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Case No: CR-2017-007800

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (Ch D)

Royal Courts of Justice
Rolls Building,
Fetter Lane
London
EC4A 1NL

Date: 8 December 2017

Before :

MR JUSTICE SNOWDEN

- -

IN THE MATTER OF M2 PROPERTY INVEST LIMITED

AND IN THE MATTER OF VENDOR WIND SERVICE SP. Z.O.O.

AND IN THE MATTER OF THE COMPANIES (CROSS-BORDER MERGERS) REGULATIONS 2007

- -

Ms. Chloe Shuffrey and **Ms. Rachael Earle** (instructed by **IMD Solicitors LLP**) for the Applicant Companies

Hearing dates: 10 November, 24 November and 1 December 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE SNOWDEN

MR. JUSTICE SNOWDEN :

Introduction

1. This is an application for the approval of the completion of a proposed cross border merger pursuant to Regulation 16 of the Companies (Cross-Border Mergers) Regulations 2007 ("the Regulations").

2. The Regulations give effect in the UK to the provisions of Directive 2005/56/EC on cross-border mergers of limited liability companies ("the Directive"). The Directive provides that Member States should facilitate the cross-border merger of limited liability companies if the national law of the relevant Member States permits mergers between such types of companies.

3. As regards the procedure to be adopted, Art 4(1)(b) provides that each company taking part in the merger should comply with the provisions and formalities of the national law to which it is subject, and Article 4(2) provides that such provisions and formalities shall, in particular,

> "include those concerning the decision-making process relating to the merger and, taking into account the cross-border nature of the merger, the protection of creditors of the merging companies, debenture holders and the holders of securities or shares, as well as of employees…"

4. The Directive then sets out the requirements for the agreement, publication and approval by the shareholders of the merging companies of common draft terms of merger, and for the scrutiny by the designated authority in each relevant Member State of the merger process.

5. In particular, as regards the approval of shareholders to the terms of the merger at meetings under Article 9, Article 7 provides that,

> "The management or administrative organ of each of the merging companies shall draw up a report intended for the members explaining and justifying the legal and economic aspects of the cross-border merger and explaining the implications of the cross-border merger for members, creditors and employees.
>
> The report shall be made available to the members and to the representatives of the employees or, where there are no such representatives, to the employees themselves, not less than one month before the date of the general meeting referred to in Article 9."

6. The requirements for scrutiny of the merger by the relevant national authorities are set out in Articles 10 and 11, the material parts of which are as follows,

> "Article 10
>
> Pre-merger certificate
>
> (1) Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law.
>
> (2) In each Member State concerned the authority referred to in paragraph 1 shall issue, without delay to each merging company subject to that State's national law, a certificate conclusively attesting to the proper completion of the pre-merger acts and formalities.
>
> …..
>
> Article 11
>
> Scrutiny of the legality of the cross-border merger
>
> (1) Each Member State shall designate the court, notary or other authority competent to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns the completion of the cross-border merger and, where appropriate, the formation of a new company resulting from the cross-border merger where the company created by the cross-border merger is subject to its national law. The said authority shall in particular ensure that the merging companies have approved the common draft terms of cross-border merger in the same terms and, where appropriate, that arrangements for employee participation have been determined in accordance with Article 16.
>
> (2) To that end each merging company shall submit to the authority referred to in paragraph 1 the certificate referred to in Article 10(2) within six months of its issue together with the common draft terms of cross-border merger approved by the general meeting referred to in Article 9.

7. The scheme of the Directive is thus that there are two stages of scrutiny of a cross-border merger. The first is performed in respect of each merging company by its own designated national authority, and relates to the compliance by the company

with the relevant procedure under its national law. The second stage of scrutiny is performed only by the designated national authority of the company which results from the merger, and relates to the legality of the completion of the cross-border merger.

8. In the UK, the designated national authority is the Companies Court. Article 10(2) of the Directive is given effect by Regulation 6 which provides in relevant part,

> "(1) A UK merging company may apply to the court for an order certifying for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) that the company has completed properly the pre-merger acts and formalities for the cross-border merger.
>
> (2) The court must not make such an order unless the requirements of regulations 7 to 10 and 12 to 15 (pre-merger requirements) have been complied with."

9. Where the company resulting from the merger is an English company, Article 11 of the Directive is given effect by Regulation 16(1) which provides that the court may approve the completion of a cross-border merger if,

> "(a) the transferee company is a UK company;
>
> (b) an order has been made under regulation 6 (court approval of pre-merger requirements) in relation to each UK merging company;
>
> (c) an order has been made by a competent authority of another EEA State for the purposes of Article 10.2 of the Directive (issue of pre-merger certificate) in relation to each merging company which is an EEA company;
>
> (d) the application is made to the court on a date not more than 6 months after the making of any order referred to in sub-paragraph (b) or (c);
>
> (e) the draft terms of merger approved by every order referred to in sub-paragraphs (b) and (c) are the same; and
>
> (f) where appropriate, any arrangements for employee participation in the transferee company have been determined in accordance with Part 4 of these Regulations (employee participation)."

The Initial Evidence

10. The merger in this case is a merger by absorption of Vendor Wind Service Sp. Z.o.o. ("Vendor Wind"), a company incorporated in Poland, by its parent company, M2 Property Invest Limited ("M2"), a company incorporated in England and Wales.

11. Vendor Wind was incorporated in 2008 and has carried on business providing building services in Poland. M2 was recently incorporated in August 2016 and its annual accounts give its principal activities as the provision of consultancy services in the property sector.

12. Under the merger, Vendor Wind will transfer its whole business including all rights and obligations, to its parent M2. In the terminology of the Regulations, M2 is the transferee company which will survive the merger, and Vendor Wind is the transferor company, which will cease to exist.

13. The draft terms of the merger (the "Terms of Merger") were presented to the board of M2 in English on 13 March 2017 and were approved by Mr. Karol Kuczkowski who is the sole director and shareholder of M2. The Terms of Merger were presented to the board of Vendor Wind in Polish on 15 March 2017 and approved by Mr. Rafal Dost who was the sole director of Vendor Wind.

14. The report of the board of directors of M2 prepared for the purposes of Article 7 of the Directive was dated 13 March 2017 and included the following statements,

> "Economic basis of the merger
>
> [Vendor Wind] has for the time being concluded and/or suspended its operations and functions under its name. There are currently no economic basis for maintaining the functioning of the organisational structure in Poland. Further, the costs of liquidation of [Vendor Wind] outweigh the costs of the merger….
>
> …The rationale for [M2] in proceeding with this merger is the net asset gain which may be lost by otherwise liquidation of their subsidiary.
>
> Effect of the merger on the creditors
>
> Any potential creditors' rights will not be adversely affected by the merger. [M2] is acquiring a net gain of assets and no special privileges are being extended to the creditors of [Vendor Wind].
>
> Any potential creditor will therefore be in a better position as the pool of assets will increase. Such is the same position for the creditors of [Vendor Wind]."

15. These statements were also reflected in the equivalent report of the board of directors of Vendor Wind dated 15 March 2017, which stated,

> "Economic rationale for the merger
>
> [Vendor Wind] has now finished its operating business activity. Therefore, there are no economic grounds for maintaining the company organisational structure [in] Poland, whereas the costs of its liquidation and transfer of the company assets to the parent company exceed the costs of the cross-border merger of the two companies.
>
> The merger effects for the creditors
>
> The situation of possible creditors will improve as the liability for the subsidiary debts will extend onto the parent company on the universal succession basis. No modification in the Company liability is provided for."

16. The Terms of Merger and other relevant documents were made available for inspection at M2's registered office and on its website and the relevant documents were also delivered to the Registrar of Companies and published in the Gazette as required by Regulations 10, 12 and 12A. Vendor Wind took similar steps in Poland.

17. Having completed those pre-merger steps, M2 obtained a certificate from Mr. Registrar Jones on 4 July 2017 pursuant to Regulation 6(1) certifying that the pre-merger acts and formalities for the cross-border merger in Regulations 7-10 and 12-15 had been complied with.

18. Vendor Wind also obtained a document headed "Decision" from the Gdansk-North District Court on 25 September 2017 which certified compliance by Vendor Wind with the procedure for cross-border mergers under Polish law.

19. The main evidence originally provided to me for the first hearing of this application consisted of the first witness statement of Mr. Kuczkowski dated 9 October 2017. In relation to the pre-merger certificate issued by the Polish court, that evidence asserted,

> "58. I respectfully submit and aver that such a decision is granted by the Court in Poland. Consequently, I submit that this is not merely an administrative function as [the] interests of all stakeholders are considered by the Court.
>
> 59. In this respect I respectfully submit that with respect it is not for this Court to reconsider the decision of the Gdansk District Court in respect of the appropriate level of

> consideration having been afforded to all the stakeholders in this merger."

20. Having made that submission, the first witness statement of Mr. Kuczkowski nonetheless went on to exhibit a large number of documents which were said to have been placed before the Polish Court, together with other documents which addressed the financial position of the two merging companies. Mr. Kuczkowski said that he did so in order to demonstrate that the Polish court had given due consideration to all stakeholders in the merger.

21. The documents exhibited by Mr. Kuczkowski included accounts for both M2 and Vendor Wind. The accounts for M2 were made up to 29 June 2017 and showed that it was insolvent on a balance sheet basis with fixed assets of £61,563, liabilities of £66,761 and a deficiency of £5,198. The accounts for Vendor Wind were for the financial year ending 31 December 2016 and showed that Vendor Wind was solvent, with assets of PLN 279,216.99, long term liabilities of PLN 184,000, and short-term liabilities of PLN 79,044.62. Mr. Kuczkowski's evidence also stated,

> "20. [Vendor Wind] has at this time suspended its functions and operations under its name whereby all new functions and operations will be conducted under the [M2] name upon absorption. Consequently, no new accounts have been produced as the financial position of [Vendor Wind] has not altered.
>
> 21. Further the financial position of [M2] has not altered since the last accounts as annexed to this witness statement as [M2] has suspended its operations until such time as this merger is completed.
>
> 22. [M2] does not wish to liquidate [Vendor Wind] due to the high expense of liquidation in Polish jurisdiction. It would be economically damaging for [M2] to seek to liquidate [Vendor Wind] as any leftover assets would be consumed by the costs of liquidation.
>
> 23. The rationale is that [M2] will receive a net gain once [Vendor Wind] is absorbed thus this being the most economically appropriate solution for [M2]."

22. Mr. Kuczkowski's evidence raised two issues. The first was that although Mr. Kuczkowski stated that Vendor Wind had suspended its operations and that it had not traded since the end of 2016, the Schedule of Assets and Liabilities to be transferred pursuant to the merger as at 28 February 2017, which was annexed to the Terms of Merger, showed a different picture from its accounts to the end of 2016. In

particular there had been a significant reduction in the company's current assets and short-term liabilities to PLN 29,362.56 and PLN 1,714.93 respectively.

23. The second, and potentially more significant issue, was the evidence that showed that a solvent Vendor Wind was being merged into an insolvent M2. This seemed, at first blush, to cast doubt upon the suggestion made in both directors' reports that the creditors of Vendor Wind would benefit from the merger in the same way as creditors of M2. Apart from the potential prejudice to the creditors of Vendor Wind, of becoming creditors of a marginally less solvent merged company, it was obvious that they might well be materially disadvantaged by having to bring proceedings to recover their debts against M2 in England rather than being able to be paid in a conventional liquidation process of Vendor Wind in Poland or at least being able to sue for their debts in Poland. If, as Mr. Kuczkowski contended, the Gdansk District Court had fully inquired into the effect of the merger on creditors of Vendor Wind, it was not immediately obvious to me how these issues could have been resolved on the materials which I had seen.

Re Diamond Resorts and Re Livanova

24. This situation raised the fundamental question of whether and if so, to what extent, the English court should, on an application under Regulation 16, investigate the impact of a cross-border merger on the creditors of the two merging companies. This issue has been considered in two first instance cases in England.

25. In *Re Diamond Resorts (Europe) Limited* [2013] BCC 275, Mr. Justice Sales was asked to approve the completion of a merger by absorption between a non-trading English holding company and 14 of its Spanish subsidiaries. The subsidiaries had each obtained the necessary pre-merger certificate from the designated Spanish authority (its commercial registry) but evidence showed that whilst 13 of the 14 Spanish subsidiaries were solvent, the English company was insolvent on a balance sheet basis. Mr. Justice Sales stated,

> "7. As Mr Thornton informs me, Member States have a considerable discretion as to what body they designate as the competent authority for the purposes of the Directive. Such designation may range from a court being the nominated competent authority (such as in this country and in Germany), through other bodies such as a company or commercial registry (as in Spain) to public notaries (as in Italy). The question arises of the role of this court in scrutinising a transaction involving a foreign company where pre-merger certification has been granted by the competent authority in the home state of that company. The issue is of particular relevance in relation to the transaction under review in this case, in light of certain matters which I examine below.

> 8. The proposed resultant merged company, DREL, was at the end of last year, according to its statutory accounts, insolvent on a balance sheet basis and dependent on the support of DRGH under a letter of comfort to continue as a going concern; whereas 13 of the 14 Spanish subsidiaries which are proposed should be merged into DREL were solvent companies. An issue could therefore arise as to whether a significant material detriment would be suffered by, in particular, creditors of those companies if the merger proceeded. But the Commercial Registry in Spain has granted pre-merger certification for the merger of those companies into DREL. Does this court's role in deciding how to exercise its discretion under reg.16(1) involve looking behind that certification?
>
> 9. In my view, as a matter of general principle, the weight that this court should accord to the pre-merger certification by a foreign competent authority under the Directive will depend upon the nature of the competent authority and the extent of any investigation which it appears that competent authority may have conducted into the benefits or dis-benefits of the proposed transaction for shareholders, employees and creditors of the companies falling within its jurisdiction. In the circumstances of the present case, Mr Thornton accepts that he is unable to say that the Spanish Commercial Registry has the same status as a full court would have and he is unable to point to any substantive investigation by the Commercial Registry into the commercial merits or demerits of the proposed transaction from the point of view of shareholders, employees or creditors of the Spanish companies which it is proposed should be merged into DREL.
>
> 10. In those circumstances, I consider that the proper function for this court in the exercise of its discretion under reg.16(1) of the 2007 Regulations is to examine with care the question whether, if the merger proceeds and is authorised, stakeholders in the merging Spanish companies will suffer a material detriment such that the merger ought not to be approved."
>
> (my emphasis)

26. That approach has been followed and applied in a number of cross-border merger cases since. Those cases included *Re Livanova Plc and Sorin SpA* [2015] BCC 915. However, in *Livanova*, Mr. Justice Morgan cast some doubt upon the correctness of the approach outlined in *Diamond Resorts*,

> "14. … carrying out the exercise identified by Sales J [in *Diamond Resorts*], I am satisfied that this is a proper case for

> the court to give approval under reg 16. It may be, for the purposes of the present case, sufficient to leave the matter there. However, I consider that it is well arguable that Sales J. went too far in describing the nature of the exercise required of the court under reg 16. I have referred to the language of the Directive and of reg.16 and it seemed to me in the absence of authority (and indeed in the absence of any argument in the case before me) that the exercise required of the court might involve a much narrower process of review in two respects. First, it might be argued that the English court should not take upon itself the burden of looking at the procedures adopted in other Member States as regards the citizens of those Member States. Secondly, it might be argued that the obligation on the court (identified by Sales J) to consider the benefits and dis-benefits for shareholders, employees and creditors went beyond what was required by the language of the Directive and the Regulations.
>
> 15. I mention this matter because the court has an interest of its own in knowing what exactly it is expected to do on an application of the present kind. If it is asked to carry out a careful, thorough scrutiny of the benefits and dis-benefits of the proposal that will require the parties to put in extensive material to satisfy the court of those matters. It will involve the judge doing extensive pre-reading, particularly in a case where he is likely to hear from one side only. The judge may then need to conduct a detailed and lengthy hearing of the application. If a court must do what *Diamond Resorts* … says, then so be it; the court will do it. But if the legislation does not require that exercise to be carried out, then it would be unfortunate if the court nonetheless carried out in every case what might be an unnecessary exercise."
>
> (my emphasis)

27. Ms. Shuffrey, who appeared for the merging companies at the first hearing of the application, contended that I should follow the obiter dicta of Mr. Justice Morgan in *Livanova* rather than the decision of Mr. Justice Sales in *Diamond Resorts*. She contended that I should not inquire into the position of the creditors of Vendor Wind. I was, however, not convinced that this was the appropriate course to follow given that the decision in *Diamond Resorts* seemed to be directly on point and that Mr. Kuczkowski's evidence seemed unsatisfactory. The matter was therefore adjourned in order that the applicants might provide better evidence as to the position of the creditors of Vendor Wind.

The subsequent evidence

28. I was subsequently provided with a second witness statement from Mr. Kuczkowski, together with a first witness statement of Mr. Dost. That further evidence revealed a surprising turn of events.

29. In paragraphs 12-14 of his second witness statement, Mr. Kuczkowski stated that he wished to "withdraw" paragraph 20 of his first witness statement (to the effect that Vendor Wind was not trading). His new evidence was that Vendor Wind "has lifted any suspension of its operations" and that it "therefore continues to trade under its own name" pending completion of the merger. Mr. Kuczkowski and Mr. Dost both explained that this resumption of trading by Vendor Wind had been undertaken through sub-contractors as a temporary measure to prevent the loss of clients and loss of goodwill by Vendor Wind with the intent that such intangible assets could be passed to M2 by the merger. They stated that the decision that Vendor Wind should resume trading had been made on 24 April 2017.

30. Mr. Dost also provided up-to-date management accounts for Vendor Wind for the period from the end of 2016 until 15 November 2017 which showed that the PLN 184,000 of long term liabilities which had existed at the 2016 year end had been discharged. In their place, Vendor Wind had incurred significantly increased liabilities of PLN 3,705,179, but had also acquired significant current assets (including short-term receivables and short term investments) of PLN 2,932,507.27. Those new liabilities were said to be owed to two creditors pursuant to a series of invoices, and witness statements in near identical form were produced from those two creditors (a Mr. Maciej Skalik on behalf of Zdrowie kolejarzy Sp. Z.o.o. and a Mr. Miecsyslaw Pruszewicz, a sole trader) confirming that they were both fully aware of the proposed merger and had no objections to it.

31. Further clarification was given in additional evidence from Mr. Dost, who explained that the long-term liability of PLN 184,000 which appeared in the accounts for Vendor Wind at the end of 2016 and in the annexes to the Terms of Merger had arisen from the payment in June 2016 by a company called Intermedica Farmacja Sp. z. o.o. of a deposit for a property which had been intended to be purchased from Vendor Wind. Mr. Dost stated that the money had been utilised by Vendor Wind, but the purchase had not materialised, so the liability to refund the deposit to Intermedica had been shown in the accounts. Mr. Dost stated that this debt had been discharged on 17 August 2017 using new monies derived from the renewed trading by Vendor Wind.

32. Whilst this further evidence explained the various movements in the accounts of Vendor Wind, it raised a number of other potential difficulties.

33. In particular, it was readily apparent that the evidence that was before the Gdansk District Court when it issued its pre-merger certificate in September 2017 as to the creditors of Vendor Wind had been inaccurate and incomplete. That evidence simply comprised the accounts to the end of 2016 and the Terms of Merger and annexes which showed only the debt of PLN 184,000 owing to Intermedica. No mention was made to the Polish Court that Vendor Wind had in fact resumed trading and that, by September 2017, the debt to Intermedica had been discharged and replaced by the much larger amount of PLN 3,705,179 owing to the new trade

creditors. If, as I had been told by Mr. Kuczkowski in his first witness statement, the Gdansk District Court had issued the pre-merger certificate having considered the interests of all stakeholders in the merger, the inevitable conclusion would be that the decision to issue the certificate must have been given in reliance on an inaccurate picture of Vendor Wind's financial position and creditors.

34. This prompted a yet further adjournment and a second *volte face* on the part of Mr. Kuczkowski. He provided a second corrective witness statement withdrawing his account of what the Polish Court had done prior to issue of its pre-merger certificate. In its place, I received evidence from a Polish lawyer, a Mr. Sebastian Wojdyl, that the Polish court does not in fact examine the position or interests of creditors at the first stage before issuing its pre-merger certificate.

35. That evidence was helpfully supported by the production by Ms. Earle (who appeared at the second and third hearings in place of Ms. Shuffrey) of an extract from Chapter 14 of <u>European Cross-Border Mergers and Reorganisations</u> (ed. Vermelen and Vande Velde) on cross-border mergers in Poland, contributed by members of Hogan Lovells in Poland. That chapter indicates at paragraphs 14.79 – 14.82 that at the first stage of issue of the pre-merger certificate, the main task of the registry is to verify the legality of the merger and that the necessary formalities have been complied with. Moreover, under the heading of "Protection of creditors", paragraph 14.103 then explains,

> "Under Polish law, if a foreign company is the acquiring company, then, within a month of the date on which the common draft terms of merger was published, a creditor of the Polish company may request that its claims be secured, if it can demonstrate the probability that its claims are threatened by the merger. In the case of a dispute, based on a petition by a creditor filed within two months of the publication of the common draft of terms of merger, the local court for the seat of the company shall be asked to rule on whether or not security should be granted as demanded by the creditor. However, creditor's petition cannot halt the issuance of the pre-merger certificate of conformity with Polish law of the cross-border merger by the Polish registry court."

36. That passage reveals that a separate regime exists for the consideration and protection of the interests of creditors of a transferor Polish company in a cross-border merger. Although that regime can be invoked as a consequence of the pre-merger process, it would involve conventional court proceedings to resolve any dispute between the company and the creditor, and it would seem that the outcome of those proceedings would <u>not</u> prevent the issue of a pre-merger certificate for the purposes of Article 10(2) of the Directive.

37. For completeness, the position under Polish law to which I have referred can be compared and contrasted with the procedure which would be adopted under English

law in a case where an English company was to be absorbed by a cross-border merger with a foreign company. In *Re House-Clean Limited* [2013] BCC 611 Mr. Justice Roth considered the question of whether the English court should consider the interests of creditors before issuing a pre-merger certificate in a case of the merger by absorption of an English trading subsidiary into its German parent. Mr. Justice Roth concluded, at paragraph 30,

> "… in my judgment it is clear that regulation 6 does not give or seek to give the court the discretion provided for the different stage of the procedure under regulation 16. In my view, as Mr Jack submits, the approach set out in *In re Diamond Resorts (Europe) Ltd* [2013] BCC 275 therefore does not apply when dealing with the stage 1 approval of the pre-merger requirements. It follows that, in my judgment, the task of the court at stage 1 under Part 2 of the Regulations is limited to ascertainment whether the requirements of the various regulations have been complied with, subject only to this: that regulation 11 does give the court a discretion to order a meeting of creditors and also, in my view, of members in the case of a merger by absorption of a wholly-owned subsidiary."

38. The discretion given to the English court to convene a meeting of creditors under Regulation 11, to which Mr. Justice Roth referred in *Re House-Clean*, is an important provision which corresponds with the protection given to creditors of a transferor company in the case of a domestic merger implemented by way of a scheme of arrangement under Part 26 of the Companies Act 2006, as modified in the case of a merger involving a public company by Part 27 of the Companies Act 2006. If a meeting of creditors is convened, the cross-border merger would have to be approved by a majority in number representing 75% in value of the creditors (or classes of creditors) of the transferor company present and voting at the meeting(s). Satisfaction of this requirement would be necessary before a pre-merger certificate could be issued by the English court: see Regulations 6 and 14.

39. It should be noted that both the Polish and the English provisions for the protection of creditors to which I have referred will in practice depend upon creditors responding to publicity being given to the merger and its terms as envisaged by Article 6 of the Directive, and seeking appropriate orders from their respective national courts to protect their position prior to the merger taking effect.

Should I approve the cross-border merger?

40. At the third hearing of this application, Ms. Earle submitted that notwithstanding the various twists and turns in the evidence, I had the jurisdiction and should in my discretion approve the completion of the cross-border merger under Regulation 16.

The requirements of Regulation 16

41. There is no doubt that, as least as a matter of form, each of the requirements of Regulation 16 have been complied with in this case. Taking those requirements sequentially: M2 is a UK company; an order has been obtained from Mr. Registrar Jones granting a pre-merger certificate in respect of M2; a pre-merger certificate from the Gdansk District Court has been obtained in respect of Vendor Wind; the application under Regulation 16 is made within six months of the issue of that order and that certificate; the draft Terms of Merger are in materially the same form (albeit in two different languages); and there are no employees to bring any arrangements for employee participation into play.

42. There is an issue, however, whether in light of the facts now known, I can accept and place any reliance upon either pre-merger certificate obtained from Mr. Registrar Jones in relation to M2 or from the Gdansk District Court in relation to Vendor Wind. For the reasons that I have outlined, in each case, by the time that the Article 7 report of the board of the merging companies was placed before the court, the stated position that Vendor Wind was not trading was no longer true; the assets and liabilities of Vendor Wind were no longer as stated in the annexes to the Terms of Merger, and in each case the supposed benefits of the merger for the creditors of Vendor Wind were at best overstated, and at worst simply inaccurate.

43. Ms. Earle's primary argument was that these matters all related to Vendor Wind and not M2, and that I was prevented from questioning the validity of the Polish pre-merger certificate or looking into the circumstances in which it had been obtained. She contended that the pre-merger certificate was either a judgment within the meaning of Regulation (EC) No. 1215/2012 of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast version) ("the Recast Judgments Regulation") and hence that I could not inquire into its validity; or that it was a certificate "conclusively attesting to the proper completion of the premerger acts and formalities" and hence immune from challenge under Article 10(2) of the Directive.

Is a foreign pre-merger certificate a "judgment"?

44. Article 2(a) of the Recast Judgments Regulation states that for the purposes of the regulation,

> "'judgment' means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court."

45. Article 36.1 then states that,

> "a judgment given in a Member State shall be recognised in the other Member States without any special procedure being required."

and Article 52 provides that,

> "under no circumstances may a judgment given in a Member State be reviewed as to its substance in the Member State addressed."

46. In *Solo Kleinmotoren* [1994] ECR I-2237, [1994] I.L.Pr. 457, a decision of the Court of Justice of the European Communities, the CJEC was required to consider the question of whether a consensual settlement of a legal action reached between a claimant and a defendant before a German court was to be regarded as a judgment under what was then the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The CJEC held that it was not. The core of the reasoning is at paragraphs 17 to 18 of the judgment, where the court said:

> "It follows from the foregoing that, to be classified as a "judgment" within the meaning of the Convention, the act must be that of a court belonging to a Contracting State and ruling on its own authority on points in dispute between the parties.
>
> However, this condition is not fulfilled in the case of a settlement, even if it is reached before a judge of a Contracting State and puts an end to a dispute. Court settlements are essentially contractual in nature, in the sense that their terms depend primarily on the parties' intentions."

47. To my mind this authority makes it clear that the pre-merger certificate issued by the clerk to the Gdansk District Court in this case lacks the essential elements of a judgment. The cross-border merger upon which it was based was, by definition, a contractual arrangement between M2 and Vendor Wind on the basis of the agreed Terms of Merger. There could not be, and was not, any point in dispute between the parties to the merger. Moreover, in issuing the certificate, the clerk of the Gdansk District Court was not ruling on her own authority on points in dispute. Nor was she investigating or resolving any issues concerning creditors. She was simply verifying whether the pre-merger process under Polish law had been completed.

48. I therefore reject Ms. Earle's submissions that the Recast Judgments Regulation prevents me from inquiring into the validity of the Polish pre-merger certificate.

"*Conclusive attestation" under Article 10(2) of the Directive*

49. There is no definition or further explanation in the Directive or the Regulations as to the meaning of "conclusively attesting" in Article 10(2). Moreover, Ms. Earle was not able to identify any European jurisprudence on the question of whether a court at

the second stage of the scrutiny process could go behind a certificate granted under Article 10(2) in circumstances in which it was aware or suspected that the certificate had been obtained on the basis of inaccurate information.

50. My inclination is that "conclusively attesting" ought to be given its ordinary, wide meaning, so that the court hearing the application for approval at the second stage would be bound to accept and give effect to the pre-merger certificate, even if aware of facts that might suggest that the certificate had been issued in error, or on the basis of erroneous information. In that regard, one analogy which suggests itself under English law is the wide effect given to a "conclusive evidence" provision as regards a certificate of registration of a charge under the Companies Acts: see e.g. *R v Registrar of Companies, ex parte Central Bank of India* [1986] QB 1114.

51. Further, although the provisions of Article 10(2) are applicable to each pre-merger certificate (i.e. including the one granted by Mr. Registrar Jones in this case), the "conclusive attestation" provisions are most likely to be designed to operate as between the designated authorities in different EU Member States. Giving such provision a wide meaning would give full effect to mutual recognition and respect between such national authorities. It would also serve a very real practical purpose of relieving the court or authority at the second stage of the merger process from being under any obligation to conduct potentially difficult, onerous and time-consuming inquiries into the pre-merger process which had been followed under a foreign law in another EU Member State.

52. However, on the facts of the instant case (and in the absence of contrary argument) I do not think that I need to reach a final view on this point. That is because even if I were to take the view that I could inquire into the facts behind the two pre-merger certificates, I am satisfied that had the correct position been explained to the courts, the certificates would still have been issued.

53. The first issue relates to the fact that by the time the Article 7 reports were placed before the two courts, Vendor Wind had resumed trading. In this regard, the first and most obvious point is that the reports were, as Article 7 states, "intended for the members" of the merging company and that they accurately stated the position of Vendor Wind when they were adopted. Further, according to the evidence, Mr. Kuczkowski, who was the only shareholder and director of M2, which was itself the only shareholder of Vendor Wind, was well aware of the resumption of trading by Vendor Wind and indeed was keen that it should do so to preserve the value of its goodwill which was to be acquired by M2 under the merger. The member of Vendor Wind was therefore not misled in any way by any errors or omissions in the report.

54. As to the change in the financial position of Vendor Wind and the statement of the economic effect of the merger on its creditors, I accept that these were matters that did not relate to M2 and were therefore not a relevant matter for Mr. Registrar Jones to inquire into when issuing his pre-merger certificate. Nor, for reasons that I have explained, was it any part of the task of the clerk at the Gdansk District Court to inquire into the status or interests of creditors of Vendor Wind before issuing the Polish pre-merger certificate. Any errors and omissions were therefore immaterial to the decision to issue the pre-merger certificate.

55. Accordingly, whilst in no sense suggesting that inaccuracies in an Article 7 report or any other documents placed before a court or national authority will always be irrelevant to the decision whether to issue a pre-merger certificate, I am satisfied that the inaccuracies and omissions which have been identified in the materials in this case would not have caused either court to refuse to issue its pre-merger certificate.

56. As such, either because I would be prohibited from inquiring into such matters by the "conclusive attestation" wording of Article 10(2), or because I would in any event reach the view that the identified errors and omissions do not undermine the validity of the certificates, I consider that I am entitled to proceed upon the basis that the pre-merger certificates from Mr. Registrar Jones and from the Gdansk District Court satisfy Regulations 16(1)(b) and 16(1)(c) in the instant case.

The exercise of discretion and the task of the court under Regulation 16

57. I therefore turn to consider whether in the exercise of my discretion under Regulation 16, I should follow the views of Mr. Justice Sales in *Diamond Resorts*, or some other course suggested by the comments of Mr. Justice Morgan in *Re Livanova*.

58. Ms. Earle submitted that the correct approach was that of Mr. Justice Morgan in *Livanova* and that I should not concern myself about the interests of creditors of Vendor Wind; and that since the creditors of M2 would obviously be better off after the merger, I should approve the completion of the merger. Ms. Earle's fall-back position was that I could in any event be satisfied on the evidence that the creditors of Vendor Wind were not materially prejudiced by the merger.

59. There are, I think, 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.

60. I think 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 not promote uniform treatment of creditors of both companies in a cross-border merger.

61. The choice between options (i) and (iii) is more difficult. 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).

62. The structure of the Directive appears to be that it is for the national laws of each of the respective merging companies to implement appropriate protection for the

creditors of their own company, so that by the time that the matter reaches the second stage, the court should be entitled to rely upon the pre-merger certificates and assume that the correct procedures have been followed. This will mean that creditors will have been given the opportunity to avail themselves of whatever measures for creditor protection exist under national law. That approach would be consistent with the twin stage process to which I have referred under Articles 10 and 11, and in particular would give full meaning to the provisions of Article 10(1) that it is for each national authority,

> "to scrutinise the legality of the cross-border merger as regards that part of the procedure which concerns each merging company subject to its national law."

63. By way of illustration, in the instant case the relevant protection for creditors of M2 under English law was the ability of the court at the pre-merger stage to convene a meeting of creditors to approve the merger under Regulation 11; and the relevant protection for the creditors of Vendor Wind under Polish law was the procedure under which a creditor could request security for his claim within a month of the publication of the Terms of Merger and then challenge a refusal to provide security by petitioning the local court.

64. Were it otherwise, I foresee that the court at the second stage would have to inquire into the measures which exist under the relevant foreign law and ask what steps had already been taken for the protection of creditors in the other relevant jurisdictions before exercising its discretion; alternatively it would simply have to apply its own view of what the interests of creditors of the merging companies required, irrespective of whether that corresponded with the rights given to such creditors under the foreign law of the transferor company.

65. The former course seems to have been what Mr. Justice Sales envisaged in paragraph 9 of his judgment in *Diamond Resorts* (supra), but as Mr. Justice Morgan pointed out, it would necessarily require the English court in every case to receive evidence of foreign law and then express its own view as to the adequacy of the creditor protection provisions of the law of the other EU Member State concerned. My own experience of ascertaining what Polish law was in this case has been far from straightforward and illustrates the difficulties of such an approach.

66. The alternative course of the English court simply applying its own view of creditor protection is not supported by the terms of the Directive, which contain no statement of any creditor protection test to be applied by the court or designated national authority at the second stage. In the absence of any such guidance, if the court or authority at the second stage were simply to apply its own notions of creditor protection, this would introduce an undesirable lack of consistency of approach between Member States. It would also risk a conflict of laws where, for example, creditors of a transferor company had unsuccessfully objected to the merger at national level and then were given another opportunity to object under a different law before a different national authority or court at the second stage.

67. Fortunately, I do not think that I have finally to resolve this question on the facts of the instant case. Even if I were to adopt the approach in *Diamond Resorts*, I accept that I can be satisfied that the merger is for the benefit of the creditors of M2 because it involves M2 merging with a solvent company and saving the costs of liquidating Vendor Wind. As to Vendor Wind, although it is merging into a company that is marginally insolvent on a balance sheet basis and is seeking to avoid a formal liquidation process which would lead to creditors being paid in Poland, as I have indicated in paragraph 30 above, evidence was eventually produced from the two current creditors of Vendor Wind in Poland, making clear that they have been notified of the merger and of its terms, and they expressly indicated that they do not object to it. This does, I think, solve any concerns over creditor protection.

Conclusion

68. For these reasons, and in spite of the manifest problems caused by the inaccuracies in the documents and the original evidence of Mr. Kuczkowski, I will grant an order approving the completion of the cross-border merger of M2 and Vendor Wind.

69. I am required by Regulation 16(2) to fix a date on which the consequences of the cross-border merger will take effect, which date cannot be less than 21 days after the date of my order. For convenience, that date will be 1 January 2018.