Neutral Citation Number: [2021] EWHC 222 (Ch)

Case No: CR-2020-004538

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

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Date: Tuesday, 2nd February 2021

**Before**:

**MR. JUSTICE MILES**
**Remotely via Microsoft Teams**

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**IN THE MATTER OF PGS ASA**

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

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**MR. TOM SMITH QC and MS. GEORGINA PETERS** (instructed by **Ashurst LLP**) for **PGS ASA**

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# Approved Judgment

Transcript of the Stenograph Notes of Marten Walsh Cherer Ltd
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**MR JUSTICE MILES:**

1. This is the hearing of an application by PGS ASA ("PGS") for an order pursuant to section 899 of the Companies Act 2006, sanctioning a scheme of arrangement (the "Scheme"). The application was made by a Part 8 claim form dated 16 December 2020. By a convening order dated 21 December 2020 I directed that a single meeting of Scheme creditors be convened. The convening judgment is reported at [2020] EWHC 3622 (Ch) (the "Convening Judgment").

2. The Scheme meeting was held virtually on 20 January and 27 January 2021. The vote took place on 27 January 2021. At the meeting, 186 out of the 190 Scheme creditors attended in person or by proxy: 99.88% by value of the Scheme creditors and 97.89% by number of Scheme creditors. The only four Scheme creditors who did not vote at the meeting had, in fact, acceded to a Lock-Up Agreement prior to 20 November 2020, by which they undertook to submit a proxy form to vote in favour of the Scheme, but they did not, in the event, do so. 185 of the 186 Scheme creditors present and voting at the Scheme meeting, representing 95.33% by value of Scheme creditors present and voting, voted in favour of the Scheme. The one creditor which voted against did not appear at this hearing to oppose the sanction of the Scheme and, indeed, no creditors of the company were separately represented before me.

3. I set out the factual background to the Scheme and the application for the convening order in paragraphs 20-29 of the Convening Judgment:

> "20. Before the pandemic PGS had already commenced a process to address its 2020 debt maturities. In February 2020 it completed the refinancing of its debts, and the group at that stage expected to be in a position to service the refinanced debts. However, since that time, as a result of the pandemic, the group's financial performance has sharply deteriorated. Its revenues declined markedly during 2020 and its cash flow has declined steeply. This has materially affected the group's business, rendering its current financial position unsustainable. The group has adopted a number of operational measures and reductions in expenditure in an attempt to mitigate its falling revenues. However, its current levels of financial indebtedness remain unsustainable.
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> 21. The proposed financial restructuring of which the scheme is part is a product of negotiations with scheme creditors as well as lenders under the export credit facilities. In March 2020 PGS initiated discussions with creditors on a one-to-one basis. At the same time the board of PGS considered whether there was any alternative financial transaction available to discharge its 2020 debt obligations. In April 2020 it engaged Morgan Stanley as its financial adviser for this purpose. The board concluded, having considered the options, that there was no viable financial transaction other than a restructuring of its existing indebtedness.
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> 22. By June 2020 it became clear that PGS would be unable to pay the amounts payable under the Credit Agreement in

September 2020 when due. Morgan Stanley advised that payment of the debt would cause PGS's available liquidity to fall below the minimum liquidity covenant ($75 million) under the Credit Agreement.

23. In June 2020 PGS invited certain of its largest term lenders to form an ad hoc committee to engage advisers for the purpose of obtaining access to confidential information and negotiating the proposed terms and amendments to the Credit Agreement. The ad hoc committee members engaged legal advisers and took part in intensive negotiations. Separate groups of revolving lenders were formed to negotiate with the group and they engaged their own legal advisers.

24. As part of this process, on 24 September 2020 PGS entered into a forbearance agreement with the requisite majorities of lenders to prevent enforcement action being taken under the Credit Agreement. PGS agreed also to pay a work fee in the aggregate sum of $1.2 million to certain members of the ad hoc committee, payable in cash, to compensate them for the work done and time spent in negotiating and agreeing the terms of proposed amendments to the Credit Agreement. That fee has already been paid. It compensated designated lenders for their role in co-ordinating the restructuring, including time spent by them, and for the opportunity cost of allocating resources away from other investments. Those lenders did not engage their own separate financial advisers.

25. PGS also agreed, by separate agreement, to pay the fees incurred by financial advisers to certain of the revolving facility lenders, as well as the legal advisers to those lenders, and to the ad hoc group. The adviser fees are to be paid directly to the relevant advisers. The obligation to pay pre-dates the scheme and is not dependent on the scheme taking effect.

26. On 21 October 2020 PGS, PGS Finance and certain group subsidiaries entered into a Lock-Up Agreement with certain consenting lenders which documented their agreement as to the terms of a proposed financial restructuring, including the scheme.

27. By November 2020 all but one of the 195 lenders under the Credit Agreement had acceded to the Lock-Up Agreement, representing 95.35% by value of those lenders. The only lender not to consent is one of the three lenders under the existing revolving facility, representing about 30% by value of that facility.

28. To encourage support for the restructuring, the Lock-Up Agreement requires PGS to pay a fee to lenders who have acceded prior to a date called ‘the Early Bird Deadline’. That

> was originally 6 November 2020 but has been extended to 5.00 pm on 20 January 2021. That fee, which amounts to 25 basis points, will therefore be paid to all lenders except the non-consenting lender, unless that lender also accedes to the Lock-Up Agreement by 20 January 2021. The lock-up fee is payable in cash on the effective date of the restructuring. The Lock-Up Agreement will automatically terminate on 16 April 2021 if the financial restructuring has not been completed by that date, unless extended by consent.
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> 29. Parallel with the negotiations concerning the Credit Agreement, PGS and PGS Titans AS have negotiated continued forbearance in respect of the export credit facilities."

4. I summarised the nature and intent of the Scheme at paragraphs 30-36 of the Convening Judgment:

> "30. I turn to say something more about the scheme. Its primary objective is to reschedule the debt obligations of PGS and the group by amending and extending the facilities, which will be restated into new term loans. The key amendments involve, first, the reinstated loans being given an extended common maturity date of 19 March 2024, and, secondly, upcoming amortisation payments in respect of the facilities being amended and replaced by a new payment schedule to apply to all the new term loans which will resume from September 2022 onwards. There will also be a common interest rate. The extension of the amortisation payment schedule until 2022 is to seek to give the group breathing space between the implementation of the scheme and that date.
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> 31. The amendments include the conversion of the existing principal amounts outstanding under the revolving credit facilities and existing term loan facilities into a single new term loan constituting one tranche. There will also be changes to the cash sweep provisions and amendments to the financial covenants and other terms of the facilities.
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> 32. The scheme consideration involves a payment of certain fees to all scheme creditors: (i) an amendment fee equal to 40 basis points of the principal amount of the loans advanced by creditors under the Credit Agreement; and (ii) an additional fee which is expressed either as a payment in kind option equal to 1% of the principal amount of the outstanding loans, or, at creditors' election, a mix of payment in kind and certain convertible notes, which are to be issued as a new issue.
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> 33. A lender with cross-holdings under both the existing revolving facilities and the term loan facilities, called Sculptor Investments IV S.à.r.l. ('Sculptor'), has entered underwriting or

> backstop arrangements concerning the convertible notes, but no additional fees are payable to Sculptor for its services.
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> 34. In addition to the financial restructuring, a corporate reorganisation of the group is proposed to take place from the effective date of the restructuring. If completed, PGS would at that point become a guarantor rather than a borrower under the Credit Agreement.
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> 35. I have read the explanatory statement and I am satisfied that it provides adequate and proper details of the proposed scheme.
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> 36. The scheme also includes a customary release of certain parties, as well as PGS, which include group guarantors under the Credit Agreement. It is well established that the court has jurisdiction to release claims by scheme creditors against third parties where the release is necessary in order to give effect to the arrangement and is ancillary to the arrangement between the company and its own creditors."

5. At the convening hearing, I expressed my views on some of the principal jurisdictional issues and gave a ruling on them. The first was that the Scheme constitutes a compromise or arrangement within the meaning of Part 26 of the Act. The second was that on the question of international jurisdiction, I concluded that there was no jurisdictional roadblock. Nothing has changed to affect the views I then expressed.

6. In short, my conclusions as to jurisdiction were as follows: first, as a Norwegian company, PGS is a foreign company liable to be wound up as an unregistered company under Part V of the Insolvency Act 1986. PGS is therefore a *"company"* for the purposes of sections 895(1)(a) and 895(2)(b) of the 2006 Act. Second, the court has personal jurisdiction over scheme creditors under the Recast Judgments Regulation (to the extent that it applies to schemes of arrangement at all). Third, although PGS is a foreign company, it has a sufficient connection to England. The recent approach of the courts has been to treat this third issue as a matter relevant to the court's discretion rather than a strictly jurisdictional one. As I explained in the Convening Judgment at paragraph 60, there are two sufficient connecting factors: first, the English governing law clause and, second, the jurisdiction clause, both under section 10.09 of the Credit Agreement. I shall not repeat the analysis contained in that part of the Convening Judgment, other than to add one comment.

7. The governing law and jurisdiction clauses were amended relatively recently, on 25 September 2020, from New York law to English law, and from the New York courts to the courts of England and Wales for the primary purpose of proposing the Scheme. I am satisfied that the amendments were effected by a majority of the Scheme creditors in accordance with the contractual documents pursuant to section 10.02(b) of the Credit Agreement. It is well-established that a change in the governing law of finance documents with a view to invoking the scheme jurisdiction of this court does not prevent the new governing law provision from establishing a sufficient connection with England. Furthermore, lenders who were invited to consent to the amendments were not only fully aware of their purpose, but were in fact the lenders with whom PGS had already been negotiating the terms of the Scheme for some months.

8. I shall return to a final territorial issue which I touched on at the Convening Judgment, namely, whether the Scheme will have substantial international effect, later in this judgment.

9. I turn next to summarise what has happened since the convening hearing on 21 December 2020. The convening order provided for a meeting to be convened on 20 January 2021. After the Scheme documentation had been distributed, but shortly before the Scheme meeting, PGS became aware that, by an administrative error, default interest under the Credit Agreement had been paid erroneously via the revolving credit administrative agent to certain lenders between 25 September and 23 December 2020, in sums totalling some US$668,000. PGS immediately took steps to liaise with the relevant parties to agree a solution for the mistaken payments to be repaid and on 21 January 2021 wrote to the relevant lenders (via the Revolving Credit Administrative Agent) to request repayment. PGS put in place an arrangement either for the sums to be repaid or for deductions to be made from other amounts which had or will become due to the relevant recipients under the Credit Agreement. In fact a deduction was made on 22 January 2021 against interest payments.

10. PGS considered that, before a vote took place, it should give a full explanation to Scheme creditors of these events and the arrangements by which PGS proposed to remedy them. The mechanism for remedying the overpaid interest also required certain additional amendments to the transactional documents. For these reasons, the Chairman of the Scheme meeting, Mr. Langseth, decided to adjourn from 20 January 2021 to 11.00 a.m. on 27 January 2021.

11. On 20 January 2021, notice of the adjourned meeting was uploaded on to the Scheme website and further notice was given to Scheme creditors about the adjournment. On 23 January 2021, Scheme creditors were informed about the circumstances giving rise to the interest overpayments and the proposed solution by way of an addendum to the explanatory statement for the Scheme. The addendum itself was uploaded on to the Scheme website on 23 January 2021 and, by 25 January 2021, all Scheme creditors had been informed by the administrative agents that they could view and download the addendum. The addendum contained a summary of proposed amendments to the Credit Agreement Amendment Agreement and the amended Credit Agreement, which were intended to become effective on the restructuring effective date.

12. The modifications were therefore notified to Scheme creditors before the vote at the adjourned Scheme meeting. Creditors were permitted to resubmit proxy forms to amend their vote, but none in fact did so. The adjourned meeting took place virtually, by Zoom, on 27 January 2021. The Webinar technology worked well. I am satisfied that it was a proper meeting. Creditors were able to hear, ask questions or express opinions at the meeting.

13. I have already set out the numbers attending and voting at the meeting. Thet show that the Scheme has the support of an overwhelming majority of Scheme creditors.

14. I turn to the application for sanction pursuant to section 899. I gratefully adopt the summary of the approach taken by the courts to the sanction jurisdiction given by Snowden J in *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) at [16]:

> "The relevant questions for the court at the sanction hearing can therefore be summarised as follows:
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> (i) Has there been compliance with the statutory requirements?
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> (ii) Was the class fairly represented and did the majority act in a *bona fide* manner and for proper purposes when voting at the class meeting?
>
> (iii) Is the scheme one that an intelligent and honest man, acting in respect of his interests, might reasonably approve?
>
> (iv) Is there some other 'blot' or defect in the scheme?
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> In the case of a scheme with international elements there is also the question of whether the court will be acting in vain if it sanctions the scheme. This requires some consideration of whether the scheme will be recognised and given effect in other relevant jurisdictions."

15. Addressing the four issues raised in that guidance, the first is: has there been compliance with the requirements of the statute? In this regard, I again gratefully adopt Snowden J's summary of the requirements in the *KCA Deutag* case at [18]:

> "(i) have the classes been properly constituted;
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> (ii) was there compliance with the terms of the convening order (including in particular whether the scheme creditors received an adequate explanatory statement); and
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> (iii) were the statutory majorities obtained?"

16. I am satisfied that each of these requirements has been met. I considered the constitution of the class of creditors and gave a reasoned decision at the convening stage. No creditors appeared then or today to contend that there should have been more than one class of creditors. There has been no change of circumstances and I do not think it is appropriate to reopen the question. I have already addressed the steps taken after the convening meeting to call and hold the meeting and I am satisfied that the requirements of the convening order were followed. I am satisfied that there was a proper meeting. I am also satisfied that the explanatory statement is an adequate explanation of the Scheme. The requisite statutory majorities, both in number and value, were obtained at the Scheme meeting.

17. The second question is: was the class fairly represented by the meeting and did the majority act *bona fide*? As noted above, the turnout was very high, at 99.98% of the total Scheme claims and the Scheme received near unanimous support of the Scheme creditors present and voting at the meeting. I am satisfied that the Scheme creditors were fairly represented at the Scheme meeting, and there is nothing to suggest that they acted anything other than *bona fide* in accordance with the interests of the class.

18. There are several Scheme creditors with cross-holdings under the facilities. The evidence is that even if the cross-holders had been placed into a class of their own, the

Scheme would still have been approved by 92.65% by value and 99.44% in number of the other Scheme creditors . There is no reason to think that the cross-holders acted other than in the interests of the class as a whole or that those holdings otherwise affected the fairness of the meeting.

19. The third question is: could an intelligent and honest Scheme creditor acting in his capacity as such actively approve the Scheme? The starting point is that the overwhelming majority of the Scheme creditors have in fact approved the Scheme. This is strong evidence that a reasonable creditor could approve the Scheme. That being so, there is a rebuttable presumption that the Scheme represents a fair deal for Scheme creditors. Snowden J helpfully put the point like this in *KCA Deutag*:

> "28. ... The court simply has to be satisfied that the scheme is one that an intelligent and honest man, acting in respect of his interests, might reasonably approve. It does not mean that the court is required to form a view of whether the scheme is, in some general sense, or even in the court's own opinion, the 'fairest' or 'best' scheme.
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> 29. Moreover, as Mr. Justice David Richards explained, provided that the scheme meeting was properly consulted (viz., by creditors having the necessary time to consider sufficient information in an adequate explanatory statement), that attendance at the meeting was representative of the class, and that the majority were not actuated by any form of improper motive or purpose, the court will generally take the view that in commercial matters the majority of scheme creditors are much the better judges of their own interests than the court. Accordingly, given satisfaction of the qualifications that I have mentioned, the court will be very slow to differ from the result of the meeting."

20. There is nothing in the present case to displace the presumption that the Scheme is fair in this sense. Apart from the high turnout and large majority in favour (which firmly points in the same direction as the presumption), as explained in the Convening Judgment at paragraph 10 the expert report provided by Alvarez & Marsal shows that the Scheme is likely to lead to a materially better return to Scheme creditors than would be likely in an insolvency of PGS and other group members. The likely recoveries under the insolvency comparator will be materially lower (34.0% to 69.3%) than a full recovery, which may reasonably be expected if the Scheme is implemented (most probably through a refinancing).

21. At the convening hearing I considered a number of factors which might be said to impact on the class composition, and concluded that none of them required any fracturing of the class: see paragraphs 52-58. For a similar set of reasons, none of those factors seem to me to give rise to any unfairness, in the sense I have set out above.

22. First, there is nothing unfair in the lock-up fee payable to all Scheme creditors who have acceded to the Lock-Up Agreement. The lock-up fee gives rise to a difference of only 0.25% in value of returns under the Scheme. I concluded at paragraph 53 of the Convening Judgment that the value of the lock-up fee to Scheme creditors is likely to

be immaterial for the voting decisions of Scheme creditors. Moreover, as I explained there, all the relevant creditors were given the opportunity to obtain the fee and it was fully disclosed. It is well-established that there is nothing inherently unfair about offering a (properly disclosed) consent fee in connection with a scheme.

23. Second, to my mind, there is nothing unfair in the work fee which PGS has paid to certain members of the ad hoc committee, because it compensates them for their work in negotiating the Scheme. Moreover, as I concluded at paragraph 54 of the Convening Judgment, I do not think this fee would have any material influence on the voting decisions of creditors. There are advisers' fees which are being paid to relevant advisers directly and are not dependent on the Scheme being sanctioned. I concluded at paragraph 55 of the Convening Judgment that the payment of these fees cannot reasonably be said to be material to the decision which the Scheme creditors need to make when voting on the Scheme. I am satisfied for similar reasons that these fees would not affect the fairness of the Scheme.

24. Third, there are the amendment fees and additional fees. Again, these do not, to my mind, affect the fairness of the Scheme. All Scheme creditors have the same right to receive the amendment fee and the same right and option to receive payment of the additional fee.

25. Finally, I do not consider that the provision by Sculptor of backstopping services affects the fairness of the Scheme. This is a commercial arrangement for which Sculptor is not being paid any fee. Such backstop arrangements are relatively commonplace in schemes and are intended to give the company certainty that the relevant securities will be issued in a sufficient amount and that the scheme will be viable. As in other cases, I do not consider that the presence of such services is a reason for thinking that the approval of the Scheme was in any way unfair.

26. As I have said, the court will generally give great weight to the commercial views of creditors expressed by them through their votes at the Scheme meeting. This is particularly so in a case like the present where the vast preponderance of votes is in favour of the Scheme. For the reasons I have given, there is no reason for calling into doubt the decision of Scheme creditors to support the Scheme or for thinking that they did not act in the interests of the class as a whole.

27. The fourth question is this: is there any blot on the Scheme and will the Scheme achieve a substantial effect? This may be paraphrased by asking whether there is some technical or legal defect in the Scheme, for example, that it does not work in accordance with its terms or that it would infringe some mandatory provision. I can see no defect in the Scheme and no creditor has suggested one.

28. Finally, I turn to the question of international effectiveness. In *Re Magyar Telecom B.V.* [2014] BCC 448 at [16] David Richards J said:

> "The court will not generally make any order which has no substantial effect and, before the court will sanction a scheme, it will need to be satisfied that the scheme will achieve its purpose."

29. There is no requirement for a scheme to be effective in every jurisdiction worldwide, provided that it is likely to be effective in the key jurisdictions in which the company operates or has assets. Where the governing law of the debt affected by the scheme is English law, it is inherently likely that the scheme will be recognised abroad: see *Magyar* at paragraph 15.

30. The starting point here is that the Credit Agreement is English law-governed and the Scheme creditors' claims against PGS are subject to the English non-exclusive jurisdiction clause. That being so, it is inherently likely that the Scheme will be recognised abroad.

31. It is also relevant that virtually all Scheme creditors have contractually agreed to support the Scheme in the Lock-Up Agreement, the vast majority of which have also voted in favour of the Scheme. This alone provides good evidence that the Scheme will achieve substantial effect vis-à-vis the Scheme creditors: see for example *KCA Deutag* at [33].

32. For these reasons alone, I am satisfied that the Scheme is likely to have substantial effect overseas. However, for good measure, the company has obtained independent expert advice of US law (as the Credit Agreement was previously governed by New York law) and of Norwegian, Brazilian and Indonesian law. Norway is PGS's place of incorporation as well as that of several group guarantors. Brazil and Indonesia are countries in which certain other group guarantors under the Credit Agreement which have material assets are incorporated. Where a company adduces expert evidence on a sanction hearing, the court does not need to reach a final conclusion, as long as the evidence sufficiently shows that the scheme will have a real prospect of having substantial effect.

33. I have considered the expert evidence and I am satisfied that the Scheme is likely to be recognised and given effect in the relevant jurisdictions.

34. I should finally deal with a modification to the Scheme which is proposed to be included in it, and which was made after the Scheme meeting. As I have already explained, before the Scheme meeting took place, modifications were made as set out in the addendum to the explanatory statement. Those were concerned with the erroneous overpayment of interest to certain of the creditors. After the Scheme meeting, as Mr. Langseth explained in his second statement, it became apparent that certain further modifications were required to be made to section 10 of the Credit Agreement Amendment Agreement to facilitate the recovery of the interest overpayments.

35. This limited modification involves a waiver of two requirements under the Credit Agreement. The waivers are expressly made in conjunction with the recovery of the overpaid interest and not for some wider purpose. Under clause 10.2 of the Scheme, it is envisaged that the court may sanction the Scheme with certain modifications made after the Scheme meeting.

36. I am satisfied that the modifications proposed here fall within the scope of clause 10.2 of the Scheme as they do not materially and adversely affect the position of any Scheme creditor as compared with any other Scheme creditor, nor do they impose any additional material obligations on Scheme creditors. The modification is simply the working through of amendments which have already been included in the amendments made

and notified on 23 January 2021 before the Scheme meeting on 27 January 2021, which have already been approved by Scheme creditors at the Scheme meeting.

37. I was referred to the case of *Re Aon plc* [2020] EWHC 1003 (Ch) at paragraphs 16-18 where Trower J dealt with the question of post-meeting modifications. Applying the reasoning found there, I am satisfied that had these further modifications been before the Scheme meeting, they would not have made any difference to the outcome at the meeting. There is no question of the court, by approving these modifications, "foisting" on Scheme creditors anything other than what they voted on at the Scheme meeting. I am therefore satisfied that these modifications are proper ones to be sanctioned if the Scheme should otherwise be sanctioned.

38. I am satisfied for the reasons given above that the Scheme should be sanctioned.

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