

ROYAL COURT
(Samedi Division)

39

22nd February, 1996.

Before: The Deputy Bailiff, and
Jurats Bonn and Vibert.

In the matter of Plus 500 Emerging Markets High
Yield Fund, Limited ("the Company").

Representation of the Company.

On 16th February, 1996, the Company sought the Court's sanction to a Scheme of Arrangement under Article 125 of the Companies (Jersey) Law, 1991, between the Company and holders of Participating Redeemable Preference Shares in the Company, by which the assets and liabilities of the Company are to be transferred to Plus 500 Emerging Markets Dollar Income Fund, Ltd., (the "Transferee Company").

The Court adjourned to allow further submissions to be prepared on whether, on a true construction of Article 125 (1) of the said Law:

- (1) it is an absolute requirement that the Court must order that a meeting of the creditors or class of creditors, or of the members or class of members (as the case may be) of the Company shall be called before the Company is able to seek the sanction of the Court to the Scheme of Arrangement; and
- (2) if the Court holds in respect of (1) above that a meeting must be ordered by the Court, whether the Court is empowered to order that a meeting be called in such a manner as to take account of the holding of an Extraordinary General Meeting of the shareholders of the Company on 14th February, 1996, to consider the Scheme of Arrangement.

Advocate A.O. Dart for the Representor.

JUDGMENT

5 THE DEPUTY BAILIFF: This is a representation made by a company called Plus 500 Emerging Markets High Yield Fund Limited. It is made under unusual circumstances. It is supplemental to a Representation which was presented to the Court by the Company on Friday 16th February, 1996, whereby the Company sought the sanction of the Court to a Scheme of Arrangement under Article 125 of the Companies (Jersey) Law, 1991, between the Company and the holders of Participating Redeemable Preference Shares in the Company, by which the assets and liabilities of the Company were to be transferred to Plus 500 Emerging Markets Dollar Income Fund Limited, and the holders of the Participating Shares and the

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nominal shares in the Company were to be allotted the appropriate number of Participating Shares and nominal shares in the transferee Company.

5 When we sat on the 16th February, 1996, at a set time after
the Samedi Court's public business, it was pointed out to Counsel
representing the Company that we had, yet again, problems under
Article 125 of the Companies Law, in that all the consents had to
10 be obtained prior to the Court's sanctioning the procedures to be
adopted. Article 125 states that it is an absolute requirement
that the Court must order a meeting of the creditors, or class of
creditors, or members or class of members, as the case may be, of
the Company, in order to obtain the sanction of the Court to the
Scheme of Arrangement pursuant to Article 125 of the Law.

15 Mr. Dart, on behalf of the Company, has considered the matter
and now submits argument which gives us some comfort although, of
course, we cannot depart from the strict requirements of the Law.

20 In the present case, a meeting has been convened and held,
and resolutions have been passed at that meeting by a unanimous
vote of those represented at the meeting - being more than the
majority required for the purposes of Article 125 (2) of the Law -
25 in all respects in a manner in which such a meeting might have
been called by the Court pursuant to Article 125 (1) of the Law
had sanction been obtained.

30 We were told that representatives of the managers of the
Company had contacted each of the holders of the Participating
Shares of the Company, and we were told that seven proxies had
been obtained for the nineteen shareholders, but in respect of
those shareholders who were not represented, all shareholders of
the Company are now in favour of the Scheme of Arrangement.

35 Accordingly, if the sanction of the Court had been obtained
and matters had proceeded in the normal way, then everything would
have been done in conformity with the Law.

40 The Company has submitted to us that there is a problem
because the holders of the Participating Shares in the Company,
all of whom are in favour of the amalgamation proposed by this
Scheme, could suffer prejudice if the Scheme does not become
effective on 1st March, 1996, and that is because, in anticipation
45 of the Scheme of Arrangement becoming effective, the Company has
already liquidated or taken steps to liquidate its investments,
and of course, this being a volatile market, in the event of the
markets performing well, where the company holds cash only, the
value of the interests of the holders of Participating Shares in
the Company will tend to suffer as compared to the value which
50 those interest would have had if the Company had remained fully
invested.

Further, it is apparent that at least one holder of the Participating Shares in the Company other than West Merchant Bank Limited, has given notice of its desire to redeem such shares on the 29th February, and this redemption could take place at a lower value than would otherwise be the case if the Scheme of Arrangement is delayed. Finally Advocate Dart draws to our attention that Article 125(1) of the Law permits the Court to call a meeting in a manner in which the Court directs and Advocate Dart has submitted that this confers to a certain extent upon the Court, a discretion.

His prayer is in two forms. The first, of course, asks that the matter be dealt with retrospectively. That we cannot do. We are not only bound by the provisions and strict requirements of the Law but we are assisted by the recent Judgment in the Representation of Royal Bree's Hotel Limited (1st July, 1994) Jersey Unreported. In that case the learned Bailiff said certain things which we must note carefully. He said on page 2:-

"That being so.. that is the requirements of Article 125, "...it is important, in the Judgment of this Court, that the statutory procedures which are designed to protect the interests of minority creditors should be strictly observed." Then the Court went on at page 3 to say this:- *"Counsel invited us - if we were to find that the statutory procedure had not been observed - to make a retrospective order so that the meeting which has already taken place could be regarded as the statutory meeting provided for in paragraph (1). We do not feel able to make such an order nor do we feel able to accede to the alternative request which was that the matter should be adjourned for one week so that service of the representation and affidavit in support could be made upon the unsecured creditors who had not agreed with the compromise. The reason for that is that it appears to the Court that that would not adequately protect the unsecured creditors who have not given their consent to the proposed compromise."*

We should perhaps point out that in this case there are no unsecured creditors, the creditors are in fact the managers and promoters of the scheme which is well run.

Finally the Court went on to say this:-

"One of the important proposals that was made and was indeed accepted by the Court was that a particular person should be appointed as Chairman of the meeting and that that person would be directed to report the results of the meeting to the Court."

5 This appears to us to be an important provision because
if a compromise is not unanimously agreed, it is
important that the Court should be informed and should
be satisfied as to the reasons why the minority of
creditors have not given their consent. Without that
information it is difficult for the Court to exercise
satisfactorily the discretion which it has to decide
whether or not to sanction the compromise in the
aftermath of the meeting."

10 So the request that we should look upon the matter
retrospectively is one which, Mr. Dart readily concedes, we cannot
follow but he has submitted an alternative and that alternative we
are quite happy to follow. It may well be that we will have to
15 regard the proxies already filed with the Registrar as being the
proxies returned for the purposes of this meeting, and human
nature being what it is, it may well be that those who are sent
additional proxy forms within such a very short period of time may
not understand the urgency of the matter and may not return those
20 proxy forms at all. But the chairman of the meeting can report
that matter to us when he is required to do so within the
requirements of the law. Therefore, we need only, I think, to
follow the alternative suggestion that Mr. Dart has put forward in
his prayer at paragraph 2, and this the Court is quite happy to do
25 in the particular circumstances of this case knowing that there
are no unsecured creditors. Therefore distinguishing this case
from Royal Bree's Hotel Limited, we order as required, namely:

30 (1) that a meeting of the shareholders of Participating
Shares in the Company other than any Participating
Shares beneficially owned by West Merchant Bank
Limited (the shareholders convened to such meeting
being hereinafter called the "Independent
35 Shareholders") be called pursuant to Article 125(1)
of the Law for the purposes of considering and if
thought fit agreeing (with or without modification)
to the Scheme of Arrangement proposed to be made
between the Company and the holders of the
Participating Shares;

40 (2) that the said meeting shall be held at 3.00 p.m. on
Tuesday, 27th February, 1996, at Kleinwort Benson
House, Wests Centre, St. Helier, Jersey;

45 (3) that each of the Independent Shareholders of the
Company shall be notified of the meeting by sending
to such Independent Shareholders by facsimile
transmission

50 (i) the Chairman's Letter to Shareholders dated
19th January, 1996, (but not the documents
stated to be enclosed therewith);

- 5 (ii) the Explanatory Statement and Comparison of Key Features as required pursuant to Article 126 of the Law as contained in the Schedule to the First Representation;
- 10 (iii) a Notice of Meeting of Independent Shareholders in a form identical to the Notice contained in the Schedule to the First Representation (save as to the description of the nature of the meeting and the date of the meeting);
- 15 (iv) a Proxy Form for use at such Meeting of Independent Shareholders; and
- 20 (v) an explanatory letter to explain that this meeting is being called pursuant to the requirements of the Court and the Law and explaining the matters contained in (4) and (5) below and confirming that any shareholder may require a copy of the documents stated to be enclosed with the Chairman's Letter to be faxed to him;
- 25 (4) that all proxy forms completed and returned to the Company in connection with the meeting held on 14th February, 1996, shall continue to be valid and effective in respect of the meeting called for 27th February, 1996, unless countermanded or revoked by receipt of a further proxy form from each Independent Shareholder and that all Independent Shareholders shall be notified accordingly;
- 30 (5) that any shares in the Company held by West Merchant Bank Limited or by any subsidiary or associated company shall be disqualified from attending or voting at the said meeting;
- 35 (6) that Martin Angus Taylor or failing him Philip Malet de Carteret shall be appointed Chairman of the said meeting and be directed to report the results thereof to the Court;
- 40 (7) that voting at the said meeting on the resolution contained in the said Notice or any amendment thereto shall be by poll and that the manager of the Company namely WMB Asset Management (Jersey) Limited shall be appointed to act as scrutineer;
- 45 (8) that without prejudice to the general powers and discretions of the Chairman of the said meeting,
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5 the Chairman shall in particular have authority, if
it appears to him that it is likely to be
impracticable to hold or continue the meeting
because of the numbers of such holders or their
proxies present or wishing to attend, to adjourn
the meeting to such other time and place as he
shall determine without any requirement to give
notice should the meeting be adjourned for a period
10 less than 14 days and furthermore either for the
purposes of the said meeting or any adjournment
thereof arrangements may be made by the Chairman of
the meeting such that he should preside at the
place specified in the notice, or in the case of
any adjournment at the place determined by him, in
15 each case on the basis that such place is the
principal place at which the meeting is held but so
that provision is made for simultaneous attendance
and participation in the meeting at other places as
directed by the Chairman by persons otherwise
20 entitled to attend the meeting provided they shall
be able to hear and be heard by the persons
attending at the principal place and at such other
places. That such arrangements for simultaneous
attendance at more than one place may include
25 arrangements for controlling the level of
attendance at any of such places provided that they
operate so that any person excluded from one place
shall be able to attend at one of the other such
places to which he is directed.

30 (9) that the First Representation (which the
Representor will seek leave to amend to reflect the
order of the Court made pursuant to this
Representation) be adjourned until Wednesday 28th
35 February, 1996, at such time as the Court may order
for the purpose of receiving the report of the
Chairman of the said meeting and to consider
whether to sanction the Scheme of Arrangement".

40 We will sit again on Wednesday, 28th February, at a time to
be agreed when I hope that this matter can be put to rest and that
matters can proceed as originally intended when the matter first
became before us.

Authorities

Companies (Jersey) Law, 1991: Articles 125, 126, 127.

Companies Act 1985 ss. 425, 426, 427.

Palmer's Company Law: pp. 12021 - 12026.

Representation of Royal Bree's Hotel, Limited. (1st July, 1994)
Jersey Unreported.