

JERSEY / JUDGMENT

Representation of APIC [2013]

JRC 034 (11 February 2013)

[2013] JRC 034

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judgment

the commissioner: 1. On 19 th December, 2012, the Court sanctioned the scheme of arrangement ("the scheme") by which Apic Petroleum Corporation ("Apic") amalgamated with Longreach Oil & Gas Limited ("Longreach"). The first stage of the three stage process by which schemes of arrangements become binding on shareholders (see *In Re Computer Patent Annuities Holdings Limited*

[2010] JRC 011 at paragraph

- 6) took place on 2 nd November, 2012 when the Court ordered a meeting of the shareholders of Apic to be held on 4 th December, 2012 ("the Court meeting"). The Court's judgment of 10 th December, 2012 (JRC 228) sets out the background and this should be read as a continuation of that judgment whose definitions we adopt. 2. The test to be applied by the Court when sanctioning a scheme of arrangement is three-fold as set out in the case of *In the matter of Computer Patent Annuities Holdings Limited*

[2010] JRC 021 . "The test is three- fold. The Court must consider:- (i) whether the provisions of the 1991 Law have been complied with; (ii) whether the class of shareholders to be affected by the proposed scheme was fairly represented by those who attended the meeting and whether the statutory majority are acting bona fide and not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent; and (iii) whether the arrangement is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve." 3. This test is based on the following statement in *Re National Bank Ltd*

[1966] 1 All ER 1006 at 1012, as cited with approval by the Court on numerous occasions:- "In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with; secondly, that the class was fairly represented by those who attended the meeting and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent, and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might

reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting; but at the same time the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme." 4. The test in *Re National Bank Ltd* as applied by the Jersey Court in *Representation of Andsberg Limited*

[2007] JRC 179 concentrates on the main three-fold test. In *Re: TDG Plc*

[2009] 1 BCLC 445 (cited with approval in *Representation Vallar Plc*

[2011] JRC 125), the English Courts separated the latter paragraph quoted in *Re National Bank Ltd* (cited at paragraph 3 above) to find a fourth element that must be considered by the English Court when requested to exercise its discretion to sanction a scheme of arrangement: that there must be no "blot" on the scheme. 5. Palmer's Company Law at paragraph 12.070 indicates that this additional consideration reflects the Court's discretion to consider the overall commercial and factual context of the proposed scheme, including any consequences of it. 6. We take each of those questions in turn. Were the provision of the Companies (Jersey) Law 1991 ("the Companies Law") complied with? 7. The Court was satisfied that the scheme circular had been properly served on the shareholders in accordance with the directions given by the Court and that it contained an explanatory statement prepared in accordance with Article 126(2) of the Companies Law providing shareholders with sufficient information in relation to the scheme. 8. The Court was satisfied that the Court meeting had been duly convened and held in accordance with the directions given by the Court. The meeting commenced at 8:00am (Toronto time) on 4 th December, 2012. The first resolution approving the financing was passed by 99.9% of those present and voting either in person or by proxy. The second resolution approving the continuance into Jersey was passed by 99.99% of those present and voting either in person or by proxy. The meeting was then adjourned to permit the continuance into Jersey to be effected. Once confirmation had been received that the continuation had been effected and that Apic was now a company registered under the Companies Law, the meeting resumed at 11:13am (Toronto time) and the third resolution approving the scheme was passed by 99.99% of those present and voting either in person or by proxy. The shares voted either in person or by proxy represented 56.13% of the total shares issued by Apic. 9. In the premises, the requisite majority (three-quarters of the voting rights of the members present and voting either in person or by proxy) was not only comfortably exceeded but was close to unanimous. Was the class of shareholders to be affected by the proposed scheme fairly represented by those who attended the meeting and were the statutory majority acting bona fide and not coercing the minority in order to promote interests adverse to the class whom they purport to represent? 10. There is one class of shareholder in this case whose interests are aligned and the shareholders who voted to approve the scheme did not stand to benefit in some manner that was not available to those who did not vote. We were satisfied that the Court meeting was conducted in a fair and proper

manner and there is nothing to suggest coercion of the minority or that the majority were not acting bona fide . 11. Shareholders had a right to dissent from the continuation of Apic into Jersey although no such rights were exercised. In addition, the views of the beneficial owners had been taken into account rather than the registered shareholders holding as nominees (see paragraph 15-17 of the judgment of 10 th December, 2012). Is the scheme an arrangement such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest might reasonably approve? 12. The scheme had been unanimously recommended by the boards of both Apic and Longreach. The exchange ratio had been negotiated at arm's length between the parties and was based upon the prevailing market price of each of Apic's and Longreach's share prices over a significant period of time. The fair market value of the parties' share prices was determined to be \$0.70 for Longreach and \$0.13 for Apic. These prices were then used to calculate the exchange ratio of 5.3846 in accordance with the Canadian Statutory Provision Multi-lateral Instrument 61-102 - Protection of Minority Shareholders in Special Transactions, which applied to Apic in connection with both the scheme and the financing. 13. We were satisfied that the shareholders had been properly informed and that the scheme was such as an intelligent and honest man might reasonably approve. No "blot" on the scheme? 14. The Court was satisfied that there was no "blot" on the scheme. Although this was a members' scheme, the Court felt it was appropriate to have regard to the interests of the creditors of Apic, even though there was no formal requirement to do so. As noted in paragraph 21(ii) of the judgment of 10 th December, 2012, the process of continuation requires the provision of a solvency statement and for the JFSC to be satisfied that the creditors will not be unfairly prejudiced. By issuing the certificate of continuance to Apic, the JFSC was clearly satisfied in this respect. The Court heard evidence that Apic had cash reserves of C\$ 1.9M, which is more than sufficient to discharge its debts as they fall due (as at 26 th November, 2012, it had total liabilities of C\$89,245.98). The Court was given an undertaking by Apic that it would use its commercially reasonable efforts to pay the trade payables prior to completion of the scheme and would withhold sufficient cash to pay all trade payables that are outstanding as at the completion of the scheme. Exemption under United States Securities Act 1933 ("the Securities Act") 15. The Court was advised before the hearing that neither the shares in Apic nor the shares in Longreach that the shareholders will receive in exchange will be registered under the Securities Act, reliance being placed upon the exemption provided by Section 3(a)(10). In that connection, the Court confirms, for the reasons set out above, that prior to approving the scheme it found the terms and conditions of the exchange fair to those to whom the Longreach shares will be issued.

Conclusion

16. No shareholders appeared at the hearing on 19 th December, 2012, to oppose the sanctioning of the scheme, nor had there been any written communications from shareholders opposing the same. The Court confirms the scheme and pursuant to Article 127(2) of the Companies Law ordered that the whole of the undertaking, property and liabilities of Apic be transferred to Longreach and that Apic be dissolved. Authorities In Re Computer Patent Annuities Holdings Limited

[2010] JRC 011 . Representation of APIC

[2012] JRC 228 . In the matter of Computer Patent Annuities Holdings Limited

[2010] JRC 021 . Re National Bank Ltd [1966] 1 All ER 1006. Representation of Andsberg Limited

[2007] JRC 179 . Re: TDG Plc

[2009] 1 BCLC 445 . Representation Vallar Plc

[2011] JRC 125 . Palmer's Company Law. Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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