Neutral Citation Number: [2020] EWHC 1270 (Ch)

Case No: CR-2020-001555

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

IN THE MATTER OF ORGANIC MILK SUPPLIERS CO-OPERATIVE LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 20/05/2020

Before :

MR JUSTICE BIRSS

- -

Andrew Thornton QC (instructed by **Burges Salmon LLP**) for the **Company**

Hearing dates: 14th May 2020

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BIRSS

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Mr Justice Birss :

1. This is an application for permission to convene a Court meeting relating to a proposed Scheme of Arrangement pursuant to Part 26 of the Companies Act 2006. The Scheme is a members' scheme rather than a creditors' scheme. The members are all holders of the ordinary shares (of 50 pence each) in the capital of Organic Milk Suppliers Co-Operative Limited. I will refer to the members as Scheme shareholders. The Scheme shareholders are all milk producers. The company (OMSCo) carries on business as a co-operative milk distributor on their behalf. The principal business of OMSCo involves the purchase of the Scheme shareholders' milk and its onward sale into the dairy market in a manner which seeks both to maximise the milk price returned to such members and provide them with the security of a long-term market for their milk.

2. Each Scheme shareholder is both a holder of ordinary shares in the company and a party to a milk supply contract with the company. Examples of the milk contracts are in evidence. Membership of the company is conditional on being party to a milk contract. Each Scheme shareholder holds ten ordinary shares.

3. The company wishes to undertake a reorganisation involving, amongst other things, the Scheme. The underlying commercial purpose of the reorganisation is to improve the returns received by Scheme shareholders in respect of the milk they produce. The Scheme provides for the ordinary shares in OMSCo to be transferred to a new company, to be called Omsco Group Limited. The new company (OGL) will be a company limited by guarantee formed for the purposes of the Scheme. In exchange for the transfer of their Scheme shares to OGL, each Scheme shareholder will be admitted to membership of OGL. The existing company OMSCo will remain in existence but will then be wholly owned by OGL.

4. The plan is that what will become the holding company, OGL, will sell all members' milk on their behalf, just as OMSCo does now, and be responsible for its collection and testing, and handle membership issues and maintenance of members' capital accounts. OGL will be a member-facing mutual trading company. The current OMSCo will become a wholly owned subsidiary of OGL. OMSCo will buy from OGL all the milk produced by members and focus on using this through contractual arrangements with customers and partners. In other words, it will be the market-facing entity securing access to premium markets for the members' milk it buys.

5. OGL is to be established as a company limited by guarantee for two reasons. First, it will simplify the termination of the membership right of a member whose milk contract is terminated (the existing arrangements in OMSCo involve converting their ordinary shares to deferred shares and then cancelling them). Second it will enable the company to obtain a tax treatment more consistent with its co-operative nature than is currently obtained.

6. Alongside the Scheme, it is proposed to modify the milk supply contracts to which members are party and novate them to OGL. The Scheme and the milk contract novations are part and parcel of a single reorganisation. In deciding how to approach the Scheme, a Scheme Shareholder will consider both the terms of the Scheme and the changes to the milk contracts. Similarly, in determining its approach to the Scheme, the Court is entitled to take into account the changes to the milk contracts,

both when considering questions of jurisdiction at this stage, and fairness at the sanction stage - see ***Re Baltic Exchange Ltd*** [2016] EWHC 3391 at §17 (citing ***Re Stemcor Trade Finance Ltd*** [2016] BCC 194 at §§ 17-18.).

7. The modifications to the milk contracts will allow OGL to be able to collect a levy from members to strengthen the company's balance sheet and invest in future initiatives. It will also facilitate OGL's ability to raise additional bank funding by allowing OGL to offer security over funds held within OGL which are destined to be paid to the members. Shareholders who do not wish to be bound by the new contracts will have the right to terminate. They will either never become or will cease to be members of OGL in that event.

8. The Scheme is a scheme between the company (OMSCo) and the Scheme shareholders. It is proposed that OGL will become bound by the Scheme through the provision of an undertaking to the Court. OMSCo's deferred shares do not form part of the Scheme and are unaffected by it. Since the Scheme is structured as a transfer, the interests of OMSCo's creditors are not prejudiced by it. There are no options or awards outstanding in relation to the company's share capital.

9. The Claim Form was issued returnable before a High Court Judge, rather than an ICC Judge, owing to the complexity of the reorganisation and to enable the company to raise an issue in relation to class composition at this, the permission to convene, stage.

10. To give permission to convene a meeting, the Court needs to be satisfied:

    i) that the Scheme amounts to a compromise or arrangement between the Company and its shareholders (or some class of them);

    ii) that the company has produced a notice and accompanying explanatory statement satisfying the requirements of the Act;

    iii) that the appropriate class meeting(s) are proposed; and

    iv) that appropriate directions for the convening of the meeting are proposed.

11. I was satisfied about (i), (ii) and (iv) at the hearing and there is no need to address those issues in this judgment.

12. Item (iii) relates to classes. I indicated at the hearing that I was satisfied about that too but that I would give my reasons in a judgment afterwards. This is the judgment. The law in relation to class constitution was set out by Mr Thornton QC in his skeleton argument. There was no dispute about it and I set it out here. The question of class constitution is answered by reference to an analysis of members' rights rather than interests. This principle is derived from ***Sovereign Life Assurance Co v Dodd*** [1892] 2 QB 573 which established the basic test for determining class constitution in the context of a creditor scheme. Bowen LJ held at p. 583 that creditors fall within the same class if their "*rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest.*" The question of whether the rights of members (or creditors) are so dissimilar as to prevent them from constituting a single class depends on an analysis "*(i) of the rights which are to be released or varied under the scheme and (ii) of the new rights (if any) which the scheme gives, by*

way of compromise or arrangement, to those whose rights are to be released or varied": ***Re Hawk Insurance Co Limited*** [2001] 2 BCLC 48 per Chadwick LJ at §30.

13. The fact that there may be certain differences between the rights of members does not mean that they must be placed in separate classes for the purposes of considering a scheme. A broad approach is to be taken. Accordingly, differences may be material without leading to separate classes: ***Re Telewest Communications plc*** [2005] 1 BCLC 752 at §37 and ***Hawk*** (above). If members have similar rights under a proposed scheme, but different commercial interests, this does not affect the issue of class constitution but may be relevant to the exercise of the Court's discretion under section 899 to sanction the scheme. The safeguard under Part 26 of the Act against majority oppression is that the Court is not bound by the decision of the scheme meeting: ***Re BTR plc*** [2000] 1 BCLC 740 at p. 747.

14. Finally, I refer to ***Baltic Exchange*** and ***Stemor*** above, which explain that in assessing whether classes of members (or creditors) have been correctly constituted for the purposes of a scheme, the Court should not adopt a narrow approach, looking only at a scheme in isolation from other arrangements entered into collaterally with the scheme.

15. The application was supported by the witness statement of Amanda Grist, the Finance Director of OMSCo. The point on class composition is this. There are in fact two kinds of ordinary shareholders. In addition to the shareholders who became members after OMSCo was founded, of which there are currently over 200, there are also 4 founder members of OMSCo. The founder members hold ten ordinary shares each, just as any other member does, but they also have certain enhanced rights under the company's articles of association. By Article 12 the founder members have a veto over change control and some other enhanced voting rights. In fact they have all consented to the change control involved in the scheme. The enhanced voting rights apply in relation to potential changes to the articles. On votes to change the particular articles, the founder members carry 75.1% of all the votes cast. The particular articles subject to these enhanced rights are Articles 17.1, 19.2, 19.8 and 24.1. Article 17.1 provides for one member having one vote. Article 19 relates to the Board of Directors. Within it Article 19.2 provides the founder members with the right to appoint three founder directors of the company while Article 19.8 relates to retirements. Article 24.1 relates to removal of directors. In effect it ensures that the founder members have the same enhanced rights in relation to removal of a founder director.

16. Therefore at one level it is manifest that the founder members have different legal rights than the other ordinary shareholders. One might think therefore that they ought to be in different classes. The effect of putting the founder members in a separate class would be that there were two classes of members to whom the provisions of the Act would apply concerning approval of the Scheme.

17. However it is relevant to examine what is to happen to the founder members' rights as a result of the Scheme. The evidence is clear that all the rights I have described are preserved under OGL's proposed articles of association. The relevant new articles are Articles 8, 12, 14 and 19. Mr Thornton took me through the new articles in detail to make that point good. Therefore, although the founder members will be carrying enhanced rights both into the Scheme and out of the Scheme, when it comes to

considering how to vote in relation to the Scheme, they will have the same broad question to consider as the other Scheme shareholders. That is whether to surrender the bundle rights they have against OMSCo in exchange for the grant of the same bundle of rights by OGL. This is not a case, for example, in which the holders of enhanced rights in the company are instead going to be effectively paid to surrender those rights, nor a case in which the holders of enhanced rights acquire new rights of a materially different kind from those they previously had. In my judgment, Mr Thornton is right in his submission that these differences between the founder members and the other Scheme shareholders are not such as to make it impossible for them to come together in a single meeting to consider the Scheme in their mutual interest.

18. I am told that similar approaches were taken in the unreported cases of ***Re Oxford Immunotec Ltd*** (unreported) 1 October 2013 (per Sales J and David Richards J (at the convening and sanctioned stages respectively) and ***Re The City Pub Company (West) plc*** (unreported, Carr J) 31 October 2017.

19. At the hearing I raised another question about class composition with Mr Thornton. This relates to the milk contracts. Although, subject to the founder members, all the Scheme shareholders have the same rights vis a vis the company as shareholders, in fact there are two mutually exclusive milk contracts which may apply. The default milk contract is called the Standard Agreement. Other shareholders have an agreement known as the Processor's Agreement. For shareholders with the Processor's Agreement, they process their own milk and only sell surplus milk to OMSCo. In fact there is also a third variant for certain members for producers without antibiotics called the PWAB Addendum. It is clear that the contractual rights the shareholders have with respect to the company therefore are not all identical. It seems to me that the Court is entitled to take this into account in considering class composition (again ***Re Baltic Exchange*** and ***Re Stemcor***). Should these different sets of shareholders be in different classes?

20. The answer is the same as for the founder members. What is envisaged is that although the milk contracts will be varied and novated as part of the overall reorganisation, the rights under these contracts will all change in the same way. Looking at this aspect of the matter, the shareholders with different milk contracts will still have the same broad question to consider as each other, that is whether to surrender the bundle rights they have against OMSCo in exchange for the grant of the same bundle of rights by OGL.

21. For these reasons I agree with the company that all the Scheme shareholders form a single class for the purposes of the meeting.