Puma Brandenburg Limited and a Scheme of Arrangement
Royal Court
23rd June 2017

JUDGMENT 31/2017

A scheme of arrangement pursuant to Part VIII of The Companies (Guernsey) Law 2008 – Application for Costs

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

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

APPLICATION FOR COSTS

Judgment handed down: 23rd June 2017

Before: Sir Richard Collas, Bailiff

Advocate for the Company: Advocate J P Greenfield

Advocate for the Respondents: Advocate A R Lyall

Cases and laws referred to:

The Companies (Guernsey) Law, 2008, as amended
In the Matter of Puma Brandenburg Limited (Royal Court 9/2017)
In the Matter of Puma Brandenburg Limited (Court of Appeal 29/2017)
Re Thomas de la Rue & Co [1911] 2 Ch 361
In re National Bank Ltd [1966] 1 WLR 819
Re Peninsular and Oriental Steam Navigation Co [2006] EWHC 3279 (Ch)

1. On 24 February 2017 I gave judgment refusing 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 which was to be between the Company and certain of its shareholders was challenged by Aralon Resources and Investment Company Limited and Nortrust Nominees Limited ("the Respondents"). The judgment was the subject of an appeal and on 18 May 2017 the Court of Appeal gave judgment dismissing the Company's appeal against my decision. Subsequently, on 6 June 2017, the Court of Appeal, in a written judgment, ordered the Company to pay the Respondents' costs of the appeal on the indemnity basis.

2. Following the handing down of my judgment of 24 February, the Respondents applied for an order, pursuant to rule 83 of the Royal Court Civil Rules, 2007, that their costs be paid by the Company on an indemnity basis. I reserved my judgment on the costs application pending the decision of the Court of Appeal. The Court of Appeal expressly reserved to the Royal Court the question of the costs at first instance (paragraph 34 of its costs judgment). In reaching its decision on the appeal costs, the Court of Appeal very helpfully set out the considerations to be applied to applications concerning schemes of arrangement which, it held, are to be distinguished from the costs of typical litigation. The considerations they set out apply equally to hearings at first instance as to appeals. In this judgment I have sought to apply those considerations to the application before me.

3. In support of their application for costs in the Royal Court proceedings, the Respondents submitted a skeleton argument dated 10 March and the Company replied with a skeleton argument dated 24 March. Both skeletons predated the costs decision of the Court of Appeal but both parties have confirmed that they do not wish to make further oral submissions and are content for me to decide the application on the basis of their earlier written submissions.

4. The Company had contended in its skeleton argument that the Respondents should not be entitled to their costs on an indemnity basis and further that there should be an issue-based or proportionate costs order to take into account that the Respondents had not been successful on many of the points raised in their opposition to the scheme of arrangement. The Company's position was maintained after the Court of Appeal judgment. In a letter dated 9 June to H M Deputy Greffier, Advocate Greenfield acting on behalf of the Company wrote:

> *"We are content for the Bailiff to deal with the Application on the papers, subject to making the point that issues decided in the Royal Court judgment produced a result (as outlined in our costs submissions) that although Aralon's jurisdiction objection was upheld, many of its peripheral arguments (in particular as to the applicability of the Takeover Code, the adequacy of the Scheme documents and the information as to value) required a great deal of the Company's time and incurring of professional fees to deal with and were rejected. Further, the issue of the Takeover Code was not even put before the Court of Appeal.*
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> *It is the Company's position that the Court of Appeal's decision in relation to the appeal costs has no bearing on the arguments put forward by the Company in relation to the Application as set out in their skeleton argument dated 24 March 2017."*

5. In its skeleton argument of 24 March, the Company had stated that its primary position was

> *"that the present situation is no different to ordinary litigation and the fact that the Company sought sanction of a scheme of arrangement does not amount to "special circumstances" under Rule 83(2)(a) of the RCCR".*

6. For their part, the Respondents had contended, both in their skeleton argument of 10 March and in the Court of Appeal, that in line with persuasive decisions of the English courts, the

Court should generally order that the costs of a party objecting to a scheme of arrangement be borne by the company's assets on the ground of ensuring that the Court has the benefit of hearing all the interests represented so that shareholders are not discouraged from appearing at the hearing. The Respondents had relied upon the decisions in Re Thomas de la Rue & Co [1911] 2 Ch 361, In re National Bank Ltd [1966] 1 WLR 819 and Re Peninsular and Oriental Steam Navigation Co [2006] EWHC 3279 (Ch).

7. The Company's position was that such English authorities should have little persuasive value and should not be followed in Guernsey where there had been no decided cases concerning any challenge to a scheme of arrangement but normal litigation principles are what should be followed.

8. However, in its costs judgment, the Court of Appeal rejected the Company's submission and instead followed the principles in the English cases which it said could be appropriately followed in Guernsey:

> *"17….we accept that in England and Wales, on a scheme of arrangement which is to alter rights attaching to shares, shareholders objecting unsuccessfully may reasonably expect to have between them at least one set of costs ordered to be paid by the company, provided that their grounds of objection are reasonable and worthy of proper consideration by the court when deciding whether or not to sanction the scheme. This is not to say that it would be the exception if costs were to be refused, but rather that if an objecting shareholder took reasonable objections and advanced them reasonably and so as to assist the court the objecting shareholder would have good grounds for having costs ordered in his favour.*
>
> *18. In our judgment the approach described in the previous paragraph, an approach which is well-established and familiar in England and Wales, could be appropriately taken in Guernsey…..*
>
> *19. Further, although we have not been shown any reasoned decision of the English court in which there has been a discussion of the basis of taxation or assessment of such costs when ordered to be paid, we conclude that there could be a principled basis for the Guernsey courts ordering (if thought fit to do so) the opposing shareholders' costs to be on an indemnity basis."*

9. The Court of Appeal's decision as to the principles to be followed in considering the instant application are of course binding on the Royal Court although the Court of Appeal expressly reserved to me the decision as to the costs at first instance. The Court said *"We therefore do not need to trespass upon or pre-empt the decision on costs to be made by the Royal Court"* (paragraph 34).

10. The issues singled out by the Company on which the Respondents did not succeed in the Royal Court and in relation to which it proposes that costs should be disallowed either by way of an issue-based order or a proportionate order are that: (a) the claim that the proposed purchase price was unfair and unsupported by a valuation: (b) allegations that a number of the minority shareholders were connected in diverse ways to the largest shareholders, Mr and Mrs Howard Shore; (c) the Company should have adhered to provisions of the Takeover Code; and (d) there was a lack of disclosure in the scheme particulars provided to shareholders.

11. The starting point in relation to such issues is the test set out by the Court of Appeal in its costs judgment, not the typical litigation approach that takes account of the success or otherwise of the issue. In my substantive decision, I declined to approve the scheme of arrangement on jurisdictional grounds and said that even if I had had jurisdiction, I would nonetheless have refused the scheme on the ground that I was 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.

12. Whilst the Court of Appeal held that the Company must fail in any challenge to my exercise of discretion (paragraph 120), the Court did state that it had some misgivings about my conclusion, such as in relation to the contents of the explanatory statement provided to shareholders (paragraph 91). It is right that I approach the costs application in light of the findings in my judgment although I find nothing in the Court of Appeal's decision that would cause me to alter that approach. That is because the approach to the costs decision is not whether any objection raised by the Respondents was successful but whether it was reasonable and worthy of proper consideration by the court.

13. In deciding whether it was reasonable to raise an issue, the Court has to consider whether it has been *"materially assisted"* by the criticism of the particular dissentient (quoting Eve J in Re Thomas de la Rue & Co Ltd). It is important that the Court has before it all the material facts relevant to the scheme of arrangement. In the instant case, I was greatly assisted by the evidence adduced by the Respondents, as is clear from my decision not to sanction the scheme. It does not matter that I did not accept every one of their criticisms. It was helpful to have drawn to my attention issues such as the fact that there had not been a specially commissioned valuation report and that some of the shareholders had diverse connections with the largest shareholders, together with other deficiencies in the disclosure documents. All such evidence helped me to form a view as to how the Company had approached the application.

14. In addition to those issues, the Company has drawn attention to the Respondents' reference to the Takeover Code as having given rise to significant costs which should not have been incurred because the issue raised amounted to a baseless argument, largely because the Code did not apply on jurisdictional grounds. If I were applying the usual litigation principles, I would not award the Respondents their costs on this issue and might well order that they pay the Company's costs but, as I have said, that is not the correct basis for my decision. I do not consider it wholly inappropriate for a shareholder who is threatened with a hostile takeover by a company with strong UK connections to investigate whether the Takeover Code is applicable to the offer. Even when the Code has no application on jurisdictional grounds, as was the case here, the principles set out in the Code may be of assistance to the Court as we have no equivalent; it is not unusual for us to look to larger jurisdictions, usually in the UK, for guidance. That is not to say that it will always be appropriate to look at the Takeover Code however the circumstances of the present scheme of arrangement were unusual. I also consider a relevant factor to be that this was the first occasion on which a scheme of arrangement had been challenged in the Royal Court. It was not unreasonable for the Respondents to seek to put before the Royal Court as much information as possible with the intention of giving the Court the greatest possible assistance.

15. In the unusual circumstances of this matter, I do not regard any of the objections raised by the Respondents as being frivolous or inappropriate. It was reasonable that they be raised.

16. For that reason, I consider it is appropriate that the Respondents be awarded their costs from the Company's funds and, for the reasons given by the Court of Appeal, that their costs be recovered on a full indemnity basis, to be taxed if not agreed.

Sir Richard Collas
Bailiff