

EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 0452 OF 2009

BETWEEN:

SPORT FINANCIERA SA

Applicant

and

OLYMPIC GOLD HOLDINGS LIMITED

Respondent

Appearances: Mr Jonathan Addo for the Applicant, Sport Financiera SA
Mr Robert Christie for the Respondent, Olympic Gold Holdings Limited

JUDGMENT

[2013: 19 September, 3 October]

(Section 179A Business Companies Act, 2004 – Scheme of Arrangement between respondent company and creditors – construction of terms of scheme – whether scheme terms subject to variation at option of company - whether company in breach of scheme terms – whether scheme any longer ‘viable’)

- [1] **Bannister J [Ag]:** By this application Sport Financiera SA ('Sport'), a creditor of the respondent Olympic Gold Holdings Limited ('the Company'), seeks various declarations and orders in relation to a scheme of arrangement entered into between the Company and its then creditors on 3 March 2010 and sanctioned by this Court pursuant to section 179A of the Business Companies Act, 2004 ('section 179A') on 22 July 2010 ('the Scheme').
- [2] As its name suggests, the Company is a holding company. It has a subsidiary which held a licence to operate the Ukrainian National Lottery, although it appears that that expired in March of this year. It has

a number of loan creditors, some of whom appear in one way or another to be connected persons. Sport, on the other hand, is a creditor in the principal amounts of US\$1,287,538 and EUR279,199,¹ due to it from the Company under an arbitration award made on 16 September 2009 by an arbitral tribunal established under ICC Rules.

- [3] The burden of Sport's complaint, as advanced on its behalf at the hearing by Mr Jonathan Addo, is that the Scheme is not being administered according to its terms. In particular, Mr Addo submits that it was a term of the Scheme as approved that Sport's admitted debt, together with interest at 18.25% per annum, would be discharged in full by payment of US\$1,833 million during the course of the calendar year 2012 and of US\$1.968 million, the balance, during the calendar year 2013. To date Sport has received nothing. Worse, in March 2011 the Company purported to revise the projected payment schedule so as to defer any payments to Sport until 2016, with the debt, together with accrued interest by then amounting in total to some US\$5,250,000, not being finally discharged until the end of 2017. A subsequent communication from the Company dated 13 February 2012 indicated a further revised intention to pay nothing to Sport until 2018, during the course of which year it is proposed that the debt, by then standing, together with accrued interest, at US\$9,561 million, will be discharged.
- [4] The Company's position is that these proposed variations are within the terms of the Scheme and that Sport can have no legitimate complaint in respect of them. Sport, it says, is bound by the terms of the Scheme, to which it assented, and by the covenant not to sue which it embodies, in perpetuity, provided only that any amendments to repayment dates are made on a 'principled' basis and with good reason. In order to test the validity of this remarkable contention, it is necessary to turn to consider the terms of the Scheme itself.

The terms of the Scheme

- [5] Clause 6 of the Scheme is headed 'Scheme Terms.' It provides that the Company and each of the Scheme Creditors have determined that in satisfaction of the Admitted Liabilities (which include the Company's liability to Sport) the Company will repay them within the Repayment Period by 'relevant installments' due and payable on each Interest Payment date and Principal Payment Date. Interest and Principal

¹ admitted to the Scheme in the amount of US\$2.115 million

Repayments Dates are each defined as falling on 1 August 2010 and on the first business day of each succeeding calendar month. Clause 6.1(c) provides, so far as relevant, that the principal amount of each Admitted Liability 'calculated on a pro rata entitlement basis' shall be due and payable to, among others, Sport, on each Principal Payment Date as shall be determined by the Scheme Administrators taking into account the amount of Funds on each Principal Payment Date.

- [6] The 'Repayment Period' referred to in clause 6 is defined as the period starting on 1 August 2010 and ending upon the date when the Scheme ceases to have effect. Clause 28 provides that the latter event will occur when the Scheme Creditors resolve that the Scheme should determine or fifteen months after the making of the final payment under the Scheme, whichever first happens.
- [7] The 'Funds' to which clause 6 refers are defined as the available 'distributable amounts' of the Company for the benefit of the Scheme Creditors determined in accordance with clause 9. Clause 9 provides that as soon as practicable after the Scheme becomes effective the Scheme Administrators shall pay any Scheme Expenses that have fallen due and which have been approved by the Scheme Creditors and shall 'provide' for such Scheme Expenses as are yet to fall due. Scheme Expenses are listed in clause 6.2 and comprise, in short, the costs of establishing and subsequently administering the Scheme. Once the Scheme Expenses have been paid or, as the case may be, provided for, the Scheme Administrators are to confirm the amount of the Funds (as defined as above) based on the Operating Cash Flow Projections as they may be updated from time to time. Operating Cash Flow Projections are defined as the summary cash flow projections prepared by the Company for the years 2010 to 2018 as set out in Schedule 2 to the Scheme document as may be updated and approved by Written Resolution of the Scheme Creditors from time to time.
- [8] By clauses 14 and 15, the Funds available to the Scheme Administrators are to be applied on 1 August 2010 and on the first of each subsequent month in or towards the debts (including interest) of (inter alia) the class of creditors ('Preferred Scheme Creditors') of which Sport is a member 'in accordance with the payment schedule set out in Schedule 2 to the Scheme document.
- [9] These provisions thus contemplate that Schedule 2 will include at the least (a) Operating Cash Flow Projections – which may be updated from

time to time by use of the Written Resolution procedure² - and (b) a payment schedule. When one turns to Schedule 2 as attached to the Scheme as approved, one finds a document entitled 'Operating Cash Flow Projections.' The first section of the document is a table headed 'Summary Cash Flow Projections' and shows the Company as having a projected cash surplus of US\$3.4 million as at 31 December 2010. Figures are then given for each succeeding year until 2018. The figures project a total distributable surplus of US\$33.164 million as being available for distribution between 1 January 2010 and 31 December 2013, the date by which it was projected that Sport's debt would have been repaid.

- [10] The second table in Schedule 2 is sub-headed 'Liability and Repayment under Scheme of Arrangement' ('the payment schedule'). This table contains a section dealing with four so called Preferred Creditors, of which Sport is one. It envisages payments being made to one only of those Preferred Creditors during 2010 and 2011; a final payment to that creditor and a single payment to another creditor, clearing that creditor's entire debt, in 2012; and envisages Sport and the remaining Preferred Creditor as receiving nothing during 2010 or 2011, but as receiving repayment of their entitlements during 2012 and 2013. There is thus a mismatch between the timing and relative proportions of the projected receipts set out in the schedule.
- [11] The provisions of clause 6 and those of clauses 9 and 14 do not sit easily with the contents of the payment schedule set out in Schedule 2. While clause 6 and, aside from its reference to the payment schedule, clause 14, provide for a rateable repayment commencing on 1 August 2010 or so soon thereafter as Funds are available and proceeding month by month thereafter as Funds become available, Schedule 2 appears to envisage repayments being made according to a timetable which discriminates between the various Preferred Creditors and which is not consistently related to projected available Funds.
- [12] In my judgment, the Scheme can be read as a coherent whole (which is, after all, the cardinal object in construing any document intended to have legal effect), once it is appreciated that Schedule 2 is indicative only and does not impose any self standing obligation upon the Company. Clause 6, headed 'Scheme Terms,' is the fundamental provision of the Scheme – indeed, it is the essence of the Scheme. Clause 14 is also a

² essentially, by a 75% majority in value of those voting

substantive provision, which envisages, as does clause 6, that rateable distributions will be made on 1 August 2010 and on the first business day of each month thereafter, always provided that there are Funds – profits – available to make them. The ‘payment schedule’ envisaged by clause 14 is and can only have been intended to give an indication of the anticipated size of each such payment based upon the profit projections contained within Schedule 2, which are themselves expressed to be subject to subsequent variation. Clause 14 and Schedule 2 do not, in other words, constitute a binding promise that Sport’s debt will be repaid by the end of 2013, nor do they override the Company’s obligation under clauses 6 and 14 to pay Sport a rateable proportion of such Funds (if any) as may have been available for distribution at any time earlier than 2012. Sport has at all times had an entitlement to a *pro rata* share of Funds available for distribution on a monthly basis. It has never been entitled to have its debt repaid by the end of 2013 or, indeed, by any other time.

- [13] With that introduction, I can turn to deal with the questions and issues raised by Sport’s application.

Can the Scheme, once sanctioned, be amended?

- [14] The short answer to this question is No. Quite apart from the fact that, in the absence of an express provision contained within a Court sanctioned scheme for variation after sanction, no scheme approved under section 179A can be varied otherwise than through the mechanism of a further Court sanctioned scheme, clause 33.3 of the Scheme expressly so provides. Sport asks the question because of a contention on the part of the Company that clause 40.1 of the Scheme permits the Company to amend the payment dates embodied in the Scheme. This contention of the Company’s rests upon the fallacy that the payment schedule in Schedule 2 gives Scheme creditors an entitlement to be paid upon those dates. As I have already explained, it does no such thing. Scheme creditors’ entitlements to repayment are set out in clauses 6, 14 and 15. Even if the dates set out in the payment schedule gave rise to entitlements, clause 40.1 would not enable them to be varied. Clause 40.1 provides for the Scheme Administrator to be able to extend the deadline for the taking of any step by any of the Company, the Scheme Administrator, or any Scheme Creditor under the Scheme. The provision is directed at administrative provisions of the Scheme³ only –

³ for example, the convening of meetings

hence its being available to the Scheme Administrator alone. It is not concerned with the Company's substantive obligations under clause 6, which may be altered only with the sanction of the Court,⁴ and does not, for that reason, permit the Company to suspend distributions to Sport or to keep Sport out of such distributions as may be made in the future.

- [15] This answer also deals with the question whether purported amendments made to the Scheme are lawful. I should add, for completeness, that there is undoubtedly a power by Scheme Creditors' Written Resolution, for the cashflow predictions contained in Schedule 2 to be varied. Quite why it should have been thought necessary for Creditors' consent to be obtained in order for that to be done, or how withholding of consent would have any effect upon the amount of cash available for distribution by the Company to Scheme Creditors, is not obvious, but for the reasons which I have given, those projections do not constitute terms of the Scheme.

What is the true meaning of the Scheme?

- [16] This question has been sufficiently answered above.

Should an order be made enforcing the terms of the Scheme and requiring payment of all sums due to Sport under the Scheme?

- [17] I have the impression that this head of relief was sought on the basis that it might be held that Sport had a present entitlement under the Scheme to be paid the entirety of its debt. For the reasons which I have given, unless, which Sport does not allege to be the case, the Company has since 1 August 2010 been in receipt of sufficient distributable funds to have enabled all of the four Preferred Creditors to be paid by the time Sport's application was issued, that is not so. There would therefore appear to be no basis for the making of any such order under this part of the application. I will, however, hear Counsel on this component of the application.
- [18] As for an order 'strictly enforcing the terms of the Scheme,' I am unclear what form such an order would take. I have already indicated what are the obligations of the Company under the Scheme. It seems to me that it would be for a Scheme Creditor first to allege that they have been broken before any order was made consequent upon such breach, if

⁴ clause 33.3

established. Again, however, I will hear Counsel on this element of the application.

An order requiring the Scheme Administrator to be bound by this judgment

- [19] The Scheme Administrator is not a party to this application and is not, as things stand, at any rate, subject to the *in personam* jurisdiction of this Court. The Court cannot make such an order.

An order that the Scheme be administered under the supervision of the Court

- [20] Neither precedent nor machinery exists for the Court to take any such step.

A handwritten signature in black ink, appearing to read 'Edward Sumner', is written over the printed name and title.

Commercial Court Judge
3 October 2013