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# Smile Telecoms: English Court Approves First Restructuring Plan to Disenfranchise Out-of-the-Money Stakeholders and First to Compromise Shareholders in a Foreign Company

30 March 2022

## At a Glance

The English court approved the restructuring plan of Smile Telecoms, which is the first to exclude out-of-the-money stakeholders from voting on the plan, and the first to compromise shareholders' rights in a foreign company.

In road-testing the power to exclude out-of-the-money plan participants from voting, the court laid down new principles that will be critical to future such applications — including how stakeholders' lack of genuine economic interest is to be determined and the relevant standard of proof. It is clear that the court needs to be entirely satisfied that it is appropriate to make such an order, given the "draconian" consequences of doing so (including not giving such stakeholders the opportunity to vote on the plan and removing them from the formal protections of the conditions for cross-class cram-down).

In approving a plan compromising shareholders' rights in a foreign company, the court was careful to test the local expert's evidence as to recognition and to ensure the English court's exercise of authority would not be regarded as an exorbitant exercise of jurisdiction. The court commented that foreign law experts should submit their evidence in accordance with CPR Part 35; it ultimately confirmed satisfaction with the form of the expert evidence ahead of handing down judgment and sanctioning the plan.

A senior lender, Afreximbank, expressed its opposition in correspondence and produced competing valuation evidence to demonstrate it was not out-of-the-money; however, it did not formally oppose the plan in court. The court criticised this conduct: “Put simply, if a creditor or member wishes to oppose a scheme or plan based upon a contention that the company’s valuation evidence as to the outcome for creditors or members in the relevant alternative is wrong, they must stop shouting from the spectators' seats and step up to the plate."

Kirkland & Ellis advised Smile Telecoms.

## Background

Smile Telecoms Holdings Limited (the "Company") is the holding company of an internet and telecoms business that operates across four countries in Africa. The Company is incorporated in Mauritius with a registered branch and its centre of main interests in England.

The Company conducted an earlier restructuring plan in early 2021 in order to facilitate the provision of urgent funding and to implement a framework to permit the solvent disposal of the Company’s operations. The Company sought to sell its operating subsidiaries or their assets in order to repay its senior lenders and the super senior lender, which advanced a c. $64 million super senior facility pursuant to the first restructuring plan (the "Super Senior Lender").

However, the sales process did not yield offers that would be sufficient to repay the group’s existing financial indebtedness. The Company faced very serious cash-flow issues and had insufficient funds to pay trade creditors or the super senior facility (which matured on 31 December 2021).

## Proposed Restructuring

The restructuring involved (in summary):

- the acquisition of control of the Company by the Super Senior Lender;
- further new funding from the Super Senior Lender;

- the compromise of existing senior facilities, and release of related security, in return for a $10 million payment to the senior lenders (pro rata);
- the compromise of other unsecured claims and the equity of the existing shareholders; and
- the issuance of a contingent value rights instrument in favour of the Super Senior Lender and the senior lenders.

The Company successfully argued that the most likely alternative to the proposed restructuring plan was administration and for its operating subsidiaries to enter liquidation (or some similar local insolvency process).

## Disenfranchisement of Out-of-the-Money Stakeholders

The Company successfully persuaded the court to convene only a single class of plan participants (consisting of the Super Senior Lender alone), on the basis that no other stakeholder had a genuine economic interest in the Company.

Under the relevant legislation, the court may (upon application) exclude a class of creditors or shareholders if it is satisfied that none of the members of that class has a genuine economic interest in the company. This power — which had never before been utilised — is in addition to the court's power to approve a plan that not every class has approved.

*Lessons learned*: The court laid down the following principles, which will be critical to future applications to disenfranchise out-of-the-money stakeholders.

1. In considering whether a plan stakeholder has a genuine economic interest in the company, the court will consider the position by reference to the relevant alternative for the company if the plan is not sanctioned.
2. The court should address the question by applying the civil standard of balance of probabilities.
3. At a convening hearing, the court may conclude that — in assessing an application to exclude plan stakeholders from voting — the evidence is not sufficiently complete or satisfactory to enable the court to reach a concluded view. (For example, this may be the case if inadequate notice has been given in relation to the application, or if a stakeholder raises objections that the court considers need further evidence or investigation.) On the other hand, if the court is satisfied by the evidence at the convening stage that none of the members of the relevant class has a genuine economic interest in the company — as in this

> case — then the court may properly conclude that there is no purpose to be gained from requiring any meeting of that class.

At the sanction hearing, Snowden LJ (unusually, "reaching down" from the Court of Appeal to sit as a judge of the High Court) particularly endorsed the cautionary words in point 3 above. As he noted, despite the degree of attention focused on the court's "cram-down" power (to bind a dissenting class), the power to exclude classes from voting at all — on the basis that their views are essentially irrelevant — is even more draconian. This makes it "of very considerable importance that the court should be entirely satisfied" that it is appropriate to make an order to exclude out-of-the-money stakeholders from voting on the plan.

The court noted the Company's extensive valuation evidence, relevant comparator report and the real-world evidence of the marketing and sales process that had taken place. It held the evidence established that the senior lenders and those below the senior lenders were "well out of the money" and that this was "not a marginal case". There had been adequate notice (of a month) and opportunity to challenge.

It was therefore satisfied, on the balance of probabilities, that the only class of creditors or members with any genuine economic interest in the Company was the Super Senior Lender, and convened a single class meeting accordingly.

This effectively meant that only the Super Senior Lender was invited to vote on the restructuring plan (which it supported). There is no issue in having a meeting of a single member of a class if there is only one member of that class.

## Binding Shareholders in a Foreign Company

The Company is incorporated in Mauritius with its centre of main interests ("COMI") in England, as noted.

Afreximbank, in correspondence, contended that the court would not have jurisdiction in respect of the proposed restructuring plan because it affected the rights of members in a foreign company. However, the court held:

- there was sufficient connection to England to justify the court exercising its discretion to sanction the plan — namely, the Company had moved its COMI to England and the overwhelming majority of the debts compromised under the plan were governed by English law;

- the English court has jurisdiction, *as a matter of concept*, to sanction a plan that involves the alteration of the constitution and share capital of an overseas company;
- the real issue was whether it was *appropriate* for the English court to exercise this jurisdiction, in circumstances where there was no parallel scheme or plan in Mauritius;
- if the court can be satisfied that the necessary alterations to the constitution and share capital of an overseas company can be satisfactorily achieved in the overseas jurisdiction by an alternative process that is compliant with local laws and acceptable to the local courts without any need for a parallel scheme or plan, then the absence of such a parallel proceeding should not deter the English court from sanctioning the plan (see further below); and
- the plan was likely to be recognised and given effect in jurisdictions in which the Company has its main assets and business interests (Nigeria) and in the jurisdiction of the governing law of a preference share subscription agreement (South Africa).

The court was especially careful to test how the plan would be given effect in Mauritius, the Company's jurisdiction of incorporation. It rejected the idea that a plan could have direct effect to alter the Company's constitution and share capital in Mauritius. Instead, it held the real question was whether the court could be sufficiently satisfied that the procedure envisaged under the plan for altering the constitution and share capital of the Company using the power of attorney conferred under the plan, would be acceptable and effective in Mauritius. This is essentially a matter for expert evidence as to the law of Mauritius.

The court identified certain areas of expert evidence where it required further explanation/assurances. The court confirmed satisfaction with the confirmatory evidence provided prior to the handing down of the judgment and has sanctioned the plan.

## Opposing restructuring plans on valuation grounds: "stop shouting from the spectators' seats"

As noted, Afreximbank expressed opposition to the plan in correspondence but did not formally oppose the plan in court. Specifically, Afreximbank produced competing valuation evidence to demonstrate it was not out-of-the-money and contended that the court would not have jurisdiction in respect of the restructuring plan because it also affected the rights of shareholders in a foreign-incorporated company.

The court (in the sanction judgment) described Afreximbank's conduct as "unhelpful". "Put simply, if a creditor or member wishes to oppose a scheme or plan based upon a contention that the company's valuation evidence as to the outcome for creditors or members in the relevant alternative is wrong, they must stop shouting from the spectators' seats and step up to the plate."

The court outlined the proper route to be followed by a stakeholder opposing a plan on valuation grounds:

1. obtain any financial information from the company that may be required, either on a voluntary basis or by making a timely disclosure application;
2. file expert evidence of its own, instruct the expert to engage in the production of a joint report in the normal manner and tender the expert for cross-examination; and
3. attend the hearing and address argument for the assistance of the court at the appropriate stage in the process at which the point is to be determined:

    (a) if an order is sought to disenfranchise out-of-the-money stakeholders from voting, that will be at the convening stage; and

    (b) if the court is being asked to approve a plan that not every class has approved, that will be at the sanction hearing.

In the present case, given opposing stakeholders had not taken such steps, the court found there was no basis upon which it should re-evaluate the decision at the convening hearing (that no plan participant other than the Super Senior Lender needed to be invited to vote on the plan, given no other plan participant had a genuine economic interest in the company).

Now the court has laid out such a clear road-map for opposing a restructuring plan on valuation grounds, it should be harder than ever for opposing stakeholders simply to "shout from the spectators' seats".

## Requirement to compensate out-of-the-money classes?

A scheme or restructuring plan must constitute a "compromise or arrangement". For conventional schemes, this requires some element of "give and take" and the test will not be satisfied if the scheme effects an expropriation of rights without some compensating advantage. The courts have extended the same principle to early restructuring plans, though without detailed consideration.

Arguably, this principle might not apply equally in the context of restructuring plans: if stakeholders would receive nothing in the relevant alternative to the plan, then the court ought to be able to sanction a plan that provides them with nothing in exchange for the release / cancellation of their existing rights.

The court in *Smile* concluded it was unnecessary to decide this point given the *de minimis* payments to dissenting classes under the plan which — the court held — sufficed to prevent the plan being an expropriation of plan participants' rights.

The convening judgment is here; the sanction judgment is here.

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## Related Services

### Practices

- Restructuring

## Suggested Reading

- 05 April 2022 Press Release Kirkland Represents Noble Group on $1.3 Billion Restructuring
- 01 April 2022 Sponsored Event 2022 Wharton Private Equity & Venture Capital Conference
- 01 April 2022 Award GRR 40 Under 40 2022