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

Judgment handed down: 24 February 2017

Before: Sir Richard Collas, Bailiff

Advocate for the Applicant: Advocate J P Greenfield & Advocate A D Lane

Advocate for the Respondents (Aralon and Nortrust): Advocate A R Lyall

Cases, texts and laws referred to:

The Companies (Guernsey) Law, 2008, as amended
Buckley on the Companies Acts
Re International Harvester Co of Australia Pty Ltd [1956] VR 669
Re Savoy Hotel [1981] Ch 351
Re T&N Ltd & Ors [2006] EWHC 1447
Re TDG plc [2008] EWHC 2334 (Ch)
Re National Bank Ltd [1966]1 WLR 819
Re Montenegro Investments Limited (In Administration) [2013-14] GLR345
Re Assura Group Limited (Royal Court, unreported 27th January 2015)
Re Telewest Communications PLC (NO 2) [2005] 1 BCLC 772)
Re TDG PLC [2009] 1 BCLC Ch D 445

The Application

1. Puma Brandenburg Limited, a Guernsey registered company (the "Applicant" or the "Company") represented by Advocates Greenfield and Lane sought the Court's approval for a Scheme of Arrangement further to the provisions of Part VIII of the Companies (Guernsey) Law, 2008, as amended (the "CGL"). On 10 November 2016, I ordered the convening of the court meetings of all members of the Company other than its majority shareholders, Mr and Mrs Howard Shore, to consider a proposed Scheme of Arrangement ("Scheme of Arrangement" or the "Scheme") between the Company and the members other than Mr and

Mrs Howard Shore. If approved, the effect of the Scheme would be to authorise the acquisition by the Company of all the shares held by those members so as to place the Company in the sole ownership of Mr and Mrs Howard Shore.

2. The court meetings were duly held and the required majorities of those attending and voting was attained to enable the Scheme of Arrangement to return to Court for approval at a sanction hearing (the "Sanctions Hearing"). At the Sanctions Hearing, the Application was opposed by Aralon Resources and Investment Company Limited, the beneficial owner of shares held by a nominee, Nortrust Nominees Limited (together "Aralon"). Aralon is a minority shareholder in the Company and was one of the members who voted against the Scheme of Arrangement at the court meetings.

3. The grounds of objection raised by Aralon, for whom Advocate Lyall appeared at the Sanctions Hearing, went both to matters of the Court's jurisdiction to sanction the Scheme and to the exercise of its discretion if the Court were to hold that it had jurisdiction. The issue concerning jurisdiction arises from section 313(3) of CGL which provides that a shareholder must give consent to any acquisition by a company of his or her shares in the company and hence the Court could not authorise such acquisition through a scheme of arrangement. The matters pertaining to the exercise of the Court's discretion were (i) the rationale for the Scheme was disproportionate; (ii) the proposed price to be paid for the shares was unfair and no explanation had been provided as to how the price had been arrived at; (iii) the constitution of the classes of shareholders at the court meeting resulted in some members being able to vote when they had conflicting interests; (iv) the disclosures made by the Company to the members in the "Scheme Circular" that had been circulated prior to the court meetings was deficient; and (v) the Court should refuse to give its blessing to the Scheme on the ground that there was a 'blot' on the Scheme.

The Company

4. The Company was formed on 17 February 2006 for the purpose of raising capital for investment in German real estate assets. It has been involved in two amalgamations, in 2009 and 2012. The purpose of the first amalgamation was for Shore Capital Group plc to acquire the Company. Mr and Mrs Howard Shore's majority shareholding in the Company derives both from their shareholding in Shore Capital Group Ltd and also from the subsequent acquisition by them of shares from other shareholders. The majority of the current shareholders in the Company were originally shareholders in Shore Capital Group Ltd and became shareholders in the Company following the demerger of its then parent from Shore Capital Group Ltd and the subsequent amalgamation of the Company with its parent in 2012.

5. The Company has continued to invest in German real estate assets and wishes to pursue and expand its investment strategy, not only in Germany but internationally. The board of the Company sees a strong future in that investment market which, it is claimed, has resulted in a divergence of ambition between the Company and the majority (by number) of its shareholders who never intended to invest in such assets but have only become shareholders as a result of the two amalgamations and the demerger. The Scheme provides a tax-efficient method that would enable members (other than Mr and Mrs Howard Shore) to realise their investment in shares that otherwise are not readily saleable and where there may not be another liquidity event that would enable them to do so.

6. The directors of the Company are Mr Howard Shore who has excluded himself from the board meetings convened in connection with the Scheme, Hermanus Troskie ("Mr Troskie") and Werner Klatten. It is the last two named directors who approved the details of the Scheme on behalf of the Company. As at 28 October 2016, there were in issue 22,692,112 ordinary A shares and the same number of ordinary B shares, all of no par value. The A shares carry no rights to receive dividends but carry a right to share in the surplus on a return

of assets on a liquidation and the right to receive notice and vote at general meetings. The B shares carry the right to dividends but no right to share in the surplus on a return of assets on a liquidation. B shares carry the right to receive notice of but not vote at general meetings.

7. In the Act of Court of 10th November, I ordered that there be two court meetings, both to be held on 1st December, the first to be for holders of A shares and the second for B shareholders. Mr and Mrs Howard Shore were excluded from both meetings so the persons attending and eligible to vote at each meeting were the minority shareholders in respect of which there was one class only at each meeting.

The Court Meetings

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 CGL.

Scheme of Arrangement – The Statutory Provisions in Part VIII of CGL

11. Section 105(1) of CGL 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 CGL, and an amalgamation or a migration, may be effected under the provisions of Part VIII of CGL 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 Aralon 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.

15. The other two sections in Part VIII of CGL are not relevant to the present matter.

The Jurisdictional Challenge

16. Aralon's challenge to the Court's jurisdiction to sanction the Scheme relies upon the provisions of the CGL relating to the acquisition by a company of its own shares. Section 312 permits such acquisition if authorised under the memorandum or articles of association of the company. The nub of the submission is that section 313(3) provides that *"The company must obtain the consent of the shareholders whose shares are being acquired to that acquisition".* In summary, the submission is that section 313 cannot be overridden by Part VIII of the CGL and requires the express consent of the shareholder. As a matter of statutory construction, a general provision cannot override a specific provision. Consequently, the court does not have the power to authorise a scheme of arrangement the purpose, or effect, of which is to authorise a company to acquire its own shares from a member who has not expressly consented to sell to the company.

17. In reply, the Company submits that it is not seeking to avoid the provisions applicable to the acquisition by a company of its shares; it will comply with all the requirements of the CGL, including section 313. The consent of shareholders would be obtained if the Court were to sanction the Scheme.

18. On behalf of Aralon, Advocate Lyall cited a passage from *Buckley on the Companies Acts* regarding section 895, the English equivalent of section 105 of CGL:

> *"All modes of reorganising the share capital of a company, even when involving an interference with preferences or special rights attached to shares by entrenched provisions of the articles or by the memorandum can be effected as part of an arrangement with members under CA 2006, Pt 26. This is, however, subject to the qualification that if the arrangement involves anything (eg a reduction of capital) for which other sections of the CA 2006 prescribe special formalities, then such formalities must also be complied with. If it is desired to convert issued shares into redeemable preference shares, the scheme should provide for a reduction of capital by cancelling the issued shares and a re-increase by the creation of redeemable preference shares of an equivalent amount. Where a proposal involves the treatment of members holding shares of the same class in different ways, the practice of the*

court is to require that it be carried out as a scheme of arrangement under what is now CA 2006, Pt 26 because of the greater protection provided by this section."

19. The above passage relates to the reorganising of share capital and not to the acquisition by a company of its own shares, but I accept the principle that if the arrangement involves anything for which another section of the Law prescribes special formalities, then such formalities must also be complied with. Advocate Greenfield did not dispute that was so; hence his submission that section 313 will be complied with by the Company. I also accept Advocate Lyall's submission that a scheme which would evade a restriction imposed by the Law would be *ultra vires* and unlawful (per Re International Harvester Co of Australia Pty Ltd [1956] VR 669 at 672).

20. Advocate Greenfield submitted that the word "arrangement" in Part VIII of CGL is to be given a broad meaning, following decisions of the courts of England and Wales, including Re Savoy Hotel [1981] Ch 351 (Nourse J as he then was) and Re T&N Ltd & Ors [2006] EWHC 1447 (David Richards J) and of Australia such as Re International Harvester. The principle was accepted by me in the present matter at the *ex parte* hearing on 10 November last year. The arrangement between a company and its members is indeed an "arrangement" and hence within the scope of Part VIII of CGL and it was on that basis that I ordered that the court meetings be convened. The potential conflict with the provisions of section 313(3) was not drawn to my attention at that time (as far as I can recall) so I am not precluded from considering it in this *inter partes* hearing. In any event, both parties accept that the Court cannot sanction the Scheme unless the provisions of the legislation have been complied with.

21. In Re TDG plc [2008] EWHC 2334 (Ch), Morgan J cited with approval the decision of Plowman J in Re National Bank Ltd [1966]1 WLR 819 in which he said that: *"The judge, in short, did not see any reason why a party should not be able to rely upon the scheme of arrangement provisions, with the safeguards and checks and the balances contained in them, rather than a different set of statutory provisions, which were structured in a different way and were to be operated in a different way."* However, that passage would not assist the Company if, as Aralon submits, the scheme of arrangement provisions are not available in respect of a buyback scheme.

22. Advocate Greenfield said that, unlike the CGL, the legislation in England and Australia does not expressly spell out that the consent of the parties is required when a company seeks to acquire the shares of its members. Similarly, section 311 of the CGL dealing with the terms and manner of redemption of shares by a company does not state that the company must obtain the consent of shareholders. He questioned why the Guernsey legislature would have effected a change to the law from that in comparable jurisdictions by spelling out that consent is required to a share buyback. There was no mischief to be addressed and nothing to be achieved by such a change. There is nothing in the policy letters or other preparatory materials to explain the rationale or to indicate that the legislature intended to make such a change.

23. A scheme of arrangement can be used to give effect to a takeover of a company where there are a minority of dissentient or non-assenting members of the company or of a class of members. The CGL enables a third party to achieve a takeover in that manner and it is illogical that the statute would enable a third party to proceed by means that are not available to the company itself or to a member or class of members of the company.

24. He said that the Company has been alert to complying with the provisions of the CGL, including section 314 which expressly provides that a company may only acquire its own shares in pursuance of a contract authorised by a special resolution of the company (save for a market acquisition where authority is obtained in accordance with the formalities set out in section 315). In order to seek to comply, the Company passed a special resolution authorising

the terms of acquisition of the Class A and Class B Shares following the court meetings. Whilst the Scheme is not a contract, it sets out the terms on which the Shares are to be acquired.

25. Where there is a third-party takeover, the consent of the dissenting or non-assenting members is, in effect, obtained through the scheme of arrangement sanctioned by the court. Advocate Greenfield submitted that in respect of a buyback, the approval of the statutory majority of the class of members obtained through the court meeting and the sanction of the court to the scheme of arrangement is the means of providing the requisite consent.

26. Advocate Greenfield's submissions are very persuasive and I was initially attracted by them but I have difficulty reconciling them with the provisions of the CGL. Other jurisdictions and their procedures are only persuasive to the extent that the legislation and other circumstances are comparable. There is no express reasoning to be found to explain why the Guernsey legislature enacted section 313(3) of CGL. However, there is no need to look for any rationale to assist in the interpretation of words used where those words are clear and unambiguous.

27. I accept that in Part VIII of CGL, "arrangement" is to be given a broad meaning to include any arrangement between a company and its creditors or, as in the case, its members or a class thereof. Section 105(2) illustrates certain types of arrangement included in the definition but they are not exhaustive. On its true meaning, an "arrangement" is capable of including the acquisition by a company of its own shares.

28. Section 106(1) specifies certain types of arrangement that may be effected in accordance with Part VIII of the Law and not the provisions of those parts of the Law that deal expressly with such arrangements. If the acquisition by a company of its own shares had been included in the list of arrangements in section 106(1), there would be no argument; there would have been no requirement to comply with section 313 by obtaining the consent of members. However, a share buyback is not one of the specified arrangements. Consequently, a scheme of arrangement to give effect to the acquisition by a company of its own shares must be effected both in accordance with the provisions of Part VIII and in accordance with the other provisions relating to a share buyback including sections 313 and 314 of CGL.

29. Both parties would agree with the generality of that last statement. The issue is how to obtain consent. I have difficulty with the Company's submissions that the consent of the dissenting or non-assenting shareholder to the acquisition by the Company of its shares can be provided by the statutory majority at the court meeting and the subsequent sanction of the court. The material part of section 110(4)(a) provides that an "*arrangement sanctioned by the court is binding upon the class of members*". The operative verb is "*binding upon"*, the natural meaning of which is to "*impose legal obligation upon"*. A legal obligation requires someone to do something whether or not they consent or, to put it another way, where someone is obliged to do something it matters not whether they are consenting to do it because they are obliged to do so. The imposition of legal obligations does not fit comfortably with the requirement under section 313(3) that "*the company must obtain the consent of the shareholders whose shares are being acquired to that acquisition"*.

30. Advocate Lyall interpreted the section as requiring the "individual" or "express" consent of the shareholder and was criticised by Advocate Greenfield for attempting to insert additional language into the section. In my judgment, such words do not need to be inserted; they are to be inferred from the natural meaning of the section. To "*obtain the consent of the shareholder*" means that the shareholder must give his agreement. It would be different if the section had not specified that it is the shareholder who must consent. The section could have been worded in more general terms that could have left scope for interpreting the section as

providing that consent could have been given by the court in place of the shareholder. My interpretation is that it is the shareholder from whom consent must be obtained.

31. There is a difference between a court order that an act be performed and an order that someone give consent. There are many instances where the court has power to order someone to do something (or to refrain from doing something). For instance, in order to give effect to a scheme of arrangement to enable a takeover of the Company by a third-party the court may order a shareholder to transfer his shares to another person. Advocate Lane, in his second affidavit, confirmed that in such a case the shareholder may not be required to sign the instrument of transfer and may not see the instrument. In that case, the shareholder is not required to consent and is not ordered to do so.

32. In conclusion, I am persuaded that the effect of section 313(3) is that the shareholder must give consent to the acquisition of his shares by a company. The Court does not have power to order him to do so, nor to substitute the court's consent for that of the shareholder. Thus a scheme of arrangement under the CGL cannot be used where a company is seeking to acquire the shares of a member who does not want to sell to the company.

Discretionary Factors

33. Having decided that the Court does not have jurisdiction to sanction the Scheme, there is no need to proceed to consider the discretionary factors, but I will do so for completeness.

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.

35. Counsel for both parties accepted those were the relevant principles and also accepted that in applying them, the Court should bear in mind the following:

    "*(1) The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme."* (*Buckley on the Companies Acts*, paragraph 45.54)

    "(2) In commercial matters members or creditors are much better judges of their own interests than the courts… The court will be slow to differ from the

meeting." (David Richards J in Re Telewest Communications PLC (NO 2) [2005] 1 BCLC 772); and

"(3) It is also right to record that the court does not act as a rubber stamp simply to pass without question the view of the majority but, equally, if the format as I have referred to are all demonstrated, the court should show reluctance to differ from the views of the majority, and should certainly be slow to differ from the majority, on matters such as what an intelligent, honest person might reasonably think." (Morgan J in Re TDG PLC [2009] 1 BCLC Ch D 445)

36. The specific objections raised by Aralon are:

"(1) The Scheme is not fair and reasonable. The rationale for it is disproportionate and it is unnecessary. The minority shareholders who wish to sell at the proposed price could be free to do so. It is unfair that other minority shareholders are to be compelled against their will.

(2) The price proposed in the acquisition of six Euros per unit (each comprising an A Class and B Class share) is stated to be a 43.6% discount to NAV with no justification for such a discount and no explanation as to how the price had been arrived at.

(3) A number of minority shareholders had given irrevocable commitments to vote in favour of the scheme including Mr Howard Shore's brother, Mr Graham Shore who represented 27.85% of the A shares and 27.64% of the B shares in the two classes convened for the court meetings. The shareholders have business relationships with Mr Howard Shore and Shore Capital Group which were not fully disclosed in the scheme circular.

(4) The disclosure given by the Company in the Scheme Circular was deficient."

37. There is some considerable overlap between the several objections. The fundamental issue is the divergence of ambitions between those shareholders looking to realise their investment in the Company and the others who wish to remain invested either for the longer term or because they hope for a better price. The Company is neither an investment fund nor is it publicly traded, but it is an unlisted closed-ended property investment company. There is no ready market for its shares. The rationale for the Scheme is that the Company has the funds available to enable it to purchase shares and that the Scheme provides a tax efficient opportunity for those minority shareholders who are not looking for a long-term investment to realise the value of their shares. The sole purpose put forward in the Scheme Circular is to provide a liquidity event for minority shareholders. The purpose suits some shareholders but not others.

38. The price offered was at a premium over the price paid for the shares in recent transfers of the Company's shares. Thus it 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. (Aralon's criticism of the lack of any independent valuation evidence in the Scheme Circular was not in my view justified, the Company relied upon the valuation evidence that had been included in the audited accounts as at 31st March 2016 and shareholders could form their own view as to how the market values might have moved in the meantime.)

39. Aralon's complaint is that the shares were worth substantially more in the longer term than the offer price. It was not known what might be the true value of the shares. For example, there was nothing to advise what price a third-party purchaser might offer for the shares of the

Company. Shareholders looking to sell an illiquid asset will accept a lower price than those who are invested for the longer term. It may well be that a third-party purchaser looking to take over the Company would have to offer a higher price. A takeover offer would have to be attractive to Mr and Mrs Howard Shore and whilst they were content to allow the Company to acquire shares at the offer price, there is no evidence to suggest that they would sell their own shares at that price.

40. Aralon produced evidence of other recent share acquisitions to show that it is normal in a takeover for the offer price to be at a premium to the prices at which shares had recently been traded. Whilst there was no evidence to show how the price at which those shares had been traded related to the NAV of the companies, the inference to be drawn is that the offer price would have been closer to the NAV than the offer price in the present Scheme.

41. Aralon contend that the requisite majority was only achieved at the court meetings because of the votes cast by those shareholders with business relationships of one sort or another with Mr Howard Shore and, in particular, the number of votes wielded by Mr Graham Shore. In support of its case, it submitted affidavit evidence detailing the business connections of a large number of the minority shareholders and which had not been disclosed in the Scheme Circular. It is not apparent to me that there was any requirement those connections should have been disclosed. There is no evidence of any undisclosed payments or other benefits passing to, or being promised to, any of those shareholders. Good faith is always to be presumed and in the absence of evidence to the contrary, it is to be presumed that those shareholders voted in accordance with their best interests.

42. That is the real issue in this case. Was it sufficient for members to vote in accordance with the best interests of each shareholder when, within the class of members, 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 assets in the longer term? 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.

44. In paragraph 1.8 of the Letter of Recommendation from the Independent Directors to the members included with the Scheme Circular, the independent directors wrote:

> *"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."*

45. In that sentence, the independent directors were acknowledging that there were some shareholders whose wishes would not be met, namely those (other than Mr and Mrs Howard Shore) whose investment objectives were aligned with the Company's objectives. 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.