

JERSEY / JUDGMENT

Representation of Vallar

[2011] JRC 051 (07 March 2011)

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judgment

the commissioner: 1. This is an application by Vallar Plc, ("the company") pursuant to Article 125 of the Companies (Jersey) Law 1991, seeking an order convening a meeting of the shareholders of the company ("the Court meeting") for the purpose of considering and approving a scheme of arrangement ("the scheme") between the company and its members. Various related directions are also sought; the company has received an affidavit which we are told has been sworn by Lord Renwick and the Court has noted an undertaking by counsel for the company to deliver that affidavit to the Judicial Greffier within 72 hours. 2. Article 125 of the Law provides as follows, so far as it is material:- "(1) 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. (2) If a majority in number representing - a. 3/4ths in value of the creditors or class of creditors; or b. 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 - (i) all creditors or the class of creditors; or (ii) 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". 3. The Law, therefore, confers a discretion upon the Court both as to the convening of a meeting or meetings of shareholders and in due course as to the approval of the scheme. The Court is concerned at this stage only with the process for convening the meeting and not with the merits of the scheme itself which involves, inter alia, a reduction of capital. 4. The Court has considered on a number of occasions arrangements involving the substitution of a holding company registered in Jersey for a holding company registered elsewhere. This application is concerned with that process in reverse. The company is registered in Jersey and the scheme involves the insertion into the group structure of a holding company named Bumi plc which is registered in England and Wales. Shares in the company will be cancelled subject to the approval of the Court, and the shareholders will instead hold an equal number of shares in Bumi plc. The broad purpose of the

substitution is to enable the shares of the holding company of the company's group to be included in the FTSE 100 or FTSE 250 share index. Under the FTSE ground rules for the management of the different share indices it is a requirement in relation to a company not registered in the UK that not less than 50% of the shares must have a "free float", that is be held in public hands. Less than 50% of the shares in the company are so held. This "free float" requirement does not apply in the same way to a company registered in the United Kingdom. The directors of the company consider that significant advantages would accrue from having the shares of the holding company of the company's group included in one or other of the FTSE indices and that it is therefore desirable to alter the group structure in the manner proposed. 5. Miss Lacey has drawn our attention to the provisions of A Practice Statement [2002] 3 All ER 96 issued by the Chancery Division of the High Court in England and Wales setting out the principles to be applied in that jurisdiction on an application under equivalent legislation. The main points in the Practice Statement are helpfully summarised in Tolley's Company Law Service S1003 in the following way:- "The main points set out in the Practice Statement are as follows: (a) that the applicant should bring to the attention of the court, at the earliest opportunity, any issues which may arise relating to the constitution of meetings of creditors or which may affect the conduct of those meetings; (b) that the court, when deciding whether to convene the meetings of creditors, should consider the constitution of the classes of creditors and whether one or more meetings should be convened; (c) that the court should consider giving directions for the resolution of any creditor issues brought to its attention by the applicant; (d) that unless there is a good reason for not doing so, the applicant should take all steps reasonably open to it to notify any person affected by the scheme as to the purpose of the scheme, the creditor meetings which the application considers will be necessary and their composition - in the Marconi scheme of arrangement (Re Marconi Corporation plc and Re Marconi plc [2003] All ER (D) 362 (Mar), the court held that although (as per the Practice Statement) notice of a proposed scheme should be given to the creditors before the initial hearing unless there are good reasons to the contrary, the time pressures will often mean that providing an adequate summary of the scheme and describing the composition of the classes will be impracticable; and (e) that creditors who feel they have been unfairly treated will still be able to raise objections at the hearing to sanction the scheme, but the court will expect them to show good reason why they did not raise the issue earlier." 6. Counsel submitted that those principles should apply equally to members' schemes as to creditors' schemes and we agree. 7. The first question for the Court this morning is whether there are separate classes of shareholder so that different meetings should be convened. As at the date of the initial representation to the Court, the authorised share capital of the company was £2,500,000,000, comprising 2,500,000,000, ordinary shares of £1 each, of which £67,342,736 had been issued and paid up. Over the course of the past few days the company has issued, or will shortly issue, a further 90,072,216 ordinary shares in order to fund major acquisitions. 61,211,044 of those shares will be subject to specific restrictions as to voting, the Suspended Voting Ordinary Shares. The remaining shares, to be called together with the existing ordinary shares, Voting Ordinary Shares are all, it is intended, to be listed on the standard listing segment of the official list of the UK Listing Authority and to trading on the London Stock Exchange's main market for listed securities. The Suspended Voting Ordinary Shares will not be so listed. There will therefore

be two different types of share in the company. If the scheme becomes effective the holders of Voting Ordinary Shares in the company will exchange their shares for Voting Ordinary Shares in Bumi plc and the holders of Suspended Voting Ordinary Shares will exchange their shares for Suspended Voting Ordinary Shares in Bumui plc. 8. The principles to be applied in deciding whether there are separate classes for the purposes of Article 125(1) do not appear to have been considered fully in this jurisdiction before. However, as Carey, Commissioner, noted in *Re CI Traders Limited*

[2007] JRC 149A there is authority for the proposition that English precedents on comparable provisions of the Companies Act may be regarded as persuasive. The locus classicus in England is a decision of the Court of Appeal in *Sovereign Life Assurance Co-v-Dodd*

[1892] 2 QB 573, where Bowen LJ expressed the test in the following way:- "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 from 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." That test was considered exhaustively by the English Court of Appeal in the later case of *Re Hawk Insurance Company Limited*

[2001] 2 BCLC 480. Having cited the passage to which we have just referred, Chadwick LJ stated:- "The answer, therefore, which Bowen LJ may be taken to give to the question "...are the rights of those who are to be affected by the scheme proposed such that the scheme can be seen as a single arrangement; or ought it to be regarded, on a true analysis, as a number of linked arrangements?" is clear enough. The scheme proposed may be regarded as a single arrangement with those creditors whom it is intended to bind if, but only if, the rights of those creditors are not so dissimilar as to make it impossible for them to consult together with a view to their common interest. If the rights of those creditors whom the scheme is intended to bind are such as to make it impossible for them to consult together with a view to their common interest then the scheme must be regarded as a number of linked arrangements. In the latter case it will be necessary to have a separate meeting of each class of creditors; a class being identified by the test that the rights of those creditors within it are not so dissimilar as to make it impossible for them to consult together with a view to their common interest." 9. For the word "creditors" in that extract we think that the word "member" or "shareholder" can equally be substituted. Are then the rights of the Suspended Voting Ordinary Shareholders so different from the rights of the Voting Ordinary Shareholders as to make it impossible for them to consult together with a view to their common interest? Counsel submitted that the answer to that question was clearly in the negative and we agree. All the ordinary shareholders, both Suspended Voting and Voting, are to rank *pari passu* on any distribution of profits. More importantly, all of them have the right to vote at meetings called to consider the scheme. The relevant restrictions

on voting do not apply to resolutions relating to the scheme or return of capital on a winding up of arrangement contemplated by the scheme. In relation to such resolutions all shareholders form a single class. We conclude therefore that the proposal to convene a single meeting is entirely right and proper. 10. Counsel for the company has submitted that a number of directions in relation to the procedural requirements of the Court meeting and as to entitlements to vote and so on should be given. We do not need to specify those directions here but they will be recorded in the relevant Act of the Court. Counsel has taken the Court through the proposed explanatory statement to be circulated to shareholders which we consider to be comprehensive and clear. Counsel has suggested that a modification to the notice should be included so as to make it more obvious to shareholders that they have a right to attend the further hearing of the Court which is due to take place on 6 th May, 2011, and we agree. Counsel has undertaken to make the requisite amendment to the documentation. 11. We therefore make the order in the form of the revised draft placed before us by Counsel. Authorities Companies (Jersey) Law 1991. A Practice Statement 2002 3 All ER 96. In the matter of CI Traders Limited

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