

**Judgment 25/2006 In re Tetragon Credit Income Fund Limited – Royal Court
(Company File 43321) – 31st May 2006**

Companies (Guernsey) Law, 1994 – Court confirmed change of name – subsequently transpired that the special resolution has not been validly approved by shareholders – fresh special resolution validly passed – discretionary powers of the Court (see Judgment 37/2005) – Court confirmed change of name effective from the earlier date - Court must be able to rely on representations by Advocates that all legal formalities have been complied with

IN THE ROYAL COURT OF GUERNSEY

The 31st day of May, 2006, before Richard John Collas, Esquire, Deputy Bailiff; sitting alone.

In the matter of

TETRAGON CREDIT INCOME FUND LIMITED

Whereas on 31st May 2006 the Deputy Bailiff considered an application

1. for a declaration that the Order of 10th February 2006 of the Royal Court of Guernsey is valid and effectively changed the name of the Company Number 43321 from Polygon Credit Income Fund Limited to Tetragon Credit Income Fund Limited;
2. alternatively to confirm the undermentioned Special Resolution which was carried unanimously by the shareholders of the Company on 3 April 2006 namely:

“That the name of the Company be changed to Tetragon Credit Income Fund Limited effective as at 10th February 2006 or such later date as the Royal Court may approve.”

and heard thereon Advocate William Simpson, Counsel for the Applicant;

The Deputy Bailiff this day handed down judgment in the terms attached hereto and CONFIRMED the change of name from Polygon Credit Income Fund Limited to Tetragon Credit Income Fund Limited and declared that the change was effective as and from 10th February, 2006.

S. M. D. ROSS
Her Majesty's Deputy Greffier.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

In the matter of

**TETRAGON CREDIT INCOME FUND
LIMITED**

**Application to declare that a change of Company
name was valid and effective.**

Judgment handed down: 31 May 2006

Before: Richard John COLLAS Esq., Deputy-Bailiff

Advocate for Applicant: Advocate W Simpson

Cases, texts & statute referred to:

- 1 The Companies (Guernsey) Law 1994, Section 22
- 2 Stroud's Judicial Dictionary
- 3 Words and Phrases Legally Defined
- 4 Re Barry Artist Ltd [1985] 1 WLR1305
- 5 Re Pearce Duff & Co Ltd [1960] 1 WLR 1014

Introduction

1. On 10 February 2006 the Royal Court approved an application under Section 22 of the Companies (Guernsey) Law 1994 confirming a change of name of a company from Polygon Credit Income Fund Limited to Tetragon Credit Income Fund Limited pursuant to a special resolution of 24 January 2006 purportedly passed by the shareholders.
2. The application with which I am now concerned was supported by an affidavit sworn by Advocate Roger Le Tissier on 1 May 2006 and a memorandum of 3 May 2006 from Advocate Simpson. It arose because the Special Resolution of 24 January had not been validly approved by the shareholders for the reason explained by Adv Le Tissier in Paragraph 4 of his affidavit of 1st May:

"I now realise, the Special Resolution [of 24 January] was passed only by the founder members of the Company and that the holders of the Participating Shares issued and outstanding at the date of the Special Resolution were not notified of and did not vote on the Special Resolution".

3. The error was not noticed by the two nominee shareholders who, when signing the Special Resolution of 24 January 2006, had declared that they were *"all the members of the Company entitled to receive notice of, and to attend and vote at, a general meeting of the Company"*.
4. In a supplemental affidavit sworn by Advocate Le Tissier on 5 May 2006 he explained, in paragraph 5, that:

"I understand that the error came about because a company into which the Company invests (the "Investee Company") also sought to change its name at the same time. The registered shareholders of the Investee Company are the same two companies as were the founder shareholders of the Company. Accordingly, documentation for the change of name of the Investee Company was used as a precedent for the change of name of the Company. Unfortunately the member of staff at [Kleinwort Benson (Channel Islands) Fund Services Limited] responsible for this omitted to include the names of all shareholders of the Company in the draft Special Resolution. Accordingly, it was not circulated to shareholders who had since acquired shares in the Company".

Application

5. The application now before me, dated 3 May 2006, is in the alternative. The first part seeks a declaration that the Order of 10 February 2006 was valid and effective. The second part seeks confirmation that a second Special Resolution carried unanimously by the shareholders on 3 April 2006 changed

the name from Tetragon Credit Income Fund Limited with effect from 10 February 2006 or such later date as the Royal Court may approve.

6. The present application was published twice in La Gazette Officielle and, as was the case when the earlier application was heard on 10 February 2006, no one appeared in court to oppose it. I heard submissions from Adv Simpson on 5th May and granted the application that day. I am now giving written reasons for my decision.

Law

7. The power of a company to change its name is set out in Section 22 of The Companies (Guernsey), Law, 1994:

22. (1) *A company may by special resolution change its name.*
- (2) *A change of name by a company under this Law-*
 - (a) *shall not be effective unless confirmed by order of the Court;*
 - (b) *shall not affect the rights of any person or any obligation or liability of the company or render defective any legal proceedings by or against the company, which proceedings may be continued in the new name.*
- (3) *An application to the Court for an order confirming a change of company name shall not be granted unless, prior to the hearing thereof, the company has, on two occasions falling in successive weeks, placed a notice in La Gazette Officielle giving details of the proposed change of name and of the date, time and place of the hearing.*

8. I must consider what is the meaning and effect of the court **confirming** the change of name. I had to consider a similar issue in an application presented by Adv Simpson's partner, Adv Davies on behalf of a company now called Silverwood Management Limited. In the earlier case, I was grateful to Crown Advocate McMahon for his assistance as *amicus curiae*.
9. Mr Simpson relied upon arguments put forward by Mr Davies in the *Silverwood* case and relied on the same authorities to persuade me that the Royal Court had the power when confirming a change of name to give effect to it, or to give life to it, notwithstanding that the original Special Resolution was invalid.
10. My attention was drawn to Stroud's Judicial Dictionary, Fourth Edition stating that:-

“to “confirm” a document will frequently mean, to give it life which previously it never had, e.g. if the document is invalid, either intrinsically or extrinsically, and is subsequently “confirmed” by another document which would have validly accomplished the objects

of the prior document, such prior document will be vivified and its professed objects will be made effectual (Carver v. Richards, 29 L.J. Ch. 357; Morgan v. Gronow, L.R. 16 Eq. 1)”.

11. I was also shown an extract from “Words and Phrases Legally Defined” referring to a definition of a Canadian court to similar effect:

“As regards minutes of meetings, confirmation verifies the accuracy of the minutes. It sometimes requires a knowledge of a defect in the act to be confirmed and the right to reject or ratify it”.

12. Advocate Davies also drew my attention to two English cases where the court granted orders notwithstanding a failure to comply with statutory requirements. In re Barry Artist Limited [1985] 1WLR 1305, Nourse J. (as he then was) sitting in the Chancery Division of the High Court **confirmed** a resolution of the company, reducing its share capital and cancelling its share premium account, notwithstanding that the company had failed to pass a special resolution as required by Section 66 (1) of the Companies Act 1948. The company contended that the “*resolution, being an expression of the unanimous will of all the corporators acting together and being intra vires the Company, was effective to reduce its capital and share premium account subject only to confirmation by the court*” (page 1306 D). Nourse J held that he had a discretion whether to confirm or refuse to confirm the resolution. Although his strong inclination was to adjourn the matter to enable a special resolution to be passed in proper form, he was satisfied that the Company had a good reason for having the reduction confirmed without delay and said that with great reluctance in those circumstances he acceded to the petition but he would not be prepared to do so in any similar case in the future. He referred to the earlier decision of Buckley J (as he then was) in Re Pearce Duff & Co. Limited [1960] 1WLR 1014 in the Chancery Division of the High Court **confirming** a reduction of share capital, notwithstanding that the special resolution was not valid because it had been passed on short notice without the shareholders agreeing to the lack of proper notice.
13. I consider it to be significant that in both these cases the defect in the special resolution which was to be confirmed was known by the judge who was therefore able to consider whether to reject or accept the application in each case. I also note that both “Stroud’s” and “Words and Phrases Legally Defined” state that a court can give life to an otherwise defective act but the latter states that existence of the defect must sometimes be known. In this case the majority of the shareholders were originally unaware of the Resolution of 24 January 2006, it having been approved only by the two nominee founder shareholders. I cannot agree that the Royal Court, on 10 February, gave valid effect to that Resolution without knowing that it was defective and also without knowing whether the majority of the shareholders would support it. I am therefore unable to grant the declaration sought in the first paragraph of the application.
14. The second paragraph of the application relies upon a second Special Resolution which was validly approved by all the shareholders on 3 April 2006. I can, and I do, therefore confirm the change of name pursuant to the second Resolution, under S22(2) of the 1994 Law. I next have to decide to decide from what date is the name change to be effective.

15. In paragraph 4 of the memorandum filed by Advocate Simpson in support of the application, he submitted that:

- i. *an Act of Court should be presumed to be valid irrespective of the facts upon which it is based (absent compelling reasons to be contrary);*
- ii. *whilst the Special Resolution of 24 January 2004 was not passed validly, all shareholders have subsequently approved the change with a view to the change being effective as at 10 February 2006 or such later date as the Court may approve;*
- iii. *since 10 February 2006 the Applicant has been known as Tetragon by shareholders, creditors and counterparties;*
- iv. *in the terms of section 22 of the Companies (Guernsey) Law 1994 (as amended) the confirmation of the Court was sufficient in itself to change of name and/or it is within the inherent power of the Royal Court notwithstanding any procedural defects (absent any opposition);*
- v. *the public should be entitled to rely upon any Act of Court and/or certificate issued by H M Greffier in respect of the corporate status of a Guernsey registered company;*
- vi. *the Island's reputation as a centre for the establishment of investment companies depends in part upon the confidence placed in such Acts of Court and certificates;*
- vii. *there was/is no opposition to either application and all relevant parties wish the Order of 10 February 2006 to be confirmed;*
- viii. *if the Order is not confirmed inconvenience or possibly loss may be incurred by persons who are not party to the current application.*

16. Whilst I do not go so far as to agree that an Act of Court should be presumed to be valid irrespective of the facts upon which it is based, I accept the arguments that the public should be entitled to rely upon an Act of Court and that innocent third parties who are unaware of the defect in the Special Resolution should not be misled, or suffer inconvenience, or financial loss. Those arguments are highly persuasive. Any third party dealing with a company needs to know, with certainty, the name and identity of the company with which he is dealing. The company in this case is an investment fund which is trading with third parties. Confusion could be caused and loss might be suffered by investors or other third parties if there is uncertainty as to the name of the Company. Such uncertainty might arise if I declare that the name was not validly changed on 10 February.

17. All these arguments should impress upon Advocates who present applications for a change of name the importance of ensuring that all formalities have been complied with. Most applications are made under the provisions of Practice Direction No.1 of 1999 which requires an Advocate to certify that:-

“I confirm that all formalities required by the appropriate legislation have been complied with, including any necessary publications in La Gazette Officielle. I know of no reason why the application should not be granted”.

18. The court must be able to rely upon an Advocate to satisfy himself that it is in order for him to sign the application and before doing so the Advocate must make all proper enquiries to ensure that it is in order for him to do so. The professional standing and the reputation of an Advocate are at risk if he misleads the court, even unintentionally.
19. In this case, I am satisfied that the errors that led to the presentation of the application in February resulted from carelessness or incompetence rather than any intention to mislead or deceive. I am concerned however, that this is not the first time in my short term of office as Deputy Bailiff that similar errors have come to my attention. It is in the best interests of the Bar, and the financial community in this Island, that the court must be able to rely upon Advocates' representations to the court and, consequently, that the public can rely upon decisions of the court and its Acts of Court. I urge all Advocates to review their responsibilities and their own procedures to ensure that we can rely upon their representations in future.
20. Returning to this application, I am asked to give a declaration that the earlier Order of 10 February 2006 is valid and effective. I respectfully adopt the judgment of Lieutenant Bailiff Hancox in Re Westbury Property Fund Limited (Royal Court 4 July 2005) in which he was prepared to accept that the Royal Court has the discretionary power to grant a declaration in an appropriate case.
21. In this case, all the shareholders have now unanimously agreed that they wish the Company to be known by its new name. Publications have been made in La Gazette Officielle and there was no opposition, either to this application or to the earlier application for the change of name. Any third parties dealing with the Company will have been unaware of the defect in the original Special Resolution. Third parties will have had no reason to question the validity of the decision of the Royal Court on 10 February 2006, confirming the change of name. I have a discretion to refuse the application, but, if I do so, that is likely to lead to confusion and possible loss to those who have dealt with the Company since 10 February 2006 under its new name.
22. In the unusual circumstances of this case and for the reasons I have explained, I declare that the change of name was effective as at 10 February 2006.
23. I hope that in future Advocates will ensure that all Special Resolutions are valid and correct before the court is asked to confirm them and that it will never again be necessary to have to consider whether to declare that an Act of Court confirming a change of company name is valid. Any future case will have to be considered on its merits and as the court's power to grant declaratory relief is a discretionary remedy there can be no certainty that the court will grant any future application.