Re ColourOz Investments 2 LLC and Others [2020] EWHC 1864 (Ch), Snowden J

Nicholas Cooper, Associate, Freshfields Bruckhaus Deringer LLP, London, UK

Synopsis

This is the convening hearing judgment for schemes of arrangement pursuant to Part 26 of the Companies Act (the 'Schemes') in respect of certain entities of the Flint group of companies (the 'Flint Group'), a global printing and packaging supplier. This was the first scheme of arrangement judgment to apply the New Practice Statement (as defined below). Whilst not in immediate financial distress, the Flint Group proposed the Schemes to extend the maturity on their main credit facilities (among other amendments). Creditors were provided with 17 days' notice (including three weekends) of the convening hearing. Considering the notice to be inadequate, the Court applied the New Practice Statement to make an order permitting creditors an extended period to subsequently seek to vary or discharge the convening order due to the lack of adequate notice whilst still permitting the convening of the Schemes.

Factual background

It had become clear that the Flint Group would be unable to repay or refinance their first and second lien facilities at maturity and so would be forced to conduct a distressed disposal of the business (and there was some concern that in the wake of the Covid-19 pandemic, such a disposal may result in a lower achievable price or a failure to carry out a sale altogether). The Schemes proposed, among other things, an extension of the maturity date for both facilities along with higher interest rates and an exit fee.

In advance of the proposal of the Schemes, the Flint Group had engaged with a material subset of its lenders (owning approximately 50% of the first lien and 90% of the second lien debt), who had formed an ad-hoc group ('AHG') and subsequently entered into a lock-up agreement whereby the locked-up creditors agreed to support the Schemes. Amendments were also made to the governing law and jurisdiction clauses of the facilities, which had originally been governed by New York law, but were amended to English law and subject to English jurisdiction. The lock-up agreement remained open to accession, and by the time of the convening hearing almost all creditors (approximately 97% of first lien and 99% of second lien creditors) had acceded.

Although there had been substantial engagement with the AHG and locked-up creditors in advance of the proposal of the Schemes, and communication with the broader creditor group through the use of lender data sites, the Scheme creditors were given two working weeks' (a total of 17 days including three weekends) notice of the convening hearing.

It is also notable that very shortly after the issuance of the Practice Statement Letter by Flint Group, the practice statement in relation to schemes of arrangement ('Practice Statement (Companies: Schemes of Arrangement)' dated 2002) (the '2002 Practice Statement') was replaced by a new practice statement (the 'Practice Statement (Companies: Schemes of Arrangement under Part 26 and Part 26A of the Companies Act 2006' dated 26 June 2020) (the 'New Practice Statement'). As such, the New Practice Statement was applicable to the Schemes.

Held

Paragraph 8 of the New Practice Statement requires that notice of the convening of creditors meetings 'should be given to persons affected by the scheme in sufficient time to enable them to consider what is proposed, to take appropriate advice and, if so advised, to attend the convening hearing. What is adequate notice will depend on all the circumstances.' Snowden J noted two cases of relevance to the 2002 Practice Statement (which he considered were still applicable to interpretation of the New Practice Statement).

In *Re Indah Kiat International Finance Co BV [2016] BCC 418*, Snowden J that where there is great financial urgency behind the scheme being put forward, it may be justifiable to reduce the notice period, but that in the absence of substantial urgency the practice statement ought to be followed. The Court, Snowden J said, must be 'astute to detect any attempt to 'bounce' creditors into a convening hearing in relation to a complex or novel scheme on inadequate notice'. In *Re NN2 Newco Ltd [2019] EWHC 1917 (Ch)* Norris J had endorsed the position of *Indah Kiat* and added that the nature of the

scheme creditors and their claims would also impact on the adequacy of any period of notice given.

Counsel sought to justify the 17-day notice period by reference to the high number of scheme creditors locked-up, the extensive period of engagement with creditors in advance of the convening and the sophisticated nature of the creditors involved. Snowden J held that whilst the early engagement and nature of creditors were both of relevance (as the quoted cases indicated), he ultimately did not accept that these factors objectively justified a shorter period of notice.

Snowden J explained that in the majority of modern restructurings, groups of early engaging creditors (such as the AHG in this case) have substantial influence over the form of a restructuring. The locked-up creditors, and those that accede (often in exchange for a 'consent fee') at an early stage commit to support a deal and so, as Snowden J explained

> 'it is increasingly the case that by the time the formal scheme process is launched and the court becomes involved, the commercial deal has been done, and achieving the statutory majorities at the scheme meetings is assured provided the court agrees with the classes proposed by the company'.

The necessity to give adequate notice to the scheme creditors is not for the benefit of those who have already engaged in the restructuring process, but as part of the court's 'essential role to ensure the fairness of the process and to provide appropriate protection to the minority from the use of majority power'. Whether or not adequate notice had been provided was to be judged by reference to those creditors who are not locked up – ensuring that they would have adequate time to consider and (potentially) oppose the Schemes.

Snowden J held that given the lack of urgency as a result of there being no immediately impending financial crises and the Schemes' complexities, there was no good reason to give such a short notice period of the convening hearing. However, he did not consider it necessary to adjourn the convening hearing, noting both the small number of non-locked up creditors and lack of any stated opposition to the Schemes. Instead, Snowden J opted to apply paragraph 12 of the New Practice Statement to make an order permitting creditors to apply (for an additional period after the convening hearing) to vary or discharge the convening order whilst still convening the creditors meetings as requested by the Flint Group.

Comment

The Flint Group Schemes are the first example of the New Practice Statement being applied, having come into force as it did very shortly after the Practice Statement Letter for the Schemes was issued. Snowden J's judgment makes two things clear. Firstly, that previously established jurisprudence in relation to the practice statement letter will continue to apply. Secondly, that whilst the New Practice Statement provides the Court with flexible options to remedy deficiently provided notice, it should not be thought that this would permit scheme companies to give insufficient notice in future. In short, debtors should not depend on the pragmatism of the Court in lieu of giving proper notice.

The Court also considered the class compositions for the Schemes dealing with varying interest rates, cross-holdings, consent fees and lock-up agreements. Whilst there is nothing especially controversial in the Court's conclusions (the Judge ultimately agreed with the Flint Group's proposed class composition), the judgment provides a useful and detailed summary of the case law and the Court's approach to these issues which will likely provide a convenient reference for those considering class composition and adequacy of notice in a scheme of arrangement or the new restructuring plan (notably, this case was referenced in relation to the timing of notice of convening in the first restructuring plan judgment[1]).

One further noteworthy point also derives from the New Practice Statement which refers to the Court's role in 'considering the adequacy' of a scheme company's explanatory statement. Snowden J makes clear that the Court's role here is to ensure that the essential elements are present (and potentially decline to convene creditor meetings if they are not), but not to approve or weigh in on the accuracy of the explanatory statement.

Notes

1 *Re Virgin Atlantic Airways Limited* [2020] EWCH 2192 (Ch).