Application pursuant to s. 107 of Part VIII of the Companies (Guernsey) Law 2008 as amended, for the Court to give directions for the convening of a meeting of its members (designated the "Scheme Shareholders") in Guernsey, for the purpose of considering and if thought fit approving a scheme of arrangement, between the Company and the Scheme Shareholders

[2023]GRC023

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

IN THE MATTER OF A SCHEME OF ARRANGEMENT PROPOSED UNDER PART VIII OF THE COMPANIES (GUERNSEY) LAW, 2008

AND

IN THE MATTER OF INDUSTRIALS REIT LIMITED

INDUSTRIALS REIT LIMITED **Applicant**

Hearing date: 5th May 2023
Judgment delivered ex tempore
Approved judgment handed down: 20th June 2023

Before: Her Honour Hazel Marshall KC Lt Bailiff

Advocate for the Applicant: Advocate T Corfield

Legislation cases and textbooks referred to:

Legislation:
Guernsey
Companies (Guernsey) Law 2008 ss 105 - 110
England and Wales
Companies Act 2006 s 895
Cases:
Guernsey
In the Matter of New River Retail Limited [2016] 30/2016,
Puma Brandenburg Limited v. Aralon Resources and Investment Company Limited [2017] 27/2017
England and Wales
Re Jelf Group Plc [2015] EWHC 3857 (Ch)
Ultra Electronics Holdings plc [28 July 2002] No CR-2021-001390
Re Clinigen Group plc [2022] EWHC 990 (Ch).
Textbooks:
Buckley on *The Companies Acts,* Div16 para 9

J U D G M E N T

1. By an application dated 2 May 2023, the Applicant Company, Industrials REIT Ltd made application pursuant to s. 107 of Part VIII of the Companies (Guernsey) Law 2008 as amended, for the Court to give directions for the convening of a meeting of its members (designated the "Scheme Shareholders") in Guernsey (in fact on 31 May 2023), for the purpose of considering and if thought fit approving a scheme of arrangement under that Part of such Law, proposed to be made between the Company and the Scheme Shareholders ("the Scheme").

2. The essence of the Scheme was a proposal that the Company be taken over by Sussex Bidco LP, a newly formed Jersey limited partnership indirectly owned by investment funds advised by affiliates of Blackstone Inc, a major international real property investment company, through the purchase by Sussex Bidco of the entire issued and to be issued share capital of the Company from its members, at a price per share which, according to the evidence, represented a significant premium over the current quoted price for such shares.

3. The Scheme itself, in this case, was thus a very simple scheme, concerned only with shareholders. There is only one class of shareholder in the Company. The offer to all the shareholders was a cash offer, rather than even being an offer in shares in another company. There were no creditors or debenture holders whose interests needed to be taken specifically into account. The Directors, who disclosed that they themselves owned about 6% of the Company's shares in aggregate which they would vote in favour of the Scheme, commended the Scheme to members on the grounds that accepting Sussex Bidco's offer would provide an advantageous financial exit from the Company at a value which they considered would not be obtained through the present structure of the Company for many years.

4. Where a scheme of arrangement under Part VIII of the Companies Law is ultimately sanctioned by the Court, its acceptance by the requisite majority in number, representing 75% in value, of the members present and voting either in person or by proxy at the required meeting or meetings of those classes of members affected by the scheme has the effect of binding any dissentients, see s 110 (4). The process for gaining the advantage of such potentially binding effect involves two court hearings.

5. First, the company (this is the usual case) must apply (under s 107) to the Court for directions to convene the necessary meeting or meetings of members, explaining to the Court the essence of the scheme, why it is recommended and demonstrating to the Court the propriety and efficiency of the procedures for convening the required meetings, and providing all proper information about the proposed Scheme to the members, so as to obtain a sufficient turn out of the relevant members at the meeting, (either in person or by proxy) and a consequently well-informed, reliable and substantial voting result. This application is the First Court Hearing.

6. Certain logistical complications regarding these directions arose in this particular case from the fact that, whilst the primary listing of the shares in the Company was on the London Stock Exchange, there was a significant secondary listing on the Johannesburg Stock Exchange. This occasioned complexities as regards methods of giving effective notice to such shareholders and security as to ensuring that subsequent payments for the shares would go safely to the correct persons, but those matters are not relevant for present purposes.

7. Returning to the procedure, assuming that the class(es) of members voting at such meeting do approve the adoption of the scheme by the required statutory majority (or separate majorities) the company will then apply to the Court under s 110 of the Companies Law, for the Court to sanction the scheme itself. This is the Second Court Hearing, and is usually prospectively fixed at the initial application for directions under s 107. It is at this point that any member or group of members who is or are aggrieved at the prospect of the scheme being implemented are able to make their objections to the Court, and if the Court considers that there is force in any such objections, such that it would be unfair and unreasonable for the scheme to be implemented and to bind those persons

despite their dissent, it will not sanction the scheme to go ahead. Otherwise, it will do so with, as mentioned, the statutory force that the scheme will bind any dissenters, as well as the company, to implement it.

8. The initial application for directions in this matter was due to come on before me on 5th May 2023. As mentioned, apart from the logistical complexities occasioned by there being South African shareholders, it appeared to be a very simple scheme, which it would be appropriate for shareholders to meet to consider, in their own best interests.
9. However, one point of law, concerning the actual jurisdiction of the Court to implement the powers conferred by Part VIII of the Companies Law in relation to a scheme such as the present one, did concern me and I raised it in advance of the hearing with Advocate Corfield. At the hearing, this point was addressed to my satisfaction. I was informed, though, that the point had never been the subject of a reported decision in Guernsey, although many similar schemes of arrangement had been sanctioned by the Court. I therefore stated that I would provide a short judgment on the point, if that would be useful to the profession, and I was subsequently invited to do so. This is that judgment.

10. The point of law in question arises as follows. Ss 105 and 106 of the Law confer the relevant jurisdiction on the Court. They provide:

> *"Application of this Part.*
>
> *105. (1) The provisions of this Part apply where a compromise or arrangement is proposed between a company and –*
>
> *(a) its creditors, or any class of them, or*
>
> *(b) its members, or any class of them.*
>
> *(2) In this Part, "arrangement" includes a reorganisation of the company's share capital by the consolidation of shares of different classes, or by the division of shares into shares of different classes, or by both of those methods.*
>
> *"Relationship between this Part and Parts IV to VII.*
>
> *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."*

11. Section 105 (1) (b) thus contains the relevant power for giving effect to a scheme of arrangement which concerns members rather than creditors. However, the power envisages a *"compromise or arrangement … between a company and … its members… .*" (emphasis added).

12. My difficulty was that it appeared to me that an arrangement by which a third party was going to purchase all the issued shares of the Company, could not be regarded as a compromise or arrangement *between* the Company and its members at all. The proposal was either a proposed arrangement between one shareholder and all the others, (if Sussex Bidco held any shares already) or between all the shareholders and a total outsider (if Sussex Bidco were not an actual shareholder, but an independent entity), but on either basis, the Company was not doing anything, except organising the implementation of the proposal, which did not appear to qualify. It could also be seen that the proposed scheme did not fit into any of the extending provisions of s 106 (1), either.

13. Advocate Corfield responded by supplying me with a very helpful legal note, from which I derive the following useful references.

14. As to Guernsey authority, in *Puma Brandenburg Limited v. Aralon Resources and Investment Company Limited* [2017] 27/2017 in the Guernsey Court of Appeal, it was said by Bompas KC, JA at [8]:

> "*…. 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. ….. 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 known as 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*".

S. 895 of Part 26 of the English Companies Act 2006 contains identical terms to s 105 (1) (b) of the Companies Law, thus providing a helpful source of guidance as to its meaning.

15. In *In the Matter of New River Retail Limited* [2016] 30/2016, at [7] Collas B referred to Buckley on *The Companies Acts,* at Division 16 "Reconstructions, Mergers and Takeovers" paragraph 9, considering the meaning of "compromise or arrangement", as follows:

> "*A power to 'compromise' rights presupposes some dispute about them or difficulty in enforcing them. An 'arrangement' is interpreted widely. A number of decisions have recognised that an arrangement should not be limited to something analogous to a compromise. <u>For a scheme to constitute a compromise or arrangement it is essential that there is an element of accommodation or 'give and take' between the parties</u>. …."* (emphasis added)."

Collas B approved this passage, and also noted, at [8], that s 105 (2) of the Companies Law was not definitive but merely gave a clarificatory example, and that English authority approved the approach that the word "arrangement" had a very broad meaning.

16. On the basis of the above, Collas B held that an agreement between a company and its members to cancel their shares in exchange for shares in another company was an "arrangement" within the meaning of s 105 (1) (b). He was able to find the necessary element of "give and take" between the relevant parties, because the arrangement could only happen if the company and the members did "arrange" reciprocally for it to do so.

17. This decision does not really, therefore, cover the present Scheme. In the "share exchange" scheme it is necessary for the company to participate in the actual scheme activity. However, in the case of a cash purchase by a third party, the company itself does nothing. Its only function would be subsequently to register the transfer of the shares to the new owner, but it is difficult to see that as being part of the arrangement constituting the scheme, since it is nothing more than the company's usual recording function as holder of its register of shareholders. It is therefore very difficult to

identify any element which could reasonably be called one of "give and take" on the company's part.

18. There is no publicly reported Guernsey authority which satisfactorily covers the precise point of my concern. However, an authority which I have found to be of great assistance, is the English case of *Re Jelf Group Plc* [2015] EWHC 3857 (Ch), a decision of Mann J, which was a case involving the same kind of scheme as the one with which I am concerned, which expresses precisely the concerns which I have myself had, and which deals with them in a manner which fits with my own reactions. I can do no better than cite the relevant passages.

19. At [4], Mann J quotes s 895 of the English Companies Act 2006, in identical terms to our own s 105 (1) of the Companies Law 2008, and continues:

> *".....There is no question of compromise involved in this case. So if the scheme is to be sanctioned by the court, it must be "an arrangement between a company and its members". The relevant word for present purposes is "arrangement". As I read the scheme I struggled to find what it was that made this scheme an arrangement between the company and its members. What has happened in this case is that the members have been made an offer and have accepted it. It is proposed that, pursuant to the scheme, all the members should sell all their shares to the purchaser. The company seems to have little to do with that. Looking at the terms of the scheme itself, the company seems hardly to participate in the scheme. The scheme document gives the company three functions: First, in certain circumstances it will receive consideration which cannot for various reasons be paid to a member; second, under clause 6, it may consent along with others to amendments of the scheme; and, third, under clause 4.1(c), it is provided that "As regards certificated Scheme Shares an appropriate entry will be made in the register of members of the company with effect from the Effective Date…" That seems expressly to provide for amendments to the register. As I read the scheme I wondered what made this scheme an arrangement between the company and its members.*
>
> *"5.* [Counsel for the company] *has elaborated on that. He has pointed out — indeed as I was already aware — that schemes have been used in these sorts of circumstances for some considerable time. An example of that is the case of Re Savoy Hotel [1981] Ch. 251. That was a share purchase scheme and not a share cancellation scheme. In that case Nourse J determined that an obligation of the company under the scheme (and contained in clause 1(b) of the scheme as set out at page 356 D-F of the report) was an obligation to register shares, and not suspend them, notwithstanding the absence of a share certificate. That was sufficient, according to Nourse J, to make the arrangement one between the company and its members.*
>
> *"6. The matter was presented to me as though it was self-evident that a scheme of this nature was such an arrangement within the section. I have to say that for my part it is not self-evident that an arrangement such as this, which is really the contractual sale of shares to a purchaser in which the company has what seem to be purely administrative functions, should be treated as any such arrangement particularly bearing in mind the notion of an "arrangement" as involving "give and take" according to Nourse J. It does not seem to me obvious that an element of give and take involving the company arises in such a transaction. In the present scheme document, the participation of the company as a recipient of funds for some shareholders, or as having the power to consent to variations of the scheme (which it has), would not, to my mind, make it party to an arrangement for the purposes of s.895 at all. The third element, however, the registration, seems to me to be a sufficient equivalent to that which satisfied Nourse J in the Savoy Hotel case to be sufficient for present purposes to make the scheme an arrangement for the purposes of s.895.*

"7. I confess that for my part, if I were considering this jurisdiction entirely afresh and without the weight of history and authority, I might well have not reached the decision that this was an "arrangement between the company and its members." However, [Counsel for the Applicant] *has satisfied me that for some considerable time and via a large number of authorities it has been established and assumed that an arrangement such as this, with this sort of level of participation of the company, does amount to such an arrangement.* [He] *drew my attention to the summary of the jurisdiction contained in Re T & N Limited (No.3) [2007] 1 BCLC 563, a judgment of David Richards J (as he then was). David Richards LJ (as he now is) is, of course, a Judge with great experience of company law and schemes of this nature and he sets out in paras. 49 and 50 the matters which demonstrate that the word "arrangement" is taken to be extremely broad in this context. At the end of para.50, he says this:*

> *"As members' schemes such as that in In re Savoy Hotel Ltd show, the give and take need not be between the members and the company, but may be between the members and a third party purchaser, with the company's only function being to register the transfer of shares and thereby terminate the existing members' status as members."*

It would not be right after all this time to undermine the clear understanding on which these transactions have taken place probably for decades.

"8. Mr. Horan also drew to my attention the third edition of a book entitled ***Schemes, Takeovers and Himalaya Peaks*** *written by Mr. Tony Damien and Mr. Andrew Rich and, in particular, footnote 39 on p.45 which sets out a large number of cases in which it is said transactions of this kind have been sanctioned by the court on the footing that they were arrangements. Of particular significance is a citation from Lowe ACJ in Re International Harvester Co. of Australia Proprietary Limited [1953] VLR 669 (set out at p.47 of that book) in which he said:*

> *"The word [arrangement] has been given a liberal meaning and, generally speaking, unless the arrangement is ultra vires or the company seeks to deal with a matter for which a special procedure is laid down or to evade a restriction imposed by the Act, almost any arrangement otherwise legal which touches and concerns the rights and obligations of the company or its members or creditors may come under [the section]."*

That is a very important formulation which is said to be the summary of the jurisdiction, and this case brings itself within it…

…

"10. In all the circumstances, and notwithstanding the fact that it might be thought to be stretching the concept of an "arrangement between the company and its members" to apply it to a case such as this, I am satisfied that the existence of authority and reliance on that authority for decades mean that the facts of this case do fall within the definition of "arrangement" as it has come to be interpreted for the purposes of the Act. Therefore the transactions fall within the relevant part of the Companies Act 2006. … "

20. Advocate Corfield noted that Mann J's decision in *Re Jelf* had subsequently been followed, by himself in *Ultra Electronics Holdings plc* [2002] 28 July, No CR-2021-001390, but also by Joanna Smith J in *Re Clinigen Group plc* [2022] EWHC 990 (Ch). Also, as to historic decisions in Guernsey, his researches have disclosed a list of schemes of arrangement similar in nature to that with which I am concerned, which have been approved in the Royal Court in Guernsey

between 2010 and 2020, apparently on the basis that they sufficiently constituted an "arrangement between the company and its members" within the meaning of s 105 (1):

- European Capital – Share Transfer – 2010
- Uranium Limited – Share Transfer – July 2010
- Friends Life Group Limited – Share Transfer – 10 April 2015
- Japan Residential Investment Company Limited – Cash – 30 December 2015
- Mariana Resources Limited – Cash and Share Transfer – 26 June 2017
- Avnel Gold Mining Limited – Share Transfer – 14 September 2017
- NYX Gaming Group Limited – Cash – 19 January 2018
- John Laing Infrastructure Fund Limited – Cash – 28 September 2018
- MedicX Fund Limited – Share Transfer – 14 March 2019
- HWSI Realisation Fund Limited – Cash – 9 September 2020.

This is not quite "decades" but certainly a significant length of time.

21. In the light of the above, I was, therefore, satisfied that the present Scheme, and schemes of this type, do constitute "arrangements between the company and its members" within the meaning of s 105 (1) of the Companies (Guernsey) Law 2008. Like Mann J, I might well not have come to this conclusion if presented with this proposition entirely afresh and without any considerations of previous authority and history, but like him I am also satisfied that it would not be right to undermine the understanding, which has clearly pertained in Guernsey for at least the last 13 years, that such a scheme of arrangement can be authorised and implemented under Part VIII of the Law.

22. For those reasons I was content to give the relevant directions to hold the necessary meetings for the prospective implementation of this Scheme of Arrangement under the jurisdiction conferred on the Court by s.105 (1) of the Companies Guernsey Law 2008, on the grounds that it is an "arrangement between the Company and its members" within the meaning of that section.

Her Honour Hazel Marshall KC
Lt Bailiff
20th June, 2023