An application for an expedited hearing before the Court of Appeal.

IN THE COURT OF APPEAL OF GUERNSEY

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION APPEAL No. 508)

BETWEEN:

PUMA BRANDENBURG LIMITED

Applicant

And

IN THE MATTER OF: A SCHEME OF ARRANGEMENT PURSUANT TO PART VIII OF THE COMPANIES (GUERNSEY) LAW 2008

Judgment handed down: 6th March 2017

Advocate for the Applicant: Advocate J P Greenfield
Advocate for the Respondents: Advocate A R Lyall

JUDGMENT

McNEILL, J A:

1. There is before me, sitting as a single judge of the Court of Appeal, an application by Puma Brandenburg Limited, a Guernsey registered company (the "Applicant" or the "Company"). By letter dated 24 February addressed to the Greffe, the Applicant intimated that it intended to appeal to this court in respect of a judgment given in the Royal Court on 24 February 2017 (Collas, Kt, B.) ordering that the Applicant's application for the sanction of the court to a Scheme of Arrangement be dismissed. Such an application does not require leave to appeal and, by its present application, the Applicant applies, pursuant to Rules 16 and 17 of the Court of Appeal (Civil Division) (Guernsey) Rules, 1964 and the inherent jurisdiction of the Court, (i) for the setting of directions for the filing of Cases on an expedited basis and (ii) for a hearing before the full Court of Appeal to be listed for the determination of the appeal at the earliest possible opportunity. That application is

opposed by Aralon Resources and Investment Company Limited, a company, on whose behalf appearance was permitted at the Sanctions Hearing and which, as a minority shareholder in the Applicant, was one of the members who voted against the Scheme of Arrangement at the court meetings.

Background

2. The Company was formed in February 2006 with the aim of raising capital for investment in real estate in Germany. It has pursued that purpose and now wishes to expand into investment in real property on an international basis.

3. Having presented its Scheme of Arrangement to the Royal Court, the Royal Court ordered that there be two court meetings, both to be held on 1 December 2016, to obtain the views and votes of, respectively, holders of A shares and holders of B shares.

4. The court meetings were duly held and the requisite majority of those present and voting approved the Scheme. At an ensuing Extraordinary General Meeting, 91.5 per cent of those voting approved a special resolution to approve the share buy-back proposal which was at the heart of the Scheme pursuant to Section 314 of the Companies Guernsey Law.

5. At the Sanctions Hearing the Royal Court heard both from counsel for the Applicant and from counsel for Aralon. The Royal Court refused to sanction the Scheme both on jurisdictional and on discretionary grounds.

6. As to jurisdiction, the nub of the Scheme, as I have said, was to seek sanction for a compulsory buy-back of all shares, save for those held by the majority shareholders, at a price which, so Avalon claimed, represented a 43.6 per cent discount to net asset value. The jurisdictional challenge was that whilst Section 312 CGL permitted such an acquisition if authorised under the memorandum or articles of association of the company and with the consent of the shareholders whose shares were being acquired, those statutory provisions could not be overridden by the procedures set out in Part VIII CGL: express consent of the shareholder was required. The Royal Court took the view that the words "must obtain the consent of the shareholders whose shares are being acquired" in Section 313(3) set a mandatory requirement which could not be, in any sense, be overridden by the general provisions of Part VIII.

7. Having reached that decision, the Royal Court did not require to go further to consider the discretionary factors, but the learned Bailiff proceeded to do so for sake of completeness. The Royal Court concluded that, had it had jurisdiction to approve the Scheme, it would not have done so as the Company had not satisfied the court that the members of the classes who had voted in favour of the Scheme were acting *bona fide* in the interests of the class as a whole.

Present Issues

8. It is against that Judgment and the decision following upon it that the present Applicant has intimated an intention to appeal. Whilst a draft notice of appeal has been prepared, a Notice of Appeal has yet to be served. The Applicant, however, seeks an expedited appeal hearing for various reasons. In the letter to the Greffe it was submitted that the Applicant had a real and urgent concern that any delay in the hearing of the appeal could have an adverse impact on the sums receivable by investors in the event that the appeal was successful. Those concerns were expressed in somewhat general terms.

9. First, it was submitted that currency issues following the Brexit vote, which had allowed the value of the Euro to appreciate against Sterling, might only be short term and it was in the interests of shareholders to realise their Euro investment whilst Sterling was weak.

10. Quite separately the concern was expressed that there was a risk that there might be an increase in the rate of capital gains tax payable by a UK resident on the realisation of such an investment when the March 2017 United Kingdom Budget was made. As will be noted, each concern is entirely speculative.

11. The Applicant also seeks to rely upon correspondence from various shareholders expressing their concerns regarding the impact of delay. However, as counsel for Aralon has pointed out, the emails in question all predate the Judgment and none comment on the need for an appeal to be expedited.

12. For the purposes of the present application, a fifth affidavit of Hermanus Troskie, dated 28 February 2017, has been lodged. That affidavit expands upon the expression of the Applicant's concerns set out in the letter to the Greffe by indicating various reasons why shareholders in favour of the scheme desire to avoid delay.

The Law

13. Appeals against refusals to sanction Company Schemes of Arrangement are rare. In most instances when grounds of opposition become known, either through contentions for respondents or through the expression of the views of the Court, Schemes are either amended or withdrawn. Further, whilst there is often an immediacy about the circumstances giving rise to the presentation of a scheme, it is rare that there is an absolute urgency. That absolute urgency may arise because of the imminence of a known critical date which will affect either the company or its shareholders; but, otherwise, Schemes of Arrangement invariably bring with them complexities especially if shareholders perceive that they have competing interests. In consequence, not only do relevant statutory provisions provide appropriate timescales for procedures, but Sanctions Hearings can themselves be very complex affairs and bring with them extensions of time in order that parties can be fully prepared and the Court fully informed as to the bases upon which its discretionary power is to be exercised.

14. In the present day, the courts recognise that particular expedition ought to be accorded to commercial matters including both company and insolvency issues and, in larger jurisdictions, specialist courts have been provided. However, once the procedures at first instance have been completed and a judicial determination made, the process of appeal is, to all intent and purpose, the same as any other matter. In particular, any court has to bear in mind that an order for expedition of one matter means that both the court and its staff and the lawyers for all parties must give an element of preference to this litigation rather than to other court proceedings. I therefore agree with the views expressed by Warren J in *CPC Group Limited v Qatari Diar Real Estate Investment Company* [2009] EWHC 3204 at paragraphs 84 to 91. The critical point, so it seems to me, is that the party seeking expedition must show to the Court that there is an objective urgency that the claim should be decided.

Discussion

15. In my judgment, no objective urgency has been shown here. There was no indication before the Royal Court that there was any particular urgency. The possibility of a hearing and determination prior to the presentation of the UK budget on 8 March is out of the question. It is as likely as not that currency fluctuations between Sterling and the Euro will continue for numerous reasons and, in the event of sanction being given to the scheme and an investor wishing to divest, an appropriate time for divesting, agreeable to the shareholder, can be chosen. An investment in a private concern is, by its nature, one which may well not permit of such easy divestiture as is the case in an ordinary stock market investment.

16. Whilst there is, as almost invariably the case, a long-stop date of 14 May 2017 set out in the Scheme Document, such dates are not infrequently extended by Company applicants with the permission of the Court.

17. The next scheduled sitting of the Court of Appeal is between 15 and 19 May 2017. I have ascertained through the Greffe that the business presently scheduled for the court during that week allows ample time for a hearing on this matter and, subject to the complexities which may emerge from parties' contentions, allow for a reasonably prompt determination. If the Applicant decides to present a notice of appeal, the period between now and the May sitting provides sufficient time for each party to give proper consideration to the issues and to present their Cases in time for a hearing during the May sitting. As part of the proceedings leading to such hearing, an application can be made for extension of the long-stop date.

Decision

18. For all these reasons, the application for an expedited hearing is refused.