18-JUN-09
(FJ)

GRAND COURT CAYMAN ISLANDS

IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 63 OF 2009

IN THE MATTER OF SECTIONS 86 AND 87 OF THE COMPANIES LAW (2007 REVISION)

AND IN THE MATTER OF NOBLE CORPORATION

AND IN THE MATTER OF NOBLE CAYMAN ACQUISITION LTD.

Coram: The Hon. Mr. Justice Foster

Appearances: Mr. Colin McKie and Mr. Marc Kish of Maples and Calder for the Petitioners

RULING

1. The particular issue which arises for determination in this matter is whether the scheme of arrangement proposed in respect of the Second Petitioner company constitutes an "amalgamation" or "reconstruction" within the meaning of section 87(1) of the Companies Law (2007 Revision) ("the Law") such that the Court would have jurisdiction to sanction it in appropriate circumstances pursuant to section 86(2) with provisions pursuant to section 87(1) (a), (c) and (d) of the Law.

Background

2. The Petitioner companies, Noble Corporation ("Noble Cayman") and Noble Cayman Acquisition Ltd. ("Merger Sub") petitioned the Court together for

sanction of two proposed schemes of arrangement which are interconnected and interdependent upon each other.

3. Both companies are part of the Noble Group, which is a leading offshore drilling contractor for the oil and gas industry. The object of the proposed schemes is to replace Noble Cayman with its wholly owned subsidiary, a company incorporated under the laws of Switzerland ("Noble Switzerland"), as the ultimate holding company of the Noble Group, thus moving the holding company from Cayman to Switzerland, for reasons which are not relevant to the particular issue which is the subject of this Ruling. Currently Merger Sub is a wholly owned subsidiary of Noble Switzerland which is in turn a wholly owned subsidiary of Noble Cayman. In order to effect the change of location of the parent company from Cayman to Switzerland it is proposed to change the status of Noble Cayman from parent of Noble Switzerland to subsidiary of Noble Switzerland and for Noble Switzerland to become the ultimate holding company. This is proposed to be achieved by repurchasing all of Noble Cayman's shares and merging it with Noble Switzerland's existing subsidiary, Merger Sub. This "merger" would be carried out in such a way as to allow Noble Cayman to continue to carry on business through its numerous operating subsidiaries. In the resulting structure, Noble Switzerland would own Noble Cayman, which would in turn continue to own its operating subsidiaries. In effect, the shareholders of Noble Cayman are being asked to exchange their shares in Noble Cayman for shares in Noble Switzerland. At present, as explained, Merger Sub is a wholly owned subsidiary of Noble

Switzerland. By the proposed "merger" between Merger Sub and Noble Cayman, Noble Cayman would thereby become the wholly owned subsidiary of Noble Switzerland.

4. The sanction of the Court is sought simultaneously in relation to two schemes of arrangement. The first is a proposed scheme of arrangement between Noble Cayman, the holders of its ordinary shares ("the Scheme Shareholders") and Noble Switzerland (the "Noble Cayman scheme"). The second proposed scheme is between Merger Sub, its sole shareholder Noble Switzerland and Noble Cayman (the "Merger Sub scheme"). Both Noble Cayman and Merger Sub are Cayman Islands exempted companies limited by shares and have unrestricted objects. There are a significant number of Scheme Shareholders most having addresses in the U.S.A. Merger Sub has only one registered shareholder, namely Noble Switzerland.

5. The common purpose of the proposed schemes is to effect a re-organization and consolidation of Noble Cayman such that Noble Cayman combines its undertaking with that of Merger Sub and thereby becomes a wholly owned subsidiary of Noble Switzerland. Merger Sub would then be dissolved and Noble Switzerland would become the ultimate holding company in place of Noble Cayman.

6. Under the proposed schemes the Scheme Shareholders shares would be cancelled and in exchange the Scheme Shareholders would receive registered shares in Noble Switzerland on a one for one basis. In summary, in order to achieve this it is proposed that the following events would occur simultaneously on the date when the schemes become effective:

(a) Under the Noble Cayman scheme, Noble Cayman would repurchase and cancel all of its relevant shares.

(b) Under the Noble Cayman scheme, Noble Cayman would issue new ordinary shares to Noble Switzerland.

(c) Under the Noble Cayman scheme, Noble Switzerland would issue and allot to each of the Scheme Shareholders one registered share for each ordinary share previously held in Noble Cayman, as well as issuing to Noble Cayman an amount of shares in Noble Switzerland to be held as treasury shares. The Scheme Shareholders would waive all claims and rights they may have in respect to the issuance of such treasury shares by Noble Switzerland.

(d) Under the Merger Sub scheme Merger Sub would transfer all of its property, rights and obligations to Noble Cayman and Merger Sub would be dissolved, without winding-up.

Under the Noble Cayman scheme, the rights of all Noble Cayman registered shareholders (the Scheme Shareholders) are affected. Under the Merger Sub scheme, Noble Switzerland, as the sole shareholder, is the only shareholder affected.

7. The Petitioners duly applied pursuant to section 86(1) of the Law by summons, in the case of Noble Cayman to convene a meeting of its shareholders (the Scheme Shareholders) to consider and, if thought fit, to approve the Noble Cayman scheme. Since Merger Sub had only one shareholder, namely Noble Switzerland, which had already consented to the proposed schemes, it was sought to dispense with a Merger Sub shareholder meeting.

8. At the hearing of the Petitioners' summons counsel for the Petitioners quite properly raised the question of whether the Merger Sub scheme amounted to an "amalgamation" or "reconstruction" within the meaning of section 87(1) of the Law, since, if it was not, the Court would not have jurisdiction to make the provisions which are part of the scheme. As that scheme is an integral and essential part of the whole proposed structural change, there would be little point in the Court giving directions in relation to shareholder meetings if it would have no jurisdiction to sanction it with the provisions pursuant to section 87(1) of the Law. I should say that there were several other issues on the application as well but none of them were particularly troublesome and accordingly this Ruling only

relates to the interpretation of "amalgamation" or "reconstruction" in section 87(1) of the Law.

The issue

9. Section 87(1) of the Law provides as follows:

> *"(1) Where an application is made to the Court under section 86 for the sanctioning of a compromise or arrangement proposed between a company and any such persons as are specified in that section, and it is shown to the Court that the compromise or arrangement has been proposed for the purpose of or in connection with a scheme for the reconstruction of any company or companies or the amalgamation of any two or more companies, and that under the scheme the whole or any part of the undertaking or the property of any company concerned in the scheme (in this section referred to as "a transferor company") is to be transferred to another company (in this section referred to as "the transferee company") the Court, may either by the order sanctioning the compromise or arrangement or by any subsequent order make provision for-*
>
> *(a) the transfer to the transferee company of the whole or any part of the undertaking and of the property or liabilities of any transferor company;*
> *(b) .....*
> *(c) the continuation by or against the transferee company of any legal proceedings pending by or against any transferor company;*
> *(d) the dissolution, without winding up, of any transferor company;*
> *(e) .....*
>
> *(2) .....*
> *(3) .....*
> *(4) In this section-*
>
> *"property" includes property, rights and powers of every description;*
>
> *"liabilities" includes duties; and*
> *"transferee company" means any company or body corporate established in the Islands or in any other jurisdiction".*

10. Under the Merger Sub scheme it is proposed that Merger Sub will transfer to Noble Cayman all of it assets and liabilities. Adopting the terms used in section

87(1) of the Law, Merger Sub is therefore the proposed "transferor" and Noble Cayman is the proposed "transferee". Both Merger Sub and Noble Cayman are Cayman Islands companies and Noble Cayman accordingly falls within the definition of "transferee company" in section 87(4) of the Law.

11. The question therefore is whether, on a proper construction of section 87(1) of the Law, the transfer of all the assets and liabilities of Merger Sub to Noble Cayman pursuant to the Merger Sub scheme is proposed *"for the purpose of or in connection with a scheme for the reconstruction* [my emphasis] *of any company or companies or the amalgamation* [my emphasis] *of any two or more companies...."*

12. It was submitted for the Petitioners that in considering the meaning of the terms "amalgamation" and "reconstruction" the Court should adopt a broad construction, as it has done previously in interpreting other terms in that part of the Law, such as the expression "arrangement" as used in section 86 and 87 of the Law. See for example *In Re SIIC Medical Science and Technology (Group) Limited* [2003] CILR 355 where the judge said at 359: *"the courts have construed "arrangement" as a word of very wide import, covering almost every type of legal transaction so long as there is some element of give and take and it has the approval of the company concerned...."*

It was submitted that in the ordinary sense, and in the sense that a business man nowadays would understand it, an "amalgamation" of two or more companies is a bringing together or a merger of their businesses or operations as currently represented by existing assets and liabilities. It was submitted that a "reconstruction" would be understood to be a re-organization, a re-fashioning or a re-ordering of an existing business or operation which results in something identifiably different in form or substance but yet retains identifiable characteristics of the original business or operation. On that basis it was contended that on a plain and ordinary construction the Merger Sub scheme - whereby Merger Sub would transfer to Noble Cayman all of its property, rights and liabilities - would amount to a bringing together or merger of the business and operations of Merger Sub, as currently represented by its existing assets and liabilities, with those of Noble Cayman. It was submitted that this would amount to an amalgamation with Noble Cayman or possibly a reconstruction of Merger Sub with Noble Cayman.

13. Section 87 of the Law is substantially the same as section 427 of the English Companies Act 1985. I was informed that there is no reported English case which has directly considered the meaning of the term "amalgamation" in the context of an application under the English companies legislation. However the term "reconstruction" was considered *In Re MyTravel Group Plc* [2005] BCLC 123. In that case an insolvent company applied to the court in respect of a scheme of arrangement the intended effect of which was that all the assets and undertaking

of the company would be transferred to a new company which would assume a limited quantity of the company's debts but the bulk of the new company's share capital would be allocated to major creditors, leaving the existing shareholders with only a 4% stake in the new company. The court (Mann J) upheld the contention of objecting bondholders that it was essential to the concept of a reconstruction that the shareholders in the new company should be the same, or substantially the same, as the shareholders in the old company, which was not the case in the proposed arrangement. The judge concluded that a company, which was to be treated as the same as its incorporators, was reconstructed when those incorporators were the same in both the old and the new companies (or at least there was substantial identity between them). In his judgment the judge made reference to *Re South African Supply and Cold Storage Company* [1904] 268. That was a case relating to the interpretation of the words "reconstruction" and "amalgamation" as used in a company's articles of association and not in the context of on application to the Court in respect of a scheme of arrangement. Nonetheless, the judgment (Buckley J.) has been treated in England and elsewhere in the Commonwealth as authoritative on the meaning of the words in relation to schemes of arrangement or similar applications.

14. At page 281 Buckley J. said:

> *"Neither of these words, "reconstruction" and "amalgamation" has any definite legal meaning. Each is a commercial and not a legal term, and, even as a commercial term there is no exact definite meaning. In each case one has to decide whether the transaction is such as that, in the meaning of commercial men, it is one which is comprehended in the term "reconstruction" or "amalgamation".*

Buckley J. then went on to consider the meaning of these two terms and said (page 286):

What does "reconstruction" mean? To my mind it means this. An undertaking of some definite kind is being carried on, and the conclusion is arrived at that it is not desirable to kill that undertaking, but that it is desirable to preserve it in some form, and to do so, not by selling it to an outsider who shall carry it on - that would be a mere sale- but in some altered form to continue the undertaking in such a manner as that the persons now carrying it on will substantially continue to carry it on. It involves, I think, that substantially the same business shall be carried on and substantially the same persons shall carry it on. But it does not involve that all the assets shall pass to the new company or resuscitated company, or that all the shareholders of the old company shall be shareholders in the new company or resuscitated company. Substantially the business and the persons interested must be the same. Does it make any difference that the new company or resuscitated company does or does not take over the liabilities? I think not. I think it is none the less a reconstruction because from the assets taken over some part is excepted provided that substantially the business is taken, and it is immaterial whether the liabilities are taken over by the new or resuscitated company or are provided for by excepting from the scheme of reconstruction a sufficient amount to answer them. It is not, therefore vital that either the whole assets should be taken over or that the liabilities should be taken over. You have to see whether substantially the same persons carry on the business; and if they do, that, I conceive, is a reconstruction.

Now what is an amalgamation? An amalgamation involves, I think, a different idea. There you must have the rolling, somehow or other, of two concerns into one. You must weld two things together and arrive at an amalgam - a blending of two undertakings. It does not necessarily follow that the whole of the two undertakings should pass - substantially they must pass - nor need all the corporators be parties, although substantially all must be parties. The difference between reconstruction and amalgamation is that in the latter is involved the blending of two concerns one with the other, but not merely the continuance of one concern. An amalgamation may take place, it seems to me, either by the transfer of undertakings A. and B. to a new corporation, C., or by the continuance of A. and B. by B. upon terms that the shareholders of A. shall become shareholders in B. It is not necessary that you should have a new company. You may have a continuance of one of the two companies upon the terms that the undertakings of both corporations shall substantially be merged in one corporation only".

15. On the facts of that case Buckley J. found that the sale of some of the assets of First African etc Supply Company ("the Supply Company") to the "Australasian Company" in return for shares in the Australasian Company and the subsequent sale to the "Cold Storage Trust", which had been newly established for that purpose, of those shares together with the remaining assets of the Supply Company amounted to a "reconstruction" of the Supply Company. However, it was not an "amalgamation" of the Supply Company because "*the Cold Storage Trust had nothing to bring into an amalgamation. It had no business of its own, but was acquiring its business by this purchase*".

By contrast, the judge concluded that the subsequent sale of the business of the Australasian Company to the "Imperial Company", with the shareholders of the Australasian Company becoming shareholders in the Imperial Company constituted an "amalgamation" because the Imperial Company "also has a business of its own" and the business of each of the two companies became "*blended in the hands*" of the Imperial Company.

16. It was submitted that in the case before me the transfer of the assets and liabilities of Merger Sub to Noble Cayman pursuant to the Merger Sub Scheme would similarly constitute a reconstruction within the meaning of the *South African Supply* case. However, a strict reading of the judgment and conclusions in that case might also lead to the conclusion that the proposal with respect to Merger Sub did not constitute an "amalgamation" because, like the Cold Storage Trust, it

was incorporated specifically for the purposes of the proposals behind the two schemes and, other than a nominal amount, it has no assets and no liabilities (other than nominal liabilities to its professional service providers) and has no employees.

17. In *Citizens and Graziers' Life Assurance Company Ltd. v Commonwealth Life etc* [1934] 51 CLR 422 the High Court of Australia considered an application to sanction a scheme of amalgamation under a statutory court-supervised procedure to enable companies to amalgamate. After referring to the *South African Supply* case, Dixon J., in giving the judgment of the majority said (page 457):

> *"The union of shareholders, which amalgamation involves, is, of course, not concerned with the members of the combining corporations as persons. It is the reorganization of share capital that matters. The replacement of two separate systems of share capital by one appears to be required before a union of two companies limited by shares can justly be called an amalgamation of the companies. In the process of reorganization, classes or divisions of shares, or amount of shares, or amount of share capital, in one or other or both of the old companies may find no representation in the one system of capital which emerges. But the substantial result must be to reduce for practical purposes two or more organizations of capital to one, and two or more incorporated companies to one. The amalgamation to which the clause in the memorandum refers is not a mere combination of businesses separately conducted, but an amalgamation of companies. There is no context to enlarge the meaning of the expression. To accomplish such an amalgamation, it seems necessary, either to consolidate the constituent elements of the old companies into a new one, or to merge in one of the old companies the constituent elements of the other. Possibly a transaction may be an amalgamation although the corporate existence of the consolidating companies, or of the merged company, may be continued for some special and definite purpose. But the continuance of two corporations under separate control, organized with their separate systems of share capital and capable of independent activities, appears to me inconsistent with an amalgamation of more than their existing enterprises".*

It was submitted by counsel for the Petitioners that Dixon J. was not suggesting a test different from that in the *South African Supply* case but merely that an

amalgamation or consolidation of different companies' share capital into a single share capital and two or more companies into one would be other key characteristics to which the court would have regard. In the present case the shares of Merger Sub are currently owned by Noble Switzerland and the shares of Noble Cayman are currently owned by the Scheme Shareholders and the proposal is that the new shares of the enlarged Noble Cayman will be owned by Noble Switzerland alone so that arguably there would be a reduction of two existing companies into one surviving company.

18. In the *Citizens and Graziers'* case Starke J. gave a minority judgment. He agreed that "amalgamation" is a commercial and not a legal term and went on to say (page 447):

> *"The individual corporators in the old company are not corporators in the new company. But is that essential to amalgamation? I do not think it is. It is uniting in whole or in part the undertakings and business of two or more companies in a new company or in one of the old companies, so that those undertakings and businesses may in future be carried on as one business, that is the essence of amalgamation. The fact that the corporators are the same is evidence of the character of the transaction, but the shareholding of the transferring companies is quite as strong in that direction as is the fact that the individual corporators in the transferring companies are corporators in the new company; it shows that the persons beneficially interested in the business now carried on by the new company are in substance the same as those who were interested in the business carried on by the old companies".*

On the facts of that case Starke J. concluded that there was an amalgamation.

19. In the present case the registered shareholders of Merger Sub and Noble Cayman are clearly different but the persons beneficially interested in the Noble Cayman and Merger Sub are the same. It was argued that in substance the persons who

have a beneficial interest to be carried on by the Noble Cayman are the same as those with a beneficial interest in the business currently being carried on by the existing Noble Cayman and in Merger Sub and I think that is right.

20. In further Australian case, *Re Stork ICM Australia Ltd. etc v Stork Food Systems* [2007] 25 ACLC 208, the Federal Court of Australia (Lindgren J.) considered the meanings of the terms "amalgamation" and "reconstruction" in the context of the section of the Australian Corporations Act equivalent to section 87 of the Law. He said (para. 76):

> *"I agree with Mr. Oakes that a restrictive interpretation should not be placed on either the term "reconstruction" or the term "amalgamation". I also accept his submission that the approach should be simply to inquire whether the circumstances of a particular case fall within one or the other or both of the words, without first attempting to delineate their respective boundaries of meaning".*

This is consistent with a broad and purposive construction approach.

21. In the relation to the term "reconstruction" Lindgren J. said (paras 77 and 78):

> *"In my view, the arrangement as proposed is a reconstruction. The whole of the undertaking, property and liabilities of Stork ICM is to be transferred to and vest in Stork FSA. These circumstances fall within Buckley J.'s description of "reconstruction" in South African Supply. Although the run-off activity of Stork ICM can hardly be called the "carrying on" of an undertaking, that business-related activity will be taken over by Stork FSA and will continue to be, indirectly, an activity of the parent company Stork NV, as it is at present. It will, however, be an activity distinct from the trading activity of Stork FSA. Stork FSA will receive particulars of claims made by the potential claimants, and will deal with the insurers and CMS in relation to them. That is to say, Stork FSA will continue to do what Stork ICM does now, but its activity in this respect will not form part of its trading activity.*

To my mind the word "amalgamation" does not so easily lend itself to the proposed arrangement, because there will be no "blending" of the two activities, even though they will both be carried on by Stork FSA".

22. The High Court and the Federal Court of Australia apparently did not feel constrained to adopt a restrictive view of the *South African Supply* case and adopted a commercial meaning at the relevant time of the words "amalgamation" and "reconstruction" in the context of the particular proposal put before the court. It was emphasized before me that this Court should, in particular in viewing the use of companies specially incorporated for a particular proposed purpose (such as Merger Sub) note that attitudes have changed over the last century and should adopt a modern purposive and commercial approach.

23. I was also referred to some English tax related cases concerning schemes of reconstruction in the context of applications concerning stamp duty or capital gains tax in which a somewhat narrower view of the meaning of the term "reconstruction" was taken (see *Brooklands Selangor Holdings Ltd. v IRC* [1970] 1 WLR 429; *Baytrust Holdings Ltd. v IRC* [1971] 3 All ER 76; *Swithland Investments Ltd. v IRC* [1990] STC 448; and *Fallon v Fellows* [2001] STC 1409). These "fiscal" cases were considered and applied in the *MyTravel* case (*ibid*). However, it was submitted to me that until very recently the English courts have resisted a purposive construction in determining the meaning of tax related statutes and have traditionally adopted a literal construction approach to such statutes. It was suggested that the Cayman courts should be slow to construe words appearing in our Companies Law by reference to authority deriving from

English tax legislation which has never had any counterpart here. In this context it was also noted that in the *Stork ICM* case in the Federal Court of Australia Lindgren J. referred to *Brooklands Selangor Holdings v IRC* (*ibid*) and *Baytrust Holdings Ltd. v IRC* (*ibid*) but he specifically noted that those are fiscal cases and he neither quoted from nor relied on them.

24. In my opinion it is appropriate and desirable in this jurisdiction and at this time to adopt a purposive and broad interpretation approach to the provisions of sections 86 and 87 of the Law and in particular with respect to the meaning of the words "amalgamation" and "reconstruction". That would be consistent with the broad interpretation already given to the term "arrangement" as it appears in the same sections by this Court and in my view the same general approach should be adopted when considering the construction of the terms "amalgamation" and "reconstruction". I also respectfully and gratefully adopt the words of Buckley J. in the *South African Supply* case (*ibid*) that neither word has any definite legal meaning, that each is a commercial and not a legal term and that even as a commercial term has no exact definite meaning. He said that in each case one has to decide whether the transaction concerned is such that in the meaning of commercial men it is one which would be comprehended within the term "reconstruction" or "amalgamation". It seems to me that this must mean that I should determine whether the transaction before me would be probably considered a reconstruction or amalgamation by commercial men in this day and age.

25. Furthermore, in my opinion it is legitimate to look at the whole transaction which is under consideration, albeit that in this case it necessarily consists of two separate schemes of arrangement. It seems to me that in adopting a purposive approach it would be artificial and unduly restrictive to consider whether the proposed transfer of the assets and liabilities of Merger Sub to Noble Cayman constitutes an "amalgamation" and/or a "reconstruction" in isolation given that it is an integral part of the related and interdependent arrangement which Merger Sub has been specifically incorporated to facilitate. Although I do not anyway consider the narrower, more legalistic approach to the construction of these words, which is based to a significant degree upon the English fiscal cases, which was adopted in the *MyTravel* case, that case is clearly distinguishable on its facts from the present circumstances in which the transfer of assets and liabilities by Merger Sub to Noble Cayman is clearly an essential element in a greater overall arrangement.

26. I also take the view that it is sufficient for these purposes that, as shareholders of the ultimate parent company within the Noble Group, the Scheme Shareholders at all times have ultimate beneficial ownership of both Noble Cayman and Merger Sub (and Noble Switzerland) and that under both of the schemes of arrangement this ultimate beneficial ownership will not change, although, of course, Merger Sub itself will cease to exist.

27. In all the circumstances of these particular proposed schemes of arrangement I am satisfied that the proposed Merger Sub scheme is, in context, an "amalgamation" and that accordingly the Court would have jurisdiction to make orders under section 87 of the Law and sanction the Merger Sub scheme of arrangement if it thought fit on the hearing of the joint Petition in due course.

Dated 18th June 2009

The Hon. Mr. Justice Angus Foster
Judge of the Grand Court (Acting)