

**Judgment 23/2013**

**In the matter of Montenegro Investments Limited (in administration) and in the matter of Parts VII and XXI of The Companies (Guernsey) Law 2008 (as amended)  
Royal Court  
22<sup>nd</sup> July 2013**

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**Company in administration – application for scheme of arrangement.**

Approved Text  
22.7.2013

**IN THE ROYAL COURT OF GUERNSEY**

**ORDINARY DIVISION**

**IN THE MATTER OF MONTENEGRO INVESTMENTS LIMITED (IN ADMINISTRATION)**

**AND IN THE MATTER OF PARTS VIII AND XXI OF THE COMPANIES (GUERNSEY) LAW 2008 (as amended)**

**SANCTION HEARING FOR A SCHEME OF ARRANGEMENT**

**Hearing date: 2<sup>nd</sup> July 2013**

**Before: Richard John Collas, Esq., Bailiff**

**Advocate M.C. Newman represented Alan Roberts and James Toynton (the Joint Administrators)**

**Legislation text and cases referred to in the judgment:**

The Companies (Guernsey) Law, 2008 (as amended), parts VIII and XXI

Re TDG Plc (2008) EWHC 2334, CH at para 29

Buckley on the Companies Acts Vol 1, 50<sup>th</sup> edition, paras 425.53 and 54

In Re English, Scottish and Australian Chartered Bank (1893) 3CH 385

Re The Designer Room Limited [2004] EWHC 720 Ch

Lune Metal Products [2006] EWCA Civ 1720

Re South African Supply and Cold Storage Co., Wild and South African Supply Cold Storage Co. [1904]  
2Ch 268, at page 286

### **Approved Judgment**

1. This is the second stage of an application for a Scheme of Arrangement under Part VIII of the Companies Law 2008 ("the Scheme"). The brief background to it is that the application is presented by the Joint Administrators of Montenegro Investments Limited ("MIL") a Guernsey registered company, previously listed on the Channel Islands Stock Exchange as an authorised closed - ended fund.
2. MIL's business was to provide investment opportunities in land situate in Montenegro. MIL structured the investments through Maltese and Dutch holding companies which in turn own various properties in Montenegro, via locally incorporated entities. The assets were acquired for investment in their development potential and as such provide no income stream.
3. All was going well, it seemed, with the investments until the global financial crisis came along, when it became difficult to raise funds to convert MIL's land banks into commercial and residential properties and the ability to raise additional equity finance was hindered by the fact that key creditors could effectively call in their loans at short notice.
4. The liquidity problems led to MIL being unable to satisfy the solvency test and consequently it was placed in administration in the hope of preserving its business. One of the difficulties identified by the Administrators was the high regulatory costs caused by the nature of the structure used for this investment. The Administrators have come up with an arrangement the effect of which will be to decant the assets and one liability into a new company, whilst paying off all other creditors through the raising of additional investors' funds. Investors will be issued shares in the new company in proportion pro rata to their present investment in MIL and any new funds they may agree to invest as part of the arrangement. Thereafter MIL will be dissolved.
5. Members were told that there was a precondition that had to be satisfied before the Scheme could go ahead. Members were advised that the Joint Administrators had calculated that a minimum of €4 million of additional investor funds were required to repay the creditors and provide working capital for two years; the working capital needed for the proposed new structure is of course less than would have been needed for the present structure because of the reduced regulatory costs. I was told that sufficient new funds have been offered and hence that the precondition has been met.
6. The new company has recently been formed. It is a BVI company called Adriatic Opportunities Limited ("Adriatic"). It will be administered by a Jersey regulated fiduciary and structured as a closed ended entity, such that investors who invest in the fund will not have the right to call for a redemption of their shares during the life of the fund but will only receive redemption following a specific event, for example, disposal of the underlying real estate assets or expiration of the term of the fund. The GFSC have been consulted and notified of the Scheme. They have raised no issues with it.
7. In an Affidavit sworn in support of the Application by one of the Administrators, I was informed me that the only other possibility that could be considered would be to place MIL into liquidation but the Administrators had been advised that, on a fire sale basis, the assets would raise only some €6 million whereas prior to the crisis they were valued at something in excess of €35 million.

8. I had previously approved the first stage of the Scheme. The meetings required have duly been held, they were conducted satisfactorily and this scheme has been approved at both of the meetings. There were two meetings of the members; one known as the “Investor Meeting” for members holding participating redeemable preference shares, in other words, the investors and a second meeting of the sole member holding management shares, i.e. the manager, which is referred to as the “Manager Meeting.” Both meetings approved the arrangement.
9. I have had drawn to my attention by Advocate Newman the role that the Court has to perform under Section 110 of the Companies Law. He submitted that the section, which mirrors similar provisions under English Law, confers on the Royal Court an unfettered discretion. I accept that the matters which should guide the Court in the exercise of that discretion are those summarised by Morgan J. in *Re TDG Plc (2008) EWHC 2334, CH at para 29* referring to Buckley on the Companies Acts Vol 1, 50<sup>th</sup> edition, paras 425.53 and 54.
10. The first is that the court must be satisfied that the provisions of the statute and all procedural requirements have been complied with in giving notice of the meetings, convening and holding the meetings, and lodging the chairman’s report with the court. In the present case, that condition has been satisfied; the affidavit before me sworn by Alan John Roberts, one of the Joint Administrators, confirms that the provisions of the statute and all the procedural requirements have been duly complied with.
11. The second factor is that the court must be satisfied that the classes of shareholders were fairly represented by those who attended the meeting, that the majority acted bona fide and that there was no oppression of minorities such that the result of the meeting of each class fairly reflected the views of the members concerned and so the Court may disregard the votes of those members who had special or personal interests in supporting the proposals as their views can, potentially, not be regarded as fairly representative of the class in question.
12. In the present case, only one member was eligible to attend the Manager Meeting and it voted in favour. As for the Investor Meeting, 92.144% by value of the investors attended, either in person or by proxy. Of those who did attend 100% voted in favour. There are two significant shareholders, one holding 29.6% and the other 13%, both of them voted in favour but as very nearly 50% of the votes were cast by other investors who all voted in favour, I am satisfied there is no need to disregard the votes of those members who had special or personal interests. Less than 8% did not attend either by proxy or in person but apart from them everybody voted in favour.
13. The third matter is that the Court must be satisfied that the terms of the arrangement are fair such that an intelligent and honest man from a member of the class concerned in acting in respect of his interests might reasonably approve.
14. In *Re English, Scottish and Australian Chartered Bank (1893) 3CH 385*, Lindley, LJ, held that -

*“The Court should be slow to substitute its view for the commercial decision of members acting honestly and with sufficient information.”*
15. In the present circumstances, there is no reason why the Court would substitute its own view for the commercial decision of the members. The investor members are sophisticated investors who are well able to take their own decisions as to how they wish to invest their funds. Furthermore, there is no other deal available; the only other option would be liquidation which is clearly less favourable because of the low value of the investment properties on a fire sale basis mentioned above.

16. The fourth matter is that there must be no blot on the scheme which, it is submitted by Mr. Newman, is simply another way of saying that the court can take any other factor into account in exercising its discretion. I see nothing in the present Scheme to suggest that it has any blot.
17. An issue that Advocate Newman raised is whether the Joint Administrators have the power to distribute the company's property first to creditors and then to members of the company? He drew my attention to English cases including in particular *Re The Designer Room Limited* [2004] EWHC 720 Ch and *Lune Metal Products* [2006] EWCA Civ 1720. In the latter case Neuberger, LJ, as he then was, held at paragraph 48 of the judgment: -

*“the court must equally be able to sanction administrators paying money directly to a class of creditors (and therefore to all creditors), at least if it is to facilitate a desirable exit route. The proposed distribution would enable a CVA (or, indeed, a compulsory liquidation) with the consequential costs and delay, to be avoided, and should facilitate the achievement of the relatively simpler and cheaper section 652 exit route.”*

18. Applying that decision of Neuberger LJ, I am satisfied that an English Court would have the discretion to grant approval to this scheme if it saw fit to do so. The reasoning of Lord Neuberger is persuasive in this jurisdiction and I see absolutely no reason why I should not respectfully follow it.
19. English decisions in insolvency matters are of assistance in this jurisdiction, especially when they are interpreting legislative provisions which our legislature have chosen to copy in identical terms. However, they are not binding on the Royal Court and we are not required to follow them in every case. In my view, the Royal Court when dealing with insolvency matters has to be aware that our statutory regime and the regulations thereunder are not as prescribed as English legislation. In some instances the local legislation provides the basic framework or bare bones of an insolvency procedure whilst leaving the Royal Court greater scope and flexibility in deciding how to apply its powers in any particular situation. Where it is appropriate to do so, the Court may adopt a pragmatic approach to applications and adjust its procedures in order to deal with issues as and when they arise during the course of any insolvency, as long as it is at all times mindful of the powers bestowed on it by the legislature and always acts within the limitations and constraints of the legislation.
20. There is nothing in Guernsey law that would prevent the Royal Court granting approval to the Joint Administrators to do what they propose in relation to the Scheme. There is no need to set out here the extent of the powers available to the Court and the Joint Administrators but I am quite satisfied that the powers exist to do what is proposed in this instance.
21. Advocate Newman also drew my attention, quite properly, to English authorities dealing with the question of what amounts to a reconstruction of a company or a merger of a company. That arises because of the wording of Section 111 of the Companies Law, and in particular 111(1)(a):-

*“This section applies where an application is made to the Court under section 110 to sanction a compromise arrangement and it is shown that –*

*(a) the compromise or arrangement is proposed for the purposes of, or in connection with, a scheme for the reconstruction of any company or companies, or the merger of any 2 or more companies.”*

22. This is not a merger situation so the Court's powers can only be engaged if it is a reconstruction.
23. In order to define a reconstruction, Advocate Newman helpfully referred to what Buckley J. said in *Re South African Supply and Cold Storage Co., Wild and South African Supply Cold Storage Co.* [1904] 2Ch 268, at page 286:

*“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 that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business should be carried on and substantially the same persons shall carry it on. It does not involve that all the assets should 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.”*

24. Advocate Newman also drew attention to other cases where a scheme has been said not to constitute a reconstruction. I find the definition of Mr. Justice Buckley to be helpful, mindful that in a Guernsey context we should not necessarily fetter ourselves by English decisions which are not binding on this Court. The proposed Scheme will enable the business of MIL in which the investors have invested to carry on in substantially the way that they intended when they made their investments. It is their wish that the business should continue and some, at least, of the investors are willing to invest further funds to enable it to do so. The Scheme is perhaps an unusual arrangement but I am satisfied, looking at the nature of it, that it does amount to a reconstruction and hence that Section 111 (1) (a) engages the Court's powers.
25. In conclusion, I am persuaded that the Court has the power to approve the Scheme. I note that the GFSC, MIL's subsidiaries and the members of MIL have all been consulted and/or have voted upon it. Nobody is opposing it. In all the circumstances, I am persuaded that it is appropriate to sanction the Scheme of Arrangement and to grant the relief sought in paragraphs 1 and 2 (a) of the Application.
26. Paragraph 2 (b) seeks a direction that a copy of any order be provided to the Registrar of Companies within 7 days and paragraph 2(c) that notice of the dissolution of the company be placed in La Gazette Officielle.
27. I am persuaded it is appropriate that the notice of this order should be given to the Registrar and published in La Gazette in the manner proposed.
28. I turn now to the question of whether it is right that MIL be dissolved. In my opinion, dissolution in these circumstances is preferable to requiring that MIL be placed into liquidation because it will save costs. There are no benefits to be achieved by going into liquidation; the Administrators have already advertised for creditors and, more recently, they have placed advertisements in the London Gazette and in La Gazette Officielle in connection with this application today. No creditors have come forward as a result of those advertisements who were not already known to the Joint Administrators. The creditors will be satisfied as part of the Scheme so I cannot see that there would be any benefit in requiring that MIL be placed in compulsory liquidation. As I have said, the only consequence would be to generate costs to be borne by the investors. I am therefore satisfied that it is appropriate that, as soon as all creditors have been satisfied and the assets have been transferred to Adriatic, MIL shall be dissolved without a winding up, pursuant to the powers in that regard conferred by Section 111(2)(d) which reads as follows-

*“The Court may either by order sanctioning the compromise or arrangement or by a subsequent order, make provision for all or any of the following matters ...*

*(d) the dissolution, without winding up, of any transferor company.”*

29. As requested, I also order that immediately prior to the dissolution of MIL, the Joint Administrators be released and discharged from all liability in respect of their acts and omissions, except to the extent set out in Section 385 of the Companies Law, that the Administration Order then be discharged pursuant to Section 382 of the Companies Law and that the Joint Administrators vacate office pursuant to Section 384 (1) (c).
30. I make an order that the costs of this Application be paid as a cost of the Administration.