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

No. CR-2023-003034

Rolls Building
Fetter Lane
London, EC4A 1NL

Friday, 22 March 2024

IN THE MATTER OF **THE COMPANIES ACT 2006**

Before:

MR JUSTICE EDWIN JOHNSON

B E T W E E N :

NETWORK INTERNATIONAL HOLDINGS PLC — Applicant

Mr Andrew Thornton KC (instructed by Allen & Overy LLP) appeared on behalf of the Applicant.

JUDGMENT

MR JUSTICE EDWIN JOHNSON:

Introduction

1 This is an application by Network International Holdings Plc (which I shall refer to as "T**he Company**"). The application is an unusual one. By proceedings which were commenced by a Part 8 claim form issued on 26 June 2023 the Company sought the sanction of the court for a scheme of arrangement which it proposed between the Company and the holders of its ordinary shares who will be subject to the scheme. I will refer to the scheme as "**the Scheme**". The sanction is sought pursuant to the powers of the court to sanction compromises and arrangements under Part 26 of the Companies Act 2006 ("**the Act**") and specifically under s.899 of the Act. An order giving the Company permission to convene a meeting of the holders of its ordinary shares (to whom I will refer as "**the Scheme Shareholders**") and also any consequential directions concerning the meeting was made by ICC Judge Barber on 10 July 2023. I will refer to the shares which are the subject of the Scheme as "**the Scheme Shares**".

2 A meeting of the Scheme Shareholders was convened pursuant to the convening order made by ICC Judge Barber on 4 August 2023. At my request, I have been shown a copy of the Chair's report of the meeting. The report discloses that the Scheme was approved by the Scheme Shareholders at this meeting by the requisite statutory majorities. I note in passing and on a point of detail that paragraph 8 of the report appears to give the wrong figure for the percentage of Scheme Shareholders present at the meeting who voted in favour of the Scheme. If, however, the arithmetic is corrected, and I have been told by Mr Thornton KC (representing the Company) that the report will be corrected, there will still be the required majority of Scheme Shareholders in favour of the scheme.

3 The next step following the meeting would normally be the application for sanction of the Scheme to proceed to a hearing at which the court will decide whether to sanction the Scheme. There is, however, a problem which means that the sanction hearing has yet to take place.

4 The problem arises in the following circumstances. The Scheme, as it is currently drafted, contains an effective long stop date of 9 April 2024. Clause 8(B) of the Scheme provides as follows:

> *"(B) Unless this Scheme has become effective on or before 9 April 2024, or such later date, if any, as may be agreed in writing by Bidco and Network (with the Panel's consent and as the Court may approve (if such approval(s) are required)) this Scheme shall never become effective".*

5 The transaction which is intended to be implemented by the Scheme requires regulatory approval in a number of different jurisdictions before it can be brought into effect. If the long stop date in Clause 8(B) is not extended, the concern is that the required regulatory approvals will not have been obtained by 9 April 2024, with the consequence that the Scheme will lapse. In these circumstances a deed of extension has been executed on 14 March 2024 between the relevant parties by which the long stop date in Clause 8(B) is extended to 9 October 2024; that is to say, an extension of time for a period of six months. The extension is expressed to be conditional upon the approval of the court or, if the court considers that no such approval is required, on the court confirming that no such approval is required.

6 The Company now applies to the court for an order approving the extension of time and adjourning the hearing of the application for sanction of the Scheme to a date to be fixed.

7 On the hearing of this application, the Company is represented by Mr Andrew Thornton KC. No notice of this hearing has been given to any of the Scheme Shareholders. In this context Mr Thornton has pointed me to an announcement made on 15 March 2024 that agreement has been reached, with the consent of the Takeover Panel and subject to the approval of the court, to extend the long stop date from 9 April 2024 to 9 October 2024. Prior to this hearing I asked to see the formal application notice by which this application (that is to say, the application to approve the extension of the long stop date) had been made. It turned out that no application notice had been issued, on the basis that the same was not considered necessary. It seems to me that the application for approval is an application made in the course of proceedings, like any other, and requires an application notice. I will come back to this point later in this judgment.

The evidence

8 The evidence in support of this application is contained in the second witness statement of Mrs Jaishree Razzaq, Group Risk Officer and Group Company Secretary of the Company. This second witness statement is dated 18 March 2024. In the second witness statement Mrs Razzaq outlines the position in relation to the regulatory conditions which have still to be satisfied before the Scheme can become effective. According to the announcement made on 15 March 2024 the current position, subject to one qualification to which I shall come, is as follows, quoting paragraph 2.4 of Mrs Razzaq's second witness statement:

> "*The Long Stop Date Extension Announcement also set out that engagement is still ongoing with Relevant Authorities regarding receipt of regulatory change of control clearances (the **Outstanding Clearances**) from the Central Bank of the UAE and the relevant regulatory authorities in Kenya, Nigeria and Saudi Arabia (the **Remaining Regulators**) as required pursuant to Conditions 3(A), 3(E) and 3(F) of Section A of Part III of the Scheme Document, being the principal outstanding Conditions to the Scheme".*

9. By way of a further update, I was told by Mr Thornton in this hearing that regulatory change of control clearance had been obtained from the Central Bank of the UAE.

10. Mrs Razzaq also confirms, in paragraph 3.2 of her second witness statement, that the Executive Panel on Takeovers and Mergers has consented to the extension of what I am referring to as the long stop date. There is no document which I have seen to confirm this, but according to Mr Thornton's skeleton argument this consent was obtained by telephone on 14 March 2024.

The Scheme

11. For the purposes of this judgment, it is not necessary to go into the Scheme in any detail, but I provide the following summary of the Scheme, which I take from the summary set out by Mr Thornton in his skeleton argument for this hearing.

12. The Company is a public company limited by shares. The Company's ordinary shares are admitted to trading on the main market of the London Stock Exchange. The business of the Company is that it provides a full suite, as it is described, of technology enabled payments solutions to merchants and financial institutions of all types and sizes, including acquiring and processing services.

13. The underlying commercial purpose of the Scheme, as it is described, is to enable BCP VI Neptune Bidco Holdings Limited ("**Bidco**") to acquire the entire issued and to be issued share capital in the Company. Bidco is an entity indirectly owned by Brookfield Business Partners and private equity funds advised and/or managed by affiliates of Brookfield Asset Management Ltd. For any Scheme Share held at the Scheme record time, as it is referred to, and transferred to Bidco under the Scheme, a Scheme Shareholder will receive 400 pence in cash with an option to receive in lieu of a cash consideration one B ordinary share in Neptune Project Rollover Holdings Ltd, an associated company of Bidco.

Is there jurisdiction to make the order which is sought?

14. Mr Thornton submits that I do have jurisdiction to make the order which is sought. In terms of jurisdiction, it seems to me that there are two related questions which arise. The first question is whether the approval of the court is required at all. The second question is whether the court actually has any jurisdiction to grant such approval. There is nothing specific which either Mr Thornton or I have been able to find in the Act which assists on these questions. There is no specific power conferred on the court by the Act to approve an extension of a long stop date in a scheme of arrangement. Part 26 of the Act envisages a two stage process involving (i) the making of a convening order pursuant to s.896 and, (ii) following the convening of the meeting and assuming a favourable outcome to the meeting, the hearing to consider whether the relevant scheme should be sanctioned pursuant to s.899. Clause 8(B) of the Scheme does provide for the long stop date to be varied to a later date if three conditions are satisfied. The first is that the variation must be agreed between the Company and Bidco. The second is that the Takeover Panel's consent is obtained. The third is that the court must approve the variation to the long stop date, but this third condition is hedged by the qualification that such approval is only required if the court decides that such approval is required, which effectively begs the questions on jurisdiction which have to be answered.

15. There is also Clause 9 of the Scheme, which provides as follows:

> "**9.** ***Modification***
>
> *Network and Bidco may jointly consent on behalf of all persons concerned to any modification of, or addition to, this Scheme or to any condition which the Court may approve or impose. Any such modification or addition shall require the consent of the Panel where such consent is required under the Takeover Code. No modification to the Scheme can be made pursuant to this clause after the Scheme has taken effect".*

16. Clause 8(B) does render it a contractual requirement that the approval of the court must be obtained to an extension of the long stop date, but this does not answer the question of jurisdiction for two reasons. First, such approval is only expressed to be required, if it is required. Second, the parties cannot confer by contract a jurisdiction upon the court which the court does not otherwise have.

17. Mr Thornton has told me that there have been very few applications of this nature made to the court before. The Company is aware of at least three such applications, two of which did not result in a reported reasoned judgment. The first was a decision of Nugee J (as he then was) in relation to the takeover scheme in respect of Newcon Group Plc. In that application an order similar to that sought by the Company in the present case was made and the judge indicated that it was appropriate for the application to be made prior to the long stop date rather than seeking approval of the scheme once the long stop date had lapsed. A similar application was made in respect of Synergy Health Plc and again the court granted an order extending the long stop date. Both of these applications, as I understand the position, were determined in 2015.

18. In *Re Emis Group Plc* [2023] EWHC 1543(Ch) Michael Green J considered a similar application pursuant which the company sought to extend the long stop date prior to the sanction hearing in order to allow a Phase 2 investigation by the Competition and Markets Authority to be completed in relation to the proposed transaction. Again, the judge granted the application. I have been provided with a copy of a transcript of a short judgment given by Michael Green J on that application. I note that in that case the approval of the court was sought for an extension to the long stop date for a period of one year. The application to approve the extension to the long stop date was sought after the convening order in May and after the relevant meeting had taken place and the requisite majority had been obtained in favour of the scheme. The essential factual background was, therefore, the same as in the present case.

19. In his judgment, after reciting the relevant provisions of the scheme which provided for the long stop date to be extended, Michael Green J concluded in the following terms:

> "*8. But it is out of an abundance of caution that the Company does seek the approval of the court to this modification. The Company will still have to decide whether to proceed with the scheme without further shareholder approval or to convene another meeting before seeking the sanction of the court. The board has not decided the answer to that question and it depends on what happens in the investigation primarily and what the situation is after that. In any event, the scheme will be subject to the scrutiny of the court in due course at a sanction hearing to make sure that it is fair to proceed on the terms proposed.*
>
> *9. Mr Thornton who, as I have said, appears for the Company, says there have been at least two unreported decisions where judges of this Division have granted such an extension and that makes sense to me. It is far better to get approval before the scheme lapses rather than seeking a retrospective extension after it has lapsed. I will therefore grant the application and approve the extension to the longstop date in the scheme".*

20. Although the judge did not say this in terms, it is clear that the judge accepted that he had jurisdiction to approve the variation of the long stop date and considered it appropriate to do so. It also seems to me fair to say that the question of whether the court had jurisdiction to approve the extension of the long stop date was not in itself the subject of specific consideration by Michael Green J. I understand from Mr Thornton that the position was similar in relation to the other two cases to which he has referred me. It is clear that it has been accepted that such jurisdiction exists, but the question of the basis on which such jurisdiction exists does not appear to have been the subject of any analysis.

21. The question of whether the court does have jurisdiction to grant the approval which is sought on this application is not an easy one. An additional problem which exists with applications for sanction of schemes of arrangement is that when points of this kind do come up, the court may be required to decide the relevant point, as I am in the present case, without argument on both sides. This is not ideal for the determination of points which may be difficult and of significance for other cases. As I have said, this problem does exist in the present case. I, of course, intend no criticism of Mr Thornton in saying this. He has put the case that I do have jurisdiction perfectly fairly.

22. With some hesitation, I have come to the conclusion that I do have jurisdiction to grant the approval sought. Part 26 of the Act confers on the court the power of approval in relation to a scheme of arrangement. The ultimate decision on whether the scheme of arrangement is to be permitted to proceed is for the court. Given this overall jurisdiction, it seems to me that it would be odd if the court was not able to deal with matters arising in the course of the application for sanction.

23. In saying this I bear in mind a number of factors. First, there is the control over sanction of a scheme which is conferred on the court by Part 26 of the Act. Second, there is the control which the court has over the convening of the meeting. Third there is the ability which the court has to give such directions as it thinks appropriate for the convening of the meeting and indeed, in relation to the sanction hearing itself, to consider the question of whether the scheme should be sanctioned. It seems to me that all these various forms of control should be taken to extend to or include (which may be the better word) matters arising in the course of the application for sanction. Such matters seem to me to include a matter such as the application for approval which has come before me in this hearing.

24. It is essentially for the above reasons that I conclude that I do have jurisdiction to grant the approval sought.

25. This leaves the interlinked question of whether the approval of the court is actually required in relation to this application or whether it is for the parties to agree an extension of the long stop date leaving it to the sanction hearing for any Scheme Shareholder to raise objection in relation to or arising out of the agreement of such an extension.

26. It seems to me that if the Company wishes to vary the timetable for the Scheme it should seek the approval of the court to the variation. It seems to me to be right that the court should be able to scrutinise the variation before it is permitted to take effect. Again, this seems to me to be consistent with the overall control over a scheme which is conferred on the court by the Act.

27. I also add this point. I note, in the *Emis* case, that Michael Green J, in the extract from his judgment which I have quoted earlier in this judgment, did suggest that it would be possible to seek a retrospective extension to the long stop date after the original long stop date had

expired and the scheme had lapsed. It seems to me, however, and I understood this to be Mr Thornton's analysis of the position, that once the original long stop has gone by then the scheme ceases to have any effect and cannot be revived. Indeed, and at least in the present case, it seems to me that this result necessarily follows from the terms of Clause 8(B) of the Scheme in the present case which I have quoted above. Clause 8(B) is quite clear in spelling out that if the long stop date goes by, then *"this Scheme shall never become effective"*. In those circumstances, it does seem to me right that if the extension of the long stop date does not take effect before 9 April 2024 the consequence is that the Scheme will be incapable of becoming effective. The Scheme will lapse and, on that hypothesis, it will be necessary for the Company to go back to the starting date, effectively, and seek approval to start the process of applying for sanction of the Scheme all over again.

28. Returning specifically to the question of jurisdiction, I conclude, for the reasons which I have set out and in relation to the extension of the long stop date which has been agreed in the present case, that the court does have jurisdiction to approve the extension and that such approval must be obtained before the extension can take effect.

Should the order for approval of the extension of the long stop date be made?

29. I, therefore, come to the question of whether I should grant the approval sought. It seems to me that there are two questions to consider in this context. The first question is whether it is appropriate for the application to be heard in the absence of an application notice and in the absence of any notice of this hearing having been given to Scheme Shareholders. The second question, assuming that it is appropriate to hear the application, is the substantive question of whether approval should be granted.

30. Starting with the question of notice of this hearing, I take the view, as I have said at the outset of this judgment, that an application notice is required. As I have said, it seems to me that this is an application made in proceedings like any other application made in proceedings. It does, however, seem to me that this particular problem can be solved by the Company giving an undertaking to the court to issue the required application notice, and I understand from Mr Thornton that the Company is prepared through him to give such an undertaking.

31. This then leads on to the more difficult question of the absence of service. An application notice must normally be served on the respondents to the application. In the present case there is no application notice, as matters stand, and there has been no notice of this hearing given to any of the Scheme Shareholders. I do take the point, as Mr Thornton pointed out, that the Scheme Shareholders are not formally parties to these proceedings for sanction of the Scheme. That does not, of course, alter the fact that, as a matter of general principle, the Scheme Shareholders are the parties directly affected by the Scheme and the parties who have to approve the Scheme in the court convened meeting and the parties whose interests must principally be considered by the court.

32. In terms of informing the Scheme Shareholders of what is going on in relation to this application, there is only the announcement which I have mentioned earlier in this judgment. This is dealt with by Mrs Razzaq in her evidence. The announcement, as I have said, was released by the Regulatory News Service and is dated 15 March 2024. I understand that the announcement was also published on the Company's website. The announcement contained an update on the obtaining of regulatory approval and gave notice of the agreement with Bidco to extend the long stop date from 9 April 2024 to 9 October 2024, subject to the approval of the court. The announcement, however, gave no notice of this hearing. At best, a Scheme Shareholder reading the announcement would have assumed that an application was going to

be made to the court for approval of the extension of the long stop date. The Scheme Shareholder would have had no idea when an application was to be heard.

33. The essential point made by Mr Thornton in this context is that a Scheme Shareholder who objects to the delay created by the extension of the long stop date can raise that objection at the sanction hearing itself. Such a Scheme Shareholder is not shut out, if I approve the extension of the long stop date, from voicing whatever objection they wish in this context at the sanction hearing. I was initially somewhat sceptical of this point. My concern was that it might be said at the sanction hearing that my making an order approving the extension of the long stop date would preclude later argument from a Scheme Shareholder to the effect that the extension should not be granted. Mr Thornton has, however, assured me that that was not the intention of the current application and that the position in this respect can be made clear by an appropriate recital to the order which I am asked to make, assuming that I am persuaded to make an order approving the extension, recording that Scheme Shareholders were not in any way precluded, at the sanction hearing, from arguing that the extension of the long stop date should not have been approved and/or from running any argument in connection with the delay created by the extension of the long stop date.

34. As Mr Thornton explained this proposal, his submission was that the hearing of the application for approval of the extension of the long stop date effectively had a status equivalent to the hearing of a without notice application. I accept that the analogy is an apt one, if the order for approval is made subject to a recital of the kind proposed by Mr Thornton. There is also a question of logistics to be considered here. If I proceed (as I am proceeding) on the basis that the approval of the court is required for the extension, and given my decision that such approval is required, the Scheme will cease to be effective on 9 April 2024 if the extension has not by then been approved. It seems to me, as I have said, that the court cannot retrospectively revive the scheme if it does come to an end in this way. The Company would then have to start again. It follows that if this hearing was to be adjourned in order to allow Scheme Shareholders to be served with notice of this application for approval of the extension and for their objections to be heard, all this would have to happen before 9 April 2024.

35. I did consider whether these problems could be met by a halfway house solution whereby I made an order which approved the extension of the long stop date, but granted liberty to Scheme Shareholders to apply to set aside the order within a certain period of being given notice of the order. I can, however, see that there would be limited utility in taking this route. By the time any such application to set aside was made and came to be heard, one might be very close to the actual sanction hearing at which the question of whether approval should be granted could, if a recital referred to above is included in the order, be debated in any event.

36. Drawing together all of the above considerations, I am persuaded by Mr Thornton that I should not go further than the requirement for an undertaking to issue what I regard as the required application notice. It seems to me that the critical point is that the question of whether approval should have been granted can be reopened by a Scheme Shareholder at the sanction meeting if so advised. In these circumstances I do not think that it is necessary or desirable to require service of this application, for approval of the extension to the long stop date, on the Scheme Shareholders. Instead, what it seems to me it is sufficient to do is to require the Company to publicise the making of an order for approval, assuming that I am persuaded to make such an order, on its website and via announcement through the appropriate news feed. In referring to the appropriate news feed, I understand this to mean the Regulatory News Service, which was responsible for the earlier announcement which I have mentioned.

37. For all of the above reasons, I conclude that this is a case where it is not necessary to require any form of specific service of the application on the Scheme Shareholders and it is appropriate only to require the publication of the order, if an order is made, on the Company website and by the medium, as I understand the position, of a Stock Exchange announcement.

38. I, therefore, turn to the substantive question of whether approval of the extension of the long stop date should actually be granted. I must admit that, at first sight, it struck me that the approval which the court is being asked to grant in this case goes too far. The court meeting took place last August, at a time when the Scheme Shareholders would have assumed that the Scheme would become effective, if approved by the court, by 9 April 2024 at the very latest. The Scheme Shareholders are now confronted with a situation where the long stop date is to go back by a further six months to well over a year after their previous approval of the Scheme. In these circumstances one might take the view that the Company should, in fairness to the Scheme Shareholders, be sent back to the starting gate and commence a new set of proceedings for approval of the Scheme and a new long stop date.

39. I am, however, persuaded by Mr Thornton that this is not the right course to take. The critical point seems to me to be the same point which I have mentioned in relation to the question of service of this application. If the ability of the Scheme Shareholders is preserved, to the sanction hearing, to argue that the extension of the long stop date should not have been granted, and if the ability of the Scheme Shareholders is preserved, to the sanction hearing, to raise any other arguments in connection with the delay caused by the extension of the long stop date, it seems to me that there is no particular reason to refuse approval at this stage. The Company faces the problem that it cannot satisfy or believes that it will not be able to satisfy the regulatory conditions by 9 April 2024.

40. If the long stop date is not the subject of an extension, and given my decision that such an extension requires the approval of the court to be valid, the Scheme will cease to be effective and the Company will have to go back to the starting gate once the long stop date has gone by. That course may not be in anyone's interests, including the interests of the Scheme Shareholders. If, by contrast, the extension of the long stop date is considered by the Scheme Shareholders, or some of them, not to be in their interests they can, in my view, and with the benefit of an appropriate recital to record this issue in an order approving the extension of time, put their case to this effect at the sanction hearing.

41. Mr Thornton also made the point that hearing objections to the extension of the long stop date at this stage would result in what he called a filleted argument, where the court would not have the benefit of considering all the circumstances as they may exist when the sanction hearing takes place. I am less convinced by this point, but I can see that it does have some weight in support of the argument for granting approval to the long stop date at this stage.

42. There is also the question of whether there needs to be a further meeting convened to approve the scheme. Mr Thornton kept the Company's options open in this respect. I did consider whether I should insist on such a further meeting taking place, with directions for convening such a meeting included in my order. I have, however, come to the conclusion that Mr Thornton is right, and that it should be left for the Company to decide whether a further meeting is required. If there is no such meeting and it turns out that there are reasons why such a further meeting should have been held, that is a matter which can be addressed and considered by the court at the sanction hearing.

43. Drawing together all of the above analysis, and bearing in mind all the circumstances of this case and, in particular, the fact that the existing long stop date will expire shortly, I conclude

that the court should approve the extension of the long stop date which has been agreed between the Company and Bidco.

Conclusion

44. For the reasons set out in this judgment and subject to settling the precise terms of the order which I will be making, including in particular the recital which I have mentioned and which will need to be included in the order, I will make an order approving the extension of the long stop date to 9 October 2024.

Postscript

45. The decisions which I have reached in this judgment have been reached on the facts of the present case, and without the benefit of argument on both sides of the questions which I have been considering. This should be borne in mind by any party seeking to make use of this judgment as authority in a different case.

46. That concludes my judgment.
