IN THE HIGH COURT OF JUSTICE **Claim No. 683 of 2015**
CHANCERY DIVISIONCOMPANIES COURT

Neutral Citation Number: 2015 EWHC 1233 (CH)

Rolls Building
Wednesday, 1st April 2015

Before:

MR. JUSTICE NORRIS

IN THE MATTER OF AI SCHEME LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

AI SCHEME LIMITED **Applicant**

MR. WILLIAM TROWER QC and **MR. ADAM GOODISON** (instructed by **Stephenson Harwood LLP**) appeared on behalf of the **Applicant**

(2.07 pm)

APPROVED JUDGMENT 1 April 2015

1. **MR JUSTICE NORRIS:** These are my reasons for my decision to approve the convening of meetings in accordance with the directions sought in the application.

2. Affinion International Limited ("Affinion") is an English company forming part of an American group of companies. It provided a credit card security product under various brand names, including Card Protection, Sentinel, Sentinel Gold, Sentinel Protection, Sentinel XL, and Safe and Secure Plus.

3. The security product marketed under those names was sometimes sold by Affinion direct to its customers, but was often sold with the assistance of business partners. Those business partners might introduce a customer to Affinion by way of marketing materials, or the business partner itself might sell the product direct to its customers.

4. The card security product had several elements. It provided a service, namely the ability to cancel lost or stolen cards by a single phone call to a permanently open centre. It also provided insurance cover, for example, to replace a lost or stolen handbag, to provide emergency cash, to replace personal cash, to cover the costs of dealing with the loss of a credit card, to cover the cost of keys that were stolen at the same time as the credit card was lost or stolen and, lastly, it provided insurance cover for fraudulent use of lost or stolen cards. This last element I will call "fraud insurance cover".

5. In relation to the fraud insurance cover, in fact customers probably did not need such cover because they were otherwise covered for the loss occasioned by

fraudulent use of the lost or stolen credit card, either under consumer protection law or under banks' Codes of Conduct.

6. There is accordingly the potential for a mis-selling claim in respect of which purchasers of Affinion's product may be able to seek redress. It is thought that there may be 1.991 million potential claimants who might each have claims perhaps worth £180.

7. In such circumstances, the Financial Conduct Authority seeks the putting in place of a redress procedure which is simple, quick and effective. In relation to an earlier scheme approved by the FCA, this included access to a dedicated website and a call centre which processed claims without the requirement for any extensive supporting documentation.

8. Affinion intends to achieve that objective in relation to the potential claims which it and its business partners face. The chosen mechanism is that of a scheme of arrangement, which was a method utilised in relation to similar claims against Card Protection Plan Limited, and which was approved by Mr Justice David Richards.

9. In bare outline, the structure involves the establishment of a company, in this case an orphan vehicle (that is to say one that is not in the ownership of either Affinion International or its business partners, but in the ownership of a discretionary trust in favour of charities) which will enter into a scheme of arrangement. This scheme company has secured funding from Affinion and from the business partners under which Affinion and the business partners will pay what is called "the redress amount" to the scheme company in order to cover the redress required to be paid to successful claimants. Deeds of undertaking have been

completed to secure that funding.

10. The scheme company has also entered into what is called a "Co-obligor Deed poll", a deed by which, in return for a single capital payment of relatively modest amount, it assumes primary liability alongside Affinion and the relevant business partners in respect of the claims which might be brought by potential customers of the card product.

11. With those arrangements in place, the scheme company will then enter into a scheme of arrangement, under which direct redress will be provided to successful claimants within the compensation scheme, and there will be a release by the scheme creditors of their direct claims against Affinion and the business partners and a release of claims between Affinion and the business partners themselves.

12. There has been extensive publication of the bare outlines of the scheme and there will be extensive publication of the details of the scheme to be promoted. This is the convening hearing in relation to the proposed scheme of arrangement.

13. As is familiar, this being a convening hearing, it is not an occasion to consider the merits or fairness of the proposed scheme. As Mr Justice David Richards pointed out in Re Telewest Communications [2004] EWHC 924, the purpose of this hearing is to consider the jurisdiction of the court to sanction the scheme, if it proceeds, which is principally a matter of the consideration of the classes; see paragraph 14 of that judgment.

14. Whilst this is not an occasion to consider the merits of the scheme, or even to express a provisional view about them, it is, I think, important not to proceed with the scheme if it is plain, even at this stage, there is such a blot upon it that it has no real prospect of succeeding at the sanction hearing. That degree of initial oversight

is, I think, particularly important in the case of a scheme of this sort, where the scheme creditors will be customers, each of whom has a relatively small claim and none of whom may have sufficient access to advice in relation to the complex issues arising. I have borne that consideration in mind as I have reviewed my central function at this hearing, although I have sought to avoid expressing any provisional view.

15 The jurisdiction of course arises under Part 26 of the Companies Act 2006, section 895 of which says that its provisions apply:

> " ... where a compromise or arrangement is proposed between a company and its creditors, or any class of them."

16. There is no doubt that the scheme company is a "company" within the provisions of section 895, as subsection 2 provides:

> "A company for the purposes of section 895 means a company liable to be wound up under the Insolvency Act 1986".
>
> The scheme company is a company registered in England and Wales and is plainly so liable.

17. I am satisfied that the nature of the proposal is an "arrangement" within the meaning of the section. The nature of an "arrangement" has been considered on a number of earlier occasions and it is clear that the term has a broad meaning. There are certain criteria which must be met. The arrangement must be proposed with a creditor; it is implicit that it must be so proposed to them in their capacity as creditors; and that it must at least concern their position as creditors. Beyond that, the requirements are few. An "arrangement" is a different concept from a compromise, and an "arrangement" need not involve any element of compromise

or be confined to cases of dispute or difficulty. An “arrangement” may well include the alteration of the rights of creditors against another party, even though the alteration of those rights could be achieved by a scheme of arrangement by that other party itself. So much emerges from the seminal judgment of Mr Justice David Richards in Re T&N (No. 3) [2006] EWHC 1447 (Ch) at paragraphs 45 through to 53. The requirements were distilled by Lord Justice Patten in Re Lehman Brothers International Europe [2009] EWCA Civil 1161 at paragraph 65, where he said:

> "It seems to me that an arrangement between a company and its creditors must mean an arrangement which deals with their rights inter se as debtor and creditor. That formulation does not prevent the inclusion in the scheme of the release of contractual rights or rights of action against related third parties necessary in order to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors."

18. In the instant case, I am satisfied that insofar as the scheme of arrangement includes releases by scheme creditors of direct claims against Affinion or the business partners, and insofar as it includes releases as between Affinion and the business partners, those features are a necessary element of the proposed compensation scheme. The potential claimants, unless direct customers of Affinion, will have complementary claims in contract and in tort and will have those claims against Affinion and against the seller or facilitator of the product. In order to dispose of contribution claims arising out of the provision of the product, it is necessary for there to be a simple release. Likewise, since Affinion and the business partners may themselves have internal warranty or indemnity cross claims, it is necessary for the

simple operation of the scheme for those rights also to be released. Accordingly, I am satisfied that the scheme is an "arrangement".

19. As the quotation from Lord Justice Patten's judgment in Lehman Brothers indicates, the arrangement must be with "creditors". He dealt with who creditors were in paragraph 58 of his judgment, saying that:

> "A creditor will consist of anyone who has a monetary claim against the company which, when payable, will constitute a debt."

20. That is an accurate description of the position of each potential claimant against the scheme company arising by virtue of the existence of the Co-obligor Deed.

21. It is correct to note that the proposed scheme does not deal with all such persons who are creditors. The proposed scheme excludes those who dealt with Affinion before that company became regulated by the FSA on 14 January 2005. It excludes all those who would face a real difficulty in proving reliance upon any statement made. It identifies as such persons as deceased product purchasers and those who purchased the product as part of a larger package (for example, provided by a bank). It excludes about 39,000 customers who were introduced by smaller business partners than the 11 mainstream banks who are participating in the scheme. Those smaller business partners are not participating in the scheme simply because the numbers involved in each case are too small to justify a commercial participation. It also excludes those potential customers who have de minimis claims of £5 or less.

22. It is clear on the authorities that a scheme does not have to include all creditors within its scope. It is a matter for the company itself to identify those creditors with whom it wishes to enter into an arrangement and, provided that there is

a commercial justification for such a selection, no objection can be taken.

23. There is, as the summary of the excluded classes of creditors will have made apparent, a sound commercial reason for dealing only with the 1.991 million core customers and excluding certain creditors from the scheme. It should be emphasised that excluded creditors are not thereby debarred from exercising any rights. The fact that they are excluded from the scheme means that they continue to have their existing claims against the existing exposed parties, those claims simply having to be pursued according to conventional means and not by means of a claim for redress within the scheme.

24. I am therefore satisfied that, subject to one point, there is jurisdiction to direct the convening of meetings. The one point that requires specifically to be addressed is the context in which the scheme is promoted.

25. The scheme company has voluntarily assumed liability as co-obligor with Affinion and its original business partners in order that the scheme company shall promote the scheme of arrangement. There is a sound commercial justification for this. Even though Affinion is a solvent company, if it itself were to enter into a scheme of arrangement, that may trigger "an event of default" under its various United States financing documents, hence the need for a separate scheme company. The existence of a separate scheme company also facilitates the garnering-in of potential claims against all of the exposed defendants, Affinion and its principal business partners. The existence of a scheme also facilitates the settlement of the other claims between Affinion and the principal business partners under warranties and indemnities to which I earlier alluded.

26. Mr Trower QC submitted that the fact that this is a deliberately created scheme

company does not affect the jurisdiction, though it may affect the exercise of discretion at the sanction stage. I agree with that submission. The scheme company is, as I have said, a "company" proposing an "arrangement" with its creditors within section 895, and there is no reason to read into that section some limitation to exclude entities such as the scheme company. The structure has not been created as a matter of mere artifice; it has a solid grounding in commercial necessity. I therefore hold that the proposed scheme is one within the section, in relation to which I can order convening meetings.

27. I must therefore address the question of classes. It is the policy to avoid the proliferation of classes, some of whom might constitute a minority with a power to veto the scheme. One therefore starts with an inclination to have a single class meeting and then proceeds to seek to identify those persons whose rights are so dissimilar that they cannot sensibly consult together with a view to their common interest and so must be given separate class meetings.

(The formulation of course comes from what Lord Millet said in Re UDL Holdings Limited [2002] 1 HKC 172 at paragraph 27, drawing upon Re Hawk Insurance [2001] EWCA Civ 241).

28. In undertaking the comparison to establish dissimilarity, one is concerned to look at the rights the creditors had before the scheme and the rights which they will have under the scheme to identify whether there is any element of dissimilarity in the treatment of various creditors which means that they cannot consult together. In the instant case, I am entirely satisfied that a single class of creditor is appropriate. Affinion and its principal business partners are open to potential claims for pre-contractual misstatement and for contractual misrepresentation. Scheme

creditors who have such valid claims would have rights of action for the same loss against both Affinion and against the business partners. A payment made by way of redress to such a scheme creditor will have the effect of releasing that claim against each of the exposed parties. In these circumstances, the creditors have effectively the same present rights, each with the other, and are given the same rights under the scheme in substitution.

29. The scheme does contain a "bar date" which itself includes the possibility of an extension. The scheme has been restructured marginally so as to ensure that any decision about barring is susceptible of review by the Ombudsman. The existence of the bar affects all scheme creditors in precisely the same way. There is therefore no need for anything more than a single class meeting.

30. The evidence before me deals in detail with the proposed implementation of the scheme. I have considered the documents such as the explanatory letter, the terms of the advertisements, and the proposals for notifying scheme creditors of the availability of the scheme. I have been taken to and have considered the detailed directions for the convening of meetings. I need in this judgment say nothing about the detail, but I am satisfied that they are entirely appropriate documents and arrangements.

31. I should advert briefly to one particular issue. When notice of the preparation of the compensation scheme was circulated to people on Affinion's database, which had itself been cleaned and prepared for the exercise, some people responded by saying they wished to have no further communications. In some cases it is apparent from the terms of the response that its motivation was simply irritation with credit card companies, but in other cases it was clear that the communication

had occasioned considerable emotional distress because, for example, it concerned the affairs of someone who was dead. The distress appeared equal for those who had a relative who had died recently and for those who had had a relative who had died a while ago and were upset that the name still appeared on a database. The proposed arrangements include a discretionary power for the scheme administrators to decide not to circulate material to those whom they consider would suffer a level of distress from the communication that would outweigh the advantage of notice. The exercise of that power, of course, takes place in the context of there being a planned programme of advertisements and the establishment of a dedicated website. Those who do not receive the communication (because they have expressed a wish not to receive further communications and the scheme administrators consider that they fall into the relevant distressed category) although bound by the scheme, will still have had available to them sources of information about it should they choose to explore that avenue. It is simply a matter for them.

32. In the circumstances, I am satisfied that the proposed power not to send scheme documents to some potential claimants is warranted and appropriate.

33. For those reasons, I approve the convening of meetings in accordance with the directions sought.

(2.45 pm)