EUROPEAN RESTRUCTURING WATCH ALERT

PREMIER OIL SCHEMES – SCOTTISH SANCTION JUDGMENT

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On Wednesday 29 April the Outer House of the Court of Session in Edinburgh issued an opinion sanctioning two schemes of arrangement proposed by Premier Oil Plc and Premier Oil UK Limited (together, **Premier Oil**) (the **Schemes**). The Court addressed multiple grounds of challenge and did so without hearing live evidence, despite disputes of fact between the parties.

The purpose of the proposed Schemes is to deem the necessary lender consents for Premier Oil to acquire one or more North Sea assets, raise up to US$ 500m in equity to fund the acquisitions, alter creditor voting rights under the finance documents, and extend debt maturities from May 2021 to November 2023.

Premier Oil's largest creditor, Asia Research and Capital Management (**ARCM**), holding a c15% stake across Premier Oil's debt, opposed the Schemes at the Court hearing held on 17-19 March 2020 and has lodged an appeal against the Court's sanction decision. Until the outcome of ARCM's appeal is resolved, the Schemes are effectively stayed.

In a statement released on the date of the judgment, Premier Oil confirmed that it is assessing the feasibility of completing the acquisitions in the current market conditions and on 6 May 2020 further confirmed that the underwriting agreement entered into on 7 January 2020 in connection with the proposed equity raise had lapsed. *Debtwire* has since reported that the company last week held an all lenders' call to sound out a new amend-and-extend plan, potentially requiring another set of schemes of arrangement to be implemented.

Premier Oil's current capital structure was put in place following a refinancing in 2017 implemented through unopposed Scottish schemes of arrangement. As at the date of the 2020 explanatory statement, Premier Oil had a total of over US$2.8 billion of outstanding debt instruments (drawn and undrawn), including a US$ 1.96bn RCF, US$ 150m and GBP 100m of term loans, US$ 130m converted facilities (which replaced prior Schuldschein debt), US$ 358m of US private placement notes and GBP 150m of retail bonds.

ARCM's opposition to the Schemes was multi-faceted, ranging from challenging the permissible scope of Schemes, the proposed creditor class composition and its use of an insolvent comparator, to arguing that the Schemes are inherently unfair. ARCM also argued at the sanction hearing that the recent oil market collapse rendered the Schemes non-viable. In her opinion, Lady Wolffe rejected each of the grounds of challenge raised by ARCM.

As is implicit in its appeal, ARCM does not accept that the Judge's findings are correct. Nevertheless, some notable issues decided in the opinion are as follows:

- **The scheme jurisdiction extends to a compromise or arrangement of scheme creditors' non-pecuniary rights, including voting rights, provided they are incidental to debt owed by the scheme company to the scheme creditors as creditors.** While an arrangement or compromise must be with respect to creditor rights for the purposes of Part 26 of the Companies Act 2006 (the 2006 Act), this can include an arrangement or compromise of rights ancillary to scheme creditors' rights to have their debt repaid, to the extent that these ancillary rights are conferred on the scheme creditors as creditors and are exercisable by virtue of the debt they hold. This is a broader approach than that indicated by Zacaroli J in *Re Instant Cash Loans*.

- **A scheme that removes a creditor's veto rights can involve the requisite "give and take", provided that it does not remove the creditor's voting rights altogether.** Altering scheme creditors' voting rights in a way that disadvantages some creditors can still provide the required "give and take", provided that the voting rights are replaced with a different set of voting rights. More generally, in assessing whether a scheme involves the necessary "give and take", the proposal and its relative benefits must be considered as a whole.

- **A creditor under a revolving credit facility is a contingent creditor for any undrawn amounts such that, if a scheme extends the period over which the undrawn amounts must be made available, no impermissible**

new obligations are imposed on scheme creditors. Extending the maturity date of a revolving credit facility, and altering the risk profile of the business, without increasing the quantum of the facility does not result in an impermissible new obligation or an obligation on wholly new terms being imposed on scheme creditors in respect of undrawn commitments, but is simply a variation of an existing term.

- **In circumstances where the collapse in the oil price could impact the ability to implement the proposed scheme, such matters should not prevent sanction and are best left to the market itself.** Accordingly, the recent collapse in the oil price and its potential to undermine the commercial rationale or viability of the schemes did not lead the Judge to conclude that sanction should be refused. As noted above, it seems that Premier Oil is already looking at alternatives to the Schemes.
- **The purpose of an explanatory statement is for a scheme company's directors to honestly present their scheme proposal as they see it so that scheme creditors may form a reasonable judgment.** To challenge the adequacy of the explanatory statement, a creditor needs to show that it includes statements that are beyond the range of views which the scheme company's directors could reasonably form, precluding creditors from forming a reasonable judgment on the schemes. The lack of analysis in the scheme documents regarding the impact of insolvency on scheme creditors' returns was not held to be a deficiency, despite the Judge holding that there should be an insolvent comparator. The Judge did not appear to look separately at the position of the retail bondholders or the importance to them of the accuracy of the explanatory statement, despite their importance to the numerosity test for voting.
- **A failure to satisfy the statutory definitions of insolvency under s123 of the Insolvency Act 1986 (i.e. on a cash-flow or balance sheet basis) does not preclude the use of an insolvent comparator.** The court should consider a broader range of circumstances than the statutory definitions of insolvency in determining whether insolvency is the likely factual position in the absence of the scheme proposed (i.e. the comparator). An insolvent counterfactual can include circumstances where there is a likelihood or risk of a scheme company being unable to repay its debts, even if those debts are not presently due and the company is currently continuing as a going concern.
- **The permissible degree of futurity in the statutory cash-flow insolvency test extends to liabilities falling due in the "reasonably near future", which can include debts falling due over a year away.** What constitutes the "reasonably near future" for the purposes of the cash-flow insolvency test will depend on the individual circumstances of the scheme company. The court will have regard to the magnitude of the company's debts, whether the totality of those debts falls due on the same date, and whether the company will be able to pay them when due.
- **Changes to interest rates, to bring all creditors from different interest rates to a single harmonised interest rate, will not fracture class or create a 'special interest' provided that all creditors are to receive an increased (albeit unequally increased) economic return through the process.** Where all scheme creditors stand to benefit from a scheme, this can outweigh substantial differentials in the degree to which they will benefit so that such a differential does not render it impossible for them to consult together with a view to their common interest. The interest of a scheme creditor receiving a greater increase in its economic return (even a 67% increase) is unlikely to be adverse to a creditor who is also benefitting, even if to a lesser degree (even if it is enjoying only a 5% increase).
- **Similarly, changes to harmonise voting rights and bring all creditors within a single voting group under the finance documents will not**

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fracture class or create a 'special interest', provided that each dollar of debt has the same voting rights after the harmonisation. Pre-schemes, creditors voted in separate groups under the finance documents depending on which type of debt they owned. Each such creditor group was constituted of different numbers of creditors and of different aggregate values of debt, and each wielded its own veto. Nevertheless the Judge considered that, as a matter of substance, each creditor's voting right was the same, irrespective of creditor group. Further, the Judge considered that when the comparator was taken into account (an insolvency in May 2021), the analysis was even more straightforward, as she considered that the pre-existing voting rights would be irrelevant.

- **Where certain scheme creditors will receive collateral benefits such as payment of underwriting fees, such payments should not be considered an inducement to vote in favour of the scheme unless it can be shown that: (a) the fees are not at market rates; or (b) that those creditors would not have voted for the scheme "but for" the receipt of the payment.** In determining whether votes of scheme creditors are motivated by fees, even fees in the region of US$ 12m going to a single creditor, the court will have particular regard to whether the fees are in line with market rates, whether they are in respect of additional services to be rendered such that they do not amount to a consent fee and whether other scheme creditors not in receipt of the relevant fee(s) nonetheless voted in favour of the scheme at the scheme meetings. The court doubted that such fees need to be disclosed in the explanatory statement.

- **A scheme which purports to grant a power of attorney, even though it is not executed as a deed, does not give rise to any issue of English or Scots law.** This is the case notwithstanding both that s1 of the Powers of Attorney Act 1971 (the **1971 Act**) provides that an instrument creating a power of attorney must be executed as a deed and the absence of binding precedent in England on the point. A scheme has binding force not as a matter of contract but by virtue of the 2006 Act, suggesting that there is no need for compliance with any additional formalities (including s1 of the 1971 Act) as would be required under the general law. There is no provision in Scots law akin to s1 of the 1971 Act.

- **The Schemes were self-amending schemes.** The Schemes were to be implemented via an Implementation Deed, which could be amended to alter the Schemes by a 66.66% majority, without the consent of the Court, which ARCM argued created a blot on the Schemes. Premier Oil resolved this issue by undertaking not to agree any such amendments unless they were technical or administrative.

- **Taking its findings as a whole, the opinion shows the Court giving great deference to the views of the company's directors.** For example, on the dispute as to the correct comparator, the Judge accepted the company's submission that the court should defer to the views of the company's directors, and she declined to hear live evidence to the contrary. The Judge took a similar approach on the other disputes of fact.

ARCM is represented as to English law on the Schemes by Weil, together with a team from South Square. The Weil team is led by London Restructuring partners Andrew Wilkinson and Mark Lawford and London Litigation partner Jamie Maples, assisted by a team led by Counsel Hayley Lund and senior associate Harriet Fielding. The South Square team consists of Mark Phillips QC, Adam Goodison and Edoardo Lupi.

ARCM is represented in Scotland by Lord Davidson QC and John MacGregor of Axiom Advocates, instructed by Alasdair Proudfoot and Fiona Carlin of Dickson Minto W.S.

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