

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

No. 5347 of 2014

Rolls Building
Royal Courts of Justice
Friday, 5th September 2014

Before:

MR. JUSTICE NORRIS

IN THE MATTER OF :

NEW WORLD RESOURCES N.V.

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MR. D. ALLISON QC (instructed by White & Case LLP) appeared on behalf of the Applicant.

PROCEEDINGS

1 MR. ALLISON: If it please your Lordship, this is my application for an order
2 pursuant to Part 26 of the Companies Act sanctioning a scheme of arrangement
3 between the scheme company, New World Resources N.V., and its scheme
4 creditors. The scheme was approved at two scheme meetings convened by
5 order of Mrs. Justice Rose on 29th July. My Lord should have a skeleton
6 argument and a bundle of authorities together with the rather voluminous
7 hearing bundles.

8
9 MR. JUSTICE NORRIS: Yes. I have not read all the hearing bundles, let us be
10 clear about this, but I have read what you told me to read.

11
12 MR. ALLISON: My Lord, I am incredibly grateful because I recognise it was
13 rather a long reading list.

14
15 MR. JUSTICE NORRIS: Yes.

16
17 MR. ALLISON: Thank you very much, my Lord, for taking the time to read all
18 those documents before the hearing. It may be in those circumstances that
19 certain areas of my submissions can be accelerated somewhat from how I was
20 going to take them, because I realise the case only arrived at my Lord's
21 doorstep rather late yesterday.

22
23 MR. JUSTICE NORRIS: Yes.

24
25 MR. ALLISON: There are five key points I was going to make at the outset. The
26 first was that the issue of classes was in accordance with the normal practice,
27 giving detailed consideration at the convening hearing by Mrs. Justice Rose.
28 There were detailed oral submissions and, in addition, detailed written
29 submissions. My Lord will have seen those at Annex I of the skeleton
30 argument.

31
32 MR. JUSTICE NORRIS: Yes. I do not intend to go over that ground again. I
33 regard that as settled and nothing in the process that has been undertaken since
34 has caused any doubts to emerge about the correctness of the decision.

35
36 MR. ALLISON: My Lord, not one creditor has suggested that there was an error in
37 the composition of the class. So I am grateful we can clear that to one side.

38
39 Secondly, the issue of jurisdiction to sanction the scheme in respect of a
40 company registered in the Netherlands which operates so as to compromise
41 claims governed by New York law; the jurisdiction point. Again, my Lord,
42 that was the subject of detailed consideration at the convening hearing. My
43 Lord will have seen the written submissions at Annex II to my skeleton

1 argument. The main body, of course, deals with discretion for the purpose of
2 sanction, but the written submissions on jurisdiction are at Annex II.
3 Mrs. Justice Rose was satisfied that the court would have jurisdiction in the
4 main due to the fact that the scheme company had effectively moved its COMI
5 from the Netherlands to England, and that two cases, and in particular the
6 detailed reasoning of Mr. Justice David Richards in the *Magyar* case, are
7 authority for the proposition that the court will in those circumstances have
8 jurisdiction to sanction the scheme.

9
10 MR. JUSTICE NORRIS: Yes.

11
12 MR. ALLISON: My Lord, I recognise that we are at the sanction stage so your
13 Lordship may want to have a look at that again, but I am just mooting that that
14 has already been looked at by the court and the court was satisfied. There is
15 nothing I feel I need to draw to your Lordship's attention, whether by reason of
16 subsequent case law or anything raised by the scheme creditors.

17
18 MR. JUSTICE NORRIS: All right, yes. I shall address it shortly because the
19 judgment may be relied on in America or elsewhere and it is important to
20 record that the point was considered.

21
22 MR. ALLISON: My Lord, yes.

23
24 MR. JUSTICE NORRIS: But I do not need detailed argument on it.

25
26 MR. ALLISON: It may be we just turn up *Magyar* quickly.

27
28 MR. JUSTICE NORRIS: By all means refresh my memory.

29
30 MR. ALLISON: Shall we do that now or shall we do that at the relevant place
31 when we get to it?

32
33 MR. JUSTICE NORRIS: Yes, all right. Do that.

34
35 MR. ALLISON: The third introductory point was the vote was an overwhelming
36 one. 98% by value of the existing senior secured noteholders, that is the 2018
37 notes, voted 'yes' and 95% by value of the existing senior unsecured notes, that
38 is the 2021 notes, voted 'yes'.

39
40 Fourthly, my Lord can be content that the turn-out was very high so those
41 numbers are true representations of the views of the classes. In that regard,
42 91% by value of the 2018 notes voted and 85% by value of the 2021 notes
43 voted. So very high turn-out in both classes.

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My fifth and final introductory point is perhaps an unsurprising one in view of the two points I have just made in relation to majorities, which is no scheme creditor seeks to oppose the sanction today whether, of course, by making an appearance nor by making any written representations that we need to bring to my Lord's attention.

So, subject to my Lord, I was going to cover four broad topics in my submissions and it may be that the first or second of these can be accelerated in view of the pre-reading. The first is the background, including why the scheme is required, what the group does and why it is in difficulty. The second is a description of the terms of the compromise to be effected pursuant to the scheme, and the third is the particular issues which I feel I should draw to my Lord's attention on the application for sanction.

So turning to the first topic, the background, two things really to cover within that. First, what is the business of the group and what are its liabilities and, second, why do we need a restructuring in this case? My Lord, looking at the business of the group and its liabilities, my Lord will have seen a detailed explanation in the evidence and summarised in the skeleton. The group carries on business in the coal mining sector. It has got over 11,500 employees and over 3,000 contractors, therefore making it one of the largest private employers in the Czech Republic.

My Lord, what I would propose to do, in view of the detailed treatment in the skeleton and the explanatory statement in the evidence, is really just make a few short points by reference to the pre-restructuring structure chart. My Lord, can I pass up colour copies because I recognise the ones in your bundle are black and white and it may be slightly harder to follow things. There are three charts there. The first is the pre-restructuring state of affairs; the second is the scheme under the restructuring, and the third is the scheme under the alternative restructuring. So dealing with the present state of the group in relation to the background topic that I am covering at the moment, so it should be headed "NWR simplified structure chart pre-restructuring". That is the document that I am looking at at the moment. Five points maybe to note in relation to the structure of the group and its liabilities. First, my Lord sees, pretty much in the middle of the page, NWR NV. That is the scheme company. It is a Netherlands registered company that, as detailed in the evidence, has taken steps to move its COMI to the UK. It is the finance raising company within the group.

The second point is, above it you have NWR Plc. That is the listed entity which holds all of the shares in the scheme company. My Lord will have

1 picked up its shares are listed in three places; on the London Stock Exchange,
2 the Warsaw Stock Exchange, and the Prague Stock Exchange.

3
4 The third point is the ultimate holders of the group. My Lord will see that the
5 group is presently held in two ways. There is a majority shareholder which is
6 CERCL Mining, which holds just shy of 65% of the shares, and then there is
7 the free float on the right-hand side of the balance. That is, in essence, the
8 shares which are traded on the stock exchange at present.

9
10 The fourth point is what about below the scheme company, the other key
11 companies within the group. This is where the key operating subsidiaries sit.
12 There are, in effect, the Crown jewels. This is where the value resides. My
13 Lord sees on the far side at the bottom the two OKD entities. Now, the OKD
14 entities are those that operate the mines in the Czech Republic. My Lord then
15 sees the Karbonia entity. That is the entity which operates the mines in
16 Poland. So they are the key operating subsidiaries. The communications
17 company is one but it simply manages the communications for the group, so it
18 is not a Crown jewel in the way that the OKCos are.

19
20 The final point to make, having looked at each of the relevant companies
21 within the group, the fifth point is what about the financial liabilities of the
22 scheme company which are to be effected by the scheme? My Lord will be
23 aware there are two sets of liabilities to be effected, the first of which is the
24 2018 notes, which my Lord sees in a red box on the right-hand side,
25 €500million face value. The key point to make in relation to those notes is not
26 only do they have, of course, a covenant from the scheme company as the
27 issuer, but they benefit from two additional rights. The first thing is
28 guarantees by the two key operating subsidiaries. My Lord sees that by the
29 dotted lines around OKD and Karbonia, as indicated by the key at the bottom
30 left-hand corner. The second thing is the share pledge that my Lord sees going
31 down directly from the scheme company over the shares held by the scheme
32 company and those key operating subsidiaries. That pledge is to secure the
33 2018 notes.

34
35 The second set of liabilities to be compromised under the scheme my Lord
36 sees just above the 2018 notes in a blue ring, the 2021 notes, face value
37 €275million. The key points to note in relation to those is they are simply an
38 unsecured obligation of the scheme company. They do not have a guarantee
39 package. They do not have a security package. So materially different to the
40 present rights of the 2018 notes.

1 My Lord, that is all I was going to say in relation to what the group does and
2 its structure, unless my Lord had any further questions. Then I was going to
3 move on to why we need the scheme.
4

5 MR. JUSTICE NORRIS: Yes.
6

7 MR. ALLISON: Again addressed in detail in the evidence that my Lord has seen.
8 What I have sought to do at paras.13 through to 15 of the skeleton argument is
9 to extract the key points from the treatment in the evidence. My Lord will see
10 from that that the most important factor that has led to the financial difficulties
11 of the group is the collapse in the coal price on the global markets of both sorts
12 of coal produced by the group, thermal coal and coking coal. At sub-
13 para.13(2) I extract really a key illustration of how severe that decline has been
14 by comparing the prices in Q3 2011 and in Q3 2014, and my Lord can see the
15 dramatic decline in price illustrated there. Sub-paragraph (3) really shows that
16 in effect there has been a 50%, a halving of the revenue of the group due to
17 that decline in the coal price. The group has, as summarised at sub-para.(4),
18 taken a number of steps to try and address that revenue decline. It has tried to
19 make cost savings in relation to production costs; made some but cannot make
20 sufficient to deal with the decline in the price of the coal; identified an
21 uncompetitive mine and made arrangements for the Czech Republic
22 government to close that, and sold part of the group to realise cash, that is the
23 OKK business, for €5million. But despite that the group does not have
24 sufficient liquidity and cannot meet its debts as they fall due, particularly the
25 interest falling due on the notes.
26

27 Paragraph 14, my Lord notes that the group has considered a number of
28 various alternatives to the scheme, which are dealt with in detail in the
29 evidence. We can turn to those if my Lord would think it would assist, but the
30 punchline is each of those on consideration have been discounted as they
31 would not provide an effective solution to the group's financial difficulties. So
32 that is why the scheme represents the only realistic way of dealing with the
33 financial difficulties of the group and if the scheme is not successful the
34 evidence is that the group would likely collapse into a series of formal
35 insolvency proceedings, which, in the normal way, would lead to a worse
36 outcome for the scheme creditors and the other creditors and the other people
37 with interest in the group, for example the group's employees, than would be
38 the case under the scheme.
39

40 My Lord, unless you have anything else in relation to the background, the
41 financial liabilities and why we need a scheme, I was then going to move onto
42 the second topic of my submission which is the detail of the scheme and its
43 likely benefits.

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MR. JUSTICE NORRIS: No. It is just a puzzle to realise how much the price of both thermal and coking coal has fallen. I suppose it is the decline in steel production outside China or something like that, but it is a startling fall.

MR. ALLISON: My Lord, the headline numbers are indeed startling. My Lord will have seen, when we come to it, that one of the facets of the scheme is actually to cater for the prospect, as some people in the market believe, the likely prospect that coal prices will return to where they once were so as to give people enhanced rights within the group.

MR. JUSTICE NORRIS: Yes. Very well. Let us move onto the next topic.

MR. ALLISON: Moving to the detail of the scheme, I am just going to make three very short introductory points. The first one, I think, I have already touched on which is the directors of the company believe that this scheme is in the best interests of the scheme creditors as it will lead to a better return than what would happen in the comparator alternative and, indeed, there is no alternative route which would provide an effective solution to the group's financial difficulties.

The second point is a point of detail which may not be relevant, but it is the urgency which is the serious financial difficulties, and in particular the dates of the interim payments under the notes, mean that there would not be time to negotiate another compromise. It is this or nothing. What the group has sought to do within the scheme in order to address that, and in particular there was thought to be a risk the 2021 class may not approve the scheme, was to hardwire in two different ways in which the scheme could be implemented. That is what my Lord will have seen in the skeleton and the evidence called the "restructuring" and then the "alternative restructuring". The restructuring is in essence the preferred route and almost expected with certainty to be the route that the scheme will be implemented, and that is a scheme that binds both the 2018 notes and the 2021 notes.

The alternative restructuring was the way of implementing the scheme in a way that bound only the 2018 notes. The key reason for that inclusion was the risk that the 2021 notes may vote 'no'. My Lord will have seen from the evidence, in particular Mr. Wentink No.2 at para.18 -- we can turn it up if it will assist -- that there is a very remote possibility that the alternative restructuring may still be the way that the scheme is implemented. My Lord, it is Volume C1, Tab 4, para.18 which my Lord will find at p.5 of the evidence.
(After a pause):

1 MR. JUSTICE NORRIS: Yes.

2

3 MR. ALLISON: My Lord, I say "incredibly remote" because CERCL Mining, the
4 current majority shareholder, has of course been absolutely fundamental to the
5 development of the restructuring plan. It has entered into the irrevocable
6 undertakings and there is no reason to believe that it will not provide the funds
7 for that shareholding, but that remains the only possibility. Previously the
8 realistic way in which it was thought we may be in the realm of an alternative
9 restructuring is if the 2021 notes voted 'no' at their meeting.

10

11 MR. JUSTICE NORRIS: Yes, I see.

12

13 MR. ALLISON: My Lord, the third introductory point, before we look at the
14 compromise, really runs onto the point I have just made about the majority
15 shareholder, which is this is not a deal out of left field. This is a deal that has
16 been subject to detailed negotiation between the scheme company and its
17 creditors, in particular an ad hoc group of noteholders and the shareholders
18 over a lengthy period.

19

20 The detail of the scheme, my Lord, is addressed at Section D of the skeleton
21 argument, which starts at p.7. I would respectfully submit that that detail is
22 sufficient for today's purposes, but to maybe make the points even clearer it
23 may assist my Lord to look at what people are getting by reference to the other
24 two structure charts that I passed up, labelled "the post-restructuring" and
25 "post-alternative restructuring". So, my Lord, I have already touched on the
26 first issue that is dealt with within Part D, which is the difference between the
27 restructuring and the alternative restructuring and why they are there. So
28 moving to the detail of the restructuring, i.e. what everyone anticipates will
29 now be implemented pursuant to the scheme, my Lord will see that what
30 happens in relation to the claims of the 2018 noteholders (and this is looking at
31 a combination of para.21 of the skeleton together with the structure chart) is
32 that there are two new instruments within the group that they get in return for
33 the release of the 500million 2018 notes. They get, first, a pro rata share of
34 what my Lord sees on the right-hand side in red, the senior secured notes of
35 300million. Now, those senior secured notes have the benefit of a new
36 security and guarantee package which in essence ensure that, just as the 2018
37 notes currently have effective security over the shares in the operating
38 subsidiaries and guarantees from the operating subsidiaries, they continue to
39 have those rights after the scheme. So that is the first thing they get, they get a
40 pro rata share of a lower face value of senior notes and, rather than being
41 payable in 2018, they are payable at the back end of 2019.

42

1 The second thing they get, just looking slightly above my Lord will see
2 something called the "unsecured convertible notes €15million". Does my
3 Lord see that?

4
5 MR. JUSTICE NORRIS: Yes.

6
7 MR. ALLISON: The second thing they get is a pro rata share of €15million. The
8 remainder, as we will see, goes to the 2021 notes. So they get a pro rata share
9 by reference to their current claims of €15million of those convertible notes.
10 The key things to note in relation to those notes is they convert into ordinary
11 shares in plc on their majority, which is in 6 years' time, and that they do not
12 have the benefit of any guarantee or security obligations. They are an
13 unsecured obligation.

14
15 What about the 2021 notes, what do they get under the restructuring? They
16 also get two things, but one element is the same, one element is different. Of
17 course they do not get any of the senior secured notes, that is just for the
18 2018s. They do, however, get 35million worth of the convertible notes that we
19 have just looked at. In the same way they get them pro rata to their current
20 holdings of the 2021 notes. And they also get a pro rata share of what my
21 Lord sees labelled the "unsecured contingent value rights", on the right-hand
22 side of the page, at €35million. Does my Lord see that?

23
24 MR. JUSTICE NORRIS: Yes.

25
26 MR. ALLISON: They get a pro rata share of that. In summary, what those rights
27 are is they are rights entitling the recipients of the rights to payment in certain
28 circumstances which, in essence, are linked to financial targets of the group
29 which flow back to the price of coal. So if the coal price goes up, financial
30 performance of the group goes up, then the 2021 notes will derive value from
31 payment under the contingent value rights. So payable upon certain triggers.

32
33 My Lord, the other thing that the restructuring gives to both the 2018
34 noteholders and the 2021 noteholders is dealt with at para.23 of the skeleton.
35 First, each of the scheme creditors gets the opportunity to participate in a brand
36 new facility. My Lord sees that just to the left of NWR Holdings B.V. Does
37 my Lord see "Super Senior Facility EUR 35m"? Each and every one of the
38 scheme creditors gets the opportunity to participate pro rata in that facility,
39 which would rank senior to the senior secured notes. The second thing they
40 get is if they choose to participate in that facility they have the additional right
41 to participate in the new equity raise being conducted by the group, which is
42 the other way of bringing in the new funds. The equity raise will be done in
43 ways so as to secure 150million of new equity. CERCL Mining B.V., which is

1 the current majority shareholder, has already committed to putting €75million
2 of that equity. The scheme creditors, provided they participate in the super
3 senior facility, have the ability to offer to participate pro rata to their holdings
4 in the balance of that equity. So my Lord essentially sees that after the
5 restructuring you have 51% of the shares, so still a bare majority held by the
6 current parent, and you have the free float of 49%. Almost the entirety of that
7 will be held by the scheme creditors unless the current holders of shares also
8 participate in the rights issue, and no one knows whether they have the appetite
9 to do so or not.

10
11 My Lord, the other thing that happens is that each of the scheme creditors has
12 the ability to tender their notes for purchase by the scheme company. My Lord
13 will have noted that 150million of equity and a 35million new super senior
14 facility is to be raised, so therefore €185million of new money. From that
15 60million is to be used to redeem current senior secured notes and that is being
16 done by a tender process which, in essence, the term "reverse Dutch auction"
17 is used in the evidence, which in summary means that all of the existing senior
18 secured noteholders, the 2018 noteholders, can choose to tender their notes at a
19 discount to the par value of those notes and the company can accept the lowest
20 offer, therefore making sure that the company purchases the maximum number
21 of notes for the 60million of cash that will flow back to the senior secured
22 noteholders. Those whose notes are not purchased within that will, of course,
23 get a higher pro rata share of the new 300million senior secured notes and the
24 new 115million worth of unsecured convertible notes that go to the senior
25 secured noteholders.

26
27 In addition, the 2021 noteholders have an ability to make a tender to
28 participate in €30million of cash. Because of the fact that they are unsecured
29 obligations, they do not get to tender at the same sort of price as the 2018s.
30 They get to tender at a fixed price of, in essence, 25 cents in the euro but those
31 who participate in the super senior facility and the equity raise get a priority
32 rights within that tender process. The same purchase price but they get to
33 come first in the queue, but the key point is everyone can actually take part in
34 the super senior facility and the equity raise on day one so Mrs. Justice Rose
35 held there was no class issue by reason of that.

36
37 So that is what people get under the restructuring. My Lord, key benefits of
38 that are that €5million of new money comes into the group. That is, in
39 essence, the €185million of new money that is raised minus the €5million of
40 new money that is to be paid out under the cash tender process, so €185million
41 minus €90million giving €95million of new money.
42

1 Secondly, a significant improvement in the capital structure of the group
2 because, of course, rather than having a liability for €500million under the
3 2018 rates, one now has the €300million liability plus a share of notes which
4 will convert into equity on a fixed date. And rather than having the
5 €275million liability in respect of the 2021 notes, one has a liability to the tune
6 of €35million in that respect under the unsecured convertible notes and a
7 contingent value right. So one immediately reduces the external indebtedness
8 to €70million of which €150million in any event converts to equity at the
9 date on which the convertible note matures. That is to be compared to the
10 current amount of external financial indebtedness under the notes of
11 €825million.

12
13 My Lord, also going forwards, in addition to reducing the headline numbers of
14 the debt, you reduce the risk of the group defaulting on its interest obligations
15 which has been the principal reason for the need for the restructuring, the fact
16 it does not have liquidity to pay the interest on the notes, because you will
17 have a much lower interest payment due under the notes and, indeed, the
18 ability on the part of the group to capitalise certain sums so they can be rolled
19 up as you go along. Thereby also giving rise to the key benefit of hopefully
20 long-term value for the stakeholders. Of course, there is the very good
21 advantage that the jobs of the employees are preserved but insofar as the
22 scheme creditors are concerned, by reason of the equity stake that they will
23 gain in the business and by reason of the convertible notes and the contingent
24 value rights in particular, they maintain a long-term interest in the group which
25 it is hoped will realise real value as coal prices return to where they once were.

26
27 My Lord, that is the detail of the restructuring and why it is said that the
28 compromises represent a package which would yield more value for scheme
29 creditors than an uncontrolled insolvency, and probably why the scheme
30 creditors voted 'yes' by overwhelming majorities.

31
32 My Lord, the second way in which the scheme could be implemented is the
33 alternative restructuring. I have dealt with that in the skeleton because it
34 remains a theoretical possibility, and passed up the structure chart to my Lord.
35 I am very much in my Lord's hands as to whether you want me to address that
36 in any more detail during oral submissions?

37
38 MR. JUSTICE NORRIS: The essence of it is effectively to transfer the benefit of
39 the trading businesses through an administration through a new company. Is
40 that right?

41
42 MR. ALLISON: My Lord, absolutely.

1 MR. JUSTICE NORRIS: In a sort of thumbnail way.
2
3 MR. ALLISON: My Lord, precisely, and a new grid structure which is only held
4 by the 2018 notes. So the 2021 notes are left behind with a claim against the
5 old company, whatever is left.
6
7 MR. JUSTICE NORRIS: Whatever is left of the company in administration.
8
9 MR. ALLISON: Precisely, yes, my Lord, which is, unsurprisingly, why the 2021
10 notes also voted 'yes', because this is the way in the restructuring that they get
11 a continued long-term interest in the group and its performance.
12
13 MR. JUSTICE NORRIS: Yes.
14
15 MR. ALLISON: My Lord has the absolute key point in relation to it so, unless you
16 would like me to take you through it in any more detail?
17
18 MR. JUSTICE NORRIS: I think that suffices.
19
20 MR. ALLISON: My Lord, in view of that I think the final area of my submissions
21 that I identified at the outset were the particular matters that I should bring to
22 your attention today. I identified six in the skeleton, and we may be able to
23 take some of them more briefly than others, but, subject to my Lord, I was
24 proposing to take them by reference to the skeleton argument. The first issue
25 is whether there has been compliance with the statutory requirements; so
26 formal compliance.
27
28 MR. JUSTICE NORRIS: We can tick that box, can we not?
29
30 MR. ALLISON: My Lord, we can. The evidence shows meetings were all
31 complied with; the chairman's report tells you just what a high achievement of
32 the majorities there were, and, as we addressed at the outset, the third element,
33 were the classes properly constituted, considered in detail. No need to revisit
34 and no one suggested that that was wrong.
35
36 So, my Lord, the second issue is whether the classes were fairly represented
37 and whether they acted in a bona fide manner. I think I can be very short on
38 that.
39
40 MR. JUSTICE NORRIS: Tick that one.
41
42 MR. ALLISON: My Lord, thank you very much. The third is that the final element
43 of the formal sanction process, if you like, which is, is the scheme an

1 appropriate one? My Lord, addressed at para.61 of the skeleton. There is
2 nothing I need to draw to my Lord's attention. My Lord, of course, is only too
3 aware that the commercial judgment on the scheme is one for the scheme
4 creditors as opposed for the court. There is nothing in relation to fairness that I
5 feel needs to be drawn to my Lord's attention. In fact, quite the contrary in
6 view of the overwhelming majorities that were achieved. So unless my Lord
7 has any questions in relation to that, I do not propose to elaborate.

8
9 MR. JUSTICE NORRIS: No.

10
11 MR. ALLISON: The fourth issue identified is the jurisdiction of the court and the
12 discretion of the court in relation to foreign companies. My Lord, dealing with
13 jurisdiction first, the submissions before the judge at the convening hearing at
14 reproduced in detail at Annex II, as indicated at the outset. Subject to my
15 Lord, how much detail you wish to revisit those with. It may be that we can
16 simply have a look at the *Magyar* decision.

17
18 MR. JUSTICE NORRIS: Yes.

19
20 MR. ALLISON: My Lord, I am sorry, you have a very extensive bundle of
21 authorities due to the amount of potential class issues that I raised, through an
22 abundance of caution, at the convening hearing, but the *Magyar* decision you
23 can find at Tab 25. So three issues really looked at in *Magyar*. Is it a
24 company within the meaning of Part 26 of the Act; COMI does not give you
25 sufficient connection, and what about the Judgments Regulation, does that
26 change anything? So, my Lord, para.2. *Magyar* was also a company
27 incorporated and registered in the Netherlands. Paragraph 3, the liabilities to
28 be schemed in *Magyar* again were note liabilities governed by New York law,
29 with a jurisdiction clause non-exclusive in favour of the New York courts, so
30 on all fours factually with the current case. I do not think we need to pick up
31 anything else until para.11, where Mr. Justice David Richards said:

32
33 "The only jurisdictional requirement for a "company" is that it should
34 be liable to be wound up under the Insolvency Act...".

35
36 And then the conclusion reached in a whole number of cases.

37
38 "A foreign-incorporated company is so liable, even if its circumstances
39 at the time of the application to the court are such that the English
40 court would not at that time exercise its jurisdiction to wind up the
41 company".

1 So clearly a company under the Companies Act, and, subject to my Lord, I
2 was not going to say anything more detailed about that. In para.16 the judge
3 then starts to consider, well, it is a company, we all know that. The fact that it
4 could only maybe be wound up somewhere else if the COMI had not been
5 moved does not change the fact that it is a company. We scheme European
6 companies the whole time and even if you do not move the COMI to the UK,
7 for example English law governed debt of a company registered in Germany
8 which has its claim in Germany. But the court then said, 'Well, not only do we
9 have a company registered in the Netherlands but we also have not English
10 law obligations here but New York law obligations, and the scheme is to effect
11 those obligations, in the same way as the current scheme, to exchange the
12 existing notes for new notes and equity', and the court referred to the well-
13 known concept that, of course, the court does not sanction schemes in vain.
14 You are not going to sit here today and sanction a scheme if really it does not
15 make a jot of difference in the wider place. For example, if people can go to
16 the courts in the Czech Republic and Poland or New York and say, 'It does not
17 matter that the English court has sanctioned this scheme, it does not bind us in
18 any way'.

19
20 So in para.18 the judge recites what the company in *Magyar* had done in order
21 to engage a sufficient connection with the English jurisdiction. That was steps
22 taken in anticipation of the scheme to move the COMI of the company from
23 the Netherlands to England and there was detailed evidence before the court in
24 that regard.

25
26 My Lord, again in this case, dealt with in detail at the convening hearing, in
27 this case the COMI, we submit, has been moved. There is detailed evidence
28 dealing with the move of the COMI and in the same way we say that that is
29 sufficient to engage the sufficient connection to the English jurisdiction. So on
30 all fours again with sufficient connection.

31
32 The next point, considered at para.19, was, 'What would happen in New York,
33 even though you have moved COMI here, therefore to gain sufficient
34 connection within the way we normally look at whether an English court
35 should have jurisdiction over a scheme? Will that make any difference in New
36 York, which is the governing law of the notes? Can people still go and see in
37 the District Court on the covenants within the old notes?' In that case there
38 was expert evidence of US law that established that it is likely that the US
39 courts would, under Chapter 15 of the US Bankruptcy Code, recognise and
40 give effect to a scheme notwithstanding it alters and replaces rights governed
41 by New York law.

1 My Lord has the benefit of similar evidence, indeed detailed evidence, in the
2 current case. I do not know whether you would like to turn that up?
3

4 MR. JUSTICE NORRIS: I did look at that.
5

6 MR. ALLISON: My Lord, it is at B4 in case my Lord wishes to see it. B4 contains
7 all the expert evidence.
8

9 MR. JUSTICE NORRIS: Yes.
10

11 MR. ALLISON: Maybe we can just tick off the others as we go. Tab 62 is the
12 Czech Republic. That is there because one of the OKCOs is in the Czech
13 Republic and they have granted a guarantee of the 2018 notes. The conclusion
14 reached by the expert is, I suppose just showing my Lord two paragraphs only,
15 para.18, building on what goes before, in particular 15.3.17 is: "The Czech
16 court would recognise the scheme as a judgment within the Brussels
17 Regulation". Paragraph 19, even if the scheme does not recognise it within the
18 Brussels Regulation it would, in the expert's view, do so under Czech
19 legislation. So, my Lord, gets the punchline at para.25: "I am of the opinion
20 that the scheme would be recognised by the Czech court as a foreign judgment
21 and/or as a settlement under the Brussels Regulation. Failing that, and as an
22 alternative, the scheme would be recognised as a foreign judgment under the
23 Czech Act".
24

25 MR. JUSTICE NORRIS: Yes.
26

27 MR. ALLISON: The second opinion is Poland. That is because Karbonia, the other
28 key operating subsidiary, is Polish, which has guaranteed the 2018 debts.
29 Again just picking out the three paragraphs, 5.3, p.4 or p.11 of the continuous
30 numbering: "I therefore consider the Polish court would be highly likely to
31 find the scheme arrangement put forward and scope of the Brussels I
32 Regulation", and para.6.5, after then considering that it would be a judgment
33 as opposed to a settlement, the end of 6.5: "Accordingly I would expect a
34 Polish court to enforce any order of the English court sanctioning the scheme
35 pursuant to Article 33 of the Brussels I Regulation". Then, my Lord, again
36 similarly to the Czech opinion, 7.1: "Even if the scheme falls outside the
37 scope of the Brussels I Regulation the judgment sanctioning it would, in my
38 view, be recognised under the Polish Code of Civil Procedure". So, my Lord,
39 para.10, the headline conclusion, on p.13 using the continuous numbering: "In
40 light of all the foregoing, I am of the opinion that the scheme would be
41 recognised by the Polish court as a foreign judgment under the Brussels I
42 Regulation and/or the Polish Code of Civil Procedure".
43

1 So, my Lord, that is the Czech Republic and Poland. The next one is the
2 Netherlands, relevant, of course, because it is the jurisdiction of incorporation
3 although the evidence reflects that COMI is now in the UK.

4
5 MR. JUSTICE NORRIS: So the insolvency would be in the UK.

6
7 MR. ALLISON: My Lord, precisely, so query whether it really is something which
8 my Lord should be concerned about but, in any event, p.18 -- I think maybe,
9 my Lord, we can just pick up para.14 actually rather than looking at any of the
10 further detail at p.19.

11
12 MR. JUSTICE NORRIS: Yes.

13
14 MR. ALLISON: "In conclusion, I believe there is a high degree of likelihood of a
15 court in the Netherlands recognising a UK order sanctioning a scheme of
16 arrangement as envisaged in this case. That is to say because the most
17 plausible approach consisting that the UK decision is qualified as a judgment
18 as maintained in the Judgments Regulation and therefore to be recognised as
19 none of the grounds justifying refusal of recognition under that regulation can
20 be invoked".

21
22 MR. JUSTICE NORRIS: Yes.

23
24 MR. ALLISON: My Lord, so that is the European jurisdiction. I am sorry, that has
25 been a bit of tangent just to make good those points while we are here.

26
27 MR. JUSTICE NORRIS: It is interesting that all this proceeds on the basis of these
28 expert reports. None of the English schemes seems actually to have been
29 challenged in Holland or anywhere else.

30
31 MR. ALLISON: My Lord, no. I think the only one of which I am aware of when
32 there was any real judgment was the Equitable Life one in the German courts,
33 and the problem there was that they were dealing with insurance business ----

34
35 MR. JUSTICE NORRIS: Yes, that was different.

36
37 MR. ALLISON: -- which has to be allocated to a particular jurisdiction under the
38 regulation. I am not aware of any relevant decision where the courts have
39 doubted the analysis.

40
41 MR. JUSTICE NORRIS: No.

42
43 MR. ALLISON: So my Lord then gets, at Tab 65 ----

1
2 MR. JUSTICE NORRIS: Mr. Glosband.
3
4 MR. ALLISON: -- the evidence of Mr. Glosband, and we came here because in
5 *Magyar* Mr. Justice David Richards paid high regard to the fact there was
6 evidence of US law saying it is likely that the scheme would be recognised
7 under Chapter 15.
8
9 MR. JUSTICE NORRIS: Yes.
10
11 MR. ALLISON: A very detailed report from one of the co-authors of Chapter 15.
12 Essentially, and I do not know whether my Lord wants to go through the detail
13 of this or whether we can simply skip to para.56 and maybe I can just elaborate
14 on it, at p.55, which is the conclusion of the expert after very detailed
15 reasoning as to why that is the conclusion, is that the scheme would be
16 recognised under Chapter 15 and it would be recognised as a foreign main
17 proceeding, and not only that, that the court would also be likely to grant
18 additional relief giving full force and effect to the scheme. To explain what is
19 meant by that, essentially the additional relief to be granted is dealt with at
20 para.49 onwards.
21
22 MR. JUSTICE NORRIS: (After a pause): This is just for my interest, did the order
23 convening the meetings also appoint an additional to be foreign representative
24 for the purpose of the scheme?
25
26 MR. ALLISON: My Lord, it did indeed, absolutely. Mr. Wentink, who is the
27 person delivering the evidence ----
28
29 MR. JUSTICE NORRIS: I had forgotten to look at that in the evidence. Yes.
30
31 MR. ALLISON: Yes, and, my Lord, that application has been made in the US,
32 which I will ----
33
34 MR. JUSTICE NORRIS: Yes, I noticed that an application had been made but I did
35 not know ----
36
37 MR. ALLISON: My Lord, it did.
38
39 MR. JUSTICE NORRIS: Yes.
40
41 MR. ALLISON: My Lord, really para.55 is the key of what Mr. Glosband says we
42 can get in the current case, so it is not merely the recognition of the scheme
43 under Chapter 15, it is also additional relief giving full force and effect to the

1 scheme which gives effect to the release, which precludes people bringing any
2 claims contrary to the terms of the scheme. Mr. Glosband thinks that it would
3 be likely to grant that additional relief giving full force and effect to the release
4 provision.

5
6 My Lord, I thought it probably best just to detour to show our evidence while
7 we were there, but we were at para.19 within *Magyar* at Tab 25 in the
8 authorities bundle. So what we have dealt with now is two of the three points,
9 which is: is it a company within the meaning of Part 26 of the Act and is there
10 a sufficient connection the current case; will the court act in vain, etc.? I am
11 so sorry, my Lord, just maybe tying the second point now, para.23 is the
12 importance of the COMI move, in the words of the judge, which is:

13
14 "... the significance of moving the COMI of the company to England
15 again lies not so much in the establishment in the abstract of a
16 connection between the company and England but, on the basis that
17 any insolvency process for the company would be undertaken under
18 English law in England, providing a solid basis and background for a
19 scheme under English law which altered contractual rights governed by
20 a foreign law."

21
22 The third point on jurisdiction, which I mentioned at the outset, is what about
23 the Judgments Regulation? Does it mean that because we have creditors in EU
24 jurisdictions that this court should not be assuming jurisdiction? There has
25 been, as my Lord will no doubt be aware, a series of cases which have left
26 undecided the question as to whether Chapter 2 of the Judgments Regulation,
27 i.e. the rule in Article 2 that you have to sue someone in their home state,
28 applies to schemes or not. If it does, whether it is necessary to found
29 jurisdiction on one of the exclusions to Article 2. The most common one is
30 Article 23 when you are dealing with an exclusive jurisdiction clause for
31 English governed law debt. My Lord, thankfully we say this is yet another
32 case where the court does not need to reach a final view on that and the reason
33 for that can be found at para.31 of the *Magyar* case. We cannot rely on Article
34 23 as in most cases because we are not English law governed, but we do have
35 scheme creditors domiciled in England as, indeed, they did in *Magyar*, and
36 therefore we can use Article 6 has a hook to bring in all of the other scheme
37 creditors if you need to be content you would otherwise have collective
38 jurisdiction over each of the creditors. I do not know whether my Lord would
39 just like to read para.31?

40
41 MR. JUSTICE NORRIS: Yes. I have, yes.

1 MR. ALLISON: So, my Lord, what we say again is this case is not the case in
2 which the Judgment Regulation issue needs to be grappled with, subject to my
3 Lord, in any more detail than it has been in prior cases.

4
5 My Lord, that is jurisdiction. The other element of this point was discretion. I
6 have pretty much wrapped them up together in my submissions because both
7 sufficient connection in terms of COMI and in terms of expert evidence we
8 have dealt with. So when it comes to discretion, the submissions that I would
9 make are recorded at para.66 of the skeleton and effectively they are two
10 points. First is that there is a sufficient connection to the jurisdiction by reason
11 of the COMI of the company being here, and the second is that the scheme
12 would be effective in practice of binding the creditors into the variation of
13 their rights which is to take place under the scheme. That is the reason for the
14 expert evidence that I have shown my Lord.

15
16 I do not know whether my Lord wishes to hear anything further in relation to
17 discretion?

18
19 MR. JUSTICE NORRIS: No. Thank you.

20
21 MR. ALLISON: The two final areas I think can be dealt with relatively quickly.
22 The next one was financial assistance, dealt with again at the recent convening
23 hearing, really raised for completeness. Paragraphs 67 to 69 of the skeleton
24 look at it. We say by far the best view on the test, in particular as elaborated
25 by Mr. Justice David Richards in the unique cases, this would be financial
26 assistance. This is not for the purpose of the acquisition of shares. This is for
27 the purpose of restructuring in the broader interests of the stakeholders in the
28 group. But we recognise there is at least a theoretical argument that two
29 elements of the scheme could be said to involve financial assistance, but we
30 say my Lord does not need to reach a view because, of course, there is an
31 exception within the Companies Act that if there is financial assistance it is not
32 unlawful if done pursuant to a scheme of arrangement. So I merely draw it to
33 my Lord's attention for the sake of completeness.

34
35 MR. JUSTICE NORRIS: Yes.

36
37 MR. ALLISON: I do not know whether my Lord would like to see the provision
38 within the Act or would like me to elaborate on those points?

39
40 MR. JUSTICE NORRIS: No, I think the words of s.681 are clear enough.

41
42 MR. ALLISON: My Lord, I am obliged. Again I am sure my Lord is well aware,
43 so apologies for reminding you, that the unique case essentially said that there

1 are no limitations. The argument was run that there might be a limitation on
2 the power of the court under 681(2)(e) to the old whitewash procedure and the
3 court said, "No, they are broad words. They should not be restricted". If it is
4 thought to be in the best interests of the scheme creditors the court can
5 sanction it.

6

7 MR. JUSTICE NORRIS: Yes.

8

9 MR. ALLISON: The sixth and final point, again a very minor one, which is that
10 small modifications have been made to the scheme. They are minor. They do
11 not change the substance of the deal as convened by the order of Mrs. Justice
12 Rose. Moreover, in the normal way, as I highlight in the skeleton, the
13 convening order did allow the scheme creditors to consider whether to approve
14 the scheme with or without modification. There is nothing which would
15 materially adversely affect the interests of scheme creditors that I would need
16 to bring to my Lord's attention, and in the normal way the scheme itself
17 includes a clause allowing modifications as long as they do not do that.

18

19 MR. JUSTICE NORRIS: Yes.

20

21 MR. ALLISON: So, my Lord, in conclusion, they are the points that I feel I needed
22 to raise with my Lord today. There is nothing further I feel I should raise but,
23 of course, my Lord may have further questions.

24

25 MR. JUSTICE NORRIS: No, I think you have covered it all. So you have got
26 some draft orders there?

27

28 MR. ALLISON: My Lord, Bundle C1, Tab 3, para.1, the sanction; para.2, what is
29 now, my Lord will be aware that -- I am so sorry. Does my Lord have it?

30

31 MR. JUSTICE NORRIS: I do not know where it is.

32

33 MR. ALLISON: Hearing Bundle C1.

34

35 MR. JUSTICE NORRIS: Yes, I know the one I am looking for. Yes.

36

37 MR. ALLISON: Tab 3.

38

39 MR. JUSTICE NORRIS: Yes.

40

41 MR. ALLISON: Paragraph 1, the sanction to deal with the schedule in the normal
42 way; para.2, my Lord again we will be well aware, the normal order in
43 relation to overseas companies because without the registrar of companies

1 MR. ALLISON: My Lord, thank you.
2
3 _____