

International Corporate Rescue



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CASE REVIEW SECTION

In the Matter of Ophir Energy PLC [2019] EHC 1278 (Ch)

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Synopsis

The Court sanctioned a scheme of arrangement ('Scheme') despite objections of a shareholder as to the disclosure in the Explanatory Statement. The Court found that as the shareholder had not raised its objections with Ophir Energy Plc ('Ophir') or the Court in a timely manner and had not attended the Scheme meeting or the sanction hearing, no weight could be attached to its objections.

Abstract

Ophir, an energy company, asked the Court to approve a Scheme pursuant to Part 26 of the Companies Act 2006. Approval was delayed in response to concerns raised by an institutional shareholder, Legal & General (the 'objecting shareholder'), that shareholders had not been given all of the necessary information to make an informed decision in relation to the Scheme.

The purpose of the proposed Scheme was to enable Ophir's takeover by another energy company, Pt Medco Energi Internasional ('Medco'). Ophir's directors unanimously supported the takeover, which was to be effected by a transfer of shares at a significant premium to the undisturbed share price as at the day before the announcement of Medco's offer. The offer price was raised from its initial amount following indicative interest from two other parties. At the statutory shareholders' meeting the turnout was 15.4 per cent and 81.76 per cent of shareholders voted in favour of the Scheme.

Before the meeting to vote on the Scheme on 25 March 2019, the objecting shareholder had raised concerns regarding the conduct and decision-making process adopted by the directors to maximise shareholder value. On 21 March 2019, the objecting shareholder contacted Ophir to raise concerns, obliquely, as to the adequacy of information disclosed to shareholders. The objecting shareholder did not respond to a request from Ophir's advisors to specify the nature of these concerns.

Just before the sanction hearing on 17 May 2019 (almost two months following the Court convened shareholder meeting), the objecting shareholder

informed Ophir of its view that inadequate disclosure of information had resulted in the probability of successfully opposing the Scheme being very low. It indicated that it would therefore not attend the sanction hearing to oppose the Scheme. Ophir accepted that, while it provided evidence that the directors had considered the specific issues referred to by the objecting shareholder, the Explanatory Statement had not addressed such issues. However, Ophir strongly denied the allegations against it.

Held

The Court sanctioned the Scheme.

Failure to appear at the sanction hearing – In the absence of the objecting shareholder appearing at the sanction hearing to raise its concerns and providing detailed background to the points it had made, the Court was unable to determine whether the specific issues were material and should have been dealt with differently in the Explanatory Statement. The reasoning provided by the objecting shareholder for not appearing at the sanction hearing, namely that the probability of successfully opposing the sanction hearing was very low, was misconceived: if there was reasonable cause to doubt that sufficient information had been disclosed to shareholders, the Court would have the power to compel Ophir to give disclosure in relation to the relevant issues to members who wished to oppose the Scheme. At the very least, the Court could have required the relevant issues to be addressed directly in evidence from Ophir. Though the objecting shareholder had not raised concerns over the costs of appearing at the sanction hearing, as per *Stronghold Insurance Company Limited [2018] EWHC 2909 (Ch)* parties who have genuine issues to raise as to the adequacy of the information provided to members or creditors should not be deterred from appearing at a sanction hearing by concerns over costs (see paras 32-33, 39 of the judgment).

Delay and lack of detail in raising concerns – the time between the objecting shareholder first receiving the Explanatory Statement, on or shortly after 1 March 2019, and the first point at which it raised, obliquely,

its issues with the adequacy of disclosure under the Explanatory Statement, 21 March 2019, affected the Court's assessment of the weight to attach to the views expressed by the objecting shareholder. Promptly following the objecting shareholder's communication with Ophir on 21 March 2019, Ophir and its advisers invited the objecting shareholder to identify its specific concerns. The objecting shareholder's failure to do so deprived Ophir of the ability to take steps, if it had believed there was merit to these concerns, to deal with such concerns, for example by seeking permission of the Court to adjourn the Court convened shareholder meeting and to circulate a supplementary Explanatory Statement. This approach contributed to the impression that the objecting shareholder's concerns were not genuine: the Court believed that the objecting shareholder's failure to raise its points earlier, and in more detail, gave the impression that it was 'engaged in sniping at the Explanatory Statement from the sidelines at the last minute'. The Court dismissed the objecting shareholder's complaints on this basis (para 40 of the judgment).

Sale of asset after Court convened shareholder meeting – The sale of an asset, after the Court convened shareholder meeting, which was in line with Ophir's strategy as outlined in the Explanatory Statement did

not amount to a material adverse change or occurrence since the Court convened shareholder meeting that would raise the concern that members might have taken a different view of the Scheme if they had known of it (paras 42-44 of the judgment).

Comment

This case should be considered in conjunction with the judgment in *Stronghold Insurance Company Limited [2018] EWHC 2909 (Ch)*, which the Court in this case referenced and which came to similar conclusions on a number of points. These cases demonstrate the need for parties with objections to a Scheme to raise such objections early and in detail. This is particularly true for large corporations or financial institutions, who are well-resourced and have the benefit of legal advice. Parties with objections to a Scheme should attend the sanction hearing or else risk their objections appearing insincere in the eyes of the Court. In the view of the Court, the costs of appearing at the sanction hearing should not deter attendance at the hearing for parties with genuine objections, as there is little likelihood of an adverse order for costs arising from raising genuine objections in a timely manner.

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