[2019] IEHC 860

THE HIGH COURT
COMMERCIAL

[2019/413 COS]

IN THE MATTER OF UBS ETFs PUBLIC LIMITED COMPANY

AND

IN THE MATTER OF UBS (IRL) ETF PUBLIC LIMITED COMPANY

AND

IN THE MATTER OF SECTION 453(2) OF THE COMPANIES ACT 2014

AND

IN THE MATTER OF THE COMPANIES ACT 2014 TO 2019

EX TEMPORE JUDGMENT of Mr. Justice David Barniville delivered on the 26th November, 2019:

Introduction:

1. This is an application by two Irish companies, UBS ETFs public limited company and UBS (IRL) ETF public limited company, for orders pursuant to Section 453 of the Companies Act 2014, (the "2014 Act"), sanctioning certain proposed schemes of arrangement between the Companies and their members.

2. In an order made on 11th November, 2019, I fixed today at 11am for the hearing of the Companies' applications. I also gave directions on that occasion in relation to the advertising of the time and date of the hearing in a number of publications, namely the Irish Times, the Irish Independent, the International Edition of the Financial Times and Iris Oifigiúil. That was done on 15th November, 2019 and that is evidenced by the second affidavit of Karole Cuddihy sworn in respect of each of the Companies on 21st November, 2019.

3. I also directed that if any person was to indicate an interest in participating in the applications, that that had to be done by 22nd November, 2019. No such person has given notice of any interest to appear. Again that has been evidenced by the further affidavit of Karole Cuddihy sworn today in the case of each of the two Companies. When the application was called this morning, there was no interested party present. It is appropriate, therefore, to proceed to consider the applications in relation to each of the Companies for orders sanctioning the proposed schemes of arrangement in each case between the company and the scheme shareholders and to make certain consequential orders.

4. I can deal with both Companies together. Counsel for the Companies have provided very helpful written submissions that address the common aspects of both Companies and also the test that I have to apply, and address the basis on which it is contended that the relevant test has been satisfied. I have concluded that the statutory test is satisfied and that it is, therefore, appropriate for me to sanction the proposed schemes of arrangement.

The Companies and the Proposed Schemes

5. The Companies are umbrella investment companies, incorporated in the State, with variable capital within the meaning of Part 24 of the 2014 Act and they are authorised by

the Central Bank of Ireland under the relevant regulations (the European Communities (Undertaking for Collective Investments in Transferable Securities) Regulations 2011 S.I. No. 352/2011 (as amended)). Each of the Companies is an exchange traded fund which has numerous sub funds under its umbrella. Persons who wish to invest in any of these sub funds do so by acquiring participating shares in the relevant sub fund.

6. Most of these exchange traded funds, or ETFs, are multi listed and multi settled, so that the participating shares of the Companies are listed on various exchanges in Europe.

7. Most stock exchanges have their own central counterparty clearing and central security depository. Clearing ETFs across European borders between national central securities depositories in order to satisfy investor demand is both complex and costly, so each of the Companies, the subject of these applications, is proposing to centralise its settlement process for all of its participating shares into a single international central securities depositor called the ICSD+ model, which I am satisfied on the evidence is intended to improve the currently fragmented settlement process, which, as indicated earlier, is complex, costly and time consuming.

8. This new model, the ICSD+ model, is, on the evidence, designed to provide a streamlined and centralised settlement structure which will result in improved liquidity for investors, less liquidity fragmentation and reduced risk in the settlement process.

9. Under this new model, shares will be registered in the register of members in the name of a single shareholder, Clearstream Banking SA Luxembourg ("Clearstream"). That entity will benefit from the rights of being a registered shareholder. It will, however, as nominee, pass on the benefit of those rights. The chain of beneficial holding in this new model, the ICSD+ model, will be similar to existing nominee arrangements under the current settlement models. For the existing limited number of individual shareholders who are on the register of members, their ownership of shares will change from legal ownership to ownership of a beneficial interest through Clearstream. Both the Companies and Clearstream are proposing to create a new international settlement structure that will be safe and efficient.

10. So in essence what is being proposed under the two proposed schemes of arrangement is that the legal but not the beneficial interest in the participating shares in the Companies will be transferred from the current registered shareholders into the name of Clearstream so that it will become the sole registered holder of those shares.

11. I am satisfied that on the evidence put forward by both of the applicant Companies and, in particular, on the affidavit evidence of Mr. Robert Burke sworn in the case of the UBS ETFs public limited company on 6th November, 2019 and by Mr. Philip McEnroe on the same date in respect of the UBS (IRL) ETF public limited company, it would not be practicable to get the individual agreement of each registered shareholder to transfer the legal title into the name of Clearstream and, for that reason, the Companies have reasonably decided that the most effective and appropriate way of achieving the aim is by means of the two proposed schemes of arrangement under Part 9 of the 2014 Act.

Initial Directions

12. Initial directions were made in respect of the schemes of arrangement by the High Court (Haughton J.) on 14th October, 2019. On that occasion both applications were entered in the Commercial List. Directions were made in relation to the convening of the meetings of scheme shareholders and the directions made under Section 450(3) of the 2014 Act were to the effect that there would be, in the case of each company, a single class of members meeting rather than a number of different classes. I will come back to that issue in a moment.

Scheme Meetings

13. The evidence establishes that the scheme meetings took place on 6th November, 2019 and that the requisite special majority in support of the proposed schemes was achieved at each of the two meetings. Consequently, an application is now made to sanction the schemes of arrangement in the case of each company.

Statutory Requirements

14. The statutory requirements in respect of this application for the sanctioning of the schemes of arrangement are set out in Section 453 of the 2014 Act. Certain conditions must be satisfied and they are set out in Section 453(2)(a), (b) and (c). In particular under (a), there must be the relevant special majority; under (b), there must be notice of the passing of the relevant resolution and of the application to court advertised in at least two daily newspapers circulating in the district where the registered office or principal place of business of the company is situated; and under (c), the court must sanction the scheme of arrangement.

The Test

15. The test to be applied by the court in determining whether the schemes should be sanctioned was summarised by reference to five criteria by Kelly J, as he was, in the *Re Colonia Insurance (Ireland) Ltd* [2015] 1 I.R 497. To paraphrase what Kelly J. said in that case, the following five criteria must be satisfied: First, the court must be satisfied that sufficient steps have been taken to identify and notify all interested parties; second, the court must be satisfied that the statutory requirements and all directions of the court have been complied with; third, the court must be satisfied that the class or classes of creditors have been properly constituted; fourth, the court must be satisfied that there is no issue of coercion; and fifth, the court must be satisfied that the scheme of arrangement is such that an intelligent and honest person, who is a member of the class concerned, acting in respect of his or her interests might reasonably approve the scheme. It is also the case, clearly, that the court will not sanction a scheme which is ultra vires.

16. Those five criteria were repeated by Kelly J. in the In *Re Depfa Bank plc* [2007] IEHC 463 case and were recently considered and applied by me in *Re Ballantyne plc* [2019] IEHC 407. It is appropriate to consider each of those five criteria in turn based on the evidence in this case.

17. I will start with the first criterion, namely that steps must have been taken to identify and notify all interested parties. I am satisfied, based on the evidence of Mr. Burke and Mr. McEnroe, in respect of each of the two Companies, that the Companies have complied

with the directions given by Haughton J. on 14th October, 2019 concerning the notice to be given to all members of the Companies. The interested parties in the context of the two Companies at issue are the members of the Companies as listed in the Register of Members. Those directions were complied with by the placing of the advertisements and by the sending of scheme circulars to all of the members. That is all confirmed in the various affidavits sworn by Keith Geoghegan of State Street Fund Services (Ireland) Ltd. and by Barry Saville of Computershare in respect of each of the two Companies.

18. I am satisfied, therefore, that, on the evidence, that all persons affected by the two schemes have been duly notified of the schemes by the circulation of scheme circulars to the members i.e. scheme shareholders, which contained the information required by Section 452 of the 2014 Act.

19. I turn next to the second criterion, namely compliance with the statutory requirements and court directions. The scheme meetings were convened in accordance with the directions given by Haughton J. on 14th October, 2019 and those meetings took place on 6th November, 2019. I have already indicated that the directions given by Haughton J. were complied with on the evidence before the court. It is clear also on the evidence that the scheme circulars satisfied the requirements of Section 452 of the 2014 Act and contained all of the information required by that section.

20. The affidavits of Mr. Burke and Mr. McEnroe and the minutes of the scheme meetings satisfy me that the Companies have complied with the requirement in Section 453(2)(a) of the 2014 Act, and demonstrate that there was a special majority in favour of the schemes. That is evident from the fact that, in each case, all of the votes cast were in favour of the schemes at those meetings.

21. For the purposes of Section 453(2)(b) of the 2014 Act, the affidavits of Karole Cuddihy sworn on 7th November, and 21st November, 2019 persuade me that the requirements in that paragraph have been complied with; notices in relation to the scheme meeting and of the EGMs at which certain resolutions concerning the schemes were passed were placed in the Irish Times, the Irish Independent, the International Edition of the Financial Times and in Iris Oifigiúil on 18th and 19th October, 2019.

22. The final requirement in Section 453(2)(c) of the 2014 Act, is the requirement that the court sanctions the scheme of arrangement. That is obviously the subject of these applications.

23. As regards the third criterion, class composition, as mentioned earlier, on 14th October, 2019 one of the issues considered by Haughton J. in convening the meetings was whether or not the holders of participating shares ought to be segregated into different sub classes by reason of the fact that their participating shares were referable to different sub funds. Having considered the matter at that stage (on an *ex parte* basis), Haughton J. directed that a single meeting of members of each of the applicant Companies should be held. No person has attended today to indicate that that was an incorrect view and, as the cases make clear, the court will be slow to reach a contrary view, particularly in circumstances

where no one was or is agitating for a contrary position. Indeed, I think it can be fairly said that while the court is clearly not a rubber stamp, the Companies might well be entitled to feel aggrieved if, in circumstances where there was no opposition, the court were to reach a different view of the appropriateness of the meetings convened and, in particular of the fact that they were convened as single class meetings rather than different meetings of different classes. In any event, as the previous determination by Haughton J. was made on an ex parte basis, it is necessary for the court to reconsider the position on these applications.

24. The leading statement on the question of classes of meetings for present purposes is that made by Bowen LJ. in the Court of Appeal in *Sovereign Life Assurance Company v Dodd* [1892] 2 Q.B. 57., where he made it clear as follows:

> *"It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest*." (at p. 583)

25. So the correct focus is on the rights, in particular, the legal rights, possessed by the different members. And in this case there is, it is clear on the evidence, no difference between the rights of the relevant members irrespective of whether their participating shares are referable to different sub funds.

26. The written submissions helpfully provided by the applicant Companies refer to a number of authorities, in particular, from the Court of Appeal of England and Wales and from a number of other jurisdictions, including, Ireland, which address the single class/different classes issue. However, I do not think it is necessary for me to go into those in any detail. They all apply carefully the test stated by Bowen LJ. in the *Sovereign Life* case, which test has also been applied in this jurisdiction by Laffoy J. in the High Court in the case of *Re Millstream Recycling Ltd.* [2010] 4 I.R. 253. The principles were very helpfully summarised by Lord Millett in the Court of Final Appeal of Hong Kong in *Re UDL Argos Engineering Ltd.* [2001] HKCFA 54. For present purposes, I think it is sufficient for me to say that I approve of the observations of the Court of Appeal in England, in particular those of Chadwick LJ. in Re BTR Plc [2000] 1 BCLC 740 and in *Re Hawk Insurance Company Ltd.* [2001] 2 BCLC 480 as well as those of Laffoy J. in *Millstream Recycling*, which all focus on the rights of the members or creditors concerned with a proposed scheme of arrangement as being the crucial determining factor on the single class/different classes issue. I am satisfied that they correctly represent the law in this jurisdiction. I also believe that the helpful summary set out by Lord Millett in *UDL Argos Engineering Ltd*. is of assistance.

27. It seems to me that two arguments might be put forward to support a contention that different classes of members should have been found and that the meetings should have proceeded by way of different classes. They have been addressed in the affidavits and in the written submissions. They are, first, the argument that some of the sub funds may be

more valuable than others and, therefore, some of the participating shares may be more valuable than others. That may well be the case, but, in my view, that difference in economic value is not relevant for present purposes and does not require segregation of the participating shareholders into different classes, so that it was not necessary on that basis, in my view, to direct that there be a separate meeting for each sub fund. That is because it is necessary to focus on the rights attaching to the shares rather than the economic value of those rights. The schemes do not provide for any alterations to the rights attaching to the participating shares. Nor do the schemes seek to alter the economic value of any particular share. The schemes provide for similar treatment in relation to all classes of participating shares. It is, in my view, irrelevant to the question under consideration that the underlying economic value of the participating shares referable to the sub-fund may be greater or lesser than that of the participating shares referable to another sub-fund. So that is, I think, the first argument that might be made. However, for the reasons mentioned, I do not believe that it was necessary to segregate into different classes on the basis of the different sub-funds and any difference in economic value.

28. The second argument that might be made is that while most of the participating shares are held through nominees, some a small minority of the registered shareholders are also beneficial owners. But again it seems to me that that did not require segregation of the members into separate classes when one considers, in accordance with the legal principles and the cases which I have mentioned, that the focus must be on the legal rights attaching to the relevant shares. In my view, the legal rights attaching to the participating shares are not so dissimilar that the holders of those shares could not fairly be asked to vote together on these schemes.

29. That is, I believe, sufficient to deal with the potential arguments that might be advanced in support of separate classes of members. In my view, the order made by Haughton J. directing the convening of meetings on the basis of a single class of members in the case of each of the Companies was correct. Nobody has argued to the contrary. I am satisfied, therefore, that the third of the criteria identified by Kelly J. in Colonia has been satisfied in the case of both Companies.

30. The fourth criterion is that the court must be satisfied that there has been no coercion. As was pointed out by me in *Ballantyne*, every scheme in a sense involves an element of coercion. But I think what this criterion is focused on is the question of improper coercion or pressure in the sense of being almost like the oppression of a minority interest in the company (see *Ballantyne*, para 63). Nobody is suggesting that that is the case here and it is quite clear on the evidence, in particular, on the affidavit evidence that I have considered, that there is no question of improper coercion or pressure in this case by one member of or on another.

31. The fifth criterion is that the court must be satisfied that a reasonable, intelligent and honest person could have reasonably supported the particular scheme. There are many authorities on this aspect of the test and on the approach which the court should take in

considering whether this criterion has been satisfied. It is unnecessary, I think, to set out all of those. It was perhaps most succinctly put by Kelly J, in the *Depfa Bank* case, where he said:

> "*The scheme of arrangement must be such that an intelligent and honest man"* and I would change that to "person" *", member of the class concerned, acting in respect of his or her interest might reasonably approve of it.*"

And he continued:

> *"As I pointed out in Colonia, it is not the function of the court to act as a rubber stamp. However, the court will be slow to differ from experienced persons in the industry who are familiar with the subject matter of the scheme."* (at para 12.)

32. That, I think, describes the approach that the court has to take. It was the approach that I adopted in the Ballantyne case where I pointed out that it would be extremely rare for a court to refuse to sanction a scheme where it has been approved by an overwhelming majority, in particular, where the classes of members are correctly constituted and there is no suggestion that the majority did not represent the views of the class. While that test has been considered in many other cases, it is, I believe, unnecessary to discuss or consider those cases. In my view, the test is concisely put in Depfa and I apply it here.

33. It is quite clear from the affidavits of Mr. Burke and Mr. McEnroe that the overwhelming majority of members have supported these schemes. The schemes have been carefully considered by the respective boards of the Companies and they have been recommended by those boards. There are very good, sound and practical reasons for the objectives being sought from the schemes. It is, in my view, a reasonable way of proceeding to achieve those objectives. Finally, it seems to me on the evidence that the schemes are fair and equitable and are such that a reasonable, intelligent and honest person acting in respect of his or her own interests might reasonably approve of those schemes.

34. In this regard, I also note from the evidence that there will be no adverse effect for employees or creditors. The Companies have no employees and there will be no adverse effects for creditors.

35. In those circumstances, I will sanction the proposed schemes of arrangement in respect of the two Companies under s. 453(2) of the 2014 Act and make the consequential orders sought.