BERMUDA

SUPREME COURT

In the Matter Of Dominion Petroleum Ltd and In The Matter Of The Companies Act 1981 S99, 2011 Civil Jurisdiction (Com) No. 428 [Original Location: SC Vol. 76 P 177] (3 February 2012)

COMPANIES - SCHEME OF ARRANGEMENT - CLASSES - SHAREHOLDERS SCHEME

Dominion, a Bermuda exempted company listed on AIM engaged in oil and gas exploration in East Africa, sought the court's sanction of a scheme of arrangement under Section 99 of the *Companies Act, 1981* whereby Dominion would merge Ophir plc, another AIM listed company, also in the business of East African oil and gas exploration. The scheme was a share cancellation scheme where shareholders of Dominion would receive 0.0244 Ophir shares for each of their scheme shares.

Directions were obtained and a shareholders meeting was convened in November 2011. There was one class of shareholders, namely the holders of the common shares in Dominion. The scheme was approved by a resounding majority. A shareholder and former officer and employee objected to the scheme. His objections were summarised by the Court as: (1) the Board of Directors was improperly constituted since November 2008 and not capable of validly promoting the Scheme; (2) the constitution of a single class of shareholders for voting purposes was said to be erroneous in law having regard to the distinctive interests of certain noteholders and officers. The note holders were also shareholders and the notes were to be paid in full as a condition of the scheme proceeding; and (3) the Company had failed to disclose material facts in the Scheme alleging that the votes of certain noteholders placed them in a different class and their votes should be disregarded on fairness grounds.

The Court sanctioned the scheme. The Court held that notwithstanding the fact that at one time the board had been invalidly constituted, it was validly constituted when the Board resolved to promote the scheme. On the issue of classes, the Court held that the need for separate classes of shareholders "*is to be determined by dissimilarity of [share] rights not dissimilarity of interests*": applying the principles set out by Nazareth J (as he then was) in In *re Industrial Equity (Pacific) Ltd.* [1991] 2 HKLR 614 at 624; *Re BTR plc* [2000] 1 BCLC 740 at 747-748. The Court confirmed the well-known elements necessary for the sanction of a scheme. The Shareholder had claimed that the payment to noteholders under their notes was unfair as, he argued, the market value of the notes was on his case below their face value. The Court held on the facts that the scheme was not unfair as the noteholders were simply getting no more than their express contractual rights. The Court went on to hold that the material non disclosure arguments were wholly lacking in substance.