Neutral Citation Number: [2017] EWHC 1756 (Ch)

Case No: HC-2015-004812

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 14th July 2017

Before :

MR CHRISTOPHER PYMONT QC

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Between :

(1) M&G BROAD EUROPEAN LOAN FUND LIMITED	**Claimants**
(2) M&G DYNAMIC EUROPEAN LOAN FUND LIMITED	
(3) M&G DEBT OPPORTUNITIES FUND LIMITED	
(4) M&G DEBT OPPORTUNITIES FUND II LIMITED	
(5) M&G EUROPEAN LOAN FUND LIMITED	
(6) M&G FOCUSED EUROPEAN LOAN FUND LIMITED	
(7) M&G SLK EUROPEAN LOAN FUND LIMITED	
- and -	
(1) HAYFIN CAPITAL LUXCO 2 S.A.R.L.	
(2) HAYFIN CAPITAL LUXCO 3 S.A.R.L.	
(3) HAYFIN OPAL III LP	
(4) HAYFIN OPAL LUXCO 2 S.A.R.L.	
(5) HAYFIN OPAL LUXCO 3 S.A.R.L.	
(6) HAYFIN SPECIAL OPPORTUNITIES CREDIT FUND LP	
(7) HAYFIN SPECIAL OPS LUXCO 2 S.A.R.L.	
(8) HAYFIN SPECIAL OPS LUXCO 3 S.A.R.L.	
(9) HAYFIN TOPAZ LUXCO 2 S.C.A.	
(10) HAYFIN TOPAZ LUXCO 3 S.C.A.	
(11) HAYMARKET FINANCIAL LUXEMBOURG 2 S.A.R.L.	
(12) ETG HOLDINGS JERSEY 1 LIMITED	**Defendants**

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David Wolfson QC and Patricia Burns (instructed by **Boies Schiller Flexner (UK) LLP**) for the **Claimants**
Guy Morpuss QC and Christopher Charlton (instructed by **Macfarlanes LLP**) for the **First to Eleventh Defendants**

Hearing date: 9 June 2017

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APPROVED JUDGMENT

Mr Christopher Pymont QC :

1. I have before me an application by the Claimants ("M&G") for summary judgment pursuant to CPR 24.2. The issues raised by the application arise out of a Shareholders' Deed dated 13 November 2012 which governs the relationship between the shareholders of the Twelfth Defendant, ETG Holdings Jersey 1 Limited ("the Company"). M&G and the First to Eleventh Defendants ("Hayfin") have been shareholders in the Company at all material times. Hayfin have increased their shareholding pursuant to a number of transfers (or purported transfers) from former shareholders and in consequence claim to hold a majority of the shares in the Company. On that footing, Hayfin claim to be able to exercise certain so-called "*drag-along*" rights conferred by the Shareholders' Deed, whereby a majority shareholder can insist upon buying out all other shareholders in the prescribed circumstances. Hayfin had in fact, before the issue of the claim form, exercised (or purported to exercise) such rights, thereby acquiring M&G's shares. M&G's claim in the action is (in summary) that the various transfers by which Hayfin increased its shareholding were void, that Hayfin could not therefore have claimed to be majority shareholders or to benefit from the drag-along rights, that Hayfin's

purported exercise of these rights was void and that Hayfin should be ordered to restore M&G's shares to M&G.

Relief sought on this application

2. The application before me, as originally issued, sought three declarations, namely (a) that the relevant transfers to Hayfin did not comply with the requirements of clause 5.2(c) of the Shareholders' Deed (b) that the transfers were consequently void pursuant to clause 12.7 of the Shareholders' Deed and (c) that Hayfin therefore held insufficient shares to entitle it to exercise and/or benefit from the "drag-along" rights. However, Mr Wolfson QC (for M&G) accepts that he cannot succeed, on this application, on declaration (c) because Hayfin has raised a factual issue in answer to it which is not appropriate for summary determination (the relevant plea is at paragraph 44 of the Defence and is to the effect that M&G is estopped from denying the validity of the relevant transfers, or has waived any failure to comply with the Shareholders' Deed, for the reasons given). Mr Wolfson QC still, however, contends for declarations (a) and (b). At the hearing, I expressed my doubts about the efficacy of this course, as it seemed to me that the plea of estoppel or waiver might also render it inappropriate to make those declarations on a summary application: the issue of the validity or invalidity of the historical transfers when they were made may be found at trial to have been overtaken by the events said to have given rise to the estoppel or waiver. However since the principal issue raised by M&G's application is a point of construction of the Shareholders' Deed, I propose to deal with that issue in this judgment and I

have left any argument as to the precise relief which follows to be dealt with on further submissions, if appropriate.

3. I should also record that M&G is not seeking, on this application, to pursue any contention based on matters of disputed fact. As I explain below, M&G's complaint that the contractual share transfer procedure was not followed is based partly on a point of pure construction (the relevant transfer notices did not contain all the contractually required information) and partly on an allegation of fact (the price given was not the true price at which the shares were proposed to be transferred). It is only the point of construction which falls to be determined on this application.

The Shareholders' Deed

4. Clause 4.1 of the Shareholders' Deed provides that Investors (as defined) may "*Transfer Shareholder Instruments*" subject (so far as material) to compliance with clauses 5 and 12. "*Shareholder Instruments*" is defined to capture a number of different choses in action, including shares in the Company and various classes of subordinated debt, and "*Transfer*" is defined widely to cover various means by which changes in ownership can happen, directly or indirectly, but nothing turns on the precise terms of either definition.

5. Clause 5 provides for Investors to have rights of first refusal where a Transfer of Shareholder Instruments is in prospect. Clause 5.1 states (so far as relevant):

> "*… any Investor (the* ***Offeror****) proposing to Transfer any Shareholder Instruments, before Transferring such Shareholder Instruments, shall serve a transfer notice on each … Investor (the* ***Transfer Notice****).*"

Clause 5.2 provides that the Transfer Notice shall specify certain things, including (a) the number, per category, of Shareholder Instruments proposed to be transferred ("the ***Offered Securities***") and calculations of how many would be open for acceptance by each Investor, (b) the name of the Intended Transferee and, crucially for present purposes,

> "(c) *the price per Offered Security (the* **Price***) at, and the material terms (including as to the timing of the proposed Transfer) on, which the Offeror proposes to Transfer the Offered Securities to the Intended Transferee, together, the* ***Offered Terms***."

Clause 5.3 provides for the Transfer Notice to be expressed to be open for acceptance for 10 Business Days from the date of issue, for the Transfer Notice to be irrevocable and for it to specify that it is governed by English law.

6. By clause 5.4, if an Investor wishes to purchase its pro rata entitlement to the Offered Securities, it may serve notice in writing to that effect (a "***Buy Notice***") which may also confirm whether the Investor would accept further Offered Securities above its own pro rata entitlement, should other Investors decline ("the ***Excess Allocations***", to be allocated in accordance with clause 5.5). Clause 5.6 provides that upon expiry of the acceptance period

> *"(a) If Buy Notices are served in respect of all of the Offered Securities (including by way of applications for Excess Allocations), the Offeror shall be bound to sell, and the relevant … Investors shall be bound to purchase, the relevant Offered Securities specified in such Buy Notices upon the Offered Terms; or*
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> *(b) If Buy Notices are served in respect of less than all of the Offered Securities offered for sale, the Offeror may either retain the Offered Securities or sell all of the Offered Securities to the Intended Transferee in accordance with clause 5.10."*

If clause 5.6(a) applies, the sale to Investors who served Buy Notices will proceed as set out in clause 5.8. If clause 5.6(b) applies, the Offeror may Transfer all of the Offered Securities to the Intended Transferee (or any of its Affiliates, as defined)

> "*for cash consideration at a price per Offered Security which is not less than the Price provided that:*
>
> ...
>
> *(c) the terms applying to such Transfer are no more beneficial to the Intended Transferees (or its Affiliates) than the Offered Terms;"* (clause 5.10).

7. These procedures are mandatory in the circumstances specified. This is clear from:

    i) clause 4.1 which (as above) confers the right to Transfer Shareholder Instruments only "*subject to compliance*" with (inter alia) clauses 5 and 12;

    ii) clause 5.10(d)(ii) which provides that the Company Board shall refuse registration of any Transfer to the Intended Transferee (or its Affiliates) "*if any of the foregoing provisions of this clause 5.10 are not complied with*"; and

    iii) clause 12.7 which provides that "*any Transfer in breach of the provisions of this Deed or the Articles shall be void*".

The Issue

8. M&G's contention is that the Transfer Notices which preceded Hayfin's acquisition of a substantial number of Shareholder Instruments failed to

contain all the "*material terms*" of the proposed transfer to Hayfin, as required by clause 5.2(c). Specifically, the complaint is that the relevant Offeror was, in each case, only willing to sell its Shareholder Instruments if, at the same time, there was a sale of its share of the Senior Debt owed by a member of the Company's group (which was not one of the choses in action covered by the definition of Shareholder Instrument). Hayfin had in each case agreed to take on the relevant Offeror's share of the Senior Debt at the same time as it purchased the shares, so (M&G contends) this agreement must have been one of the "*material terms … on which the Offeror [proposed] to Transfer the Offered Securities to the Intended Transferee*" and should therefore have been included in each Transfer Notice. Yet that agreement was not referred to in any of them. The consequence (it is said) is that each Transfer made pursuant to a non-compliant Transfer Notice is void (clause 12.7).

9. Hayfin accepts that no relevant Offeror was willing to sell its Shareholder Instruments without also selling the Senior Debt at the same time and Hayfin also accepts that, although the sales were not formally conditional upon one another, they were in substance part of one economic transaction. Hayfin contends, however, that that does not make the agreement as to the Senior Debt one of the "*material terms*" of the proposed transfer of the Shareholder Instruments. Hayfin contends that the two sales are (or could be) quite separate sales, in each case for full value or for value independently negotiated, albeit that they are part of the same overall transaction. Moreover the Shareholders' Deed does not confer upon the Investors a right to insist upon the purchase of the Senior Debt along with the Shareholder Instruments, nor does it provide any express mechanism to allocate the Senior Debt among

Investors willing to acquire their pro rata entitlement of the Shareholder Instruments, unlike the express provisions in clause 5.5 for identifying the number of Shareholder Instruments and Excess Allocations to be offered to each Investor. In those circumstances, it is submitted, an agreement as to the Senior Debt is simply immaterial to the rights of first refusal conferred by clause 5.

10. The main issue before me is therefore as to the meaning of the word "*material*" in clause 5.2(c). Are the terms of the proposed acquisition of the Senior Debt "*material terms*" which have to be included in the Transfer Notice? As I have noted above, M&G's contention is that those terms were bound to be material as a matter of construction of the Shareholders' Deed: whether they were material by reason of any factual circumstance is in dispute and not capable of summary determination.

Discussion

11. M&G's approach is, in effect, to interpret the "*material*" terms as meaning the substantial or significant terms. In other words, to comply with clause 5.2(c), first one has to identify all of the actual terms of the proposed Transfer and then one must include in the Transfer Notice all of the significant or substantial terms proposed. Only then are the Investors being offered the same deal as is being proposed to the Intended Transferee, which is the overall intent of clause 5.

12. I do not agree with this approach. "*Material*" is a word which connotes relevance as well as significance or substantiality. Thus, Briggs J in In re Lehman Brothers International (Europe) [2012] EWHC 1072 (Ch),

considering the meaning of the phrase "*the material terms of [a] Terminated Transaction*", observed:

> "*At first reading, the phrase 'the material terms of that Terminated Transaction' provokes the question: material to what?*" (para [49]).

Again (though not a case cited to me), in Fitzroy House (No 1) Ltd v Financial Times Ltd [2006] 1 WLR 2207, the question arose whether a tenant had "*materially complied with all its obligations*" under a lease so as to claim the benefit of a break clause. The landlord contended that the qualification "*material*" enabled the court to ignore trifling or trivial breaches but no others (para 33). The tenant however pointed out that "*material*" had at least two senses, namely relevance and substantiality, submitting that

> "*The first sense prompts the question 'material to what?', the second 'material to what extent?'* " (para 34).

The Court of Appeal, finding for the tenant, determined that "*materiality*" was to be assessed "*by reference to the ability of the landlord to relet or sell the property without delay or additional expenditure*" and that there was no justification for limiting its effect to the exclusion of only breaches which were trivial or trifling (para 35, per Sir Andrew Morritt C).

13. I also see no reason in the Shareholders' Deed why the word "*material*" should be thought to exclude only terms which are insignificant or insubstantial. Such a test merely raises the question: by what yardstick is significance or substantiality to be judged? In my judgment, the correct approach is similar to that taken by Briggs J and Sir Andrew Morritt C in the cases I have referred to. It is necessary to identify to what end, or for what

purpose, any of the terms of the proposed transfer are to be considered "*material*" (or immaterial) under clause 5.2(c).

14. My starting-point is to observe that clause 5 of the Shareholders' Deed confers rights of first refusal in respect of Shareholder Instruments: it does not confer any rights in relation to other property which may be purchased or sold at the same time as the Shareholder Instruments, whether that be Senior Debt or anything else. For that reason, there is no mechanism for allocating other property among the Investors: simultaneous sales of other property were outside the scope of the Deed. Two consequences seem to me to follow. The first is that the clause does not require notice to be given of terms in a proposed Transfer which are entirely extraneous to the proposed Transfer of the Shareholder Instruments, such as a simultaneous transfer by (or, for that matter, to) the Offeror of other property. Such extraneous terms are not "*material*" but quite immaterial to the rights of first refusal granted in respect of the Shareholder Instruments. The second is that what is "*material*" about the terms of the proposed Transfer is not to be assessed by reference to the total terms of the proposed Transfer but only by reference to that part of the proposed Transfer which affects the Shareholder Instruments.

15. This reading is consistent with the rest of clause 5.2(c). What the Transfer Notice is required by this sub-clause to disclose is, first, the price per Offered Security at which the Offeror proposes to Transfer the Offered Securities. That is, indeed, the fundamental point in which a holder of Shareholder Instruments will be interested. The other terms "*material*" to a holder of Shareholder Instruments are the terms, other than the price, upon which that

Transfer is to be completed. That seems to be precisely what clause 5.2(c) also contemplates: the only example given of a "*material*" term in the sub-clause itself is a term regarding completion of the proposed Transfer ("*including as to the timing of the proposed Transfer*"). Such terms together (price and other terms) are then the "*Offered Terms*" which are to govern a sale to the relevant Investors of "*the relevant Offered Securities*" (clause 5.6(a)). The mere fact that the proposed Transfer to the Intended Transferee was to take place simultaneously with a sale or purchase of other property is not, without more, of any relevance to the procedure set out in clause 5 for the working out of rights of first refusal on the proposed transfer of Shareholder Instruments.

16. I recognise that there may be an argument (as M&G indeed will contend at trial in this action) that any simultaneous transaction is or becomes "*material*", and must be disclosed in the Transfer Notice, if the effect in context is to increase artificially the price of the Shareholder Instruments offered to the Investors through the Transfer Notice (in this case by offering less for the Senior Debt). I have not heard full argument on this issue, given that it raises factual questions which are inappropriate for determination on a summary application. But presumably M&G's contention at trial will be that the "*price*" referred to in clause 5.2(c) must be the true price attributable to the Shareholder Instruments by the proposed Transfer and not some price that has been artificially inflated by unjustifiably beneficial terms agreed on a simultaneous transaction. Presumably M&G would also pray in aid the protection afforded to Investors by clause 5.10, whereby the Offeror can only ever sell the Offered Security to the Intended Transferee for "*cash*

consideration at a price per Offered Security which is not less than the Price" and "*provided that ... the terms applying to such Transfer are no more beneficial to the Intended Transferee (or its Affiliates) than the Offered Terms.*" However that may be, it is not shown by M&G (or conceded by Hayfin) on this summary application that there is any factual basis for the argument. All I need to say is that, in my judgment, the mere possibility that it might be the case that the price for the Shareholder Instrument is affected by a simultaneous transaction is not a sufficient basis for saying that the terms of the simultaneous transaction must be part of the "*material terms*" to be referred to in the Transfer Notice without which the notice is invalid.

17. I also recognise that, if it is impossible to identify those terms of the proposed Transfer which are attributable to the sale of the Shareholder Instruments separately from those which are attributable to the simultaneous purchase and sale of the Senior Debt, with the result that the Investors do not have the right to accept only the former, the consequence may be that the Offeror is not entitled to serve a Transfer Notice at all. That at any rate seems to be the conclusion in similar circumstances of Chesterman J in the Supreme Court of Queensland in the case of THL Robina Pty Ltd v The Glades Golf Club Pty Ltd [2004] QSC 461, para 50, and also of the Supreme Court of Oklahoma in Ollie v Rainbolt 669 P 2d 275 (1983), paras 20-1. However, any point of this kind again involves an inquiry into factual matters currently in dispute and is not susceptible of resolution on this summary application.

18. I therefore dismiss the application.