JERSEY / JUDGMENT

LXB Retail Properties PLC [2018] JRC 049 (05 March 2018)

[2018] JRC 049

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judgment

the COMMISSIONER: 1. On 2 nd February, 2018, the Court gave orders convening a meeting of the members of LXB Retail Properties PLC ("the Company") to consider, and if thought fit, approve a scheme of arrangement ("the Scheme") and this pursuant to Article 125 of the Companies (Jersey) Law 1991 ("the Companies Law"). 2. The Company was incorporated on 27 th August, 2009 and its shares were admitted to trading on AIM and to listing on the Channel Islands Stock Exchange (the predecessor to the International Stock Exchange) in October 2009. The Company is a closed ended investment fund with the investment purpose of creating a high quality long lease retail investment portfolio through the acquisition of out of town and edge of town sites for complete redevelopment, re-modelling and extension. 3. The Company was originally structured with the potential to have a term of just over five years (from the time of the Company's listing). The Company, which has no employees and no executive directors, has delegated investment proposal responsibility and day to day management of itself and its subsidiaries ("the group") and the group's underlying assets to LXB Adviser LLP ("LXB Adviser") in a manner similar to many other open and closed ended fund structures. 4. To date the Company has raised £257.5M (net of costs) by means of an initial equity fund raise of £100M and subsequent international funding rounds. This capital was used to invest through subsidiaries in 11 opportunities across the UK. A number of challenges were faced by the group in making investments in respect of these opportunities. 5. The first return of cash was made to shareholders by way of share buy-backs in March 2013. By June 2014, the Company had returned £84.6M by means of share buy-backs and, by May 2015, this amount had increased to £167.2M realised through the sale of certain of the group's assets to the Crown Estate, and returned through a structured return of cash to all shareholders. 6. In May 2015, the board of the Company recognised that more time was needed to provide visibility to the Company's shareholders on the eventual outcome of their investments and for the board to provide a recommendation as to the best way forward, in consequence of which, a 12 month extension of the time by which the directors of the Company were required to put proposals for the "end of life" of the Company was agreed by shareholders. 7. At an extraordinary general meeting in February 2016, shareholders approved a change in strategy whereby the Company was mandated to realise its investments for cash, and further returns of cash in 2016, in aggregate of £93.95M, resulted in all of the original investment made by

shareholders (net of costs) being returned. 8. In the Chairman's statement accompanying the results for the year ended 30 th September, 2016, it was noted that there would be a need for a continuing vehicle following any final realisation due to the inevitable subsistence of ongoing liabilities. It was also stated that proposals would be put to shareholders in 2017 providing for the remaining value in the group to be returned to shareholders by way of a combination of an immediate return of cash, an additional return of cash in the medium term and shares in a new AIM listed company that would hold any assets and liabilities remaining following the date of realisation. 9. A special resolution was passed by shareholders in April 2017, extending the period within which proposals for the end of the life of the Company should be put to shareholders to 30 th November, 2017. 10. On 9 th October, 2017, the shareholders passed the following special resolution amending Article 43 of the Articles of Association :- "The Directors shall cause an extraordinary general meeting of the Company to be convened for a date not later than 28 February 2018 at which the Directors shall offer Shareholders proposals for the voluntary liquidation or other reconstruction or reorganisation of the Company (which proposals may include an opportunity to Shareholders to realise their investment in the Company and/or a continuation of the Company in a revised form, including, without limitation, a new investment objective and/or policy) ("the "Proposals"). Prior to, or with the notice for such extraordinary general or other meeting, the Directors shall send to Members detailed Proposals." 11. The Chairman's statement of 5 th December, 2017, accompanying the results for the year ended 30 th September, 2017, noted that the board no longer believed that the rationale for a new AIM listed company was viable due to delays in the deliverability of the leisure offers at two of the group's remaining property assets, together with a weakness in the leisure letting market, resulting in too much risk being placed on the substantially reduced balance sheet of that proposed entity, with the consequence that the proposal would be likely to be unattractive to shareholders. The Scheme 12. The difficulty in putting forward proposals for the winding up of the Company is that an inevitable consequence of being involved in large scale developments is that the developer (in each case a subsidiary of the Company) assumes legal liabilities for certain long-term planning and development matters, some of which endure for up to seven years following the relevant trigger event. Shareholders were looking for a solution which obviated any need for ongoing shareholder investment in a continuing vehicle to meet such liabilities. 13. Rather than the perhaps more usual options of continuing to run the Company as it currently is, with the aim of eventually winding-up its operations and liquidating the Company or commencing a voluntary solvent winding-up process in the short term which would in either case involve substantial cost, it is, in the view of the directors and having taken advice, better, in very simple terms, to realise as much value as possible from its remaining assets held through subsidiaries, returning cash to the shareholders over the short term and transferring to an independent Jersey company known as IW Midco those remaining subsidiaries in the group with liabilities and assets which have not been disposed of, together with cash to collateralise those liabilities. 14. IW Midco is ultimately wholly owned by Mr Brendan O'Grady, a principal with LXB Adviser LLP, the investment adviser. In effect, Mr O'Grady has agreed to form and manage the IW group to take on these longer term liabilities and assets, thereby enabling the Scheme to be put forward to the shareholders. The Scheme documentation explains the processes that will be put in place to ensure that the assets

and associated liabilities acquired by IW Midco are fairly valued and to manage any potential conflict of interest that Mr O'Grady may have. 15. Putting a little more flesh on the bones, the Scheme will involve;- (i) the discharge of intra-group liabilities; (ii) the reorganisation of the ownership of certain indirect subsidiaries of the Company so as to prepare for the transfers referred to in the next sub-paragraph; (iii) following the Scheme becoming effective, the transfer of certain assets and associated liabilities (actual and contingent) of the group (by way of transferring the subsidiaries which hold those assets and associated liabilities) which will endure beyond 31 st March, 2019, to IW Midco, together with an appropriate amount of cash to collateralise those liabilities; (iv) the Company realising as much value as possible from its remaining assets and agreeing to return the resulting cash to shareholders by means of returns of cash prior to the dissolution of the Company in accordance with the Scheme or in connection with it; (v) By 31 st March, 2019, the transfer to IW Midco of any subsidiaries in the group with liabilities and assets remaining which have not otherwise been disposed of or discharged by that time; and (vi) as soon as possible after 31 st March, 2019, the dissolution of the Company and the cessation of trading of its shares on AIM and its delisting from the International Stock Exchange in accordance with the Scheme (such dissolution being subject to the discretion of the Court at the relevant time.) Procedure 16. There are three stages in the process by which a scheme of arrangement under Article 125 of the Companies Law becomes binding on shareholders, which were summarised in the judgment of the Court in the case of Representation of CPA

[2010] JRC 11 at paragraph 6:- "(i) First there is an application under Article 125(1) for an order that a meeting of shareholders or creditors if necessary be called. It is at this stage that the Court should consider whether or not to summon separate class meetings and if so, who should be summoned to each meeting. The Court will not look at the merits at this stage (See Re Telewest Communications Plc [2004] EWHC 92). (ii) Second, the scheme proposals are put to the court-convened meeting and are approved by a majority by number representing 3/4ths of the voting rights of members present and voting in person or by proxy. As the Company's articles of association require a resolution to approve any change of control of the company to be passed by a majority of at least 90 per cent of the votes cast at that meeting, the scheme will in this case be conditional upon attaining the approval of scheme shareholders representing at least 90 per cent of the voting rights at the court meeting. (iii) Third, and assuming the requisite approval at such meeting is given, the Court exercises its discretion as to whether to sanction the arrangement: see Re National Bank Ltd

[1966] 1 All ER 1006 at 1012 approved by the Royal Court in Re Telewest Finance (Jersey) Limited

[2004] JRC 109 ." 17. We were concerned with the first stage and not with the merits of the Scheme. 18. Article 125 of the Companies Law provides as follows:- "Power of company to compromise with creditors and members Where a compromise or arrangement is proposed between a company and its creditors, or a class of them, or between the company and its members, or a class of them, the court may on the application of the company or a creditor or member of it or, in the case of a company being wound up, of

the liquidator, order a meeting of the creditors or class of creditors, or of the members of the company or class of members (as the case may be), to be called in a manner as the court directs. If a majority in number representing - 3/4ths in value of the creditors or class of creditors; or 3/4ths of the voting rights of the members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to a compromise or arrangement, the compromise or arrangement, if sanctioned by the court, is binding on - All creditors or the class of creditors; or All the members or class of members, as the case may be and also on the company, or in the case of a company in the course of being wound up, on the liquidator and contributories of the company. The court's order under paragraph (2) has no effect until the relevant Act of the court has been delivered to the registrar for registration, and the relevant Act of the court shall be annexed to every copy of the company's memorandum issued after the order has been made. If a company fails to comply with paragraph (3), it is guilty of an offence." Is this a Scheme proposing a compromise or arrangement? 19. English authorities that have considered the scope of the equivalent provisions of the Companies Act 1985 (s. 425) and Companies Act 2006 (s. 895) have held that the terms " compromise " and " arrangement " are to be construed widely. 20. In particular, an arrangement need not involve any compromise of a member's rights in relation to the Company, and indeed most schemes of arrangement involving members do not involve a compromise. For instance, a scheme of arrangement for the acquisition of the shares in a company by a third party does not involve any compromise but does amount to an arrangement because it involves a change in the membership: Re Savoy Hotel

[1981] Ch 351. 21. The authorities show that there must be some "give and take" or accommodation on each side, so that a scheme that simply involves expropriation of the rights of members with nothing in return does not fall within the scope of the jurisdiction: In re N. F. U. Development Trust Ltd

[1972] 1 WLR 1548. 22. A recent case which shows the breadth of the concept of an " arrangement " is In re T&N Limited (No 4)

[2007] Bus LR 1411 . In that case, David Richards J (as he then was) found that a scheme which compromised the rights of asbestos claimants not against the company but against the company's insurers was within the scope of the section. It was held:- "53 In my judgment it is not a necessary element of an arrangement for the purposes of section 425 of the 1985 Act that it should alter the rights existing between the company and the creditors or members with whom it is made. No doubt in most cases it will alter those rights. But, provided that the context and content of the scheme are such as properly to constitute an arrangement between the company and the members or creditors concerned, it will fall within section 425. It is, as Nourse J observed, neither necessary nor desirable to attempt a definition of arrangement. The legislature has not done so. To insist on an alteration of rights, or a termination of rights as in the case of schemes to effect takeover or mergers, is to impose a restriction which is neither warranted by the statutory language nor justified

by the courts' approach over many years to give the term its widest meaning. Nor is an arrangement necessarily outside the section, because its effect is to alter the rights of creditors against another party or because such alteration could be achieved by a scheme of arrangement with that other party. These considerations all go to the meaning of arrangement in section 425 and hence the jurisdiction of the court under the section to sanction a scheme of arrangement. They do not fetter the discretion as to whether to sanction a scheme of arrangement. The looser the connection between the subject matter of the scheme and the relationship between the company and creditors concerned, the more substantial might be the objections on discretionary grounds to sanctioning the scheme." 23. In the present Scheme, the rights of shareholders are altered to the extent that, following approval of the Scheme, neither those Scheme shareholders who voted in favour of the Scheme nor those who voted against or failed to vote at all will be able to challenge the decision to implement the Scheme. Further, the approval of the Scheme discharges a requirement of Article 43 of the articles of association as amended for proposals to be put to shareholders concerning the voluntary liquidation, reconstruction or other reorganisation of the Company and provides shareholders greater certainty and a shorter timeframe for the dissolution of the Company. 24. Through the Court's approval of the Scheme, greater protection against future challenge by members is achieved than would be possible through a special resolution of members, as dissentient shareholders will not be able to complain of unfair prejudice. 25. In return for the shareholders' mandate, the Company will engage in a programme of divestment and realisation of assets, with the aim of enabling returns to shareholders in a shorter timeframe and at lower cost than if the Company were simply to start realising its assets or commence a summary winding-up. 26. The Court was satisfied that there was sufficient give and take for the Scheme to constitute an " arrangement " that the Court can sanction if otherwise satisfied that it was appropriate to do so. Identification of classes of members 27. Under the Practice Note issued by the High Court of England, Chancery Division Practice Statement (Companies: Schemes of Arrangement)

[2002] All ER 96, [2002] W. L. R. 1345, a party seeking an Order under s. 425 of the Companies Act 1985 in relation to a creditors' scheme should draw to the Court's attention at the earliest opportunity any issues regarding identification of classes of creditors in the context of a scheme of arrangement between a company and its creditors, and obtain the Court's directions in relation to those issues. The identification of separate classes would mean that separate meetings must be called of each class, and a majority in number representing 75% by value of the creditors present and voting in person or by proxy in each class must be obtained. 28. The Practice Note was referred to and followed in Jersey in Representation of Vallar Plc

[2011] JRC 051 and Representation of FRM Holdings Limited

[2012] JRC 120 . In each case the Court accepted a submission that the principles in the Practice Note can be applied equally to members' schemes. 29. The Court in Representation of Vallar Plc

[2011] JRC 051 observed that the classic test for identification of classes is that of Bowen LJ in Sovereign Life Assurance Company v Dodd

[1892] 2 QB 573 , 583, a case concerning a creditors' scheme: "The word 'class' is vague, and to find out what is meant by it we must look at the scope of the section, which is a section enabling the Court to order a meeting of a class of creditors to be called. It seems plain that we must give such meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest." 30. Bowen LJ's test makes it clear that it is significant differences in the rights of members which determine that they constitute separate classes. Furthermore, it is also clear that a careful balancing act must be performed in determining whether or not certain members require the protection of a separate Court meeting, in order to prevent any " confiscation and injustice " which could result if artificial distinctions are taken. 31. In this case, the Court was satisfied that there were no particular class issues to be determined. The Company's issued share capital comprises only one class of share. Need to notify creditors of the Company 32. Under the Scheme, the liability of the Company to its subsidiaries will be discharged, and the Scheme will not affect the rights of the Company's external creditors. The Company accounts and the Scheme documentation show that the Company has substantial net assets, including substantial cash deposits which will be more than sufficient to discharge liabilities to external creditors after the Scheme is implemented. 33. The very purpose for recommending the Scheme to the shareholders is to facilitate returns of cash to shareholders of the Company. Such returns of cash can only be made on the basis of a solvency statement to be made by the directors pursuant to the Companies Law, which requires the directors to be satisfied that the Company will be able to discharge its liabilities after any distribution is made. Consistently with this, the board intends to discharge the liabilities to external creditors in full, so that the Company can be dissolved on a solvent basis after 31 st March, 2019. 34. Further, in the unlikely event that a creditor of the Company did wish to challenge the reorganisation, approval of the Scheme in no way constrains their rights to do so. The Scheme is binding only as between the Company, the shareholders and those who have undertaken to be bound by the Scheme. 35. As far as creditors of the Company's subsidiaries that are transferred to IW Midco are concerned, their rights are also not affected by the Scheme. Those creditors will continue to have claims (such as they may be) against those subsidiaries and the assets of the subsidiaries will remain as they were prior to the Scheme. The positions of potential claimants will be enhanced by reason of the further injection of cash by the Company to IW Midco, in an amount that has been considered by the board by reference to advice from BDO, to allow those liabilities to be discharged. 36. The Court was satisfied that it was not necessary to

convene the creditors of the Company or of its subsidiaries. In the case of its subsidiaries, it would not be possible in any event to know the identity of contingent creditors who, speculatively, may have claims arising out of the planning and development process; nor would it be appropriate to encourage speculative claims. Is this a Scheme for the reconstruction of the Company? 37. An issue did arise at the hearing as to whether this was a scheme for the reconstruction of the Company which, pursuant to Article 127 of the Companies Law, would provide the Court with additional powers and in particular, the power to dissolve the Company without a winding up. Article 127 provides:- "127 Provisions for facilitating company reconstruction or amalgamation This Article applies where application is made to the court under Article 125 for the sanctioning of a compromise or arrangement proposed between a company and any person mentioned in that Article. If it is shown - that the compromise or arrangement has been proposed for the purpose of, or in connection with, a scheme for the reconstruction of a company or companies, or the amalgamation of 2 or more companies; and that under the scheme the whole or part of the undertaking or the property of a company concerned in the scheme ('a transferor company') is to be transferred to another company ('the transferee company'), the court may, either by the order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters - the transfer to the transferee company of the whole or part of the undertaking and of the property or liabilities of a transferor company; the allotting or appropriation by the transferee company of shares, debentures, policies or other similar interests in that company which under the compromise or arrangement are to be allotted or appropriated by the company to or for any person; the continuation by or against the transferee company of legal proceedings pending by or against a transferor company; the dissolution, without winding up, of a transferor company; the provision to be made for persons who, within a time and in a manner which the court directs, dissent from the compromise or arrangement; such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction or amalgamation is fully and effectively carried out. If an order under this Article provides for the transfer of property or liabilities, then - that property is by virtue of the order transferred to, and vests in, the transferee company; and those liabilities are, by virtue of the order, transferred to and become liabilities of that company, and property (if the order so directs) vests freed from any hypothec, security interest or other charge which is by virtue of the compromise or arrangement to cease to have effect. Where an order is made under this Article, every company in relation to which the order is made shall cause the relevant Act of the court to be delivered to the registrar for registration within 14 days after the making of the order; and in the event of failure to comply with this paragraph, the company is guilty of an offence. In this Article, "property" includes property, rights and powers of every description and "liabilities" includes duties." 38. Under the Scheme, part of the property of the Company is to be transferred to another company (IW Midco) and therefore the requirement of Article 127(2)(b) is met. We were therefore concerned with the requirements of Article 127(2)(a). 39. The powers given to the Court under Article 127 do

not arise in the case of any compromise or arrangement proposed, but only where that compromise or arrangement was proposed for the purposes of, or in connection with, a scheme for the "reconstruction of a company or companies, or the amalgamation of 2 or more companies." The scheme did not involve an amalgamation of 2 or more companies, and we were concerned, therefore, with whether or not it was a scheme for the "reconstruction" of the Company. 40. Advocate Kistler very properly drew the Court's attention to the decision of Mann J in Re Mytravel Group Plc

[2004] EHWC 2741 (Ch), in which he declined to convene meetings of the shareholders under section 427 of the Companies Act 1985 , the equivalent of our Article 127 of the Companies Law, as the scheme in question did not amount to a reconstruction. In that case, assets of a company were to be transferred to a new company in which the existing shareholders had only a 4% shareholding, and he held that this did not amount to a reconstruction, as there was not a substantial identity of shareholders between the existing company and the new company. The scheme consisted of the transfer of assets to the differently constituted company, in which the existing company's senior secured creditors received the predominant shareholding interest in discharge of their debts. 41. Mann J set out a detailed analysis of the history of sections 425 and 427. He started by referring to the judgment of Buckley J in Re South African Supply and Cold Storage Company Wild v. Same Company

[1904] 2 Ch 268 , where a question arose as to the construction of the words " reconstruction or amalgamation ", in the memorandum of association of a company. The point arose because its memorandum of association gave to the company's preference shareholders the right, in the event of "a winding up for the purpose of reconstruction or amalgamation" to a bonus by way of percentage on the par value of the preference shares. He said at page 281:- "The only question I have to determine is whether, in the case of each of these two companies, there has or has not been a winding-up 'for the purpose of reconstruction or amalgamation'. Neither of these words, 'reconstruction' and 'amalgamation,' has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term, bears no exact definite meaning. In each case, one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term 'reconstruction' or 'amalgamation'." 42. He went on to say this, in the context of that case:- "What does 'reconstruction' mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on - that would be a mere sale - but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or

resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company or resuscitated company does or does not take over the liabilities? I think not. I think it is nonetheless a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not, therefore, vital that either the whole assets should be taken over or that the liabilities should be taken over. You have to see whether substantially the same persons carry on the same business; and if they do, that, I conceive, is a reconstruction." 43. Mann J traced the fiscal sources of sections 425 and 427 and how the word " reconstruction " had been construed in the fiscal context. Without setting out his review of the English fiscal case law he referred to, he included at paragraph 30:- "30 Despite Mr Sheldon's submissions, I cannot hold in his favour on this point. I consider that I am constrained by authority not to do so. I do not consider that the authorities can be dismissed in the manner which Mr Sheldon suggests. Although the stamp duty cases were obviously decided in their own legislative context, and whilst I accept that the statutory provisions in issue in those cases contain express qualifications in relation to shareholdings, the remarks made by the judges are general in their nature and they make sense in conceptual terms. The thrust of them involves treating the company for these purposes as the same as its corporators. The company is reconstructed when those corporators, who for these purposes are treated as carrying on the business of the company, are the same in both the old and the new companies." 44. The decision in Mytravel has been criticised in Palmer's Company Law, Volume 3 Part 12 , paragraph 12.085, where it states:- "It has been held, perhaps doubtfully, that a reconstruction into a new company for this purpose requires that the members of the company are the same in both the old and the new companies." There is no elaboration for the basis of that doubt. 45. What can be said in the context of Jersey law is that although Article 127 has been modelled on the equivalent English statutory provision, we do not share the same fiscal source, and the English cases construing the word "reconstruction" in a fiscal context have no relevance here. 46. As Buckley J said, in Re South African Supply and Cold Storage Company Wild v. Same Company , the word " reconstruction " has no definitive legal meaning. It is a commercial and not a legal term and even as a commercial term bears no exact definite meaning. In each case one has to decide whether the transaction is such that, in the meaning of commercial men, it is one which is comprehended in the term " reconstruction ". 47. Although, in the context of that case, Buckley J found that " reconstruction " involves that substantially the same business shall be carried on, and substantially the same persons shall carry it on, it does not follow that this Court will so construe it in other contexts, and in particular in the context of Article 127. 48. In any event, as Advocate Kistler submitted, the facts of the case before us can be distinguished from those in Mytravel , in that the arrangement does not involve a transfer of the Company's undertaking to a new company in which the existing shareholders do not participate. On the contrary, the shareholders remain as shareholders in the Company,

and will receive the proceeds realised from the Company's marketable assets. To the extent that the reconstruction involves transfers of subsidiaries to IW Midco, those are assets with associated liabilities that would take time to resolve. Such assets are not thought by the directors to be attractive for the existing shareholders to continue to have an economic interest in. 49. Advocate Coltman addressed us on the question of whether the Scheme is such that, using the words of Buckley J, it is one which, in the meaning of commercial men, is comprehended in the term " reconstruction ". He submitted, and we agree, that:- (i) By definition, the meaning of a "reconstruction" must be narrower than that of an "arrangement". (ii) There must be some form of reconstruction of the Company's affairs from a commercial perspective. (iii) "Reconstruction" implies some form of continuance. Whether that continuance should be determined in part by reference to shareholder composition as in Mytravel , does not arise in this case, because under the Scheme, the Company continues with the same shareholders. 50. Advocate Coltman argued that under the Scheme, the Company is reconstructed in the following ways:- (i) The collapse of its balance sheet - the principal purpose of the Scheme is to collapse the balance sheet of the Company, so that an orderly and effective dissolution becomes possible, that is to say by:- (a) the disposal of assets, where possible for valuable consideration to third parties; (b) the payment or distribution (in the broadest sense) of excess cash reserves to shareholders; and (c) the disposal of subsidiaries with non-realisable assets and associated liabilities to IW Midco and disposal or paying off of liabilities. (ii) The current duties of the board under the articles and in law (primarily Article 74(1) of the Companies Law) and its freedom to manage the Company's affairs will be altered in that the board will be obliged to put the Scheme into effect, ending the Company's commercial activities and therefore its life within the given time frame. (iii) The shareholders' relationship with the Company, currently governed by the Company's articles of association and in law, will change, in that by virtue of the Scheme, they will have rights relating to the management of the Company's affairs. The Company must be in a position to seek dissolution after 31 st March, 2019, subject to the terms of the Scheme and the directions of the Court. 51. Whilst there are other mechanisms the Company may be able to use to achieve similar results, for example a scheme mandating a transfer of assets with a subsequent and, by definition, contingent proposal to call a general meeting to approve a solvent winding-up, they would not achieve the same level of certainty and comprehensive changes in the Company's affairs, not just as regards its balance sheet, but also as to its management going forward and its eventual dissolution as provided by the Scheme. 52. The proposals, he said, differ in fundamental respects from the simple example of say, company A acquiring company B under a scheme of arrangement. In that example, the scheme's object and terms are wholly or primarily discharged once the scheme is completed. The terms of a share transfer scheme does not change the target company's balance sheet. Once company B is owned by company A, there is no legal change to company B's relationship with its board of directors, and the company's legal relationship with its shareholders does not change. Whilst the legal ownership of its shares has changed, the legal arrangements which govern that relationship have not.

Similarly, in a takeover, the board of directors of the target often changes, but that does not, in and of itself, change the legal relationship between the board and the company. Even if the articles had changed as part of or shortly after a takeover, that does not change the fundamental legal nature of the board's or shareholders' relationship with the company - these will still be governed by the articles. The proposals under the Scheme being considered by the Court in this case differ in these fundamental respects. Whilst both are schemes of arrangement, the proposals in front of the Court constitute a reconstruction. 53. If the Court had not accepted that the Scheme constituted a reconstruction for the purposes of Article 127(2)(a), there would have been no point in convening a meeting of the shareholders to consider the Scheme, as the Court's jurisdiction under Article 127(2)(iv) to order the dissolution of the Company without a winding up was, we were told, central to the Scheme. 54. The Court accepted, however, that its jurisdiction under Article 127(2) (a) was engaged on the basis that this was a Scheme for the "reconstruction" of the Company, and this for the reasons advanced by both Advocate Kistler and Advocate Coltman. 55. The Court therefore ordered a meeting of the shareholders of the Company to consider, and if thought fit, to approve the Scheme, and made further orders ancillary thereto. Authorities Companies (Jersey) Law 1991 Representation of CPA

[2012] JRC Companies Act 1985 Companies Act 2006 Re Savoy Hotel [1981] Ch 351 In re N. F. U. Development Trust Ltd

[1972] 1 WLR 1548 In re T&N Limited (No 4)

[2007] Bus LR 1411 Practice Statement (Companies: Schemes of Arrangement) [2002] All ER 96, [2002] W. L. R. 1345 [2002] W. L. R. 1345 Representation of Vallar Plc

[2011] JRC 051 Representation of FRM Holdings Limited

[2012] JRC 120 Sovereign Life Assurance Company v Dodd

[1892] 2 QB 573 , 583 Re Mytravel Group Plc [2004] EHWC 2741 (Ch) Re South African Supply and Cold Storage Company Wild v. Same Company

[1904] 2 Ch 268 Palmer's Company Law, Volume 3 Part 12 Page Last Updated: 16 Mar 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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