S- MAR-10
(EJ)

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO. FSD0066 OF 2010

IN THE MATTER OF THE COMPANIES LAW (2009 REVISION)

AND IN THE MATTER OF XL CAPITAL LTD (THE PETITIONER)

IN CHAMBERS
BEFORE THE HON. CHIEF JUSTICE
Heard on the 3RD MARCH 2010

Appearances: Mr. Colin McKie and Ms. Caroline Moran of Maples and Calder for the Petitioner (with them Mr. Rhic Webb, General Counsel for Europe and Asia of the XL Capital Group)

RULING

1. On 3rd March 2010, I heard and granted the Petitioner's ex parte application for an order pursuant to Section 86 of the Companies Law (2009 Revision) that it be at liberty to convene meetings between itself and the three separate classes of its shareholders for the purpose of considering and, if thought fit, approving a proposed scheme of arrangement ("the Scheme").

2. I then promised to provide a brief ruling giving of reasons for that order, for the consideration of the directors and shareholders upon their contemplation of the Scheme. These are those reasons.

3. Section 86 of the Companies Law vests in the Court a discretion whether or not to order a meeting of a company's creditors and shareholders (or of any class of them) for the purpose of considering a compromise or arrangement as between

them and the company. Section 86 does so in these terms (relevant to the present circumstances involving not creditors but only shareholders):

> *"86(1) Where a compromise or arrangement is proposed between a company and its ...members or any class of them, the Court may, on the application of the company...or member of the company...order a meeting of the...members of the company or class of members, as the case may be, to be summoned in such manner as the Court directs."*

4. The section goes on in subsection 2 to explain that if at a Court-directed meeting a majority in number representing at least seventy-five per cent in value of the members or class of members present and voting either in person or by proxy agree to any compromise or arrangement; that compromise or arrangement if later sanctioned by the Court, shall become binding on all the members or class of members as the case might be, and also on the company itself.

5. The meetings proposed to be convened will be of the following three separate classes of shareholders:

   (a) the holders of the Class A ordinary shares issued by the Petitioner with a par value of US$0.01 per share (the "Ordinary Shares");

   (b) the holders of the Series C preference ordinary shares issued by the Petitioner with a par value of US$0.01 per share (the "Series C Preference Shares"); and

   (c) the holders of the Series E preference ordinary shares issued by the Petitioner with a par value of US$0.01 per share (the "Series E Preference Shares").

Objects and reasons for the Scheme

6. As stated in the affidavit of Kirstin Romann Gould, the General Counsel and Secretary to the Petitioner, the principal object of the Scheme is to change the location of the ultimate holding company of the XL Capital Group from the Cayman Islands to Ireland and for the Petitioner to become a subsidiary of XL Group plc ("XL-Ireland"), a new public limited company that will be incorporated under the laws of Ireland.

7. This object will be achieved by the exchange by shareholders of their shares in the Petitioner for shares in XL-Ireland, commensurate with each class.

8. The board of directors of the Petitioner ("the Board") has approved of the Scheme, and considers that it is in the best interests of the XL Capital Group, the Petitioner and its shareholders, to change the place of incorporation of the ultimate holding company of the Group to Ireland.

9. The reason for this and that which has prompted the Court to provide this ruling is ultimately one of perception as set out at pages 39-40 of the Proxy Statement to Shareholders:

> *"Like many companies, we continually explore ways to optimize our corporate structure, including with respect to the jurisdiction of incorporation of our parent holding company. After conducting a thorough review with the help of outside advisors, our Board has determined that a change in place of incorporation is in the best interests of XL and its shareholders.*

We are subject to reputational, political, tax and other risks because of negative publicity regarding companies that are incorporated in jurisdictions, including the Cayman Islands, whose economies have low rates of, or no, direct taxation or which do not have a substantial network of double taxation (or similar) treaties with the United States, the European Union or other members of the OECD. Our Board believes that changing our place of incorporation will reduce these risks and offer the opportunity to reinforce our reputation, which is one of our key assets, and to better support our legal and business platforms.

Additionally, there have been, and could be in the future, legislative or regulatory proposals that could increase taxes for companies incorporated in jurisdictions such as the Cayman Islands. Although we do not believe that any proposals under current legislative or regulatory consideration would directly impact us if enacted, our Board believes that the incorporation of our parent holding company in the Cayman Islands increases the risk that legislative or regulatory proposals that might be enacted in the future could materially and adversely affect us.

After considering a number of locations, our Board ultimately selected Ireland as the best available alternative based on many factors, including:

(then follows a description of five areas of perceived advantages to be obtained by relocating to Ireland)."

10. Before granting an order for the convening of a Scheme meeting, the Court must be satisfied about a number of matters contemplated by the Law and Rules of Court and which are now fully explained in the case law. These are different from but related to, the considerations which must be satisfied if and when the matter returns to Court for its sanction, the Scheme meetings having been held; as to which see Section 86(2) and ***In Re National Bank Ltd. [1966] 1 WLR 819.***

11. As I stated at the outset of the hearing, having read the papers in advance; I was immediately satisfied about a number of matters:

(i) That the Articles of Association of the Petitioner permit of the kind of compromise and arrangement proposed for the Scheme; here the exchange of shares in the Petitioner for shares in XL-Ireland. The resolution of the company is a necessary prerequisite. See ***In Re General Oriental Invs. Ltd. 1997 CILR Note 6*** (and written judgment delivered on 27 June 1997).

(ii) That the Scheme is "an arrangement" within the meaning of section 86(1) of the Companies Law and so the Court's jurisdiction to grant the order is established. The term "arrangement" is to be construed broadly covering almost every type of legal transaction and the Scheme will be so classified so long as it involves an element of "give and take", having the approval of the company either by its Board or (as is proposed here) by a resolution of its members. See ***In the Matter of SIIC Medical Science 2003 CILR***

355; In Re NFU Development Trust Ltd. [1972] 1 WLR 1548, 1555; and *Re National Bank Ltd. [1966] 1 WLR 819, 829*.

I accept that the proposed exchange of shares in the Petitioner in return for shares in XL-Ireland would clearly be an arrangement within the meaning described in those cases.

(iii) As the Scheme would be a shareholder scheme involving a share for share exchange, the Scheme will not involve any compromise or reduction in respect of the assets or liabilities of the Petitioner or of the XL Capital Group as a whole.

This consideration addresses the implicit obligation of the Court to ensure that its approval is not given to an arrangement that could be used to defeat the statutory priority given to the interests of creditors of a company. I am satisfied that no such concern arises here.

(iv) That the relevant class (or classes) – here of shareholders – to be affected by the Scheme are ascertained and that, if there are differently constituted classes, different meetings are to be convened for each class with the composition of each class properly defined.

(See: *In Re Eurobank Corp. 2003 CILR 205; In Re General Oriental Invs. Ltd*. (above) and Grand Court Rules ("GCR") O. 120 R. 20 (3)(b).

12. A fifth issue, about which I was also satisfied subject to the discussion that follows, is very helpfully framed by Mr. McKie in his written submissions in these terms:

(v) Do the Scheme materials which are intended to be dispatched to the shareholders for use at the Court meetings and which comprise (i) in the case of the ordinary shareholders, the Proxy Statement, the meeting notices and the relevant form of proxy; and (ii) in the case of the Preference Shareholders, the Preference Shareholders Circular, the meeting notices and the relevant forms of proxy; conform with GCR O.102 R.20 and Practice Direction No. 1 of 2002 ("the Practice Direction").

13. The GCR O.102 R.20 and Practice Direction requirements are those about which I remain concerned such that I provisioned the orders with the caveat that the concerns of the Court as expressed in these reasons are brought to the attention of the meetings. O.102 R.20(4)(c) is to the effect that the proxy statement shall provide *"...shareholders...with all the information reasonably necessary to enable them to make an informed decision about the merits of the proposed scheme."* Practice Direction 3.4 is to similar effect.

14. These are not requirements that the Proxy Statement or Shareholders Circular shall condescend into every minute detail of the reasons relied upon by the directors for proposing the Scheme. Such a requirement in a typical case would be unnecessarily onerous and unreasonable. Given the already extensive nature of the documentation generated for the Scheme, a requirement to provide all the details of the information relied upon by the directors would also obviously result in increased and wasted costs.

15. Rather, I think that the true requirements of O.102 R.20(4)(c) are as explained by Neuberger, J. in ***Re RAC Motoring Services Ltd.*** *[2000] 1 BCLC 307, 328 e – g* in words which I adopt; (that judge himself relying on the earlier dicta from other cases):

> "...it is unnecessary for the directors to give to shareholders in a notice convening a meeting of this kind every piece of information which might conceivably affect their voting....It is sufficient if directors make a full and fair disclosure of all matters within the knowledge of the directors which would enable shareholders to make a properly informed judgment on the matters intended to be submitted to them. ...it should be sufficient to enable a person to make further inquiries."

16. While I do not criticise the sufficiency of the information provided by the Board in the Proxy Statement or Shareholder Circular, the reasons primarily given for the relocation from this jurisdiction are however, matters inherently of perception.

17. As such they may, arguably, be regarded as matters which are not given to being conclusively demonstrated.

18. This consideration in turn gives rise, in my view, to at least two distinct concerns about the manner in which matters of perception, such as these, may be taken by a meeting of shareholders (or for that matter, creditors) convened by order of the Court and who are at such a meeting, presented with a proposed scheme of arrangement for their approval.

19. The first is whether and to what extent these matters of perception may be viewed as carrying the imprimatur of the Court as being sound and proper reasons for a proposed Scheme.

20. It is certainly true that the policy behind the Scheme remains that of the directors who are responsible for the management and directions of the Company. It is also true that the reasons for their policy are in this (as in the typical case) *par excellence* commercial reasons in respect of which the Court should not seek to second guess or supplant the commercial judgment of the directors with its own.

21. Nonetheless, by its endorsement of the policy (and the reasons behind it) as being fit to be presented to a Court convened meeting, the Court will be regarded as implicitly having accepted it as being, at least ex facie, soundly premised on the basis presented by the directors. Indeed, if it were otherwise in the usual case, the Court should not grant the order at all. This is at least implicit in GCR O.102 R.20(3)(c) which requires that the affidavit(s) filed in support of the summons for directions for the convening of the Court meeting (s) shall contain "*such information as may be necessary to enable the Court to determine <u>whether</u> it should convene the meeting(s)* (my emphasis). The need for acceptance by the Court of the Scheme as being, at least *prima facie* soundly based; is also implicit in the use of the word "may" in Section 86 (1) of the Law in explaining the discretionary nature of the powers of the Court.

22. For these reasons, a summons in support of a petition for a Scheme which is not supported by credible evidence will be dismissed. Indeed, where it appears from the defective state of the evidence presented in support of the summons that the

petition itself will be unsustainable, the petition will also be dismissed at the earlier stage of the summons without being allowed a full hearing. This was demonstrated in the recent case of ***In the matter of Orient Petroleum International Inc.*** *Cause FSD 26 of 2009* written judgment delivered by Andrew Jones J. on 18th December 2009 in this Court.

23. Simply put, the objective of the Scheme must be transparently sensible and this can be shown only by credible evidence in support.

24. Against that background of the discussion of the nature of its jurisdiction; in allowing this Scheme to be presented to shareholders premised, as it is, evidentially on matters inherently of perception; I believe the Court must be astute to emphasise– where it is the case as I so regard it here – that these perceptions are those of the directors and not those of the Court and are not to be regarded as having been accepted by the Court as being correct.

25. This, I believe, is an appropriate caveat to lay down in this case, even while acknowledging that the perceptions, having regard to the factors on which they are based, are such as might nonetheless be regarded as reasonably held by the directors.

26. The second concern is the related and obvious concern whether the shareholders will be provided with sufficient information by the Proxy Statements or Circulars as presently framed to enable them to arrive at their own informed decisions on these matters of perception.

27. I concluded that this concern about the sufficiency of the documents, was in itself insufficient basis for denying the summons for the convening of the meetings,

primarily because the shareholders will certainly be well enough informed to be able to debate the issues and, if they wish, press for further information from the directors or obtain further information elsewhere themselves.

28. Nonetheless, an obvious avenue of inquiry which, it seemed to me, has not been explored, is the official position of the Cayman Islands Government on the various reputational, political and tax issues about which the directors themselves have already perceived the risks to the Petitioner that motivate the directors' policy decision.

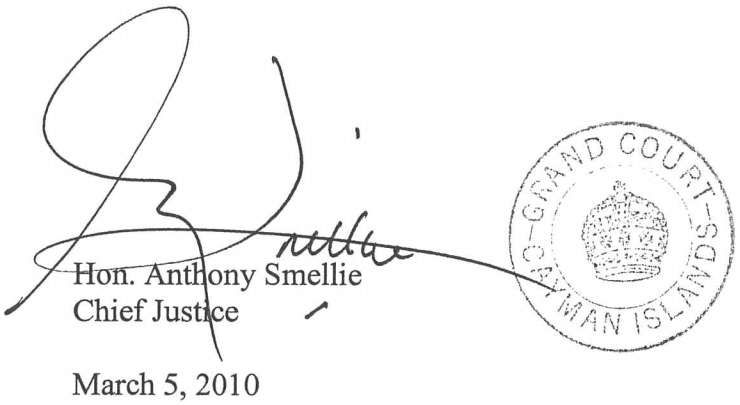
29. These are issues already in the public domain and about which it seems the "negative publicity" mentioned in the Proxy Statement has been or is being generated.

30. Given those circumstances, the official position of the Cayman Islands Government, if it can be ascertained, may well prove to be of interest to the Court meetings. It may provide possible counter-vailing considerations to the negative publicity and to those other factors which have already so heavily influenced the thinking of the directors.

31. I raised this issue with counsel at the hearing, suggesting that the official position might be ascertained, but did not see that consideration as necessitating the postponement of the order.

32. Rather, the time available between now and the meetings to be convened on the 30th April 2010 should allow for the official position to be ascertained if the matter is of interest to the Cayman Islands Government, as I would think it is bound to be.

33. The order was granted accordingly.



Hon. Anthony Smellie
Chief Justice

March 5, 2010