Puma Brandenburg Limited v Aralon Resources and Investment Company Limited & Nortrust Nominees Limited
Court of Appeal
18th May 2017

JUDGMENT 27/2017

Appeal against a decision of the Royal Court to refuse to sanction a scheme of arrangement.

IN THE COURT OF APPEAL OF GUERNSEY

CIVIL DIVISION – APPEAL NO. 508

18 May 2017

Before: **Nigel Pleming QC**
George Bompas QC
Sir Michael Birt

Between: **PUMA BRANDENBURG LIMITED** **Appellant**

-v-

ARALON RESOURCES AND INVESTMENT COMPANY LIMITED
NORTRUST NOMINEES LIMITED **Respondents**

IN THE MATTER OF
PUMA BRANDENBURG LIMITED
-and-
IN THE MATTER OF
A SCHEME OF ARRANGEMENT PURSUANT TO PART VIII OF THE COMPANIES (GUERNSEY) LAW 2008

Advocate J P Greenfield for the Appellant
Advocate A R Lyall for the Respondents

JUDGMENT OF THE COURT

BOMPAS JA

1 This is an appeal from a decision of the Royal Court (the Bailiff, Sir Richard Collas) given on 24 February 2017, when the Court refused to sanction under section 110 of the Companies (Guernsey) Law, 2008 ("the Companies Law") a scheme of arrangement proposed by Puma Brandenburg Limited ("the Company"). The proposed arrangement is to be between the Company and certain of its shareholders. Excluded from the arrangement are those shares, a majority of the Company's issued shares, which belong to Mr Howard Shore or his wife, Mrs Andrée Shore: these excluded shares are held by nominees, Mr and Mrs Shore not being themselves shareholders or members of the Company.

2 The proposed arrangement, described further below, is in its essentials very simple: Mr and Mrs Shore are to become the owners of the Company, the Company purchasing compulsorily all the Minority Shares in the Company, being those shares which are not already owned by them. The arrangement will result in a takeover of the Company by Mr and Mrs Shore, with the Company financing the takeover and with dissentients being required to sell their shares.

3 There were two reasons which the Bailiff gave for refusing to sanction the arrangement.

3.1 First, the Bailiff held that the machinery in Part VIII of the Companies Law does not enable a company to acquire its own shares by way of an own-share purchase. This is because section 313 in Part XVII, dealing with own-share acquisitions by way of purchase, contains in subsection (3) a provision which stipulates that "*The company must obtain the consent of the shareholders whose shares are being acquired to that acquisition*". The Bailiff concluded that the necessary consent had not been and would not be obtained. "*Thus",* he said, "*a scheme of arrangement under [the Companies Law] cannot be used where a company is seeking to acquire the shares of a member who does not want to sell to the company.*"

3.2 Second, the Bailiff decided that, as a matter of the Court's statutory discretion given by section 110 of the Companies Law, the arrangement was not one he would sanction.

4 On the present appeal the Company argues that the Bailiff's first reason was mistaken: the arrangement, when sanctioned, will without more supply the shareholders' consents required by section 313 of the Companies Law for the Company's acquisition of their shares. Alternatively, the Company submits that the scheme of arrangement itself allows for the appointment of an agent to act on behalf of shareholders in giving consent, or that if necessary a simple amendment to the terms of the scheme can result in the consents being given by such an agent, and offers to make that amendment in exercise of a power set out in the scheme document.

5 As to the Bailiff's second reason the Company submits that the Bailiff misdirected himself when exercising the discretion which section 110 of the Companies Law requires to be exercised if a proposed arrangement is to be sanctioned. If the Company succeeds both on this argument and on the question of jurisdiction, it would be open to this Court to consider afresh how the discretion should be exercised: that would be preferable to the alternative, of remitting the matter back to the Royal Court for a further hearing. Advocate J P Greenfield for the Company submits,

however, that in any fresh exercise of the discretion the starting position should be the factual findings made by the Bailiff. In contrast, Advocate A R Lyall for the Respondents seeks to challenge certain of the Bailiff's findings.

6 In this judgment we first describe the background to and the essential features of the Company's proposed arrangement. We then consider in turn the Company's two arguments, referred to in the two previous paragraphs.

The statutory framework

7 In his judgment, at paragraphs 11 to 14, the Bailiff summarised the immediately relevant provisions for schemes of arrangement set out in Part VIII of the Companies Law. It is convenient to draw from this summary:

> *"11. Section 105(1) of [the Companies Law] states that "the provisions of this Part apply where a compromise or arrangement is proposed between a company and …. its members, or any class of them." Section 105(2) gives a non-exhaustive definition of "arrangement" as including "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."*
>
> *12. Section 106 provides that certain specified procedures, namely an alteration of a company's memorandum or articles, a conversion or transfer under Part V of [the Companies Law], and an amalgamation or a migration, may be effected under the provisions of Part VIII of [the Companies Law] rather than in accordance with other parts of the Law. A scheme for a buyback of a company's shares is not included under section 106, giving rise to the submissions advanced by [the Respondents] that the express provisions under section 313 relating to a buyback must be followed and that Part VIII of the Law cannot be used for such a purpose.*
>
> *13. Section 107 provides for the Court to order a meeting of creditors or members or of a class thereof to be summoned. It was pursuant to the powers under this section that I ordered the convening of the court meetings described above. Section 108 provides for a statement to be circulated containing notice of the meeting and explaining the effect of it. Section 109 imposes on the directors of the company (or trustee on behalf of debenture holders) the obligation to circulate the statement and imposes criminal liability for failure to comply. Section 110 details the requirements for obtaining court sanction for the compromise or arrangement. The scheme can only proceed if a 75% majority by value of those present and voting at the court meeting agrees the scheme (section 110(1)). Section 110(1) also provides that the court **may** sanction the scheme (my emphasis). The word "may" clearly indicates that court has a discretion. Section 110(2) specifies that the "Court may consider whether –*
>
> > *(a) the majority is acting in good faith in the interests of the creditors or class of creditors, or members or class of members (as the case may be) it professes to represent, and*
> >
> > *(b) the different interests of creditors or members are such that they should be treated as belonging to a different class of creditors or members."*

14. Section 110(3) specifies who may make the application, including the company (as has happened in the present case). Section 110(4) provides that a compromise or arrangement approved by the court is binding on inter alia all of the class of members. Section 110(5) requires the company to deliver a copy of the court order to the Registrar of Companies within seven days and section 110(6) imposes a criminal penalty on any company that fails to comply with the delivery requirement."

8 What is to be found in Part VIII of the Companies Law, although introduced into the Guernsey law of companies only in 2008, has a close resemblance to what is to be found in what is now Part 26 of the United Kingdom Companies Act 2006. Part 26 is the modern re-enactment of provisions which evolved in the UK in the nineteenth century, culminating in the Companies Act 1907: that Act first enabled schemes of compromise or arrangement to be made, under these provisions, outside the context of a winding up. It was then that shareholder schemes such as the present one became possible. In the applications under Part VIII of the Companies Law which have come before the Royal Court, decisions of the courts of England and Wales on the comparable provisions of what is now Part 26 of the Companies Act 2006 have been taken (rightly, in our judgment) to offer guidance on the interpretation and operation of the relevant sections of the Companies Law.

9 Nevertheless Part VIII of the Companies Law does not simply reproduce Part 26 of the Companies Act 2006. Section 106 of the Companies Law has no place in the Companies Act 2006. As one of the questions in relation to the jurisdiction issue concerns the implications of section 106, we set it out for ease of reference:

106. (1) Where a proposed compromise or arrangement would amount to –

(a) an alteration of a company's memorandum or articles under Part IV,

(b) a conversion or transfer under Part V,

(c) an amalgamation under Part VI, or

(d) a migration under Part VII,

(in this section referred to as the "administrative procedure"), the Court may, if it thinks fit, allow the compromise or arrangement to be effected in accordance with the provisions of this Part rather than in accordance with the provisions of those Parts.

(2) Where the Court has failed to –

(a) order a meeting following an application under section 107, or

(b) sanction a compromise or arrangement following an application under section 110,

the company may not seek to effect that compromise or arrangement, or a compromise or arrangement which is substantially the same as that compromise or

arrangement, by way of an administrative procedure without the leave of the Court.

(3) Where an administrative procedure has commenced but has not yet been completed, the Court may, on an application under section 107 in respect of a compromise or arrangement which would have the same or substantially the same effect as the administrative procedure, make such order in respect of the administrative procedure as it thinks fit.

10 In the passage of the Bailiff's judgment, quoted above, the Bailiff when describing section 106 of the Companies Law referred, at paragraph 12, to section 313 of the Companies Law. As the Company's scheme involves the Company purchasing its own shares, it is convenient to set out the three immediately relevant provisions dealing with own-share purchases:

Power of company to acquire its own shares.
312. A company may, if so authorised by its memorandum or articles, acquire its own shares (including any redeemable shares).

Terms and manner of acquisition.
313. (1) The acquisition by a company of its own shares shall, subject to the provisions of this section, be effected on such terms and in such manner as may be provided for by –

(a) the company's memorandum or articles, or

(b) the terms of the issue of those shares.

(2) A company may not acquire a share if, as a result of the acquisition, the company would have no members.

(3) The company must obtain the consent of the shareholders whose shares are being acquired to that acquisition.

(4) The contract for the acquisition of shares must be authorised in accordance with either section 314 or 315.

(5) For the avoidance of doubt, there is no requirement for shares to be acquired out of a particular account or source.

Authority for acquisition.
314. (1) A company may only acquire its own shares, other than under a market acquisition under section 315, in pursuance of a contract authorised in advance in accordance with this section.

(2) The terms of the proposed contract shall be authorised by a special resolution of the company before the contract is entered into, and the following subsections apply in respect of that authority and to resolutions conferring it.

(3) Subject to subsection (4), the authority may be varied, revoked or renewed by special resolution of the company.

(4) The authority conferred by the resolution shall specify a date on which the authority is to expire."

11 Section 315 of the Companies Law, referred to in section 313(4), is the counter-part to section 314: it is headed "*Authority for market acquisition*", and regulates the making by a company of own-share purchases when these are made on an appropriate market or exchange. But, as appears from section 313(4), whether the purchase is on or off market, these provisions envisage that the acquisition is to be pursuant to a purchase contract, the contract itself being authorised in advance.

12 The provision in section 313(3), requiring the obtaining of the consent of shareholders whose shares are to be acquired, is central to the first issue on this appeal. The requirement is that the Company should obtain this consent for the acquisition: it is not expressed to be consent for the contract by which the acquisition is to be agreed upon and pursuant to which it is to be made. Bearing in mind that a company's share acquisition under either section 314 or 315 will have necessarily involved a "contract" to which the seller is a party (section 313(4)), and bearing in mind that contracts are typically made consensually, it is striking that the legislature has considered it necessary to provide separately that the seller's consent is required.

13 Also relevant to the present application is Part XVIII of the Companies Law. This Part, referred to later, facilitates takeovers by providing machinery enabling a person who has, pursuant to an offer, acquired a sufficient proportion of outstanding capital to acquire the remainder compulsorily.

14 The Companies Law replaced the Companies (Guernsey) Law, 1994 as amended ("the 1994 Law"). In many respects the Companies Law is very different from what had gone before. Three changes are immediately relevant.

14.1 First, Part VII of the 1994 Law had contained provisions enabling issued share capital to be reduced, with capital being returned or liability released on reduction and cancellation. These provisions had been first introduced in the Companies (Guernsey) Law, 1974. Now, however, there is nothing comparable to be found in the Companies Law, even though section 302(1) (mentioned below) refers to "*a reduction of share capital*".

14.2 Second, the 1994 Law contained an amendment made in 1998, when the Companies (Purchase of Own Shares) Ordinance, 1998 ("the 1998 Ordinance") was passed. The 1998 Ordinance had now allowed companies to purchase their own shares, but subject to compliance with various requirements. As discussed below, what is to be found in the replacement provisions of the Companies Law is quite different.

14.3 Third, the provisions in Part VIII ("Arrangements and Reconstructions") of the Companies Law are new, as are those in XVIII ("Takeovers").

The Company's scheme

15 The Company was incorporated on 17 February 2006. In 2009 it was acquired by Shore Capital Group Limited (the holding company of a financial services group, and a company of which Mr Howard Shore is executive chairman and substantial shareholder). In 2012 it was involved in a demerger from Shore Capital Group Limited and the majority of those who presently own shares in the Company had been owners of shares in that company.

16 The Company's present Articles of Incorporation were adopted on 29 November 2012. These set out the rights attaching to its issued shares, and have several other relevant provisions. In summary:

16.1 The Company's shares are either A Ordinary Shares ("A Shares") or B Ordinary Shares ("B Shares"), all of no par value, there being 22,692,112 of each class in issue. The A Shares have no right to dividend, but do have a right to vote at general meetings, and have the right (to the exclusion of the B Shares), to share in whatever is to be returned "*as regards capital*" to shareholders "*on a return of assets on a liquidation, reduction of capital or otherwise*". The B Shares have no right to any capital return, and no right to vote at general meetings but do have the right (to the exclusion of the A Shares) to "*all dividends that are available for distribution*".

16.2 There is nothing in the Company's constitution which requires A Shares or B Shares to be dealt with together: each A Share is distinct from each B Share, there being two classes of shares with separate rights and incidents. The Company's constitution does not recognise "units" made up of shares of each class, and there is no "stapling" of A Shares and B Shares. Accordingly holders can and in many cases do hold different numbers of shares of each class.

16.3 By Article 4.5 the Company's Board is to have "*full and complete discretion as to whether a distribution is made by the Company to Members by way of income or capital*".

16.4 By Article 4.11 the Company is given power to purchase its own shares.

16.5 Article 30 gives to the Board the power to declare and pay dividends: there is no express provision in the Company's constitution giving the Company's general meeting any powers in relation to the declaration of dividends.

17 The distinction between dividends on the one hand and returns of capital on the other made in the Articles may to be intended to follow that in section 302 of the Companies Law. This classifies dividends as being every kind of distribution of a company's assets to its members with the exception of seven specified categories of distribution. These include a capitalisation issue of bonus shares, "*a redemption or acquisition of any of the company's own shares or financial assistance for an acquisition of the company's own shares*", "*a reduction of share capital*", and any return on winding up or administration and the like. The purpose of Article 4.5 would then be to give to the Board the discretion to choose whether available assets were to be returned as "dividends" within the meaning of section 302 of the Companies Law, or by some other process involving a distribution which would not fall within that definition and would be within the meaning of the Articles to be taken to be "capital". However that may be, any attempt to place a value on an A Share or a B Share would ordinarily require consideration of the rights attaching to those shares, including the right to participate in returns from the Company; and there has been

no detailed consideration before us concerning the precise way in which those rights are framed and might operate in practice.

18 The Company has three directors. One is Mr Howard Shore. He is an executive officer. The two others are Mr Hermanus Troskie and Mr Werner Klatten. These two are non-executive directors. They neither hold nor own any shares in the Company. In relation to the Scheme they have put themselves forward as "Independent Directors" with Mr Shore refraining from taking part in the making of the Company's decisions.

19 Mr and Mrs Shore between them own 14,864,120 of the Company's 22,692,112 issued A Shares. The proposed arrangement therefore involves the purchase by the Company of 7,827,992 A Shares. The price proposed is €4.50 per A Share. Mr and Mrs Shore own 14,804,120 of the 22,692,112 issued B Shares. The proposed arrangement therefore involves the purchase of 7,887,992 B Shares. The price proposed is €1.50 per B Share. The 7,827,992 A Shares and the 7,887,992 B Shares comprise the Minority Shares, the shares which are now proposed to be purchased.

20 There were two persons interested in Minority Shares who appeared before the Court at the hearing on 31 January 2017, when the Company sought the Court's sanction for the arrangement. These, Aralon Resources and Investment Company Limited and Nortrust Nominees Limited (together "the Respondents"), hold and own between them 1,496,640 of the A Shares and 1,489,140 of the B Shares, with the latter of the Respondents as the former's nominee. In other words the Respondents are holders of over 18% of each of the two classes of Minority Shares.

21 The size of the Respondents' shareholdings means that Mr and Mrs Shore could not themselves have sought to take over the Company and, having purchased the bulk of the Minority Shares, used the machinery in Part XVIII of the Companies Law to require the Respondents to sell their shares. That statutory "squeeze out" machinery requires acceptance of the takeover offer by at least 90% of the outstanding shares subject to the offer. This appears from section 337(1) of the Companies Law which provides that if an offer is approved or accepted by shareholders comprising not less than 90% in value of the shares affected, the transferee may within two months give notice to any dissenting shareholder to acquire his shares. Even where the 90% threshold is reached and a notice duly given, by section 339 of the Companies Law a dissenting shareholder is given a right to apply to the court to cancel the notice, and the court "*may cancel the notice or make such order as it thinks fit*".

22 There has been no explanation given by the Company as to the way in which the prices of the A Shares and of the B Shares respectively have been arrived at. Specifically, there is no suggestion that the Independent Directors took independent professional advice before having the Company apply to the Court to put in train the present scheme of arrangement and before recommending the two prices to the holders of the Minority Shares. So far as it appears, the two prices are an unexplained division of a €6 price for a combination of one A Share and one B Share, notwithstanding that the arrangement deals separately with A Shares and B Shares and notwithstanding that there is not an identity between holdings of each of those classes of shares.

23 The €6 price for an A Share along with a B Share, Mr Troskie explained in an affidavit sworn on 9 December 2016, "*reflects the tax efficiency arising from the Scheme as proposed*". This explanation cast no light on the process or reasoning by which €6 was settled upon. However it would seem, in the light of what we were told by Advocate Greenfield after he had taken instructions in response to a question from us, that the Board (that is Mr Shore together with the Independent Directors), had had over a period of several months prior to the arrangement being

proposed discussions with several shareholders as part of a process by which "*the Company sought to ascertain the level of support from shareholders to the proposed Scheme*". Later a time came, we were told, when it seemed that a scheme of arrangement was the way forward for the Company, and at this unspecified time matters were carried forward by the Independent Directors alone.

24 What we were told in this respect was by way of amplification of evidence given by Mr Troskie in an affidavit sworn on 25 January 2017, only days before the Court was to consider the Company's application for sanction for the scheme of arrangement and after the Respondents had pointed out, in paragraph 87 of their skeleton argument (dated 18 January 2017) for the forthcoming hearing, the paucity of evidence from the Company concerning the way the arrangement had been decided upon, including "*how the pricing was arrived at*". This evidence, set out below, is the only noticeable explanation of the price put forward by the scheme. We say "price" in the singular, because Mr Troskie uses that word in his affidavit, not suggesting that there was more than one price (ie a price for A Shares and a different price for B Shares). What Mr Troskie said was as follows (emphasis added):

> "*In the context of the above and given the company's history the directors of [the Company] considered an offer price which would be a sufficiently attractive premium to previously traded prices to be considered likely to be accepted by a large number of shareholders whilst also being in the commercial interests of the Company. The price offered represented a 50% premium to the previous tender offer when the net asset value had only risen by 12% in the same period. In order to confirm the attractiveness of the offer price, the Company sought to ascertain the level of support from shareholders to the proposed Scheme. The price offered to the shareholders under the Scheme was based on a level at which the shareholders who provided irrevocables had indicated that they would accept an offer, and reflects the fact that the shareholdings represent minority interests, the illiquidity of [the Company] and the lack of shareholder rights. The shareholders consulted by the Company were Graham Shore, being the largest minority shareholder, together with each of the [other Committed Shareholders]*".

25 This evidence from Mr Troskie makes it clear that the only shareholders with whom the Company (that is the Directors or alternatively the Independent Directors) had discussions in the exercise of taking the soundings described by Mr Troskie were the Committed Shareholders referred to later in this judgment at paragraph 33.2. This appears from the last sentence just quoted. Although the next largest holding of Minority Shares after that of Mr Graham Shore (Mr Howard Shore's brother) and his family trust was the Respondents' holding, a holding of a notable percentage of the Minority Shares, it is a striking omission that the sounding exercise did not include the Respondents. It is also clear, having regard to "*the commercial interests of the Company*" referred to as material to the search for a suitable offer price, and also to the fact that the price "*was based on a level at which the shareholders who provided irrevocables had indicated that they would accept an offer*", that the price being sought was not to be significantly greater than the lowest one which would commend itself to the Committed Shareholders. As the Committed Shareholders between them owned approaching 60% of the Minority Shares, it would be likely that their votes at the Court-ordered scheme meetings would be sufficient to secure the required statutory majority, thereby binding dissentients to what was acceptable to the Committed Shareholders.

26 It is convenient to mention at this stage that Mr Graham Shore made an affidavit on behalf of the Company on 25 January 2017. This affidavit contained no reference to the discussions he had

had with the Company about the price at which he might sell the shares directly or indirectly owned by him. It was said in the first affidavit sworn on behalf of the Company by Mr Troskie that Mr Shore "*holds 9.61% of the total issued share capital of [the Company] comprising equal holdings of A and B shares*", and in that affidavit (as in the Circular referred to below) that he, as a shareholder with direct and indirect interests for almost 28% of the Minority Shares of each class, had given an irrevocable commitment to the Company to vote in favour of the scheme at the Court-ordered meetings.

27 Throughout its life the Company has been carrying on the business of a "*property investment company, which invests in German real estate and has a primary objective to generate income and capital growth by acquiring, actively managing and selling residential, commercial and mixed use real estate*". This is the description given in its most recent Annual Report and Accounts, those to 31 March 2016.

28 Those Accounts show the Company, with its subsidiaries, to be in a very substantial way of business: total assets at 31 March 2016 were approaching €600 million, net assets were over €240 million, and profit after tax was over €26 million in that financial year, with an equivalent of over €35 million in the previous year. The 2016 profit after tax was after payment of €3 million of fees to Mr Howard Shore, and a further €2 million to a property adviser which is a wholly owned subsidiary of Shore Capital Group Limited. The earnings per B Share were stated in the 2016 Accounts to have been €1.12 in the 2016 financial year and €1.51 in the previous year.

29 The 2016 Accounts show also, as a post balance sheet event, a sale of a social housing estate in Germany for €165 million. At all events, the Company's evidence in support of its application has explained that the Company at present, following various disposals, "*is now, exceptionally, in a position to conduct a buy-back of the shareholders' entire interests other than those owned by*" Mr and Mrs Shore. In other words the Company had the cash required to fund the proposed own-share purchases of the Minority Shares at the proposed prices. The aggregate amount was approximately €47 million. Further, it is clear that a significant return to shareholders could be made without any material impact on the interests of creditors.

30 The Company has never paid any dividends. Returns to shareholders appear to have been confined to miscellaneous own-share purchases pursuant to tender offers made from time to time, typically at a price of less than €3 for any A Share and in the region of €1 for any B Share.

31 In October 2016 the Company put in train the steps to have its proposed arrangement sanctioned under Part VIII of the Companies Law, when it applied to the Royal Court for an order for the summoning of meetings of holders of Minority Shares. By an Act of Court of 10 November 2016 a direction was made, pursuant to section 107 of the Companies Law, for the holding of two meetings, one in relation to A Shares and one in relation to B Shares.

32 Shortly after this, on about 14 November 2016, the Company sent out to shareholders its Circular summoning the two court meetings, as well as a general meeting of the Company to consider a special resolution. The Circular contained, among other things, a copy of the Scheme (that is, the document setting out the proposed arrangement), a Letter of Recommendation from the Independent Directors (the letter of recommendation referred to above), and an Explanatory Statement. The Explanatory Statement was expressed to be given for the purposes of section 108 of the Companies Law.

33 A number of features of the Circular deserve special mention.

33.1 First, the rationale for the proposed arrangement was explained as follows in the Letter of Recommendation:

> "*1.4 The Board has frequently been approached by Shareholders who have enquired whether the Company might be able to create a liquidity event with a view to their realising the value of their holdings for cash.*
>
> *1.5 However, your Board is committed to the long term growth of the Company and wishes to pursue and expand its investment strategy, not only in Germany but internationally. Accordingly, the Board intends to pursue long term capital growth by holding and improving investment assets whilst at the same time seeking to take advantage of cheap long-term finance. It is not the intention of the Board to arrange a sale of the Company, nor to seek a listing of its shares on a stock exchange.*
>
> *1.6 The Board therefore believes that there is a lack of alignment between the long-term interests of the Company and its disparate shareholder base.*
>
> *1.7 Having considered how best to deal with this situation, the Independent Directors have reached agreement with the Company's largest Shareholders (being Howard Shore and his wife Andrée) ... that the Company should buy out all of the other Shareholders so that the Continuing Shareholders will become the sole Shareholders of the Company.*
>
> *1.8 In rationalising the shareholder base in this way, the Company is securing shareholders that are aligned with the long-term investment objectives of the Company and at the same time, it is meeting the wishes of a large number of its other shareholders as well.*
>
> ....
>
> *1.10 The Share Buy-Back is, in effect, a takeover of the Company by the Continuing Shareholders, conducted by way of the Share Buy-Back, and is considered by us to be the most efficient way for the Company to balance its long term interests with the demands of its shareholders. The Company will use its current cash reserves to acquire the Scheme Shares pursuant to the Share Buy-Back.*
>
> *1.11 Howard Shore and Andrée Shore are each Continuing Shareholders and therefore will not participate in the Share Buy-Back and will be treated differently under the Scheme as compared to the other Shareholders.*"

33.2 Second, in the Letter of Recommendation, at paragraph 4.1, there was a list of 9 individuals and one company (together "the Committed Shareholders") who had given the Company irrevocable commitments to vote in favour of the proposed arrangement at the court meetings and general meeting. Between them the Committed Shareholders hold almost 60% of each of the two classes of Minority Shares. As mentioned above, Mr Graham Shore was said to own directly or indirectly almost 28% of each of the two

classes of the Minority Shares. Although not stated in the Circular, evidence provided by the Company to the Court at the outset of the proceedings explained that Mr Graham Shore is Mr Howard Shore's brother. Also, although not stated in the Circular but as appears from evidence served on behalf of the Company immediately before the final hearing, he and others of the Committed Shareholders were connected with the Shore Capital group. The Company's evidence explained that "*excluding*" him and one other (a Dr Zvi Marom, who is a director of Shore Capital Group Ltd), *"each of the individuals from Shore Capital who provided irrevocable undertakings are highly remunerated, key members of the Shore Capital team*". There has been no further explanation from the Company as to the approaches made to the Committed Shareholders to obtain their irrevocable undertakings, although (as we have explained above) it became apparent shortly before the 31 January 2017 hearing before the Bailiff that the Company had been in discussion with the Committed Shareholders in relation to the prices to be paid pursuant to the scheme.

33.3 Third, the Letter of Recommendation, at paragraph 5, made the following statements which were repeated in the Explanatory Statement:

> "*5.1 If [the Scheme does not become effective] the Share Buy-Back will not proceed and the Company's cash reserves will not be returned to Shareholders at this present time.*
>
> *5.2 The Board may, separately, seek Shareholder approval of the acquisition by the Company of those Shares held by the Shareholders who have entered into irrevocable undertakings to approve the Scheme and the Share Buy-Back. Such Shareholders have indicated that they may be willing to sell their Shares to the Company in such circumstances, but the Board has not made any commitment to acquire such Shares and none of such Shareholders has made any commitment to sell such Shares. The Board has no current intention of offering further liquidity programs to Shareholders generally in the near future.*"

33.4 Fourth, the Letter of Recommendation said at paragraph 6:

> "*The Independent Directors consider the terms of the Scheme and the Share Buy-Back to be fair and reasonable to the Scheme Shareholders and consider that the Scheme provides a sensible and fair method of enabling the Company to utilise its cash reserve to provide Scheme Shareholders with a liquidity event and a realisation of their Shares. The Board has no other current plans to create such a liquidity event for Shareholders.*"

33.5 Fifth, so far as any indication of value of the Company or its shares was given in the Circular, this was contained in paragraph 2.2 of the Letter of Recommendation, which stated:

> "*The Share Buy-Back values the Company's entire issued, and to be issued, share capital at approximately €136.15 million. This valuation translates to a price of €6.00 per unit (comprising one A Share and one B Share (a "Unit"), which represents a discount of approximately 43.6% to the net asset value per Unit reported in the Accounts. This compares with the most recent tender offer conducted by the Company in December 2015, pursuant to which the Company*

offered a price of €4 for each Unit, which represented a discount of 57.9% of the then net asset value per Unit."

33.6 Sixth, the Circular did not contain, or have attached to it, a copy of the 2016 Annual Report and Accounts, or any more recent information about the Company's performance. However the Circular did both (a) explain that copies of the 2016 Accounts (those to 31 March 2016), as well as those for the two previous years, would be available for inspection at the offices of Carey Olsen in St Peter Port, and also (b) explain that the 2016 Accounts could be found on the Company's website. The Circular stated that the Company's Directors were not aware of any material change to the Company's prospects or trading as reported in those accounts (including post-balance sheet items). No doubt, bearing in mind that the Company's previous trading had been generating profit and the Company had been amply cash-flow solvent, and that the post-balance sheet events noted in the 2016 Accounts had produced very large cash inflows, the Company's cash and net assets must have continued to grow since March 2016, but by an unstated amount.

33.7 Seventh, on the basis of the Company's net asset value as reported in the 2016 Accounts, the payment of €47.65 million for the Minority Shares, representing together approximately one-third of the Company's issued share capital, would leave Mr and Mrs Shore with sole ownership of a Company having a net asset value approaching €200 million. This could be compared with their previous position: on the approach taken in the Circular approximately €160 million (ie. approximately two-thirds) of the Company's net asset value of over €240 million might be attributable to their two-thirds holding of the Company's issued capital. The Company accepts that on this view implementation of the proposed arrangement would result in a transfer of value of approximately €37 million from the holders of the Minority Shares to Mr and Mrs Shore.

34 There was no express statement in the Circular concerning any policy which the Company may have, or any intentions which the Company's Board may hold, concerning the payment of dividends. The clear inference, however, was that shareholders should expect there to be no dividends in the foreseeable future. In his oral address to us Advocate Greenfield confirmed this to be the case. Further, having regard to the statements referred to in paragraph 33.3 above, it was also a clear inference that future returns to shareholders, if any were to be made at all, would be in the form of own-share purchases by the Company of shares of a particular class of person, namely the Committed Shareholders.

35 The arrangement, as explained in the Circular and set out in the Scheme, is (as already mentioned) simplicity itself. As soon as the Court's sanction is obtained, the arrangement is to become effective, whereupon the Company is to acquire all the Minority Shares, and within 14 days thereafter the Company is to send out cheques for the purchase monies (being €4.50 for each A Share and €1.50 for each B Share). To effect the Company's acquisition of the Minority Shares the Company is authorised to appoint an agent for holders of Minority Shares to execute and deliver forms of transfer, and other instruments or instructions on behalf of the holders, with any such document to be "*as effective as if it had been executed by the holder or holders of the*" shares thereby transferred.

36 There was a further feature of the arrangement, as explained in the Circular. In a part of the Circular immediately before the Scheme itself was a section headed "*Conditions to*

implementation of the Scheme and the Share Buy-Back". This part explained that the Scheme was to be conditional on the usual matters such as approval by shareholders and sanction by the Court. It went on to explain that "*the Share Buy-Back is conditional upon*", among other matters, "*the Directors being satisfied, immediately prior to effecting the Share Buy-Back that the Company will satisfy the solvency test specified in section 527*" of the Companies Law. As Advocate Greenfield accepted, the reason for this condition was because sections 301 to 305 of the Companies Law define dividends and distributions, prescribe procedures for paying dividends and making distributions, and prohibit distributions unless authorised under the Companies Law, another enactment or any rule of law. Relevantly, in the case of an own-share purchase (that is, a distribution within the section 302 definition), the company's board must both be satisfied as to solvency and approve a certificate (to be signed by one of their number) as to their satisfaction and the grounds for their opinion.

37 The resolutions put to each of the court meetings were for "*the Scheme between the Company and the Scheme Shareholders, a print of which has been produced to this meeting ... [to] be approved and the directors of the Company ... authorised to take all such action as they may consider necessary or appropriate for carrying the Scheme into effect*".

38 The resolution put to the general meeting as a special resolution was:

> "*that the terms of the proposed acquisition by the Company of 7,827,992 ordinary A shares and 7,887,992 ordinary B shares in the capital of the Company, pursuant to the terms of a scheme of arrangement to be entered into between the Company and the holders of such shares (the details of which are set out in a circular to shareholders issued by the Company on 14 November 2016), are hereby approved and authorised pursuant to section 314(2) of the Companies (Guernsey) Law 2008, (as amended).*"

39 The resolution referred to in the previous paragraph was clearly intended as a special resolution required by section 314 for an own-share purchase to be effected in accordance with that section, which requires (by a combination of section 313(4) and 314(2)) the proposed acquisition contract to be approved in advance. As we see it, the reference in the resolution to section 314(2) of the Companies Law is sufficiently indicative of an intention for the resolution to be one authorising a "*proposed contract*" within section 313(4), rather than authorising simply the fact of the acquisition on certain terms. As mentioned above, subsections (3) and (4) of section 313 appear to distinguish between, on the one hand, an acquisition of the shares which requires to be consented to by shareholders and, on the other, a contract for the acquisition, with the contract requiring to be authorised in advance. On the other hand, section 314(2) explains that the authorising of a contract "*in accordance with*" section 314 is achieved by authorising its terms.

40 Accordingly, in agreement with the submission made on behalf of the Company by Advocate Greenfield, we accept that the special resolution was sufficient to meet the section 313(4) requirement for the giving of authority for a contract, always assuming that the Company's proposed arrangement is to be viewed as giving rise to a contract once it has been sanctioned by the Court and become effective in accordance with its terms.

41 On 1 December 2016 the required majorities were obtained at each of the court meetings (three fourths by value representing a majority by number of those voting) and at the general meeting (three fourths of the votes cast). The detail was given as follows in the Bailiff's judgment:

"*8. The court meetings were held in Guernsey on 1 December 2016, all those attending appeared by proxy. At the first court meeting there were 29 shareholders present, some of whom may have been holding shares on behalf of more than one beneficial owner. They held a total of 7,505,405 shares. Although they represented only 25.89% by number of the holders of A Class shares entitled to vote, they represented 95.88% by value. 27 shareholders holding 6,008,765 shares voted in favour of the Scheme, they represented 90% by number and, more importantly, 80.06% by value of those present and entitled to vote. Three shareholders holding 1,496,640 shares voted against the Scheme.*

9. The comparable figures at the second court meeting, for eligible holders of B Class shares, were that 28 shareholders were present holding 7,549,415 shares representing: 24.56% by number and 95.71% by value of those entitled to vote. 26 shareholders holding 6,060,275 shares voted in favour, representing 92.86% by number and 80.27% by value of those voting. Two shareholders holding 1,489,140 B Class shares voted against the Scheme.

10. Thus, the requisite majority of those present and voting approved the Scheme. The court meetings were followed by an Extraordinary General Meeting of the Company at which 91.50% of those voting approved a special resolution to approve the share buyback pursuant to section 314 of [the Companies Law]."

42 When, following these meetings, the Company applied to the Court for the arrangement to be sanctioned, the Respondents joined in the proceedings to oppose. Further evidence was served on both sides, leading to the hearing before the Bailiff on 30 January 2017, and to the Bailiff's refusal to sanction the arrangement.

43 Subsequently, and before the hearing of this appeal, the Company launched a tender offer to purchase the shares held by the holders of the Minority Shares at the prices contemplated in the Company's proposed arrangement. We understand that the Committed Shareholders accepted this tender and have now sold their shares, while the Respondents did not. There are other holders of small parcels of the Minority Shares who neither voted for nor against the Scheme and whose shares were not tendered to the Company and therefore remain outstanding.

44 There are several further comments.

44.1 First, as regards the payment of dividends, it should be kept in mind that, as pointed out by Harman J in Re a Company (No.00370 of 1987) ex parte Glossop [1988] 1 WLR 1068 at 1075, "*a company is simply a vehicle for carrying on a business for the benefit of all its members*." Harman J added that "*One of the major benefits to shareholders ... in a company is, or ought to be, the payment of dividends*", while recognising that there can be perfectly proper reasons for not paying dividends.

44.2 Second, and related to the previous comment, in the Circular the Independent Directors have sought to make a comparison which underpins the stated rationale for the Scheme. This is between "*the long-term interests of the Company*" on the one hand and "*its disparate shareholder base*" on the other. But the Company has no long-term interests of its own as distinct from the interests of its general body of shareholders (and, were there to be any prospect of insolvency, of its creditors). The reality is that Mr and Mrs Shore have no wish to receive in the short term any

dividends or capital returns from the Company, while many other shareholders do. As Mr and Mrs Shore's ownership of the majority of the Company's shares gives them control of the Company, the Company's policies as regards dividends and distributions reflect their wishes as shareholders. In the abstract, however, the Company has no interest in building itself to its own greater glory by withholding from shareholders any possible return.

44.3 Third, in his oral address Advocate Greenfield suggested that a reason for the proposed arrangement is that there is a tension between the interests of the holders of A Shares and those of the holders of B Shares which is best managed by the Company's Directors, who are otherwise in a difficult position in managing this tension fairly, by eliminating all holdings of these shares save those which belong to Mr and Mrs Shore. This we cannot accept. The Circular made no reference to this tension as a reason for the proposed arrangement, or as a reason for the Company's omission to pay dividends or to make any returns to shareholders other than through tender offers to purchase shares or by way of own-share purchases through the proposed arrangement. In any case a tension of this kind is commonplace and the duties of directors in such a situation are familiar: it is for them to balance fairly the competing interests and to exercise their fiduciary powers in a way which maintains such a balance. One might have supposed the Independent Directors to have been aware of, and to have considered themselves capable of discharging, their duty in this regard when setting the prices to be paid by the Company to holders of, respectively, A Shares and B Shares pursuant to the scheme. But the existence of this tension in the present case cannot have been a proper reason for seeking to leave Mr and Mrs Shore as the only owners of A Shares and B Shares.

44.4 Fourth, on behalf of the Respondents Advocate Lyall submitted that, as a result of the recent tender offer made following the refusal of the Royal Court to sanction the Company's scheme of arrangement, the scheme had become futile. The argument is that because any shareholder who wished to have shares bought back by the Company on the terms proposed by the Company could have, and in the case of the Committed Shareholders and others of the holders of the Minority Shares have in fact, had their shares bought back, the Company's stated aim in promoting the scheme has been achieved, so that now further pursuit of the scheme is futile. In answer Advocate Greenfield has submitted that the aim of the scheme was to have the Company taken over by Mr and Mrs Shore with no Minority Shares whatsoever remaining outstanding, and that the scheme is still needed to achieve that aim. Further, he points out that the tender offer has not resulted in all the outstanding Minority Shares being sold back to the Company, and that seemingly not all owners of the remaining shares have been contacted, and he submits that among the remaining shareholders or owners of the remaining shares there may be some who would wish to sell their shares if given the opportunity. We return to this point later.

44.5 Nevertheless, we also consider that the recent tender offer is instructive. The making of the tender offer is surprising in the light of the statements in paragraphs 5.1 and 5.2 of the Letter of Recommendation, which we have described earlier. It suggests that after all the Company was willing to make further own share purchases without the certainty that it would only do so where it was to obtain all the Minority Shares. This means that a shareholder who, relying on statements in

the Circular, had voted to support the Scheme in the belief that the proposed scheme of arrangement represented his or her last chance to have a return from their shares would have been mistaken. Of course this particular consideration did not apply with the same force to the Committed Shareholders, as paragraph 5.2 of the Circular had identified them as being in a favoured position as regards the prospects of being able to sell their shares back to the Company.

Issue 1 – Jurisdiction

45 The reasoning of the Bailiff which led him to his conclusion, summarised at the outset of this judgment, was as follows:

45.1 For an arrangement which involves a company purchasing its own shares there needs to be compliance with sections 313 and 314 of the Companies Law (the provisions dealing with own-share purchase set out above), as well as with the formal requirements of Part VIII of the Companies Law.

45.2 Section 313(3) requires the shareholders whose shares are to be acquired to give their consent to the acquisition.

45.3 The consent stipulated for by section 313(3) involves consent by the shareholder in person, not consent given by the Court in substitution for the shareholder.

45.4 The provision of the Scheme which will authorise the appointment of someone to act on behalf of a member to effect transfers neither results in the shareholder concerned giving his consent nor his being ordered to do so.

45.5 Further, the Court does not have power to order a shareholder to give the section 313(3) consent, even if (which the Scheme did not provide for) the Court were invited to make such an order.

45.6 And so, the Bailiff concluded, an own-share purchase scheme of arrangement cannot be used by a company seeking to acquire the shares of a member not wanting to sell to it.

46 Part VIII of the Companies Law is expressed to apply "*where a compromise or arrangement is proposed between a company*" and its creditors or members or any class of these. There is no definition of the words "compromise or arrangement", although section 105(2) explains that an 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*".

47 As a matter of principle the expression "arrangement", used in Part VIII of the Companies Law to describe types of scheme which may be implemented pursuant to that Part, is broad. This proposition, submitted to us by Advocate Greenfield on behalf of the Company, is well established. It is also the case that the courts in the United Kingdom have on numerous occasions sanctioned, under the equivalent legislation to Part VIII, schemes which have involved takeovers of companies by means of reductions of capital and own-share purchases, accepting that such schemes involve "arrangements" within the meaning of the relevant legislation. Indeed, in his judgment the Bailiff observed that "*On its true meaning, an 'arrangement' is capable of including the acquisition by a company of its own shares*".

48 We have referred earlier to Part XVIII of the Companies Law. The provisions in that Part allow company takeovers to be effected by compulsory purchase of minority shares following takeover offers for shares having been accepted by a minimum 90% threshold of outstanding shares. There is no mention in section 106 of those provisions of the Companies Law. However, in agreement with the Bailiff's conclusion, we consider the Court to have jurisdiction to sanction a scheme involving a takeover, despite the fact that section 106 fails to mention anything in Part XVIII of the Companies Law. As to this the Bailiff referred to the decision of Plowman J in Re National Bank Ltd [1966] 1 WLR 819. In that case Plowman J had held that it was open to a company to promote a scheme of arrangement to effect a takeover, even though the same result (namely the purchase of the whole of the Minority Shares) might have been achieved by resorting to the takeover provision in the equivalent to Part XVIII of the Companies Law. It did not matter that the threshold of shareholder support required for a Part VIII scheme was lower than the 90% threshold required for the Part XVIII takeover. Thus, in our judgment section 106 only operates, so far as relevant for present purposes, to permit certain specified arrangements, and only those arrangements, to be effected by a Part VIII scheme without complying with whatever other requirements may be prescribed elsewhere in the Companies Law for that type of arrangement: it does not prohibit arrangements which are not mentioned from being carried out by way of schemes.

49 In the present case the Company has put forward a scheme which will involve own-share purchases. The Companies Law prescribes, in sections 312 to 314, what is necessary if a company is to acquire its own shares otherwise than by market purchases. In broad terms the Company accepts that for the proposed arrangement to be sanctioned it must be shown that its acquisition of its own shares will be in accordance with those sections. The arrangement, as set out in the Scheme, is framed perfectly properly as giving rise to own-share purchase contracts within sections 313 and 314 of the Companies Law to which each of the holders of Minority Shares is to be bound. In conventional analysis, the Scheme sets out the terms proposed for the own-share purchase contracts; and when the proposed arrangement is sanctioned, the Company and the holders of the Minority Shares will become bound on those terms. However, for the reasons developed later in this judgment, it does not follow either that a sanctioned own-share purchase scheme creates the shareholder consent required by section 313(3), which is after all required to be one obtained by the Company, or that the Court should properly sanction a scheme to bring about the acquisition of shares to which the shareholder has not consented.

50 The first step in the Bailiff's reasoning, that at paragraph 45.1 above, was not driven by any restriction on the meaning of the word "*arrangement*" when used in Part VIII. It was because an own-share purchase arrangement is not mentioned in section 106(1) of the Companies Law. As we have already explained, the section lists certain arrangements for which the Companies Law makes provision in other Parts and provides that those also fall within the purview of Part VIII as an alternative and, when carried out in accordance with Part VIII, do not require compliance with the relevant procedures in the other Parts of the Companies Law.

51 Critically, in his first step the Bailiff was applying the principle established, in Re Guardian Assurance Co [1917] 1 Ch 431, an English decision on the equivalent to Part VIII of the Companies law. In that case Younger J held, at page 441: "*The section ... has no application to an arrangement which is ultra vires the company, nor to an arrangement of a kind which can only be effected in a prescribed way, e.g., a reduction of capital, or a reconstruction under [a specified provision of the Companies Act]*". This limit to what can be sanctioned in a scheme of arrangement was approved and followed by Simmonds J in Re Oceanic Steam Navigation Co [1939] Ch 41. In "Buckley on the Companies Acts", Vol 1, para 425.4 the principle is summarised as follows: "*The court will not sanction a scheme which involves a transaction*

which conflicts with some provision of the [Companies] Act ... or evades the application of some specific statutory procedures". In our judgment this principle, developed in England and Wales as part of what might be described as the common law of companies, is equally applicable in relation to Part VIII of the Companies Law. Indeed, section 106 of the Companies Law presupposes that the principle does apply, and the purpose of the section is to ensure that the principle does not affect certain specified types of Part VIII scheme.

52 The Company's challenge is to the remaining steps in the Bailiff's reasoning. Essentially the argument is that the Bailiff gave to section 313(3) of the Companies Law a force that it does not have. In the context of a Part VIII scheme of arrangement, section 313(3) does not make ultra vires or, in other words, prohibit an own-share purchase sanctioned by the Court. This argument is in substance that the Bailiff was mistaken in his interpretation of section 313.

53 Thus, Advocate Greenfield submits on behalf of the Company:

53.1 There is no principled reason for an own-share purchase arrangement to be precluded, when, so it is submitted, other arrangements involving the compulsory acquisition of a dissentient's shares can be sanctioned and given effect under Part VIII of the Companies Law.

53.2 There is nothing in the legislative history of the Companies Law to suggest that the provision in section 313(3) concerning shareholder consent was intended to restrict the ambit of possible arrangements falling within Part VIII.

53.3 The effect of a scheme such as the present, when sanctioned in accordance with Part VIII, is to supply the consent required by section 313(3). Therefore even if ordinarily own-share purchases will require active personal consent from shareholders whose shares are to be acquired, the section 313(3) consent is supplied, in the case of a Part VIII scheme, by force of the scheme itself.

54 As to the first of these three points, it is correct that a takeover offer for a company, where the offeror is to purchase the shares of the target company shareholders, can be implemented by a Part VIII scheme, which will result in compulsory share transfers.

55 It is also correct that a takeover scheme of arrangement such as the present, which involves a company's outstanding issued share capital being diminished in return for a payment to shareholders, could be carried out by way of redemptions (if necessary coupled with a variation of class rights and conversion into redeemable shares) under sections 310 and 311 of the Companies Law: the scheme would address the difficulty that the shares to be redeemed would not be the whole of the share capital, and that their conversion into redeemable shares would involve a different treatment of shares within a single class.

56 Our conclusion, therefore, is that Advocate Greenfield's first point is to be accepted: there is no obvious reason for own-share purchases to be precluded unless, in every case, they are made with consent given for the specific acquisition.

57 Advocate Greenfield's second point requires more detailed consideration. The starting point is a comparison of the Companies (Purchase of Own Shares) Ordinance 1998 with sections 312 to 314 of the Companies Law by which it was replaced. The former was more elaborate than are the latter provisions, which have made important and obviously intentional changes of substance to

what had gone before. Now, for example, unpaid or partly paid shares may be purchased, the previous restriction in section 2(1) of the 1998 Ordinance (set out below) having been removed; and by section 313(5) of the Companies Law it is now immaterial whether or not the source of payment is distributable profit, this provision highlighting the elimination of the previous restriction in section 6 of the 1998 Ordinance.

58 Immediately noticeable for present purposes is the difference between section 2 of the 1998 Ordinance and section 313 of the Companies Law. We have already set out section 313 of the Companies Law. Section 2 of the 1998 Ordinance was in the following terms:

> "*Terms and manner of purchase.*
>
> *2. (1) A company may not purchase its own shares under this Ordinance unless the shares are fully paid.*
>
> *(2) A company may not purchase its own shares under this Ordinance without the consent of the member whose shares are to be purchased unless the company is authorised to do so by virtue of-*
>
> *(a) the provisions of its memorandum or articles;*
>
> *(b) the terms and conditions subject to which, or the rights, qualifications or restrictions with which, the shares were issued; or*
>
> *(c) the subscription agreement for the issue of the shares.*"

59 Section 2(1) of the 1998 Ordinance has no counterpart, whether in section 313 of the Companies Law or in any other section. In contrast, section 313(4) and section 313(5) (referred to above) are new, not having featured in the 1998 Ordinance. The former of these emphasises that the removal of the previous restriction in section 6 of the 1998 Ordinance has been deliberate. The latter adds nothing to the requirements in sections 314 and 315 that there should be appropriate authority, to be found set out expressly in those sections, for the relevant purchases in accordance with those sections to be authorised and therefore permissible. But what section 313(4) does do is to emphasise that both forms of acquisition provided by these two sections are contractual.

60 It is against this background of clearly intentional changes that a comparison is to be drawn between section 2(2) of the 1998 Ordinance and sections 313(1) and 313(3) of the Companies Law. Section 2(2) of the 1998 Ordinance appears to have been aimed at making clear that own-share purchases are ordinarily to be consensual transactions between company and seller, while also (and importantly) clarifying that a company's constitution or the terms on which the shares in question had been issued could enable there to be a compulsory purchase. Section 313 is, by subsections (1) and (3), quite different.

60.1 Subsection (3) is explicit in requiring selling shareholder consent, this requirement being without any stated qualification or exception.

60.2 Subsection (1) does not state that own-share purchases are permissible if authorised constitutionally. What it does state, rather, is that any purchase is to be effected on such terms and in such manner as may be provided in the company's constitution or the terms of issue of the shares. In other words purchases are only to be carried out as so provided, at any rate if there is any such provision. What is to happen in the absence of such

provision is not stated, so presumably to that extent the terms and manner may be determined by the company within the parameters set down in sections 314 and 315.

61 As we see it, section 313 of the Companies Law was enacted in order to change, and not simply restate, the previous legislation. This is demonstrated by the changes we have described above. Given this, in our judgment section 313, in particular 313(3) is to be construed as it stands in the Companies Law: section 313 is not to be read as though subsections (1) and (3) were deleted and in their place stood section 2(2) of the 1998 Ordinance. That would be an impermissible exercise in statutory interpretation. It would require a conclusion that section 313 contains, in subsections (1) and (3), a defective attempt to reproduce section 2(2), so that the clear language used in section 313 should be ignored and the section instead read as though it repeated section 2(2).

62 What does seem to have been intended, if a comparison is drawn between section 2(2) of the 1998 Ordinance and section 313 of the Companies Law, is that consent to own-share purchases should be specific and should not be capable of being supplied simply by contractual terms on which the shareholder is a member of the company and holder of shares. This is because the Companies Law sets out the consent requirement without the carve-out previously to be found in section 2(2) of the 1998 Ordinance: in that section the terms of the Company's constitution or of issue of the shares in question could give authority for the purchase without consent being required. Instead section 313(3) appears to emphasise that the consent is to be obtained by the company. Also it appears to emphasise, by referring to consent for "*<u>that</u> acquisition*" (emphasis added), that it is the particular acquisition which is to be consented to, so that a consent given generally would not suffice.

63 In his submissions Advocate Greenfield has asserted that there may be many companies which have outstanding shares which are expressed to be capable of compulsory purchase, rather than redemption, and indeed that there may have been many own-share purchases made pursuant to such compulsory purchase provisions on the assumption that the compulsory purchase was permissible. Also, he argues, it would be inconvenient if section 313(3) were construed as requiring specific consent from a shareholder where a creditor to whom their shares had been charged sought to enforce security by selling the shares back to the company.

64 We accept that there could perfectly well be situations in which a shareholder's consent could have been obtained sufficiently for the section 313(3) requirement long in advance of the specific acquisition immediately in contemplation. An example would be, say, an option for the Company to purchase shares in specific circumstances on specific terms, perhaps contained in a contract of employment. Such an option would be a "*contingent purchase contract*" within the definition in section 325 of the Companies Law and, by that section, a "*contract*". Naturally the making of the relevant option would have required the contract (that is the option contract) to have been authorised in advance in accordance with section 314, and would have had to have had sufficient certainty to qualify as giving rise to an enforceable contract when exercised. When entering into the option contract with the shareholder the company would have obtained the shareholder's consent to the acquisition of his shares, on the specific terms envisaged, on the exercise of the option. But that is far away from, say, a general provision in a company's constitution which might empower it to acquire any shareholder's shares on terms to be determined in the future.

65 We do not need to reach a final conclusion on the degree of proximity which might be needed between on the one hand arrangements made prospectively for a shareholder's shares to be acquired by a company and on the other the making or existence of the arrangements qualifying as amounting to the obtaining by a company of consent for a specific acquisition pursuant to an

own-share purchase contract. The question as to the impact of section 313(3) in the context of a scheme is not necessarily resolved by considering its operation in the context of purely contractual arrangements. It is one thing for a shareholder to have submitted himself to the possibility of having his shares purchased by and in accordance with a pre-existing contractual framework so that the section 313(3) requirement may be taken to be satisfied when that machinery is sought to be operated. It does not follow that the same requirement is to be taken to be satisfied where the proposed purchase is to be by way of a scheme of arrangement. The reason for this is that the shareholder cannot sensibly be taken to have actually consented to some acquisition of his shares simply because he is a shareholder and the Companies Law contains in Part VIII machinery which may in the future be sought to be deployed in ways which are impossible to predict.

66 However, this then leaves the question whether section 313(3) of the Companies Law sets out a requirement for any own-share purchase which cannot be met by force of a scheme of arrangement, the requirement being for consent to be given by the holders of the shares in question and not supplied by the scheme of arrangement. This question the Bailiff answered in the affirmative: he held that a Part VIII scheme involving an own-share purchase could only go ahead if there was actual consent signified by the selling shareholders, and that the scheme could not itself dispense with or furnish the consent. This answer is challenged by Advocate Greenfield: his third point, that in paragraph 53.3 above, is that sufficiently for the purposes of section 313(3), the Company's scheme will provide the required consent.

67 In support of the third submission Advocate Greenfield argued that "*a scheme of arrangement which has been approved by the requisite majority of the company's members (or creditors) derives its efficacy purely from statute and therefore operates as a statutory contract*". For this he relied on the opinion of the Privy Council (given by Lord Hoffmann) in Kempe v Ambassador Insurance Co [1998] 1 WLR 271.

68 The Ambassador Insurance case is authority for the premise of Advocate Greenfield's submission, a premise which we accept as correct: this is that a scheme of arrangement, when approved by the requisite meetings and when sanctioned by the Court, takes its effect by force of Part VIII of the Companies Law. Its efficacy derives purely from statute. The scheme of arrangement is not, and does not operate as, a court order.

69 The same point is to be found in the case of Re Garner's Motors Ltd [1937] Ch 594 in which Crossman J said at 599, "*In my judgment the effect of s.153 of the Companies Act, 1929*", which was the then English equivalent to section 110 of the Companies Law, "*is to give a scheme when sanctioned by the Court a statutory operation.*" It is from the Companies Law, specifically from section 110, that the Scheme in the present case would derive its effect.

70 However, while Advocate Greenfield is correct, in our judgment, in submitting that the proposed arrangement in the present case will result in the making of contracts between the Company and the holders of the Minority Shares, contracts which in principle meet the requirement in section 313(4) and 314 of the Companies Law, we do not see that this analysis is advanced by describing the contracts as "statutory contracts". We have referred earlier to, and quoted from, a passage in the judgment of Younger J in Re Guardian Assurance Co [1917] 1 Ch 431 at 441. That passage, which was quoted with approval by Astbury J in Re Anglo-Continental Supply Co Ltd [1922] 2 Ch 723 at 731, included also the statement that the purpose of what is now in sections 105 to 110 of Part VIII of the Companies Law "*is strictly limited: it does not confer powers; its only effect at any time is to supply, by recourse to the procedure thereby prescribed, the absence of that*

individual agreement by every member of the class to be bound by the scheme which would otherwise be necessary to give it validity."

71 Advocate Greenfield then submits that, if the scheme of arrangement in the present case (if sanctioned) can result in the supply of the selling shareholders' agreement to sell their shares on the terms of the scheme, there can be no principled objection to that same agreement not also amounting to "*the consent of the shareholders whose shares are being acquired to that acquisition*" sufficient to meet the section 313(3) requirement. This is not, he submits, because shareholders have been ordered to give consent, but because no further consent is required beyond that supplied by the scheme when sanctioned.

72 This submission, in our judgment, states the conclusion without explaining why, after all, section 313(3) of the Companies Law does not lay down a statutory requirement which must be satisfied if the Court is to sanction an own-share purchase scheme.

73 The Bailiff was persuaded to reject this submission by the clarity of the language used in section 313(3). We agree with the Bailiff's conclusion.

74 We have already drawn attention to the terms in which section 313(3) is expressed, and to the contrast with the language used in section 2(2) of the 1998 Ordinance. Four features are significant. First, the obtaining of the shareholder's consent is expressed to be something that the company has to do. Second, it is the shareholder's consent that is required, not that of the Court or the company. Third, the requirement for consent in section 313(3) is set out separately and distinctly from any reference to the authorisation of any contract, suggesting that whether or not a contract may be brought into being by some operation to which the immediate consent of the shareholder is irrelevant, still the shareholder's consent for the acquisition in question has to be obtained. Fourth, the requirement is expressed as being for the company to <u>obtain</u> the consent. It is not obvious that this requirement is met by a process, completed by the Court giving sanction to a scheme of arrangement, which might treat or deem the shareholder as having consented.

75 In our judgment these considerations lead to the conclusion that, before the Court can sanction a scheme of arrangement for a company to purchase its own shares from holders, those holders must be shown to have consented to the acquisition of their shares. The consent could not be supplied by the sanctioning of the scheme of arrangement.

76 This conclusion is supported by the further consideration that the Companies Law does not contain anything expressly to disapply the section 313(3) consent requirement in the context of Part VIII schemes of arrangement, even though a provision to that effect could readily have been included, either in Part VIII itself where a similar provision in the form of section 106 is to be found, or in the way in which section 313(3) was expressed.

77 The second way in which the Company seeks to overcome the obstacle presented by the section 313(3) requirement is to argue that its proposed scheme of arrangement either does include, or can be amended to include, a provision authorising the appointment of an agent to act on behalf of the selling shareholders and in that capacity to give consent to the Company's acquisition of their shares. Clause 6 of the scheme contains a power for the Company to appoint agents to effect transfers of shares on behalf of selling shareholders, while clause 16 contains a power for the Company to "*consent on behalf of all persons affected to any modification or addition to the Scheme or to any condition approved or imposed by the Court*".

78 In our judgment this alternative argument does not assist the Company. It is one thing for a scheme of arrangement to result in the appointment of an agent to act on behalf of shareholders to ensure implementation of the scheme in accordance with its terms. But we do not see that, where an agent is so appointed, it can be said that any consent to the proposed acquisition given by the agent on behalf of the shareholder is properly to be characterised as consent obtained by the Company: it is consent which is given pursuant to the scheme and is nothing more than a consent deemed to be given on behalf of someone who has not in fact given it or even authorised its being given.

79 We therefore agree with the conclusions of the Bailiff set out in paragraphs 28 to 32 of his judgment. This means that the Company's appeal is to be dismissed.

Issue 2 - Discretion

80 As the second issue on which the Company is appealing concerns the exercise of the Court's discretion, the Company can only succeed if there has been an error by the Bailiff as to the applicable principles or as to what might be taken into account when making his evaluation and exercising his discretion; or if his decision is plainly wrong, being outside the bounds of reasonableness. It is not sufficient that the Court of Appeal might itself have decided the application differently had the application been before that Court in the first instance.

81 At paragraphs 34 and 35 of his judgment the Bailiff set out the principles which guide the exercise of the discretion given by section 110 of the Companies Law when the Court is considering whether or not to sanction a scheme. These he explained in the following terms:

> *"34. By virtue of section 110(1) of CGL, when deciding whether to approve a scheme of arrangement, the Court has an unfettered discretion but, as always, the discretion must be exercised judicially. The factors to be considered in the exercise of discretion include, but are not limited to, those set out in section 110(2) of CGL. In Re Montenegro Investments Limited (In Administration) [2013-14] GLR345 and in Re Assura Group Limited (unreported 27th January 2015), the Royal Court has set out the following criteria as matters which must be established by the applicant Company to the satisfaction of the court:*
>
> *(1) Whether the class of members was fairly represented by those who attended the court meetings and that the statutory majority are acting bona fide and are not coercing the minority in order to promote interest adverse to those of the class whom they purport to represent;*
>
> *(2) The scheme is such that an intelligent and honest man, a member of the class concerned and acting in respect of his interests, might reasonably approve; and*
>
> *(3) There is no 'blot' on the scheme, which it is submitted is simply another way of saying that the court may take any other factor into account in exercising its discretion.*"

82 The Bailiff also reminded himself, by reference to extracts from the judgments of Richards J and Morgan J in, respectively, Re Telewest Communications plc (No.2) [2005] 1 BCLC 772 and Re TGC plc [2009] 1 BCLC 445, and also from paragraph 425.54 in "Buckley on the Companies

Acts", Vol 1, that the Court will be slow to differ from the view of the majority at a court meeting to consider a scheme of arrangement, at any rate where the scheme is such that an intelligent and honest person might reasonably approve.

83 The three principles referred to by the Bailiff were long ago expounded by the English Court of Appeal in Re Alabama, New Orleans, Texas and Pacific Junction Railway Company [1891] 1 213, and then by Lindley LJ in Re English, Scottish and Australian Chartered Bank [1893] 3 Ch 385 at 408-9. They have been restated many times, including in Guernsey by the Bailiff in Re Montenegro Investments Ltd [2013-14] GLR 345. They are, however, guidelines, developed by the courts: they should not be treated as an enactment.

84 Before the Bailiff the Company's written argument had included a statement of the applicable principles in almost exactly the way in which they came to be set out by the Bailiff in his judgment, followed by the comment that these were criteria which the Bailiff had in the Montenegro Investments case accepted as "*constituting a summary of the matters which should guide the court in the exercise of its discretion at the sanction stage*". The Company's written argument added that they were drawn from a passage in "Buckley on the Companies Acts", and "*have been approved in numerous authorities before the English courts, expressly so in the judgment of Morgan J in Re TDG plc [2008] 2334 (Ch) at [29]*". The Company's written argument went on later, in a discussion of the last principle (that concerning the absence of a "blot"), to refer to the case in the Jersey Royal Court, mentioned below, while apparently accepting that the Court could under the heading of that principle, take into account objections to the proposed arrangement which did not fall comfortably within either of the other principles. An example of such an objection could be because the explanation for the proposed arrangement put to those to vote on and be bound by the arrangement might have been deficient or misleading.

85 Nevertheless, before us Advocate Greenfield made two submissions about the last of the principles referred to by the Bailiff in his judgment. His first submission was based on a judgment given in a case in the Royal Court in Jersey, namely Re the Representation of Cazenove Capital Holdings Ltd [2013] JLR(2) N-18 (Commissioner Clyde-Smith sitting with Jurats Clapham and Blampied). In that case the Court said it preferred to regard that third principle as falling within the second. What was said at paragraph [9] of the judgment was as follows:

> *"In Re Vallar PLC [2011] JLR N25 the Court suggested that there was a fourth issue to consider, namely whether, viewing matters in the round, there was any blot on the scheme which might indicate that the Court's discretion should not be exercised in favour of sanctioning the scheme. We entirely agree that, if there were such a blot, that would be a highly material factor; but we think that this topic falls naturally for consideration under heading (iii) above. If there is such a blot, it would suggest that the arrangement is not such that an intelligent and honest man might reasonably approve. Accordingly, we would prefer to see the test on such applications continue to be expressed in its traditional three pronged form, but always accepting of course that the matter is ultimately one for the discretion of the Court having regard to all the circumstances of the scheme, including whether there is a blot of some sort which would suggest that (iii) is not satisfied."*

86 Based on this, Advocate Greenfield submitted that in the present case all that matters was the voting at the scheme meetings looked at in the light of the first principle, and the fairness of the scheme measured by the test set out in the second principle.

87 In the Re Assura case referred to in the Bailiff's judgment the Deputy Bailiff had considered and rejected just this submission. He said, "*I am satisfied that because the provisions on the face of the 2008 Law reflect those of the 2006 Act ... we can properly take guidance from England and Wales and treat the blot aspect as being a fourth consideration*". In referring to "*the blot aspect as being a fourth consideration*", the Deputy Bailiff was concluding that one of the principles guiding the exercise of the discretion is that "*there must be no blot on the scheme*". In our judgment the Deputy Bailiff's conclusion was correct, and amply supported by English authority concerned with the Court's jurisdiction to sanction schemes of arrangement. The reason he referred to it as a "*fourth consideration*" is because there is a threshold, first, consideration which is not part of the exercise of any discretion: this is, rather, that the occasion for the exercise of the discretion must have arisen because the statutory requirements have been complied with.

88 Advocate Greenfield's second submission was that the Bailiff's exposition of the principles concerning the absence of any blot on the scheme was mistaken. According to Advocate Greenfield, the Bailiff was wrong to direct himself that the Court's being satisfied that there was no blot on the scheme was another way of saying that "*the court may take any other factor into account in exercising its discretion*".

89 We reject this second submission. In our judgment the third of the principles is that in exercising the discretion the Court needs to be satisfied that the scheme is appropriate to be sanctioned: the Court must be satisfied that there is nothing about the scheme which makes it oppressive of, or unfairly prejudicial, to persons who may be bound or affected by it. This, in modern terms, is what is encapsulated by saying that there must be no "blot" on the scheme.

90 The next challenge made by the Company to the Bailiff's decision as to the way his discretion should be exercised is founded on the proposition, as set out in Advocate Greenfield's written submissions, that the Bailiff exercised the discretion in a way no reasonable judge could have exercised the discretion. The basis for this, so it is submitted, is that the Bailiff's factual findings were insufficient to support the way he exercised the discretion.

91 The Bailiff rejected a threshold argument put forward on behalf of the Respondents. This was that the information in the Circular was deficient in that (a) it failed to include any independent valuation evidence concerning the prices to be paid by the Company for the shares to be acquired, and (b) it failed to describe the connections between Mr Howard Shore on the one hand and on the other shareholders (notably Mr Graham Shore) who had given irrevocable undertakings to vote in favour of the Scheme.

92 We have misgivings about the Bailiff's conclusion, a conclusion which the Respondents have sought to challenge on this appeal. An explanatory statement should give accurate and complete information. It is not sufficient for the statement to include only the particular information required by section 108 of the Companies Law. It should also give "*such a statement of the main facts as will enable the recipients to exercise their judgment on the proposed scheme*". This is the way the requirement is summarised in "Buckley on the Companies Acts".

93 In the present case the Respondents' criticisms of the Explanatory Statement have considerable force.

93.1 There was no attempt to explain why a fair price to be paid for an A Share was €4.50, or for a B Share was €1.50. Simply to say that this price was what the Company was willing to pay (and Mr and Mrs Shore were willing to see the Company pay) does not assist a shareholder to decide whether or not the price is fair. What was indicated was

that, if anything, the price was a very poor return on the Company's net asset value. But that does not help in explaining why, fairly, the Scheme was to be approved and imposed on dissentient shareholders. As mentioned, there was no explanation of the reasoning which led the Independent Directors to recommend acceptance; by inference it was that holders of the Minority Shares could never expect to receive any return on their shares, and that if any return were to be made it would only be to the Committed Shareholders. But why the Independent Directors thought this to be appropriate was not explained.

93.2 There was no information about the consultations between the Company and the Committed Shareholders which had led to the setting of a €6 price for a combination of one A Share and one B Share, not even in the succinct and incomplete form provided by Mr Troskie in his 25 January 2017 affidavit to which we have made reference.

93.3 Information about connections between the Committed Shareholders and Mr Howard Shore was not included but was relevant, for the reason that the Committed Shareholders were identified as a favoured group who still might hope, in contrast with the remaining holders of the Minority Shares, to have their shares purchased in the event of a failure of the Scheme. There was no explanation for this prospective favouritism.

93.4 As we have said above, the Circular did explain how the 2016 Accounts could be obtained. Nevertheless there was no attempt to provide any more recent information. It was apparent from the 2016 Accounts that after 31 March 2016 there had been significant transactions resulting in large cash infusions into the Company, there was no reasonably current statement of the Company's net current assets and available reserves potentially distributable to members.

93.5 The Circular made much of the interests of the Company in securing shareholders aligned with the Company's long term investment objectives. It was not explained why this mandated ownership exclusively by Mr and Mrs Shore. The Company's interests are, after all, those of its general body of shareholders. If, as we consider probable, the Company's real and unstated objectives were those of Mr and Mrs Shore in taking over the Company, then that should have been explained.

94 In his judgment the Bailiff did not state that, objectively, the price to be paid in respect of the Minority Shares was unfair. The Bailiff also found that there was no evidence that, subjectively, any of those who voted to support the scheme of arrangement did so for corrupt reasons (that is, to obtain undisclosed payments or benefits) or otherwise than in good faith in accordance with their best interests.

95 Accordingly, submits the Company, the scheme of arrangement having been sanctioned by the statutory majority, the Bailiff should not, and could not reasonably have concluded that that majority was voting otherwise than genuinely in the interests of the class of members which it represented (namely holders of the relevant class of the Minority Shares).

96 We consider that, contrary to the submission of the Company, it was open to the Bailiff to exercise the discretion as he did.

97 While the price offered by the Company may have been acceptable to a shareholder wanting an immediate exit (a "liquidity event") and despairing of otherwise ever having any return, it was not shown to be fair to impose on a shareholder who was willing to remain a member and to share with the fortunes of Mr and Mrs Shore. As to this, the Bailiff said (emphasis added) that "*...the*

price was presented as being a price attractive to those who wished to sell. On the other hand the price was not attractive to those looking for a long-term investment as it was stated to be at a 43.6% discount to NAV." He went on to explain that having regard to the information in the Company's 2016 Accounts a shareholder could form a view as to value.

98 But this was not a finding that the Bailiff had reached any conclusion about the price beyond the fact that it was unattractive to someone who was not wishing to sell. More than that, the Bailiff pointed out that within the classes of holders of the Minority Shares "*there were such conflicting ambitions between those who wanted to realise their shares now and others who wanted to remain invested in German real estate in the longer term*". These conflicting ambitions, as we see it, went to the heart of the Bailiff's concern about the proposed arrangement; and they were a product of the price proposed and the presentation of the proposed arrangement. That is to say, on offer was a price involving a significant transfer of value to Mr and Mrs Shore only justified by the Independent Directors' indication that the alternative to accepting the price was to be a lean future as regards any returns from the Company.

99 In response to the case that the proposed arrangement involved a significant transfer of value from the holders of the Minority Shares to Mr and Mrs Shore the Company gave evidence by Advocate Anthony David Lane, a partner in the Company's lawyers, that the net asset measure of value "*assumes that the fair value of the Company is 100% of net asset value, whereas the real fair value of the shares that are to be the subject of the Scheme would be expected to be a significant discount to the net asset value.*" This evidence overlooks the fact that the scheme does not involve small trades between disparate shareholders, but is the purchase by the existing majority of the whole of the outstanding shares. It does not assist in explaining why the majority should be able to impose on the holders of those shares a price which involves the majority making such an immediate profit. It does not support a finding that the scheme price would be a fair one.

100 Ultimately Advocate Greenfield accepted that the Bailiff had not made any finding that the scheme price would be a fair one. In our judgment the Bailiff was correct not to make any such finding: the Company had not put forward evidence which would support such a finding.

101 The Bailiff made the following points:

> "*42 ... The onus is on the Company to satisfy the Court that the statutory majority is acting bona fide in the interests of the class of members it represents. In doing so, the Company is required to show that the majority are not coercing the minority (per the decision in Montenegro cited above).*
>
> *43. Prior to convening the Court meetings, the Company held the irrevocable commitments of nearly 60% of the members of each of the two classes to support the Scheme, many of whom had, or have had, a business connection with Mr and Mrs Howard Shore. By pursuing a scheme of arrangement rather than seeking the consent of each and every shareholder to the acquisition of shares, the Company is exposed to the criticism that the Scheme was designed to coerce the minority by providing a mechanism for acquiring the shares of the members who did not want to sell. The onus was on the Company to show that was not the case and, in my judgment, it has failed to do so.*
>
> *.....*
>
> *45 ... There was no explanation as to why the members who wanted to sell could not have been allowed to do so, leaving the remaining members as*

shareholders invested for the longer term. In paragraph 5.2 of the Letter of Recommendation, the independent directors advised that if the Scheme were not approved, the shareholders who had given an irrevocable commitment to sell their share might be given the opportunity to do so although the board of the Company had given no commitment to acquire their shares. There was therefore a possible alternative that could have been offered to those shareholders who wanted to sell.

46. In conclusion, if the Court had jurisdiction to approve the Scheme, I would have rejected it in exercise of my discretion, on the ground that the Company had not satisfied me that the members of the classes who voted in favour of the Scheme were acting bona fide in the interests of the class as a whole, rather than coercing the minority whose investment objectives were aligned with those of the Company and who did not want to sell their shares into doing so at a price that might not reflect the true value of their shares."

102 In our judgment the Bailiff's conclusion was open to him and his exercise of the Court's discretion in refusing to sanction the scheme is not to be faulted. More than that, it is one we wholly agree with: had it been for us to exercise the Court's discretion, we would have done so in the same way. As we see it, there is no good reason for the Company to support a scheme resulting in a takeover of the Company by Mr and Mrs Shore underpinned by the threat that, if the takeover does not succeed, there will be no returns whatsoever for dissentient shareholders.

103 The Company argues that a feature of any scheme of arrangement, one therefore which is not to be taken by the Court to be a reason for refusing sanction for the scheme, is that the wishes of those supporting the scheme will, if the scheme is sanctioned, coerce and bind to the scheme those who do not support or who oppose the scheme. It is, so Advocate Greenfield submits, of the essence of a scheme that there will be coerced dissentients.

104 There are two answers to this. The first is that it is precisely because of that element of coercion that the Court's sanction is made necessary for the scheme to take effect, and that the Court is entrusted with a discretion. The Court has to be satisfied that it should exercise its discretion to require the dissentients to submit to and be bound by the scheme. In the present case, for reasons he explained, the Bailiff considered that the particular scheme proposed by the Company was not one which, in fairness to the dissentients, ought to be imposed on them. The price which the scheme would require to be accepted had not been shown to be fair. On the contrary, the Bailiff had held that the price was not attractive to those looking for a long-term investment.

105 Advocate Greenfield has submitted in his written case that the coercion of the dissentients is justified precisely because the Scheme is a takeover scheme and because "*The Company considered that its long term investment objectives could best be met by having Mr and Mrs Shore as holders of 100% of the issued shares of the Company*". However, it is <u>because</u> the present scheme operates as a takeover scheme, the Minority Shares being purchased compulsorily, that the inducement offered to shareholders to accept should be a fair price, the onus being on the Company to satisfy the Court that the price is fair to impose on those unwilling to accept. This is not achieved by offering a price which is a significant discount to net asset value in what is simply an investment holding vehicle, and combining this with a threat of never receiving any return because the acquiring majority and the Board (including the Independent Directors) will not allow one to be made.

106 The second answer focuses on the approach to be taken by the Court when considering the voting at the scheme meetings and the means by which the required majority of votes was obtained. In the present case the Bailiff was not satisfied that the votes of the majority of the holders of the Minority Shares at the scheme meetings were to be accepted as having been cast genuinely in the interests of the class as a whole. In short, the Bailiff was in our judgment entitled to conclude that on the facts of this case he could properly reject the outcome of the scheme meetings. As to this he had made a finding, which was open to him to make, that the Committed Shareholders – whose shares could perfectly well have been bought back by the Company without the need for a scheme of arrangement – might well have been voting at the scheme meetings to secure the required statutory majority to result in a forced purchase of the shares of holders who wished to remain with the Company and not in the interests of the two classes of holders of Minority Shares as a whole.

107 In his judgment the Bailiff referred to the decision of Plowman J in Re National Bank Ltd [1966] 1 WLR 819. In that case Plowman J had held that it was open to a company to promote a scheme of arrangement to effect a takeover, even though the same result (namely the purchase of the whole of the minority shares) might have been achieved by resorting to the takeover provision in the equivalent to Part XVIII of the Companies Law. It did not matter that the threshold of shareholder support required for the former was lower than the 90% threshold required for the latter; but a distinction between the two regimes is that in the former case the court would necessarily have to scrutinise the scheme, while in the latter it might never scrutinise the takeover arrangements and would only do so if a dissenting shareholder made an application to the court.

108 This distinction between the two regimes, namely that in Part VIII and that in Part XVIII, is important to note in the present case, as it impacts on the onus in relation to the exercise of the court's discretion. Where sanction is being sought for a scheme under Part VIII, it is for the company to show why the court should exercise its discretion in favour of the scheme; in contrast, on an application by a dissentient in opposition to a takeover under the equivalent to Part XVIII, it is for the dissentient to show why, as a matter of discretion, he should not be compelled to part with his shares on the terms proposed.

109 Further, we consider it a relevant factor in any exercise of the discretion under section 110 of the Companies Law, where there is an arrangement which involves a simple takeover and which could have been reformulated as one under Part XVIII, that dissentients objecting to the arrangement had between them a sufficient proportion of the relevant share capital to ensure that the 90% threshold could not have been achieved. This is not to say that in such circumstances there could never be sanction given for a Part VIII arrangement; only that the Court would in those circumstances be likely to give particularly careful attention to the fairness of what was being proposed in return for the compulsory acquisition of the dissentients' shares and to the way in which the voting majority had been arrived at in the court meetings to approve the arrangement.

110 The case of Re Hellenic & General [1976] 1 WLR 123 is illustrative. In that case a scheme of arrangement was being used to effect a takeover in circumstances where the dissentient minority held a blocking percentage for the equivalent of Part XVIII such that the person seeking to take over the company could not use the statutory squeeze out machinery. Templeman J noted (at page 128C-D) that a large number of the shares whose votes ensured the passing of the necessary resolution at a court meeting to approve the scheme were held by the subsidiary of the offeror. Although Templeman J considered that the takeover terms were "*more than fair*" (at page 129E) (a distinction between that case and the present), he nevertheless also considered that in the

circumstances, as a matter of discretion, the dissentient should not be forced to accept those terms and so the scheme should not be sanctioned.

111 In the present case the Bailiff took the view that the stated aim explained in the Circular, the aim of providing shareholders wanting "*a liquidity event with a view to their realising the value of their holdings for cash*", could be achieved by the Company offering to purchase any of the Minority Shares which their holders wished to sell. There was no explanation in the Circular, and the Bailiff held there was no good reason put forward by the Company, for the Company's decision that this liquidity event had to involve a compulsory purchase of the shares of those members who were not willing to accept a sale of their shares at the proposed prices and were therefore willing to submit themselves to the existing state of affairs and to remain owners of the Company alongside Mr and Mrs Shore.

112 Advocate Greenfield on behalf of the Company has submitted that the Bailiff was mistaken in this last conclusion because, as he submits, the Circular in fact explained that the aim of the scheme was a takeover of the Company by Mr and Mrs Shore. His submission is that this aim of the scheme appears in paragraph 1.10 of the Letter of Recommendation (quoted earlier in this judgment), where it was explained that "*The Share Buy-Back is, in effect, a takeover of the Company by the Continuing Shareholders* ...". He also drew attention to paragraph 3.3 of the Letter of Recommendation, in the part of the document headed "*The Scheme*" and explaining what the scheme was and the procedures to bring it into effect. This particular paragraph stated that "*The purpose of the Scheme is to provide a legally-binding mechanism for enabling the Share Buy-Back to apply to all [holders of Minority Shares], and for the Continuing Shareholders to become the sole shareholders of the Company*". And he drew attention to paragraph 3.9 of the Letter of Recommendation, which contained an encouragement by the Independent Directors to Minority Shareholders to vote in support of the scheme "*in order that the Company can utilise its cash reserves to enable the Continuing Shareholders to become the sole shareholders ... and to provide [holders of the Minority Shares] with a liquidity event and a realisation of their Shares*".

113 In our judgment the Bailiff was not mistaken. Paragraphs 1.6 and 1.7 of the Explanatory Circular were clear. What impelled the proposal for the arrangement being put forward was the Board's belief in "*a lack of alignment between the long-term interests of the Company and its disparate shareholder base*". The shareholder base was said to be "disparate" because some wanted a "liquidity event", thereby to realise their shareholdings and to exit, while others were content to remain and to take a long view; and the scheme was identified by the Independent Directors, so it was said, as the best way of dealing with the situation.

114 Thus, in our judgment, a reader of the Circular would understand that the aim was to provide an exit from the Company for those shareholders wishing to realise value from their shareholdings, thereby aligning the long term interests of the Company with its shareholder base. We accept that the reader would see that the aim was proposed to be achieved by means of an own-share purchase of all the Company's issued share capital with the exception of the shares belonging to Mr and Mrs Shore; but the reader would naturally understand that that was only a means to achieve the aim, and that in achieving that aim an incidental result flowing from the means deployed would be that Mr and Mrs Shore would be the owners of all the remaining shares. Quite why the scheme with that incidental result was considered by the Independent Directors to be the best way of dealing with the situation was not explained. But if the aim, as opposed to the means to achieve the aim, had been a takeover of the Company by Mr and Mrs Shore, it would have been unnecessary for the Circular to contain, as it did, a description of the advantages for the Company from the scheme in terms of possible future empire building, as the promoters of the

scheme would be envisaging that the only persons who would be interested in that future would be Mr and Mrs Shore.

115 As regards paragraph 1.10 of the Letter of Recommendation, we consider that the inclusion of the words "*in effect*" is significant. They serve a purpose, notwithstanding Advocate Greenfield's submission to us that they were redundant: what they indicate is that the result of the scheme would be the Share Buy-Back, which when implemented would have the consequence that the Company would be taken over, but that that was not the aim of the scheme so much as the means by which the liquidity event would be achieved for those wishing for an exit and by which there would be the resulting balancing of the Company's long term investment interests with shareholder demands. Paragraph 3.3 of the Letter of Recommendation is to be read in the light of what had gone before, in particular in paragraphs 1.6 and 1.7, and was part of the description of how the scheme was to work to achieve the aim of addressing the perceived lack of alignment between the Company's long term interests and its disparate shareholder base. We think the same is so in the case of paragraph 3.9: it was explaining how the liquidity event hoped for by some shareholders was to be achieved, this being to vote for the scheme which would bring about that result with Mr and Mrs Shore being left as sole shareholders.

116 It is telling that the Company's written case on this appeal contained, at paragraph 98, the following text (emphasis added) when criticising the Bailiff's conclusion at paragraph 45 of his judgment: "*The Bailiff's findings ignore the primary relevant fact and the express statement in Part One of the Scheme Circular (at paragraph 1.11 [sic]) that the buyback was <u>in effect</u> a takeover of the Company by Mr and Mrs Howard Shore. The Company considered that its long term investment objectives could best be met by having Mr and Mrs Shore as holders of 100% of the issued shares of the Company*". Again, the words "in effect" were used, along with the explanation about long term investment objectives.

117 A further challenge made by the Company to the Bailiff's exercise of discretion concerned his conclusion in his final paragraph. It was said that having first set out correctly at paragraph 35 of in his judgment (quoted above) the principle concerning the voting at scheme meetings, that being the first of the three principles set out in that paragraph, the Bailiff had later distilled this into an incorrect principle simply that the voting majority should not be coercing the minority, and that his final conclusion at paragraph 46 of his judgment (quoted above) was not open to him because there was no basis for considering that any of those who did vote in favour of the arrangements voted for collateral reasons or otherwise than in the interests of all holders of Minority Shares as a class.

118 For reasons we have already explained, we reject this submission. Our reasons can be shortly stated. The Bailiff's concerns about the voting had been expressed in paragraph 45 of his judgment, discussed above, and in paragraph 43. Quite correctly, in our judgment, he had not been satisfied as to the approach which the Company had taken in obtaining the irrevocable undertakings from the Committed Shareholders for the purpose of ensuring that in the pursuit of their wish to have prices for their shares acceptable to them all holders of Minority Shares would be compelled to sell, and therefore had not been satisfied as to the first of the three principles described in paragraph 34 of his judgment.

119 It follows that strictly speaking we need not consider the Respondents' argument, referred to in paragraph 44.4 concerning the effect of the recent tender offer: the tender offer followed the Bailiff's decision and could only be relevant, if indeed admissible at all as a relevant

consideration, if it provided some basis on which his exercise of his discretion might be shown to have been undermined.

120 We have, nevertheless, considered how we would have approached the matter if we had been persuaded that the Bailiff had been mistaken in his conclusion concerning the Company's stated aim, namely his conclusion that the aim could be achieved without having to purchase compulsorily the shares of those shareholders who did not wish to sell. In that case it would have fallen to us to exercise the discretion conferred on the Court by section 110 of the Companies Law. Unhesitatingly we would have refused to sanction the proposed arrangement. In summary our reasons would have been as follows:

120.1 We would not have been satisfied that the majority at the Court meetings voted in the interests of the class as a whole. We have explained, as to this, that in our judgment the Bailiff was correct to observe that the Committed Shareholders were in a different position from the remaining holders of the Minority Shares: they were insiders. More than that, it is apparent from the Company's evidence that the proposed prices to be paid by the Company were the product of discussions between Mr Howard Shore, the Independent Directors and Mr Graham Shore along with the other Committed Shareholders.

120.2 We would not have been satisfied that the proposed arrangement was one which an intelligent and honest man acting in respect of his interests might reasonable approve. This is because we consider that there was insufficient attention to the significant transfer of value to Mr and Mrs Shore which would be effected by their taking over the Company at such a heavy discount to net asset value. The absence of any real effort on the part of the Company to see that the amount to be paid to the holders of the Minority Shares was fair is borne out by the absence of any explanation from the Company as to the way in which the Company arrived at the different prices being proposed for shares of the separate classes of A Shares and B Shares, and by the unsatisfactory way in which the €6 price for a pair of A Shares and B Shares was arrived at.

120.3 We would have concluded that there is a blot on the scheme and that as a matter of discretion the scheme should not be sanctioned. In our judgment it is oppressive to put pressure on shareholders to sell their shares at a price which has no real reference to any value their shares may have by the threat that the Company's Board will in the future exercise its discretion as to the payment of dividends and the making of distributions to shareholders so as to result in shareholders receiving nothing from the Company in any foreseeable future.

121 Accordingly, we are satisfied that the Company must fail in any challenge to the Bailiff's exercise of the Court's discretion.

Disposition

122 In the result we dismiss the Company's appeal. Before concluding this judgment we wish to remind companies coming to the Royal Court seeking the Court's sanction for schemes of arrangement under Part VIII of the Companies Law that care should be taken in the preparation of their schemes and to ensure a fair presentation both to those to be bound and to the Court. The Court's function is important: obtaining sanction for a scheme is not a mere formality, but requires thety, but requires the Court to make a decision which may have a material impact on the interests of those who are to be bound.