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Case Nos: CR-2018-010456, CR-2018-010458

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
COMPANIES COURT (ChD)

IN THE MATTER OF THE COMPANIES (CROSS BORDER MERGERS) REGULATIONS 2007

The Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 07/12/2018

Before :

MRS JUSTICE ROSE

IN THE MATTER OF MDNX GROUP HOLDINGS LIMITED & Others

Mr S Horan (instructed by **Bird & Bird LLP)** for the Applicants

Hearing date: 6 December 2018

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APPROVED JUDGMENT

MRS JUSTICE ROSE:

1. This is an application for the court to sanction a cross border merger under regulation 16 of the Companies (Cross-Border Mergers) Regulations 2007 (SI 2007/2974) ('the Regulations'). The application seeks approval for two linked cross-border mergers aimed at reorganising the subsidiaries within the same corporate group, the Interoute group.

The two proposed mergers

2. There are 11 UK companies and two Dutch companies involved. Both mergers are mergers by absorption. In Merger 1 the transferors are seven wholly owned subsidiaries of MDNX Group Holdings Ltd ('MDNX'). MDNX will merge with those seven companies making MDNX the transferee company for Merger 1. MDNX is an English registered company. Of the seven transferors:

    a. one is a Dutch registered company, that is Interoute Capital Markets B.V.;

    b. one is a Scottish company, that is Easynet Managed Services Ltd;

    c. the other five are English companies Easynet Enterprise Services Ltd, Easynet Channel Partners Ltd, Easynet Corporate Services Ltd, Easynet Ltd and Interoute Managed Services UK Limited.

3. Once MDNX has merged with those seven companies, the second merger will take place at which point an English company called Interoute Networks Ltd as transferee will merge with:

    a. MDNX which is its sister company;

    b. three other English companies Interoute Vtesse Ltd, Interoute Cirrus Ltd, Interoute Application Management Ltd; and

    c. one Dutch company, Interoute Treasury Services BV.

4. That is Merger 2. Following the two mergers, Interoute Networks Ltd will continue to conduct the business previously conducted by all the transferor companies.

The relevant legislation

5. The Regulations implement Directive 2005/56/EC of 26 October 2005 on cross border mergers. In June 2017, Directive (EU) 2017/1132 consolidated and codified a number of directives relating to company law. As part of that process the 2005 Directive was repealed and the relevant provisions restated in 2017 Directive. The Regulations still refer to the 2005 Directive although it is the 2017 Directive which now applies. There are two important stages for the approval of a cross-border merger.

6. The first is the issuance of a pre-merger certificate pursuant to Article 127 of the 2017 Directive (formerly Article 10 of the 2005 Directive). Article 127 provides:

> "**Pre-merger certificate**
>
> 1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law.

> 2. In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities."

7. For companies involved in a merger which are subject to UK law, the pre-merger process is governed by regulation 6 of the Regulations. That provides that a UK merging company may apply to the court for an order certifying for the purposes of Article 127.2 that the company has completed properly the pre-merger acts and formalities for the cross-border merger.

8. The second stage of the approval of a cross-border merger is pursuant to Article 128 of the 2017 Directive (formerly Article 11 of the 2005 Directive). Article 128 provides:

> "1. Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of the cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 133."

9. Thus the first stage of scrutiny of a cross-border merger is performed in respect of each merging company by its own designated national authority and relates to the compliance by the company with the relevant pre-merger procedure under its national law. The second stage of scrutiny is performed only by the designated national authority of the company which results from the merger and relates to the legality of the completion of the cross-border merger.

10. The designated national authority in the UK is the Companies Court for both stages.

11. Regulation 13 provides that before the pre-merger certificate application, in most cases a UK merging company must obtain the approval of the draft terms of merger by a majority in number, representing 75% in value, of each class of members present and voting at a meeting summoned under regulation 11. This requirement implements Article 126 of the 2017 Directive. The Directive provides for limited exceptions to the need to hold a members' meeting. These exceptions have been implemented in the United Kingdom by regulation 13(3) and 13(4).

12. Once a meeting is summoned pursuant to an order of the court made under regulation 11, regulation 12 applies. That provides that the directors of the UK merging company must deliver to the Registrar of Companies particulars of the date, time and place of every meeting summoned under regulation 11 together with a list of other specified documents. According to regulation 12(2), the directors must deliver these documents to the Registrar not less than two months before the date of the first meeting of the members of the company. Regulation 12(3) then provides that if the documents are delivered to the Registrar in accordance with paragraphs (1) and (2), the Registrar must publish notice of his

receipt of the documents in the Gazette. Paragraph (5) of regulation 12 then provides that the notice published by the registrar must include certain information. This information includes, as provided by sub-paragraph 12(5)(e), the date, time and place of every meeting summoned under regulation 11.

13. Once the meeting has taken place and the approval of the members has been obtained, the UK merging company applies to the court under regulation 6(1) for:

> "an order certifying for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) that the company has completed properly the pre-merger acts and formalities for the cross-border merger."

14. Regulation 6(2) provides that upon such an application:

> "The court must not make such an order unless the requirements of regulations 7 to 10 and 12 to 15 (pre-merger requirements) have been complied with."

15. Once the second stage of the approval process is reached, regulation 16 provides:

> "(1) The court may, on the joint application of all the merging companies, make an order approving the completion of the cross-border merger for the purposes of Article 11 of the Directive (scrutiny of completion of merger) if –
>
> (a) the transferee company is a UK company;
>
> (b) an order has been made under regulation 6 (court approval of pre-merger requirements) in relation to each UK merging company;
>
> (c) an order has been made by a competent authority of another EEA State for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) in relation to each merging company which is an EEA company;
>
> (d) the application is made to the court on a date not more than 6 months after the making of any order referred to in sub-paragraph (b) or (c);
>
> (e) the draft terms of merger approved by every order referred to in sub-paragraphs (b) and (c) are the same; and
>
> (f) where appropriate, any arrangements for employee participation in the transferee company have been determined in accordance with Part 4 of these Regulations (employee participation).
>
> (2) …
>
> (3) After the consequences of the cross-border merger have taken effect (see regulation 17) –
>
> (a) an order made under this regulation is conclusive evidence that:
>
> (i) the conditions set out in paragraph (1) have been satisfied; and

(ii) the requirements of regulations 7 to 10 and 12 to 15 (pre-merger requirements) have been complied with; and

(b) the cross-border merger may not be declared null and void."

What happened in this case

16. In the present case, there was only one shareholder in each company and it was the same shareholder, that is MDNX which is the sole shareholder of all the transferor companies in Merger 1 and Interoute Communications Ltd which is the only shareholder of all the transferors in Merger 2. One might think that a members' meeting of each merging company would be unnecessary. However, it is accepted by the Applicants in this case that neither of the exceptions to the requirement to hold a meeting applies here. Although there is an exception in regulation 13(3) for "the case of a transferor company concerned in a merger by absorption of a wholly owned subsidiary" the definition of "a merger by absorption of a wholly owned subsidiary" in regulation 2(3) is very narrow. It applies only to an operation in which there is one transferor company of which all the shares are held by an existing transferee company. Because both the mergers here involve multiple transferors, that definition does not apply and so the exception to the need to summon a meeting also does not apply.

17. Part 8 claim forms were therefore issued for each of the English transferor companies as was a petition to the Court of Session for the one Scottish transferor involved in Merger 1. For the English companies, orders were made by ICC Judge Jones on 21 September 2018, one for each of the transferor companies. The two transferee companies could take advantage of one of the exceptions to the need to hold a meeting. Documents were then sent to the Registrar and the meetings were held on 28 November 2018. The shareholder meetings were of course entirely a formality because the single shareholder involved for each merger was fully aware of and undoubtedly approved of the merger taking place.

18. The hearings to obtain the pre-merger certificates pursuant to regulation 6 were listed to take place before ICC Judge Barnett in London for the English companies and before Lord Ericht in the Court of Session in Edinburgh for the Scottish company Easynet Managed Services Ltd on 30th November 2018.

19. The hearing before Judge Barnett proceeded without difficulty and orders were made for all 12 English companies involved in the two mergers. The orders read:

> "IT IS ORDERED that in accordance with Regulation 6 (Court approval of pre-merger requirements) of the Companies (Cross Border Mergers) Regulations 2007, for the purposes of Article 127.2 (pre-merger certificate) of Directive EU 2017/1132 (which repealed Directive 2005/56/EC), the Company has properly completed the pre-merger acts and formalities for the cross-border merger."

20. However, at the hearing in Edinburgh Lord Ericht spotted a problem. The problem was that the notice published by the Registrar in the Gazette required by regulation 12 did not include particulars of the date, time and place of the meetings summoned under regulation 11. This it turned out was because the documents delivered to the Registrar by the directors pursuant to regulation 12(1)

had not included those details as required. Lord Ericht heard submissions and adjourned the hearing until the following Tuesday. When counsel attended court again on Tuesday 4 December 2018, the Judge's clerk handed counsel a copy of an order made by the Judge. The order recited the nature of the application and then stated:

> "The Lord Ordinary, having resumed consideration of the petition, no answers having been lodged, and on the motion of the petitioner, certifies in terms of regulation 6(1) of The Company (Cross Border Merger) Regulations 2007 ("the Regulations") that Easynet Managed Services Ltd ("the company") has properly completed the pre-merger acts and formalities, so far as applicable, for the proposed cross-border merger between the company, [and the other 7 companies in Merger 1] with the exception of:
>
> 1. The requirement under paragraph 12(1) of the Regulations that the directors of the company must deliver to the registrar of companies particulars of the date, time and place of the meeting summoned under regulation 11; and
>
> 2. The requirement under paragraph 12(5)(e) of the Regulations that the notice of receipt by the registrar of companies of the documents required under paragraphs 12(1) and (2) of the Regulations (which was to be published by the registrar of companies in the Gazette in terms of regulations 11(3) and (4)) must include the date, time and place of the meeting summoned under regulation 11."

21. The problem applied equally to the English companies but no one had noticed the omission from the notice in the Gazette and it had not been drawn to the attention of ICC Judge Barnett at the London hearing. Mr Horan appearing for the applicants before me candidly accepted that this was an error and I entirely accept that there has been no intention at any stage to mislead the court – this was an honest mistake.

22. Regulation 16 provides that the discretion of the court to make an order approving the completion of the cross-border merger arises only if the jurisdictional requirements sub-paragraphs (a) to (f) are met. There is no difficulty with any of those requirements other than the requirement in sub-paragraph (b). So far as the two Dutch companies involved in the two mergers there is a premerger certificate issued by Mr R M Rieter a Notary in The Hague.

23. Whether the requirement in sub-paragraph (b) is met, namely that

> "an order has been made under regulation 6 (court approval of pre-merger requirements) in relation to each UK merging company"

must be considered first in relation to the orders of ICC Judge Barnett in respect of the English companies and secondly in relation to the order of the Court of Session in respect of the Scottish company.

The orders of ICC Judge Barnett

24. As I have already set out, Article 127 of the 2017 Directive provides that the competent national authority shall issue without delay a certificate "conclusively attesting" to the proper completion of the pre-merger acts and formalities. Does the conclusive character of such a certificate mean that a court considering

whether to sanction the merger under regulation 16 cannot look behind the order made under regulation 6 in relation to each UK merging company, even if that subsequent court knows that there is, to put it at its lowest, a serious question mark over whether the order should have been made? Regulation 6(2) provides that the court "must not make" an order under paragraph (1) unless the requirements including the requirements of regulation 12 have been complied with. Here they were not strictly complied with.

25. The meaning of the term "conclusively attesting" was considered by Snowden J in *Re M2 Property Invest Ltd* [2017] EWHC 3218 (Ch). In that case the court was considering a pre-merger certificate issued by the Gdansk District Court in Poland in respect of a transferor company Vendor Wind. There was no difficulty in that case about the relevant documents having been delivered to the registrar of companies and published as required under Polish law: see [16]. A premerger certificate had also been issued by Mr Registrar Jones in relation to the English transferee company M2. Snowden J was considering whether to approve the completion of the merger under regulation 16. Initially the evidence before him was that the Gdansk District Court, when considering whether to issue a pre-merger certificate, had considered the interests of all the stakeholders including creditors. The evidence that had apparently been presented to the Gdansk District Court had indicated there was no potential disadvantage to creditors arising from the merger. It emerged at the first hearing before Snowden J that some of the evidence presented to the Gdansk court had been erroneous and that it was not possible to say that there would be no adverse effect on creditors. However, a further development was that the evidence established that in fact the Gdansk District Court was not expected to and did not scrutinise the effect on creditors when considering whether to issue a pre-merger certificate.

26. Snowden J recorded that there was no doubt that "at least as a matter of form," each of the requirements in regulation 16 had been complied with. There was an issue whether in the light of the facts now known he could accept and place any reliance on the pre-merger certificate obtained from Registrar Jones in relation to M2 or of the Gdansk District Court in relation to the transferor Vendor Wind. The difficulty was that the court was now aware that some of the information placed before the court was not true. M2's primary argument was that the matters related only to the transferor Vendor Wind so the certificate for M2 was not affected. It also submitted that the court was prevented from questioning the validity of the Polish pre-merger certificate or looking into the circumstances in which had been obtained. This was because the certificate conclusively attested to the proper completion of the pre-merger acts and formalities according to what is now article 127 of the Directive.

27. Snowden J noted that there was no European jurisprudence of the question of whether a court at the second stage of the scrutiny process could go behind a certificate in circumstances in which it was aware or suspected that the certificate had been obtained on the basis of inaccurate information. He said at [50]:

> "My inclination is that 'conclusively attesting' ought to be given its ordinary, wide meaning so that the court hearing the application for approval at the second stage would be bound to accept and give effect to the pre-merger certificate, even if aware of facts that might suggest

that the certificate had been issued in error, or on the basis of erroneous information."

28. He noted that although the provisions of Article 127 are applicable to the pre-merger certificate granted by Registrar Jones for English companies, the conclusive attestation provisions are most likely to be designed to operate as between designated authorities in different EU member states. Giving the provision a wide meaning would, he said, "give full effect to mutual recognition and respect between national authorities". It would also serve a very real practical purpose of relieving the court or authority at the second stage of the merger process from being under any obligation to conduct potentially difficult, onerous and time-consuming inquiries into the pre-merger process which had been followed under a foreign law in another EU Member State: [51].

29. Snowden J held that he did not need to reach a final view on this point because even if he could enquire into the facts, he was satisfied that had the correct position been explained to the courts the certificates would still have been issued. The first possible problem with the pre-merger certificate hearing had been the directors' report provided to members and employee representatives under Article 124 of the 2017 Directive. That report had been inaccurate by the time the pre-merger certificate hearings had taken place. However, the reports had accurately stated the position when they were adopted, and the sole member had been well aware of the change that had occurred between the time of adoption and the court hearing. The member was not therefore misled in any way by any errors or omissions in the report. As to the second potential defect namely the description of the potential economic effect on the creditors, those were not matters that either Registrar Jones nor the Gdansk District Court would enquire into as part of the pre-merger certificate process. Any errors were therefore immaterial. Snowden J therefore concluded that there was nothing before him that would have caused either court to refuse to issue its premerger certificate.

30. In the present case it is certainly not possible to say that had Judge Barnett known about the failure to comply with regulation 12, he would still have made the orders under regulation 6(1), despite the wording of regulation 6(2). Nonetheless, and although I have not heard any contrary submissions, I respectfully share the inclination of Snowden J in *M2* and conclude that Judge Barnett's orders of 30 November 2018 are indeed "orders that have been made under regulation 6" in relation to each UK merging company for the purposes of regulation 16(1)(b). It may seem counterintuitive for the court at the second stage to have to turn a blind eye to the revelation of an error which might well have resulted in the orders not being made if it had been known at the time. One cannot however sensibly draw a line either between orders made under regulation 6 for the purposes of regulation 16(1)(b) and orders made under the equivalent domestic provision in the other Member States for the purposes of regulation 16(1)(c). It is also not possible to draw a clear line between an order said to have been made as a result of an egregious error and an order made as a result of an error which is more contestable. To say that Judge Barnett's orders are not within regulation 16(1)(b) risks unravelling the pre-merger certificate stage to an extent which is not consistent with the structure of the regime. I should make clear that this conclusion is arrived at in circumstances where there is no suggestion of fraud or improper conduct in withholding information from the court at the regulation 6 stage. I am also not addressing here the question that I raised with counsel at the

hearing about the relevance of "conclusive attestation" if someone opposing the merger had sought to appeal Judge Barnett's orders immediately the error was recognised.

31. In the light of that finding that Judge Barnett's orders fall within regulation 16(1)(b), I hold that there is jurisdiction under regulation 16 to make an order in respect of Merger 2. I am also satisfied having read the submissions of Mr Horan that there is no reason for the court not to exercise its discretion in favour of approving Merger 2. I will make such an order if invited by the applicants to do so.

The order of the Court of Session

32. Unfortunately, I have not been able to arrive at the same conclusion as regards the order of Lord Ericht of 4 December 2018 in respect of the Scottish company. In my judgment that order cannot be described as an order that "has been made under regulation 6". It is certainly an order made as a result of an application for an order under regulation 6. It cannot be the case that every order made by a court in disposing of an application for an order under regulation 6 counts as "an order made under regulation 6"; if that were true, then even an order dismissing the application would satisfy the requirement in regulation 16(1)(b). The reference in regulation 16(1)(b) to an order "made under regulation 6" is short hand for "an order certifying … that the company has completed properly the pre-merger acts and formalities for the cross-border merger". Those acts and formalities include compliance with the requirements of regulation 12.

33. Mr Horan argued that the Court of Session's order expressly states that it is certifying something in terms of regulation 6(1). The order is therefore a "certificate" and it is given pre-merger, hence it must be a "pre-merger certificate". An order which dismissed an application would not have referred to certifying anything and would not amount to an act of certification. He also submitted that having regard to regulation 6(2), Lord Ericht would not have made the order unless he thought he was able to certify that the acts and formalities had been properly complied with. I do not accept that. If Lord Ericht had been satisfied that, on the facts presented to him, he was able to make an order certifying completion then he would have made an order closer to the terms of Judge Barnett's orders. He would not have needed to describe the two aspects of the lack of compliance with regulation 12 if he had been satisfied that they did not impede his ability to issue a pre-merger certificate. Mr Horan invited me to conclude that the reference in the order to the failures to comply with regulation 12(1) and 12(5)(e) was simply to make apparent on the face of the order that the Judge had been aware of the defects but had decided to certify proper compliance anyway. I do not accept that that is a possible reading of the order. The failures to comply are clearly stated to be exceptions to the proper completion of the pre-merger acts and formalities.

34. Mr Horan asked rhetorically, what is the order if it is not a pre-merger certificate? The answer to that is that it is an order certifying that some but not all of the pre-merger acts and formalities have been properly complied with. One must not allow a convenient tag - "pre-merger certificate" - to supplant the requirements of the regime. Just because an order certifies something, and it is granted pre-merger

does not mean that it is a "pre-merger certificate" within the meaning of that term as used in the Regulations and in the 2017 Directive. The fundamental requirement of Article 127 and of regulation 6 is that the court is satisfied, following its scrutiny, that all the pre-merger acts and formalities have been complied with. The term "pre-merger certificate" is limited to an order which states that the court has concluded just that. In my judgment, an order which "certifies" that some but not all of the acts and formalities have been completed is not a pre-merger certificate for the purposes of Article 127 or regulation 6. It is therefore not an order within the meaning of regulation 16(1)(b).

35. I do not accept that the reference in Lord Ericht's order to the formalities "so far as applicable" helps the Applicants. There is no doubt that the whole of regulation 12 was applicable and there was no basis on which Lord Ericht can be taken to have concluded that regulation 12(1) and (5)(e) were not applicable. The Applicants did not submit to me that they were not applicable. Nor does the statement that the order certifies what is set out in it "in terms of regulation 6(1)" help. That is different wording from Judge Barnett's orders stated to be made "in accordance with regulation 6(1)". The wording used by Lord Ericht serves only to indicate that the phrases used in the order, such as "cross-border merger" or "pre-merger acts and formalities" bear the same meaning as they bear in that regulation.

36. Mr Horan referred me to the judgment of Norris J in *Waltz Properties Ltd v Strelingstav* [2010] EWHC 333 (Ch) and that of Zacaroli J in *Re ABN Amro Commercial Finance plc* judgment of 20 December 2017 (Case No CR-2017-009599). Both those cases grappled with the problems created by the fact that several provisions in the Regulations are drafted on the assumption that a meeting of the company's members will take place pursuant to regulation 11 but in cases where the exceptions in regulation 13(3) and (4) apply, there is no such meeting. In *Waltz Properties* Norris J was considering a regulation 16 application. One problem that arose was that regulation 10 sets the period during which documents must be available for inspection at the registered office of the company as the month leading up to the meeting held under regulation 13. The case before him fell within one of the exceptions and there was no members' meeting. Norris J held that the timetable in regulation 10 must be read as not applying where there was no meeting. The question whether the creditors and employees had been given adequate opportunity to inspect the documents would be considered as part of the court's discretion when deciding whether to sanction the merger. Zacaroli J was considering whether to grant a pre-merger certificate in *ABN Amro*. He referred to the "apparent anomaly" in the drafting of regulation 8 which sets the time at which copies of the directors' report must be supplied to employee representatives as not less than two months before the members' meeting. The merger in that case fell within the exception in regulation 13(3) so that no meeting was necessary. The time period for the delivery of the report could therefore never begin. He was content to follow the approach of Norris J. However, he went on to note that the approach was supportable by reference to Article 7 of the 2005 Directive which stated that the directors' report was "intended for members explaining and justifying" the merger. That led him to the view that at least as a jurisdictional matter, it was not necessary for the report to have been provided to the employee representatives, particularly where they had the protection of the

TUPE Regulations. He was satisfied that the employees' interests had been adequately protected.

37. Mr Horan submitted that the judgment of Zacaroli J showed that where the aim of a pre-merger act or formality has been fully met in some other way, then despite some minor or technical non-compliance, a pre-merger certificate can be granted. Mr Horan urged upon me the irrelevance of the publication in the Gazette of the date, time and place of the meeting in circumstances where there is only one shareholder who obviously knows where and when the meeting summoned under regulation 11 is going to take place.

38. I do not agree that Zacaroli J so held. He was confronted with the fact that no alternative time period was provided in the Regulations for the provision of the directors' report to the employee representatives in a case where there was no members' meeting. He accepted the logic of *Waltz Properties*, namely that there was then no timetable set in the Regulations and the adequacy of notice could be considered at the regulation 16 stage. His comment that the directors' report was primarily aimed at members' not representatives explained, in his view, why it was not necessary at the pre-merger stage for the report to have been delivered to the employees. Those two judgments are dealing with a different problem that arises from some glitches in the drafting of the Regulations that the court is bound to construe and apply. I do not therefore consider that these two judgments provide any basis for holding that the jurisdictional requirement in regulation 16(1)(b) is met by an order which states that some but not all of the pre-merger acts and formalities have been properly completed.

39. I therefore hold that the jurisdictional requirement in regulation 16(1)(b) has not been satisfied in respect of Easynet Managed Services Ltd and the court cannot therefore make an order approving the completion of Merger 1.