

JERSEY / JUDGMENT

Representation of APIC [2012]

JRC 228 (10 December 2012)

[2012] JRC 228

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judgment

the commissioner: 1. On 2 nd November, 2012, the Court, on the application of APIC Petroleum Corporation (" APIC ") ordered the convening of a meeting of the members of the company for the purpose of considering, and if thought fit, approving a scheme of arrangement and this pursuant to the provisions of Article 125 of the Companies (Jersey) Law 1991 ("the Companies Law"). 2. APIC is incorporated in Canada and is in discussion with the Jersey Financial Services Commission ("the JFSC") for the continuance of the company into Jersey pursuant to Part 18C of the Companies Law. 3. Under the scheme it is proposed that APIC, whose business is energy development and distribution and whose shares are listed on the TSX Venture Exchange in Toronto Canada, will amalgamate with Longreach Oil & Gas Limited ("Longreach"), a company incorporated in Jersey, whose business is oil and gas exploration in Morocco, with Longreach being the surviving legal entity. The whole of the undertaking, property and liabilities of APIC will become the undertaking, property and liabilities of Longreach. 4. As a precursor to the scheme, APIC is conducting a C\$30 million minimum financing of subscription receipts which will only be converted into shares and the proceeds released on completion of the scheme. The subscribers have insisted that if the scheme is not closed by 21 st December, 2012, the proceeds will be returned to them. This precludes the holding of two sets of meetings, the first to deal with the continuance into Jersey and the second to deal with the scheme; the evidence shows that the holding of two sets of meetings would require 110-120 days to complete. 5. It is proposed, therefore, to hold one meeting on the 4 th December, 2012, to approve (a) the financing (b) the continuance into Jersey and, after a short adjournment to effect the continuance, (c) the scheme. 6. Article 125(1) of the Companies Law provides that an order convening a meeting can be made on the application of a "company" which is defined under Article 1(1) as being a company registered under the Companies Law. The issue arose as to whether the Court had jurisdiction either to entertain an application by a company not registered under the Companies Law or to make an order convening a meeting of a company that is not so registered. 7. Although no authority on the point was cited to us, Miss Heath pointed out that Article 125 of the Companies Law is to be interpreted broadly, so as to enable a wide variety of different types of arrangement to be put forward (see *In re TSB Bank (Channel Islands) Limited*

- [1992] JLR 160). 8. APIC has a wholly owned subsidiary namely APIC Petroleum Jersey Limited ("the subsidiary") that had been joined in on the application. It is a party to the arrangement agreement and is registered under the Companies Law. Any doubts the Court might have over making an order on the application of a company not registered under the Companies Law could perhaps be circumvented by the artifice of the subsidiary making the application for an order convening a meeting not of its members but of the members of its parent, APIC. 9. We did not think that necessary. An arrangement which involves a company first continuing into Jersey, is in our view but one example of the wide variety of arrangements that Article 125 of the Companies Law is intended to cover and the Court should be flexible in its approach. It was proposed that the order would be made conditional upon APIC first completing its continuance into Jersey so that the order would only become effective if and when APIC is registered under the Companies Law. The essential point is that the meeting, if and when it takes place, will be a meeting of the members of a Jersey registered company and the scheme the Court will be asked in due course to sanction under article 125(2) of the Companies Law will be a scheme proposed between a then Jersey registered company and its members. 10. This was not a case in which the Court was seeking to extend its reach over non-Jersey companies in an exorbitant manner; APIC had come to the Court and asked for an order conditional upon it becoming a Jersey company. We thought it appropriate to accept that invitation and to make the order. 11. 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 *In re Computer Patent Annuities Holdings Limited*
- [2010] JRC 011 at paragraph 6:- "There are three stages in the process by which a scheme of arrangement under Article 125 of the Companies Law becomes binding:- (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] EWH 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. ... (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*
- [1996] All ER 1006 at 1012 approved by the Royal Court in *Re Telewest Finance (Jersey) Limited*
- [2004] JRC 109 ." We were concerned therefore with the first stage and with whether or not to order separate class meetings. 12. In the Representation of *Vallar Plc*

- [2011] JRC 051, the Court referred to and followed the Practice Note issued by the High Court of England, Chancery Division (Practice Statement [Companies: Schemes of Arrangement] [2002] All ER 96, [2002] 1 WLR 1345) which provides that a party seeking an order in relation to a creditor 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. In Vallar, the Court accepted that the principles in the Practice Note can be applied equally to member schemes (a view also expressed in Tolley's Company Law Service at paragraph S1003). It is incumbent therefore on APIC to draw to the Court's attention any issues regarding class identification. 13. The Court in Vallar observed that the classic test for identification of classes is that of Bowen LJ in Sovereign Life Assurance Co 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." 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 would result if artificial distinctions are taken. 14. APIC has one class of ordinary shares and no issue of class identification was drawn to our attention nor could we see one. The holders of the Subscription Receipts will not be members entitled to vote when the meetings take place but they have consented to the arrangement by entering into the subscription agreements. As at 29 th October, 2012, APIC had 3,125,000 warrant holders and 7,720,000 option holders, all of whom had consented to the scheme. 15. In Canada, shareholders of a company can be classified as either registered holders (whose names appear on the register of holders maintained by or on behalf of the company) or non-registered or beneficial holders (whose names do not appear on the register of holders but rather hold their shares through intermediaries, such as brokerage firms). As at 29 th October, 2012, there were 53 registered holders and an estimated 350 beneficial holders. 16. We were provided with an affidavit by Judith Wilkin, an attorney admitted to practise law in the Province of Ontario, dated st November, 2012, who advised that APIC is subject to the Canadian regulatory provision N1 54-101, the policy of which is to ensure that all security holders whether registered or beneficial should have the opportunity to be treated alike. It

requires APIC to seek voting instructions from beneficial holders and it permits nominees to vote in relation to shares if they have received voting instructions from the beneficial holders. 17. Accordingly, APIC must seek voting instructions from its beneficial holders in the material sent out with respect to the meeting. It requires the nominees in turn to seek voting instructions from each beneficial holder. Intermediaries are required to seek a legal proxy from APIC to allow a beneficial holder to appear at the meeting as a proxy holder. The intermediary may only vote in accordance with the voting instructions received. Ms Wilkin advised that APIC had complied with all the requirements of NI 54-101 in the provisions of the scheme circular. She was satisfied that beneficial holders will have the chance to vote by giving appropriate instructions. 18. Shareholders have the right to dissent from the continuance. If they do so, their shares will be cancelled and they will cease to have any rights as shareholders except to be paid the fair market value of their shares by APIC or its successor following the completion of the scheme. 19. Under the terms of the scheme, assuming the requisite majorities are obtained and the approval of the Court given:- (i) In consideration of the transfer of the whole undertaking, property and liabilities of APIC (including its shares in the subsidiary) to Longreach, Longreach will issue to APIC shareholders (other than those who have exercised their dissent rights with respect to the continuance) 1 Longreach share for every 5.3846 APIC shares (the exchange ratio) and all convertible securities of APIC (the subscription receipts) will also be exchanged into convertible securities with Longreach with the same terms, except that the exercise price and the number of underlying securities will be adjusted on the basis of the exchange ratio. (ii) Longreach will continue as an independent oil and gas exploration company focused on exploration and development within Morocco. APIC will be dissolved. (iii) APIC will be de-listed from the TSXV and Longreach will be listed on the TSXV. (iv) The holders of the warrants and options in APIC will receive warrants and options in Longreach calculated with reference to the exchange ratio. 20. Whilst the Court was not concerned at this stage with the merits of the arrangement, it had before it an affidavit from Thomas Vukovich, a director of APIC, setting out the legal and tax benefits of APIC continuing into Jersey and amalgamating with Longreach. We were satisfied that the proposal had sufficient general support to have a prospect of success. 21. A number of drafting points arose on the documentation presented to the Court, but it is appropriate to record the following:- (i) The Court fixed 19 th December, 2012, for the hearing to sanction the scheme, assuming it is approved by the requisite majority ("the Court hearing"). (ii) Whilst the provisions under Part 18C of the Companies Law in relation to continuance provide for a solvency statement and for the JFSC to be satisfied that the interests of creditors will not be prejudiced, the Court, noting that APIC had liabilities in the sum of US\$ 178,326, requested that details of those creditors be provided at the Court hearing with evidence to satisfy the Court that their interests would not be prejudiced by the scheme. (iii) The Court requested evidence for the Court hearing that the regulatory requirements under both Canadian and Jersey law had been complied with. (iv) Shareholders wishing to appear at the Court hearing were required to file with the Court and the solicitors to APIC and Longreach their response to the representation seven days

prior to the hearing. The Court considered this to be a sensible requirement in that it would give APIC and Longreach and the Court some notice of the grounds upon which the sanction of the scheme might be resisted. In the light of the proximity between the shareholders' meeting on 4 th December, 2012, and the Court hearing, this was reduced, so that shareholders would be required to file such notice by close of business on 17 th December, 2012. 22. In conclusion, the Court ordered the meeting of the holders of the shares in the capital of APIC on 4 th December, 2012, for the purpose of considering and, if thought fit, approving (with or without modification) the scheme of arrangement proposed to be made between APIC and the holders of the shares in APIC provided that APIC had first continued into Jersey. Authorities Companies (Jersey) Law 1991. In re TSB Bank (Channel Islands) Limited

[1992] JLR 160 . In re Computer Patent Annuities Holdings Limited

[2010] JRC 011 . Representation of Vallar Plc

[2011] JRC 051 . Practice Statement [Companies: Schemes of Arrangement] [2002] All ER 96, [2002] 1 WLR 1345. Tolley's Company Law Service. Sovereign Life Assurance Co v Dodd

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