



In the matter of NewRiver Retail Limited
Royal Court
11th July 2016

JUDGMENT
30/2016

Application under section 107 of The Companies (Guernsey) Law 2008 as amended, to convene a meeting of the members of the Company for the purpose of considering a Scheme of Arrangement under Part VIII of the Companies (Guernsey) Law 2008 as amended.

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF:

NEWRIVER RETAIL LIMITED

AND

IN THE MATTER OF:

A SCHEME OF ARRANGEMENT PURSUANT TO PART VIII OF

THE COMPANIES (GUERNSEY) LAW 2008

Hearing date: 11th July 2016

Approved Judgment delivered *ex tempore* on 11th July 2016

Before: Sir Richard Collas, Bailiff

Advocate for the Applicant: Advocate S Duerden

Introduction

1. This is an application by NewRiver Retail Limited (“the Company”) under section 107 of The Companies (Guernsey) Law 2008 as amended, to convene a meeting of the members of the Company for the purpose of considering a Scheme of Arrangement under Part VIII of the Companies (Guernsey) Law 2008 as amended. The type of arrangement has been called a cancellation scheme in that existing shares in the Company will be cancelled, the reserve arising thereby will be used to pay up an issue of the same number of fully paid new shares as those cancelled to a new UK incorporated, UK tax resident company, NewRiver REIT plc, in consideration for which NewRiver REIT plc will issue shares in itself credited as fully paid to members of the Company on a ‘one for one’ basis, with the initial two shareholders of NewRiver REIT plc receiving one fewer share each in NewRiver REIT plc than the total number of shares they hold in the Company at the effective date of the Scheme of Arrangement.

2. In support of the application I have the affidavit of Allan Stevenson Robert Lockhart sworn on the 1st July 2016 and the exhibits thereto including the Draft Scheme Document to be issued to members.
3. The Company was incorporated in Guernsey on the 4th June 2009 as a non-cellular company limited by shares. There is a single class of shares – 238,550,894 shares were in issue as at the end of June and are held by 1051 shareholders. An Employee Benefit Trust holds 5,152,055 shares in respect of which the Trust has waived voting and dividend rights but for these present purposes it is to be treated in the same way as any other shareholder; the EBT is an ordinary shareholder.
4. The overview of the proposed Scheme is given by Mr Allan Lockhart at paragraphs 13-16 of his Affidavit from which I quote:

- “13. The purpose of the Scheme is to introduce a new UK Incorporated, UK tax resident company as the parent company of the New River group.*
- 14. Under the Scheme all shareholders of the Company will exchange their shares in the Company for an equivalent number of shares in NewRiver REIT plc which is a company incorporated and resident for tax purposes in the UK.*
- 15. NewRiver REIT plc was established for the purposes of the Scheme and has no material assets or liabilities. It was originally incorporated in the UK under the Companies Act 2006 on 8 June 2016 as a public limited company.*
- 16. If the Scheme becomes effective, instead of Company shares, the existing Company shareholders will each be issued shares in NewRiver REIT plc on a ‘one for one’ basis. The result will be that the Company shall become a wholly-owned subsidiary of NewRiver REIT plc.”*

5. The rationale for the Scheme is basically that the Company no longer achieves any useful purpose. When the Company was established in 2009 it was tax resident in Guernsey as a specialist real estate investment and asset manager but in 2010 the management and hence tax residency of the Company was transferred to the UK. Also in 2010, the Company successfully entered the UK real estate investment trust programme regime, conferring certain tax advantages on profits and gains to the UK property investments. The directors of the Company now believe that changing the group’s ultimate holding company to a UK incorporated company will be beneficial because the Company’s operations are focussed exclusively in the UK. The new company will have the opportunity for inclusion in the FTSE UK Index Series including FTSE 250 Index and the FTSE UPRA NAREIT Global Real Estate Index Series and hence will have better access to the capital markets. So, in short, in the opinion of the directors, there is no continued benefit in retaining this Guernsey company as the group’s ultimate parent company and it would be in the best interests of the Company and its members for NewRiver REIT plc to become the new ultimate parent company pursuant to the Scheme of Arrangement.
6. The first issue for me is whether Part VII of the Companies (Guernsey) Law is in fact engaged. In other words, is this a Scheme of Arrangement? It is a Members’ Scheme, not a Creditors’ Scheme, and hence we are not concerned with the creditors as their rights will be wholly unaffected. We are solely concerned with the members of the Company. Under S105 of the Companies Law:

- “(1) The provisions of this Part apply where a compromise or arrangement is proposed between a company and -
(a) its creditors, or any class of them, or
(b) its members or any class of them.*

- (2) *In this Part, “arrangement” includes a reorganisation of the company’s share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both of those methods.”*

7. Advocate Duerden has helpfully, in her Skeleton Argument, referred me to Buckley on the Companies Acts Division 16 paragraph 9:

“Buckley on the Companies Acts Division 16 Reconstructions, Mergers and Takeovers

[9] A power to ‘compromise’ rights presupposes some dispute about them or difficulty in enforcing them. An ‘arrangement’ is interpreted widely. A number of decisions have recognised that an arrangement should not be limited to something analogous to a compromise. For a scheme to constitute a compromise or arrangement it is essential that there is an element of accommodation or ‘give and take’ between the parties. An arrangement may, for example, involve a reduction or reorganisation of share capital, or relate to the merger of two or more companies, or it may involve a scheme of reconstruction whereby the business of a company, or companies, is transferred to a new company.”

8. Thus it seems to me that the term “arrangement” is to be given its natural ordinary meaning. S105 (2) is not definitive; it merely clarifies that an arrangement can include the type of reorganisation described in that sub-section, but it is certainly not intended to be a complete and comprehensive definition. I respectfully agree with Mr Justice David Richards, who in Re T & N Ltd & Others (2007) Business Law Reports 1411 at paragraph 46, said the following:

“The word ‘Arrangement’ has a very broad meaning. It is not defined, for the purposes of S 425, except that by S 425(b) it includes particular types of the organisation of share capital”

9. Section 425 is the equivalent of our section 105 and I also respectfully agree with the decisions of the Royal Court of Jersey cited to me, namely: In the matter of representation of Vallar Plc [2011] JRC 051; In the matter of the representation of WPP Plc [2013] JRC 035; and In the matter of the representation by Informa Plc [2014] JRC 120C.

10. In my judgment, an agreement between a company and its members to cancel their shares in exchange for shares in another company is “an arrangement”. It could only happen if the company and the members agree it should occur. It will only happen if they arrange for it to do so. I therefore have no doubt that the present proposal is “an arrangement”. However, I am conscious that this is an *ex parte* application. If a member of the company wishes to challenge this view at the next hearing when the Court is asked to sanction the arrangement he must be free to do so and I will of course consider carefully any submissions. But for the purposes of today I am satisfied this is an arrangement and it is therefore in order to proceed to the convening of a members’ meeting.

11. I note that, in the circumstances of this Application, section 106 of the Law is not engaged. However Section 107 is; it is pursuant to that section that the Court is asked this morning to order that a meeting of the members be convened. I note that the Company has the locus under Section 107 to make the Application. I note also that there is only one class of shares and hence all members of the Company are entitled to receive notice of the meeting. I am satisfied that the directions proposed in the Application for the convening of the meeting and for circulating the statement to members comply with the requirements of the Law, particularly in relation to section 108. The directors are aware of their duties under Section 109 and indeed have made declarations of their interests in the Company. The meeting is proposed to be held in London; there is no

statutory requirement that the meeting must be held in Guernsey and clearly it makes sense for the meeting to be held in a jurisdiction where the most members are likely to be able to attend. That place is London.

12. I am satisfied that what is proposed is “an arrangement” for the purposes of Part VIII of the 2008 Law. I am also persuaded that the proposed directions sought are appropriate in the circumstances and therefore I grant the Application in the terms sought.