Commercial and Insolvency Update December 2017

M2 Property Invest Limited and Vendor Wind Services SP ZOO

Rachael Earle

Rachael Earle and Chloe Shuffrey appeared before Mr Justice Snowden in *M2 Property Invest Limited and Vendor Wind Services SP ZOO*.

The case raised in the High Court, once again, the fundamental question of whether and to what extent the English Court should, on an application under Regulation 16, of the Companies (Cross Border Mergers) Regulations 2007, investigate the impact of a cross-border merger on the creditors of the two merging companies.

The issue was considered in *Re Diamond Resorts [2013] BCC 275*, in which Mr Justice Sales was of the view that as a matter of general principle the weight the court should accord to the foreign pre-merger certificate should depend on the nature of the competent authority and the extent of any investigation which it has conducted into the benefits of the proposed transaction for shareholders, employees and creditors of the companies falling within that jurisdiction. He considered that the proper function for the English court in exercising its discretion under Reg 16(1) is to examine with care the question whether the relevant stakeholders have been considered.

However in *Re Livanova* [2015] BCC 915, Mr Justice Morgan cast doubt upon the correctness of the approach of Mr Justice Sales. He suggested that the English court should not take upon itself the burden of looking at the

procedures adopted in other Member states as they regard citizens of those member states.

Mr Justice Snowden in his judgment considered three logical possibilities on an application under Regulation 16: (i) it is for the English court to consider the interests of all creditors of both merging companies before exercising its discretion to approve the completion of the merger; (ii) the English court should only concern itself with the interests of creditors of the English transferee company and not the creditors of the foreign transferor company; and (iii) the English court should not, at the stage of the approval hearing, concern itself with the interests of creditors of either company, because it is for the domestic laws of each merging company to protect the interests of the respective creditors of those companies at the pre-merger stage.

He considered that option (ii) is the least likely to have been intended by the framers of the Directive, because it is an insular approach which would potentially lead to a non- uniform approach to creditor protection across the EU depending on which national authority of an EU Member State was conducting the scrutiny of the merger at the second stage. Mr Justice Snowden considered the choice between options (i) and (iii) more difficult.

Happily for Mr Justice Snowden, but disappointingly for those interested in this area, he did not have to resolve the issue on the facts of the instant case. He was persuaded by Miss Earle that, even if they were to adopt the *Diamond Resorts* approach, he could be satisfied that the merger was for the benefit of both sets of creditors in Poland and England.

However, he did interestingly note in his judgment, given that the present case had been adjourned on two occasions for the director of the merging companies to put in further evidence as to the protection of creditors in Poland, that "… My initial inclination was that option (i) is correct, reflecting the decision in Diamond Resorts. However, not least because of my experiences of having ventured down that path in the instant case, on reflection I can see that there is much to be said for option (iii)."