Case No: 10990/2011

Neutral Citation Number: [2012] EWHC 164 (Ch)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 20th January 2012

BEFORE:

MR JUSTICE HILDYARD

BETWEEN:

(1) PRIMACOM HOLDING GMBH

(2) ALCENTRA GROUP, AVENUE CAPITAL GROUP, TENNENBAUM CAPITAL PARTNERS, ING & VARIOUS INVESTORS (THE "INVESTORS")

Applicants/Claimants

- and -

A GROUP OF THE SENIOR LENDERS & CREDIT AGRICOLE

Respondents/Defendants

MR DAVID ALLISON (instructed by White & Case) appeared on behalf of the First Claimant

Defendants not in attendance

Approved Judgment

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MR JUSTICE HILDYARD:

1. This is the hearing of an application seeking an order for the approval by the Court of a scheme of arrangement proposed by the scheme company, which is called Primacom Holdings GmbH, pursuant to Part 26 of the Companies Act 2006. The matter has been before me on a previous occasion when I was invited on that occasion to approve orders convening four meetings of scheme creditors under the jurisdiction explained and expounded in the case of Re Hawk. On that occasion there was objection put forward by counsel on behalf of Credit Agricole Corporate and Investment Bank and ING Bank N.V. (both being in the first tier of creditors in the company known as Super Senior Hedging Scheme Creditors) and all of the other Senior Creditors who had by then not consented to the scheme as then proposed (their names being listed in Annex 1 to this judgment). On that occasion counsel for those creditors sought an adjournment of the matter, since they did not feel able to support the scheme as it was then propounded, failing which, an opportunity to seek discussions with the company to see whether some more agreeable compromise could be reached. I declined to adjourn the matter, given the persuasive evidence before me as to the very considerable urgency and of the need to ensure that the proceedings were not then derailed in such a way that it would make it impossible for a scheme to be approved and made effective prior to the date of the instalments due under various of the debt instrument.

2. In the event, it is agreeable to record that further to negotiations between the company and the various creditors a modified scheme has been agreed and put forward after careful explanation of the modifications to the four class meetings which I directed on a previous occasion. Those four class meetings have been held, and the scheme was approved by each. The position now before me is that no creditor or other person objects to the scheme, and in point of fact in each of the four class meetings there were very considerable, in fact in three out of four, 100 per cent majorities, in favour of the scheme and in the one where there was not 100 per cent, I think that the figures were 96.8 per cent by number and 98.40 per cent by value. Given that satisfactory position and given that there is no opposition it would not normally be necessary for me to give a judgment, and it would simply suffice for me to indicate my approval of the draft order and initial it and initial the final draft of the scheme.

3. However, there is one point which I feel it is appropriate that I should deal with, with the caveat that I am doing so on an extempore basis, because it goes to the jurisdiction of the Court.

4. For the sake of good order I should record before coming to that jurisdictional issue, that Mr David Allison of counsel has taken me very carefully and helpfully through the salient aspects of the scheme and its background and purpose, and explained also to me the nature and extent of the modifications which have been agreed. I am satisfied for the record that the statutory requirements with respect to the class meetings that I directed should be convened on a previous occasion

have been complied with. I have, as is my duty, reconsidered the appropriateness of the classes, which I directed on a previous occasion and I am satisfied that there is no reason for me to take any other course now. I am satisfied that this is an appropriate scheme, in the sense of being a scheme which an ordinary man of business in the position of the various creditors could reasonable approve. I am comforted by the recognition that it is ultimately not possible for the Court to make business decisions, and its real function is to be satisfied that there is no blot on the scheme nor any particular feature of it which undermines the position in fact, which is that a hefty majority of well advised and sophisticated commercial parties have thought it in their interests to approve within the various classes concerned.

5. I should, perhaps, record that the class meetings were delayed a few days to accommodate discussions, and that the changes to the proposals occasioned alterations to the explanatory material. I am satisfied, especially bearing in the mind the provision within the directions given on a previous occasion, that the date of the class meetings could be moved within a window of about a month I think it was, and that provision was also made for the modification of the scheme. On the previous occasion I outlined various, I think three, considerations with respect to modification, and I do not propose to refer to them now beyond saying that in my view, and with the assistance, as I have explained, of Mr Allison, the essentials of the scheme as originally proposed remain intact, though improvements, as they are perceived by the various creditors concerned, have been included.

6. The explanatory material seem to me accurate and sufficient; no objection has been made to it or any part of the process; the proposal has secured the relevant class approvals; accordingly, but for the jurisdiction matter I see no reason not to approve this scheme in the usual way.

7. So far as the jurisdiction matter is concerned it arises because, of course, as appears from its name, the scheme company is not incorporated in England or Wales, but is incorporated in Germany. I have outlined in my previous judgment, and again do not think it is necessary to repeat, the reasons why on that occasion I was satisfied that notwithstanding that jurisdictional wrinkle, it was appropriate for the English court and it had jurisdiction to approve the scheme in the case of the scheme company concerned.

8. The only reason that I feel that I must revisit the matter, as I shall do shortly, is that on re-reading the extremely helpful and illuminating judgment of Briggs J in the matter of Rodenstock GmbH, another Germany company, the case mutual citation number being [2011] EWHC 1104 Chy, he identified one residual concern that he had, though he disposed of it on the facts of the case. The residual concern did not relate to whether the English court would have jurisdiction in respect of a foreign company under its domestic rules and in particular under the definition in the Companies Act 2006. Rather, it arose because of the possible uncertainty arising under Council Regulation (EC) No 44/2001 of 20 December 2000 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, which I shall call the Judgment Regulation. The primary rule in the Judgment Regulation is that the appropriate forum for the

adjudication of a dispute is, in the ordinary course, the forum of the domicile of the Defendant and the question which troubled Briggs J was whether he therefore had to be satisfied that there were Defendants who were domiciled in the United Kingdom (*sic).*

9. In the case before him (the Rodenstock case) he suggested that there was a conundrum in this regard, a conundrum which he did not feel it necessary on that occasion further to resolve, since he concluded that he did have jurisdiction either (a) on the basis that there is a *lacuna* in Chapter 2 of the Judgment Regulation, such as by analogy with Article 4 to enable each Member State to continue to apply its own private international law in the context of a process such as the scheme or, and this was a factual issue on which there was no difficulty in the case then at hand, (b) on the basis that one or more members or creditors of the company affected by the proposed scheme were domiciled in the United Kingdom, treating such person as in effect *quasi* Defendants. He therefore, at paragraph 62 of his judgment, said the following:

> "It is unnecessary to resolve that conundrum in the present case, because more than 50% (by value) of the Scheme Creditors are indeed domiciled in England, so that the English court would have jurisdiction, whichever solution to the conundrum were to be adopted. I shall leave to another day a case in which a scheme is sought to be sanctioned in England where all the affected members or creditors are domiciled in Member States other than the UK.

This is, of course, such a case, and having raised the question, the position (as I understand it) before me is that it cannot be said that there are affected members or creditors domiciled in the United Kingdom, or at any rate there is certainly not a majority in any of the classes of such creditors. Therefore, the case which Briggs J said would cause him to review the matter has arisen before me.

10. Upon raising this issue shortly before the hearing with counsel for the scheme company, Mr Allison put forward before me four alternative ways of resolving the conundrum. The first and, as I understood it his preferred way, was to take the view that Article 2 of the Judgment Regulations simply has no application in the context of a scheme at all, put shortly, because in such a scheme no one is being sued. The second and third ways in which he suggested the conundrum might be resolved is that if in the alternative Article 2 does apply, it is nevertheless subject expressly to the Regulation as a whole, including therefore, the provisions of Articles 23 and 24. Article 23(1) provides:

> "Article 23
>
> 1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.

2. Any communication by electronic means which provides a durable record of the agreement shall be equivalent to "writing".

3. Where such an agreement is concluded by parties, none of whom is domiciled in a Member State, the courts of other Member States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.

4. The court or courts of a Member State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settlor, trustee or beneficiary, if relations between these persons or their rights or obligations under the trust are involved.

5. Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.

And Article 24 provides:

> "Apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction. This rule shall not apply where appearance was entered to contest the jurisdiction, or where another court has exclusive jurisdiction by virtue of Article 22."

In short, Mr Allison submitted that where the parties have agreed in a contract an exclusive jurisdiction and forum provision, which nominates England and English law as the relevant binding jurisdiction, Article 23 enables and requires the Court to have regard and to enforce that in respect of any dispute or issue arising in relation to that conflict, including its modification with a scheme. As regards Article 24 the position, as put forward by Mr Allison, was that all the scheme creditors concerned had in one way or another submitted to the jurisdiction of the English court and in particular by their participation in proceedings before me on the previous occasion.

11. I think Mr Allison also suggested that on the basis of cases decided previously by Lewison J, as he then was and Pumfrey J, now sadly deceased, the Judgment

Regulations in general may have no application in a case such as this, though he acknowledged that Briggs J had not held that that particular course provided the answer.

12. In my view this is yet again a case on which the exact choice between those routes need not finally be made and I can, as it were, leave some element of the conundrum still in place, though for rather different reasons than appeared before Briggs J.

13. I do not have, as I have explained, the factual comfort that the majority of the creditors or members were domiciled in England. But it does seem to me that each of the ways in which Mr Allison urged me to look at the matter is an available analysis (*sic)*. I must say for my own part that I tend to the view that a scheme of arrangement such as this is simply not within the purview of Article 2 and that it is a stretch to consider any of the parties, though they are of course, integral to the process and have the right as creditors to attend, to be Defendants within the intended meaning of that Article. I would therefore tend to the first solution offered by Mr Allison. But if I am wrong in that provisional view I would also accept the alternative analysis offered by him. That is to say that Article 2 is subject to Articles 23 and 24 and on the facts of this case, as it seems to me, both are satisfied.

14. Dealing first with Article 23, it is an important feature for these purposes of this case that every one of the loan agreements and also the umbrella agreement is expressly governed by English law and expressly nominates the English forum as the exclusive forum for the adjudication of their disputes. That is a peculiarity of this case, though it will not necessarily be an unfamiliar circumstance. I note in passing that the exclusive selection of law and forum enables me to proceed without concern as to any issues which arise where a jurisdiction clause is non-exclusive. That might complicate the matter: but the concern simply does not arise on the facts.

15. Secondly, and again on the facts with regard to Article 24, I do accept that before me on the previous occasion there were, at least as I understood it, before me by counsel, a majority of creditors, especially in the first tier, who by their participation in that proceeding, which was of substance in that it related to the jurisdictional issue as to the proper constitution of classes, had consented or submitted to the jurisdiction of this Court. Therefore, the factual circumstances posited by Article 24 seem also applicable.

16. The fourth possibility was that canvassed by Briggs J in the Rodenstock case, that by analogy with Article 4 the English court should accept jurisdiction. My own preference is to adopt one or other of the other three solutions, but of course, that may well indicate no more than that I have not properly grasped the full extent of the analogy which Article 4 offers.

17. On that basis it does not appear to me that the Judgment Regulations pose any obstacle to my accepting that the English court has jurisdiction in the matter. That being so the other considerations, which I have dealt with previously, still

apply and I consider this to be an appropriate scheme to approve notwithstanding the foreign domicile of the scheme company.

18. Of course, my view as to the ambit of the Judgment Regulations and thus the jurisdiction of the English court might not be shared by the courts in Germany. There are indications, for example in the case of the Equitable Life, that the German court has had reservations about accepting that it should enforce or allow to be enforced an order made by the English court in a not dissimilar context. However, I have had expert evidence from Professor Powlis on behalf of the scheme company, indicating that in his view it may very well be that the reservations will disappear when the matter is considered by the highest court in the Germany legal structure. In any event, he distinguishes the Equitable Life case as being different in a very salient sense: the claims there were, as I understand it from him, treated as governed by German law.

19. However that may be I am persuaded that it would appear to the English court, even if ultimately this is not the view taken in Germany that there is a reasonable, if not better, prospect of Germany accepting that this order or the sanction of this scheme should be recognised and given effect in Germany and that I should not regard the possibility of a different view as providing an impediment to my approving the scheme.

20. Mr Allison has taken me to his proposed form of order and will shortly hand up the scheme in its final form. I am content to approve both. The only thing that remains for me to indicate is my appreciation of the obvious care with which this matter has been attended to since the previous hearing. The documents have, in my view, been very careful and clear and Mr Allison's submissions have helped me greatly.

ANNEX 1 TO JUDGMENT
CASE NO: 10990/2011
DATED 20 JANUARY 2012

PRIMACOM HOLDING GMBH & ORS -V- A GROUP OF SENIOR LENDERS & CREDIT AGRICOLE

The list is as follows:

- Alpstar CLO2 PLC
- GSC European CDO II SA
- GSC European CDO V Plc
- CELF Loan Partners 2008-2 Limited
- CELF Loan Partners B.V
- CELF Loan Partners II Plc
- CELF Loan Partners III Plc
- CELF Loan Partners IV Plc
- CELF Loan Partners V Limited
- CELF Low Levered Partners Plc
- Gillespie CLO Plc
- Credit Agricole Corporate and Investment Bank
- Cadogan Square CLO II B.V.
- Cadogan Square CLO III B.V.
- Cadogan Square CLO IV B.V.;
- INVESCO Van Kampen Dynamie CRE
- Gateway IIII - EURO CLO S.A.
- Gateway IV - EURO CLO S.A.