accordingly make an order in the form sought.