IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

COMPANIES COURT

[2014] EWHC 3143 (CH)

No. 5347 of 2014

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

Before:

MR. JUSTICE NORRIS

IN THE M A T T E R O F :

NEW WORLD RESOURCES N.V.

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

J U D G M E N T

(As approved by the Judge)

MR. JUSTICE NORRIS:

1 This is an application for the sanction of the court to a scheme of arrangement in relation to the affairs of New World Resources N.V. ('New World'). New World is the principal finance and holding vehicle in a coal mining group. It is itself a Dutch company. The operating companies operate in the Czech Republic and in Poland.

2 New World is primarily a finance vehicle which performs only limited administrative services for other companies in the group, but it is the parent company of (a) OKD A.S., a Czech company, through which the Czech mining operations are conducted at four bases in the Upper Silesian Coal Basin, and (b) Karbonia S.A., a Polish company which operates two mining projects in the Upper Silesian region of Poland.

3 New World has raised debt finance for group operations by way of two note issues, amongst other means. First, there are some senior secured notes governed by New York law. These secured notes are repayable in 2018 and are issued in the principle sum of €500million. They are secured by pledges over the entire shareholdings of OKD and Karbonia and are supported by guarantees from these companies.

4 Secondly, there is a run of unsecured notes which, as their name suggests, depend entirely upon the covenant of New World and are unsecured in nature. These are repayable in 2021. The principle issued is €275million.

5 Having raised those funds and applied them in funding the group operations, New World's principal asset consists of its equity holdings and the benefit of intercompany loan arrangements.

6 The group, as at present constituted, is a fundamentally sound business operation. Its product has a high calorific value and low sulphur content which makes it attractive both in the coking coal and thermal coal markets. But the difficulty is that there has been a most dramatic fall in the prices obtainable for both coking coal and thermal coal. This has had the effect of halving the revenue of the group's operations. However, since the costs of extraction remain fixed there is a consequent extreme pressure on liquidity. The position is that New World has not generated sufficient operating cash to cover its financial obligations.

7 It has endeavoured to address that position by selling non-core assets; by implementing expenditure cuts and expenditure savings and deferrals, and by closing one of its mining operations. But these steps do not enable it to trade soundly. That is partly because the asset realisations, (because of the terms of the notes that have been issued) are not freely available to fund the group's

operations. Having taken advice, the directors of New World do not consider that their duties allow them to move cash to the operating companies beyond a certain limit.

8 In these circumstances, there are immediate debt problems. New World has failed to pay the last instalment due in respect of the interest on the unsecured notes. In addition, there are long-term debt problems as the notes mature. In these circumstances New World has negotiated a restructuring package with its creditors.

9 Before doing so it contemplated what alternatives there were. A commercial sale of the operating companies was rejected on the grounds that the price likely to be achieved in the prevailing market would be significantly lower than the amount of the outstanding group debt. A consensual restructuring, involving enforcement of existing security rights, was rejected, both because of the uncertainties inherent in the process and because there is no precedent in either the Czech Republic or Poland for such a scheme in a cross-border context. A Dutch insolvency of New World itself was rejected because of the present impossibility under Dutch law of implementing a pre-agreed restructuring plan and the risks inherent in having an insolvency process supervised by an appointed insolvency practitioner with whom neither New World nor its creditors had previously engaged. Nor was a consensual exchange of existing notes for new issued notes possible because of the consent levels required for such an exercise under the terms of the existing notes. The notes are governed by New York law but a careful consideration of the options under New York law led to the view that the costs of the exercise were prohibitively expensive.

10 In the circumstances, what the company has decided to do is to negotiate a scheme of arrangement under English law.

11 What is proposed is an alternative restructuring scheme. Under the first, and inherently most probable, scheme the claims of the senior noteholders will be compromised and released and, in return, they will receive a pro rata share of some new senior notes to be issued by New World at a higher rate of interest, including a facility for capitalising unpaid interest at a higher rate, secured by a new guarantee and security package. The senior noteholders will also have the right to participate in an issue of new convertible notes repayable in six years and convertible into ordinary shares in New World's immediate holding company (which is itself a listed company, listed on the London, Warsaw and Prague exchanges). In addition, the senior noteholders will receive some further common participation rights.

12 As to the unsecured noteholders, they are to be given a share of the new convertible notes to be issued and they are also to be given the right to

participate in what are called “contingent value rights”, which will have the effect of conferring repayment rights if the group attains certain financial targets in future trading, thereby enhancing the value of their new notes.

13 Both the secured noteholders and the unsecured noteholders are also to be given certain further common participation rights. Shortly put, these are the rights to participate in a new “super senior facility” and, in that event, the right to participate in new equity which is to be issued, and also a right to tender notes for repurchase in the case of the secured noteholders this is at a variable price which secures that New World will obtain the maximum redemption for the available sum and, in the case of the unsecured noteholders, on terms that if they participate in the equity issue they will have an enhanced right to tender in the tendering process.

14 As to the alternative scheme, what is shortly proposed would be that New World would enter administration; it would sell its shareholdings in OKD and Karbonia to a new company, these shareholdings representing the value in the group and its only assets; a scheme would be promoted which bound only the secured noteholders, and the unsecured noteholders would be left with their claims against New World in administration. It is extremely unlikely that this alternative restructuring scheme would be implemented. It was originally promoted in the event that the scheme was rejected by one of the two classes of creditor voting upon it, but in the event both classes have overwhelmingly voted in favour of the scheme.

15 There is a residual risk that one of the preconditions to the first scheme, which is that New World's ultimate holding company should subscribe for new equity under a rights issue, is not satisfied. But since that ultimate holding company has given an irrevocable undertaking to subscribe to the rights issue, the prospect of the condition not being satisfied is extremely remote. I therefore only mention the alternative scheme in bare outline.

16 The effect of the new scheme will be to provide additional liquidity for the group's operations through the injection of new equity. It will improve the capital structure of the group by reducing its current debt burden of some €825million to €570million, of which €150million will itself be convertible in six years' time. It will reduce the interest burden, not least because of the roll-up option in relation to the new notes, and it will reduce the overall burden of interest rate payments. The company will therefore have, and the group will have, a stable platform through which to trade through the present reduction in coal prices and into an anticipated increase in prices for the quality of coal produced by the group's operations.

17 This is the hearing to sanction the scheme, Mrs. Justice Rose having given directions as to the convening of meetings. I must briefly advert to my

jurisdiction to sanction the scheme. The ground is familiar in the context of schemes of arrangement for foreign companies whose creditors have rights under foreign law. I will therefore deal with the matter shortly.

18 I am satisfied that New World is an overseas company over which the court has jurisdiction. I am satisfied that New World has a sufficient connection with England and Wales for that jurisdiction to be exercisable. New World has moved its centre of main interests to London. That is now where its head office and principal place of business is located; where, under its amended articles of association, its centre of main interests may be located; where the meetings of its board of directors must take place; where under the Articles meetings of the shareholders must take place; it is where its key employees are now located, and where its management function is now discharged. These changes have been extensively advertised and it is plain that any creditor seeking to conduct business with New World would understand that the centre of its main interests is now located in London, at its London address; its London fax number; its London telephone numbers, and its London contacts as listed on its website. There is therefore no doubt that there is a sufficient connection with this jurisdiction.

19 I am satisfied that the Judgments Regulation does not require that any proceedings relating to the company's indebtedness must be conducted in some other jurisdiction under the provisions of the Regulation. That is because, at the very least, there are a sufficient number of creditors domiciled in England and Wales to found the jurisdiction to commence proceedings in this jurisdiction, proceedings into which other non-domiciled creditors could properly be joined under Article 6 of the Regulation.

20 I am satisfied also that in the event that I make an order sanctioning the scheme, that order will be effective in the other jurisdictions with which New World and its creditors are connected.

21 So far as concerns the enforcement of rights arising from the bonds, according to New York law, which are judiciable in the New York courts, I am satisfied that under US law an English scheme approved by the court would be recognised as “a foreign main proceeding” under Chapter 15 of the US Bankruptcy Code, having regard to the opinion of Mr. Daniel Glosband. Furthermore, I am satisfied that it is likely that a New York court would not only recognise the scheme but would assist in its enforcement by granting an order under which each scheme creditor, irrevocably and unconditionally, fully and finally waived and released and forever discharged claims under the existing notes. I am satisfied by the opinion of Professor Pavel Sturma that the scheme is likely to be recognised and given effect to under the law of the Czech Republic. I am satisfied by the opinion of Professor Feliks Zedler that

the scheme is likely to be recognised and given effect to under the laws of Poland.

22 Since the COMI of New World is now relocated in England and Wales, it is unlikely that Dutch law would be of relevance. That is because, as Mr. Justice David Richards pointed out in *Magyar Telecom* [2013] EWHC 3800 at para.23, the significance of moving COMI to England lies not so much in the establishment of an abstract connection between the company and England but because any insolvency process will now be undertaken under English law in England, so providing a solid basis and background for an English scheme. But if Dutch law is relevant, I am satisfied by the opinion of Mr. Toon Huydecoper that the scheme is likely to be recognised and given effect to in the Netherlands.

23 Accordingly, I am satisfied that I do have jurisdiction to consider the scheme and may properly exercise it.

24 The exercise of the jurisdiction is a familiar one and I have been reminded of the summary of the correct approach made by Mr. Justice David Richards in *Re Telewest Communications No. 2* [2005] 1 BCLC 772 at paras.20-22. I am satisfied that the provisions of the statute have been complied with and that meetings have been duly held in accordance with the directions of Mrs. Justice Rose. I am satisfied by the attendance and vote at those meetings that each class of creditor was fairly represented by those attending and that those attending acted *bona fide*.

25 The attendance at the meetings was high. 91% by number, 98% by value, of the secured 2018 noteholders attended and approved the scheme. 85% by number and 95% by value of the unsecured 2021 noteholders attended and approved the scheme.

26 I am satisfied that the scheme is a fair one. Each of the overwhelming numbers voting at the meeting of course voted in their own interest and they are the best judges of their own interest. Nonetheless, I must, of course, consider whether overall the scheme is fair. By "fair" is meant the scheme is such as an intelligent and honest man, being a member of the relevant class acting in respect of his interest, might reasonably approve. I am satisfied that that test is well passed.

27 The alternative to the scheme is an insolvency. Insolvency is to be avoided if possible. A realisation of value within an insolvency process is much more uncertain than the implementation of a scheme negotiated between and approved by a large body of the creditors of the company.

28 I am satisfied that there is no blot upon the scheme. There was a suggestion that some of the features of the scheme, to which I have briefly referred, might amount to the giving of unlawful financial assistance within the meaning of s.678(1) of the Companies Act 2006. In particular, the grant of a share pledge by indirect subsidiaries as part of the transaction and also the issue of new convertible notes that will convert into shares in the immediate holding company. It is, I think, highly debatable whether these features constitute "financial assistance" in any sense, but in any event s.681(2)(e) of the Companies Act 2006 says that nothing done pursuant to a scheme of arrangement which has been sanctioned by the court is capable of amounting to unlawful financial assistance. Since I am satisfied as to the soundness and fairness of the scheme, and intend to sanction it, s.681(2)(e) provides the answer.

29 For these reasons, as I have indicated, I intend to sanction the scheme.

30 The scheme presented for my approval contains certain minor modifications from that originally promoted; but the original scheme always contained within it the power to effect minor and insubstantial modifications and that is the scheme that was approved by the creditors. I am satisfied that the modifications are indeed minor and insubstantial and they do not stand in the way of approval. In the circumstances, I sanction the scheme.

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