IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

Cause No: FSD 57 of 2019 (IMJ)

BETWEEN

XIO GP LIMITED

Plaintiff

AND

(1) JOSEPH PACINI
(2) CARSTEN GEYER
(3) FEI (MURPHY) QIAO

Defendants

AND

GWYNN HOPKINS AND GORDON MACRAE IN THEIR CAPACITY AS JOINT AND SEVERAL INTERIM RECEIVERS OVER XIO FUND 1 LP AND ITS ASSETS

As Intervenors

HEARD AT THE SAME TIME WITH:

Cause No: FSD 73 of 2019 (IMJ)

BETWEEN

(1) JOSEPH PACINI
(2) CARSTEN GEYER
(3) FEI (MURPHY) QIAO

Plaintiffs

AND

(1) XIO GP LIMITED
(2) XIANG (ATHENE) LI

Defendants

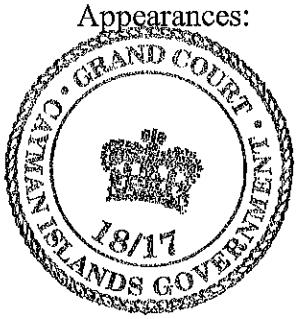
AND

GWYNN HOPKINS AND GORDON MACRAE IN THEIR CAPACITY AS JOINT AND SEVERAL INTERIM RECEIVERS OVER XIO FUND 1 LP AND ITS ASSETS

As Intervenors

OPEN COURT

Appearances:



Mr. Robert Levy QC instructed by Mr. Alistair Abbott of Forbes Hares for XiO GP Limited and Xiang (Athene) Li.

Mr. Michael Bloch QC instructed by Mr. Ben Tonner QC and Mr. Alex Davies of McGrath Tonner for Joseph Pacini, Carsen Geyer and Fei (Murphy) Qiao (collectively "JCM")

Mr. Tom Smith QC instructed by Mr. Adam Crane of HSM Chambers for the Interim Receivers/Intervenors.

Observing the Proceedings:

Mr Charles Kimmins QC instructed by Mr. Colin McKie of Maples, for Shanghai Li Hong ("SLH")

Mr. Michael Wingrave of Dentons on behalf of Interested Party Laguna Netherlands BV

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **31 May, 3 and 4 June 2019**

Written Closing Submissions and Replies were subsequently received from the parties in mid-June in accordance with the Directions of the Court

Draft Judgment Circulated: **2 August 2019**

Judgment Delivered: **12 August 2019**

HEADNOTE

Company Law – Partnership Law. Declarations.

JUDGMENT

Introduction

1. FSD 57 of 2019 is a Writ action filed by XiO GP Limited ("**XiO GP**") against Joseph Pacini, Carsten Geyer and Fei (Murphy) Qiao ("**JCM**"), on 8 April 2019. It was agreed that preliminary points in FSD 57 of 2019 and arising in FSD 73 of 2019, would be heard together.

2. XiO GP is a company incorporated in the Cayman Islands. The sole registered member and the sole registered director of XiO GP is Xiang (Athene) Li, ("**Ms. Li**") (paragraph 1 of the Statement of Claim).

3. Under XiO GP's memorandum and articles of association, new or additional directors can only be appointed by a special resolution of the members or by the existing directors. An existing director can only be removed by a special resolution of the members (paragraph 2 of the Statement of Claim).

4. XiO GP avers that, on 2 April 2019, without any lawful basis for doing so, JCM purported to appoint themselves as directors of XiO GP ("**Appointment**") and also purported to remove Ms. Li as a director ("**Removal**") (paragraph 3 of the Statement of Claim).

5. The Statement of Claim goes on to state that also on 2 April 2019, by a purported resolution of "*XIO Group Partners*" (an entity which Ms. Li says is unknown to XiO GP), JCM, among other things, purported to resolve ("**Resolutions**") as follows:

   (i) To cause XiO GP to issue three new shares, with one share to be issued to each of JCM;

   (ii) To cause XiO GP to engage the law firm Willkie Farr & Gallagher ("**WFG**") to be retained by XiO Fund 1 LP ("**Fund**") (of which the Plaintiff is the sole general partner), to represent it in certain arbitration proceedings; and

   (iii) To approve any payment by XiO GP and/or the Fund of the costs and expenses of WFG.

6. Further, on 2 April 2019, JCM purported to pass a board resolution of XiO GP ("**Board Resolution**") purportedly (1) retaining WFG to represent the Fund in the said arbitrations and (2) approving payment by XiO GP and/or the Fund of the costs and expenses of WFG (paragraph 5 of the Statement of Claim).

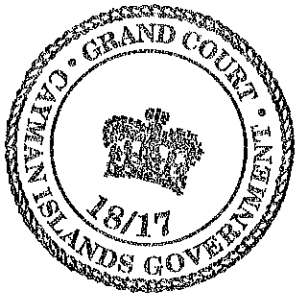
7. XiO GP claims that JCM had no right, power or authority to appoint themselves as directors of XiO GP and accordingly the Appointment was a nullity.

8. Further, XiO GP argues that JCM had no right power or authority to remove Ms. Li as a director of XiO GP and accordingly the Removal was a nullity.

9. In the premises, each of the Resolutions and the Board Resolution was a nullity. Further, it is pleaded that JCM had (and have) no right, power or authority to engage WFG in any capacity on behalf of XiO GP or the Fund.

10. XiO GP claims as follows:

> *"1) A declaration that none of the Defendants is a director of the Plaintiff;*
>
> *2) A declaration that each of the Appointment, Removal Resolutions and Board Resolutions is a nullity;*
>
> *3) A permanent injunction restraining each of the Defendants from:*
>
> *(a) In any way holding themselves(or any of them) out as, or purporting to act as directors of the Plaintiff;*
>
> *(b) Purporting to appoint any legal representatives (of any nature and in any jurisdiction and in respect of proceedings in any court or tribunal) to act on behalf of the plaintiff;*
>
> *4) Purporting to give instructions to any legal representatives (of any nature and in any jurisdiction) and in respect of proceedings in a court or tribunal) in respect of any of the matters or affairs of the Plaintiff (including, without limitation, any legal proceedings before any court or tribunal, to which the Plaintiff, or the Cayman Exempt Limited partnership XiO Fund 1 LP of which the Plaintiff is the sole general partner, is a party or may become a party):*



(a) Causing or permitting or taking any steps to cause the register of directors of the Plaintiff to be altered so as to show any person other than the existing registered director (Xiang (Athene) Li) as being a director of the Plaintiff or to show her directorship as having been terminated in any manner; and/or

(b) Causing, permitting or taking any steps to cause the register of members of the Plaintiff to be altered in any manner howsoever.

5) A declaration that Wilkie Farr & Gallagher is not and has not at any time been retained by either the Plaintiff or XIO 1 Fund LP in either of the ICC ARBITRATIONS 23050/PTA AND 23051/PTA.

6) Costs;

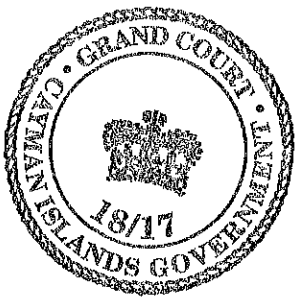
7) Further or other relief."

11. JCM have filed a Defence and Counterclaim. The pleading opens with a statement that Ms. Li has provided an undertaking through Forbes Hare to be bound by the outcome of these proceedings. That undertaking is recorded in the Order of Directions in these proceedings and in Cause No FSD 73 of 2019, which was filed 18 April 2019. JCM say that the true effect of that undertaking is that Ms. Li may be treated as a party against whom the Court has jurisdiction to grant relief. The Defence and Counterclaim was served without prejudice to JCM's contention that these proceedings have been instigated by Ms. Li and that she should not have brought them in the name of XiO GP.

12. The Defence pleads that XiO Group is a group of companies which includes the following:

(a) XiO Fund 1 LP ("**the XiO Fund**"), a Cayman Islands exempted limited partnership registered on 4 August 2014.

(b) The Plaintiff ("**XiO GP**"), a Cayman Islands exempted company incorporated on 16 July 2014. XiO GP is the general partner of the XiO Fund.



(c) XiO Cayman Limited ("**XiO Cayman**") was incorporated as a Cayman Islands exempted company on 17 June 2014. On or around 21 September 2018, XiO Cayman redomiciled to Nevis and continues to exist as a Nevis international business company.

(d) XiO Partners HK Limited ("**XiO HK**"), is a limited company incorporated in Hong Kong on 16 July 2014.

(e) XiO (UK) LLP, a UK limited liability partnership formed on 1 August 2014 ("**XiO UK**").

13. The Defence claims that the XiO Group was established pursuant to an alleged partnership between Joseph and Ms. Li which was latterly expanded to include Carsten and Murphy ("**the Partnership**"). JCM say that any and all shares Ms. Li holds or has held in any of the XiO Group of companies were held for and on behalf of the Partnership.

14. The Defence has a heading "***The Partnerships***", broken down as follows:

(1) Joseph and [Ms. Li]

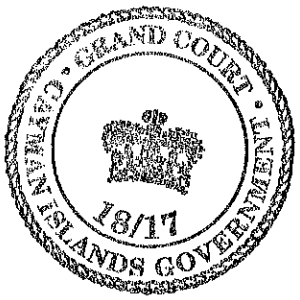
(2) Joseph, [Ms. Li], Carsten and Murphy

(3) The equal partnership.

Joseph and Ms. Li

15. JCM say that in or around 2014, it was agreed orally between Joseph and Ms. Li that they would establish a partnership in which they each held a 50% equity interest ("**the Partnership**"). Further or alternatively, it was averred that the Partnership was formed by conduct. In particular (paragraph 5):

> *"5.1 In or around February 2014, Joseph and* [Ms. Li] *commenced discussions about setting up a private equity structure.*
>
> *5.2 The proposal was that* [Ms. Li] *would source the initial capital for the new venture, and Joseph would be principally in charge of operations.*



5.3. *In a telephone call on 9 April 2014, Joseph confirmed to* [Ms. Li] *that he would join her as a partner within the new venture.*

5.4 *In the premises, it was the mutual understanding or agreement of Joseph and* [Ms. Li] *that they would carry on business in common with a view to profit with each being entitled to a 50% share in the equity of the business, and that the relationship between them was that of partners."*

16. JCM refer to the following as evidence supporting the alleged mutual understanding or agreement:

> *"6.1 The email from* [Ms. Li] *to Carsten on 13 August 2014 welcoming him to XiO on behalf of the "founding partners" (being a reference to herself and Joseph);*
>
> *6.2 The email from* [Ms. Li] *to Joseph on 17 August 2014 stating (in reference to* Joseph's former employer Blackrock: *"U can tell them u start your own business, you are the real founder too. and eventually both u and I will be proud for the rest of our life that we started this venture.);*
>
> *6.3 The email from* [Ms. Li] *to Mr. Zhu of Zhongzhi (a Chinese asset management group) on 22 September 2015 referring to XiO as "a true partnership" and asking him to copy in Joseph in all future correspondence."*

Joseph, Ms. Li, Carsten and Murphy

17. JCM say that Joseph and Ms. Li subsequently admitted Carsten and Murphy to the Partnership, affording them each a 10% interest in the Partnership and indicating that the equity interest was expected to increase so that all four partners would have an equal equity interest if the venture achieved its objectives.

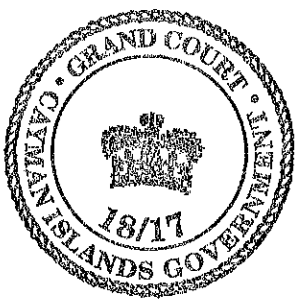
18. In relation to Carsten, the Partnership engaged a recruitment consultant who in turn recommended Carsten. Joseph subsequently met Carsten in New York in around August 2014. Carsten stipulated as a condition of agreeing to join business that he be a partner. On 14 August 2014, Carsten accepted the offer of partnership and signed an offer of employment with XiO UK.

19. It is said that Murphy met Ms. Li in person for the first time in or around March 2014 when he was Executive Director of the Investment Banking Department at China International Capital Corporation.

20. According to the Defence, Carsten and Murphy joined the partnership with a 10% equity interest each and the expectation that their respective equity interests would increase over time as the Partnership achieved its objectives. From such time as they joined the Partnership, the respective interests of Joseph and Ms. Li reduced to 40% each, with the expectation that the four partners would have a 25% interest each in the event that the Partnership achieved its objectives.

The Equal Partnership

21. The following is pleaded under the third head: The equal partnership:



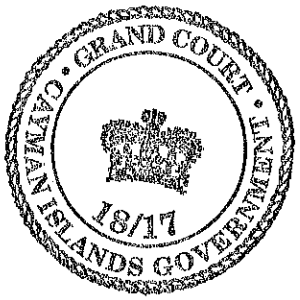
"(3) The equal Partnership

12. By around November 2018, the Partnership had achieved its objectives and it was acknowledged by the founding partners that Carsten and Murphy were entitled to an increased equity share.

13. In the premises, the Partnership shares are 25:25:25:25; alternatively, 40:40:10:10."

22. It is claimed that the following duties are owed by Ms. Li to the Partnership:

"14. At all material times [Ms Li] *owed fiduciary duties to the Partnership including but not limited to the following:*



14.1 A duty to act in good faith in the best interests of the Partnership.

14.2 A duty to avoid a situation in which she had, or could have, a direct or indirect interest that conflicted, or possibly might conflict, with the interests of the Partnership.

14.3. A duty to exercise her powers for a proper purpose.

14.4 A duty to disclose any personal interest that would or might give rise to a potential conflict with the interests of the partnership."

Breach of duty

23. It is alleged that Ms. Li has breached her duties to the partnership by:

"15.1 Transferring funds to herself and/or charging monies to XiO GP

15.2 Failing to hand over the Share after being requested to do so by her partners

15.3 Seeking to assert that she was a director of XiO GP after being requested not to do so by her partners, and failing to facilitate the appointment of other directors as directed by her partners.

*15.4 Using her position as shareholder and director of XiO GP and XiO GP's position as controller of the XiO Fund to conduct the defence of arbitrations ICC Case No.2350/PTA and ICC Case No. 230 51/PTA ("**the Arbitrations**") in a manner which is not in the best interests of the XiO Fund or XiO GP and the Partnership in the manner in which she has conducted other proceedings.*

Consequences of Breach

24. JCM suggest that Ms. Li retains any such legal interest as she does retain in the Share in breach of her fiduciary duty to the Partnership and the Partnership is entitled to claim and has a proprietary interest in any profit that she may make thereby.

25. Further, they assert that equity treats as done that which ought to have been done, and Ms. Li is to be treated as between the parties as having registered the Share jointly in the names of herself and JCM, and to have handed it over when required to do so.

Response to Statement of Claim

26. As to Paragraph 1 of the Statement of Claim: JCM admitted that the state of the register is as XiO GP alleges; and it is contended that it is for XiO GP to establish its entitlement to any acknowledgment as to the legal effect of the same, and, by reason of the foregoing, XiO GP is unable to do so.

27. As to Paragraph 2 of the Statement of Claim: JCM admitted the contents of the memorandum and articles of association therein pleaded.

28. As to Paragraph 3 of the Statement of Claim: JCM admitted that JCM took steps to appoint themselves as directors in place of Ms. Li; JCM maintain that they did so on the basis of their rights under the Partnership and that it is for XiO GP to establish its entitlement to any acknowledgment as to the legal effect of the same, and, by reason of the foregoing, XiO GP is unable to do so.

29. As to Paragraphs 4 and 5 of the Statement of Claim: it was denied that Ms. Li was unaware of the Partnership; it is admitted and averred that the Resolutions and Board Resolutions were made; and it is contended that Ms. Li was obliged as a partner to do anything required to perfect them.

30. As to the Prayer for Relief, JCM takes the position that XiO GP is not entitled to the declaratory relief sought at (1), (2) and (4) in circumstances where the purpose of XiO GP

in seeking such relief is to harm the interests of XiO GP and/or the Defendants and/or is contrary to XiO GP's and/or the Partnership's best interests and/or in circumstances where it would be inequitable to grant such relief. Further, that there is no basis for the injunction sought at (3) for the reasons given above.

Counterclaim

31. By way of counterclaim, JCM claim that they are entitled to an order for specific performance against Ms. Li to do whatever is required to perfect the transfer of the Share and an order of the Court that XiO GP perform the same on her behalf if she declines to do so.

32. Further or alternatively, JCM say they are entitled to register a charge over the Share and/or seek the appointment of a receiver.

33. Further, it is pleaded that, unless restrained by the Court, Ms. Li will continue to hold herself out as a director of XiO GP and deny the entitlement of her partners to be appointed as directors, in breach of her fiduciary duties and causing loss and damage to XiO GP and the Partnership.

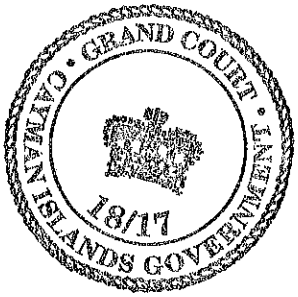
34. JCM counterclaim as follows:

(1) A declaration that Ms. Li holds and at all material times held the Share on trust for the Partnership;

(2) A declaration that Ms. Li was in breach of her duties as a partner of the Partnership in not doing whatever was necessary to perfect the transfer of the Share to the Partnership and ceding her directorship of XiO GP as requested by the Partnership;

(3) An order by way of specific performance that Ms. Li do whatever may be necessary to perfect the transfer of the Share to the Partnership and cede her directorship of XiO GP;

(4) An order that XiO GP do in the name of Ms. Li whatever may be



necessary to perfect the transfer of the Share to the Partnership and cede her directorship of XiO GP;

(5) An order for the registration of an equitable charge over the Share and/or the appointment of a receiver;

(6) Costs;

(7) All necessary accounts and enquiries;

(8) Further or other relief.

Statement of Claim in FSD 73 of 2019

35. The Statement of Claim in this matter sets out as follows:

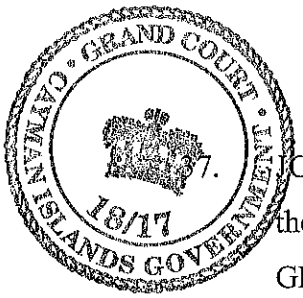
(1) XiO GP is the general partner of XiO Fund I L.P **(Fund),** which is a Cayman Islands exempt limited partnership and is part of the XiO group of companies **(XiO Group).**

(2) The XiO Group is a general partnership of which JCM and Ms. Li are partners **(XiO Partners).** The XiO Partners are beneficial owners of the XiO Group, including XiO GP, each with an equal interest of 25% in the share of XiO GP and the XiO Group.

(3) The Fund is the Second Respondent to an arbitration proceeding in Hong Kong. XiO Cayman Limited is the manager of the Fund and is under receivership in Nevis.

(4) Between early December 2018 and 2 April 2019, Ms. Li was the sole registered director of XiO GP.

36. As a result of allegations made in the Hong Kong arbitration and in proceedings in Nevis pertaining to Ms. Li's conduct in carrying on the business of the XiO Group, JCM, in their alleged capacity as partners in the XiO Group, say they resolved to remove Ms. Li from her office of Director of XiO GP.



37. JCM contend that Ms. Li has a significant conflict of interest and cannot reasonably act in the best interests of XiO GP and /or the Fund and /or act in good faith as Director of XiO GP.

38. JCM assert that, as partners of the XiO Group with a beneficial interest in XiO GP, they validly removed Ms. Li from her office as Director of XiO GP to protect the XiO Group, and the assets under the control of XiO GP, including the Fund and for the benefit of its stakeholders.

39. JCM say that the effect of the relief sought in Cause Number FSD 57 of 2019 would severely prejudice the Plaintiffs' beneficial ownership interests in XiO GP and the XiO Group.

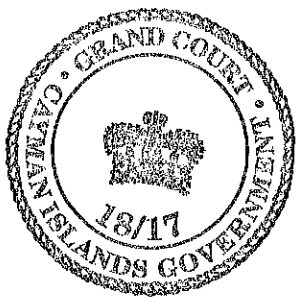
40. In her First Affirmation filed in support of the Writ of Summons in FSD 57 of 2019, Ms. Li denies that the Plaintiffs (who are the named Defendants in FSD 57 of 2019) are beneficial owners of XiO GP or the XiO Group and denies that a partnership exists.

41. JCM contend that Ms. Li is in breach of her fiduciary duties to them as her co-partners by wrongfully denying the existence of the partnership and their beneficial ownership of the share in XiO GP so as to exercise control over the XiO Group and thereby causing the Plaintiffs as well as the XiO Group to sustain irreparable losses and damages.

42. JCM seek declaratory relief so as to give effect to their beneficial ownership interests in XiO GP and the Partnership (including a declaration as to the existence of the Partnership). JCM contend that this preliminary issue ought to be resolved before the issue in FSD 57 of 2019 as to the validity of the Plaintiffs' removal of Ms. Li from office of Director of XiO GP can properly be determined.

43. JCM also seek the appointment of a receiver and/ or an injunction as an interim measure to protect the Plaintiffs' interests in the share of XiO GP and to preserve value in the underlying assets.

44. JCM claim the following final declarations and relief:



(i) that a partnership exists between the Second Defendant and the Plaintiffs and that each of the XiO Partners hold a beneficial interest in the partnership in equal amounts; and

(ii) for an equitable charge over the share in XiO GP for the benefit of the Plaintiffs in the aggregate amount of 75% (each Defendant holding a 25% interest in the aggregate amount).

45. In addition, they claim the following interim relief:

(i) The appointment of a receiver over the charge in XiO GP; and

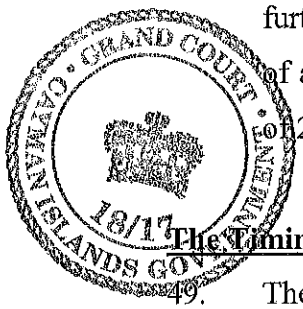
(ii) An application for an injunction incidental or ancillary to the appointment of a receiver to restrain the First and/or Second Defendant from assigning, charging or otherwise dealing with the share in XiO GP, pending the determination of the beneficial ownership interests in XiO GP and the validity of the removal of the Second Defendant from office of Director of XiO GP.

The Defence of XiO GP in FSD 73 of 2019

46. XiO GP filed a Defence which it says is filed without prejudice to XiO GP's contentions that the Statement of Claim fails to disclose any reasonable cause of action, is embarrassing for want of particulars and is liable to be struck out.

47. The Defence essentially denies that there is a "*XIO group of companies*", also denies that the term "*XIO Group*" has any legal significance and further denies that the Fund (which in any event is not a company) is part of any group of companies.

48. It also specifically denies that there is any partnership between JCM and Ms. Li and further denies that JCM have any beneficial interest in XiO GP, whether of 25% each or of any other percentage. Essentially, the Defence repeats the assertions made in FSD 57 of 2019, in which XiO GP is the Plaintiff.



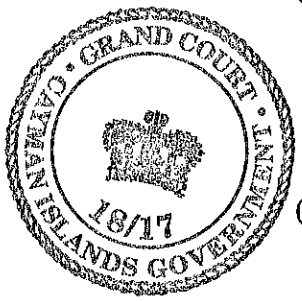
The Timing

49. These two claims which were just recently filed, and form part of a whole series of complex contentious issues between these and related parties, were at the parties' request heard urgently by me in very pressing conditions. They were heard whilst the Court also had to deal with an application by Hong Kong appointed Receivers for recognition by the Cayman Courts (FSD 78 of 2019). The urgency is that there are arbitrations set to take place in Hong Kong in the latter part of July. I indicated to the parties that what they really seem to be trying to do is to squeeze these two Writ trial matters into an impossibly short period, this Court having no control over the timetabling in Hong Kong, and that the only theoretically possible way for the Cayman Court to handle this in a helpful way at this stage, would be for them to agree some preliminary issues.

The Agreed Preliminary Issues

50. Cooperatively, the parties did agree preliminary issues, and principles, as follows:

(1) The Court shall determine whether the Plaintiff (in FSD 57 of 2019) is entitled to a declaration that JCM (the Defendants in FSD 57 of 2019) were not validly appointed as directors and that Xiang (Athene) Li was not validly removed as a director of XIO GP Limited on or as a result of the events of 2 April 2019, in the events that have happened and on the assumption (if it makes any difference and which is denied by Ms. Li) that Ms. Li and JCM were partners;



(2) If the existence of a partnership does make a difference and might preclude the grant of declaratory relief, then the Court shall determine whether there was any such partnership; and

(3) If there was no such partnership, whether in any event declaratory relief should be refused.

(4) All issues which are not determined in accordance with (1) - (3) above shall be for further hearing.

51. I have granted the application recognising the Hong Kong Receivers, and in my view that should take care of some of the urgency, certainly as far as the arbitrations are concerned. However, the Parties have nevertheless continued to press the Court for its decision and so I have tried to oblige in these highly condensed and pressing circumstances.

The Summons filed on behalf of JCM in FSD 73 of 2019 seeking Interlocutory Relief

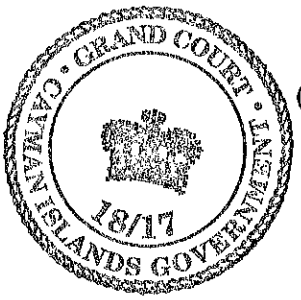
52. A summons was filed on behalf of JCM and set down for hearing, seeking that an alternative receiver be appointed over the sole share of XiO GP Limited (the **"Share"**) pending the determination of the claim in FSD 73 of 2019 for a declaration of an equitable charge over 75% of the Share in favour of and shared equally between JCM. However, that is no longer being pursued, because as Leading Counsel for JCM Mr. Bloch announced, a Form of Protocol has been agreed between JCM and the Hong Kong Receivers.

XiO GP's Case

53. It is Ms. Li's case that the Defendants, JCM, are impostors to the Board of XiO GP. It is XiO GP's case that the purported self-appointment on 2 April 2019 is a nullity, whether

analysed in corporate terms or (if there was any partnership, which is denied), in partnership terms. It was submitted that:

(1) The only person who could appoint any additional directors was Ms. Li;



(2) The Defendants, who were neither registered directors (nor directors in any other sense) nor registered members (or members in any other sense) as at that date, had no power or standing, in any capacity, to appoint directors;

(3) Even if there is a partnership (and there is no partnership) that does not affect the analysis, since at best the Defendants might have a beneficial interest in the sole issued share in XiO GP, but Article 9 expressly negates any argument that they may thereby have voting rights; and

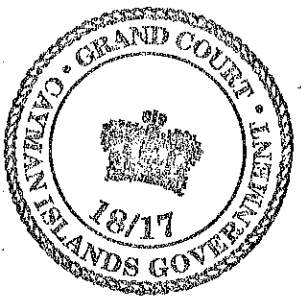
(4) The purported partnership meeting on 2 April 2019 would have been invalid as a partnership meeting in any event.

54. Mr. Levy QC, on behalf of the XiO GP, advances that it flows from the above, that the purported removal of Ms. Li as a director (by the Defendants purporting to act as directors), is a nullity, and the purported engagement of WFG is also a nullity. It was further submitted that in any event the result would be the same if JCM were purporting to act as "*partners*", since only registered members have any power to remove directors and the Defendants have never been registered members.

55. Having seen the closing submissions of JCM, learned Counsel goes on to say that it is not clear whether these matters are even contested anymore, as the main thrust of the Defendants' case now appears to be that the Court should refuse to grant declaratory relief in the exercise of its discretion.

56. It was submitted that, in that regard, there is no valid reason not to grant declaratory relief in respect of the matters sought, and every reason why, no matter what the Court's views

of the players may be, declaratory relief should be granted. According to Mr. Levy, *"an invitation to deny declaratory relief is an invitation to conceal the correct legal position from the Registrar of Companies, regulators and third parties. It should not be countenanced. It is also an invitation to ignore well established company law, at the request of impostors. However, should it be determined that the question of whether a partnership existed between Athene and the Defendants makes some difference to the question of whether declaratory relief should be granted, then the Court can and should determine that there was in fact no such partnership..."*



JCM's Position

57. Mr. Bloch QC, in his closing submissions, submitted that there are circumstances in which the Court will decline to grant declaratory relief, even assuming that the declaration sought would be true. He argued that the Court will decline to grant declaratory relief in circumstances in which the plaintiff lacks the standing to be granted such relief because of (1) his or her past conduct in relation to the matter to which the declaration would relate, (2) his or her behaviour in the proceedings or (3) the purpose for which he or she intends to use the declaration.

58. Interestingly, JCM submit that it is unnecessary for them to show that the declarations which Ms. Li is seeking would be false, and they say they do not seek to do so.

59. Mr. Bloch refers to the fact that Ms. Li is seeking declarations that she was a director and that JCM were not directors of XiO GP. It is contended that Ms. Li lacks the standing to be granted such declaratory belief because (JCM allege) (1) any such state of affairs would render Ms. Li a delinquent fiduciary, (2) she has given knowingly false testimony and (3) she is seeking the declaratory relief to further her delinquent breach of fiduciary duty.

60. The further submission is that the memorandum and articles of association of a company serve two distinct purposes; (1) they govern the dealings between those with a direct or

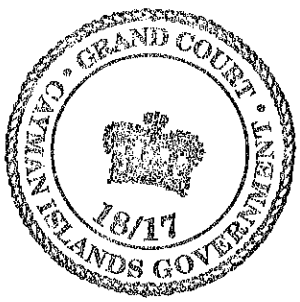
indirect interest in the company, and (2) they govern dealings between the company and third parties.

61. Accordingly, JCM contend that an innocent third party who has dealt with Ms. Li as a director of XiO GP might have the standing to obtain a declaration as to her status as a director in circumstances where it would on the other hand be an affront to justice to grant the same relief to Ms. Li.

(1) The general principles for the grant of declaratory relief

62. It was submitted that declaratory relief is a discretionary remedy. Reference was made to *Zamir & Woolf: The Declaratory Judgment* (4th ed.), at paragraph 4-01 as authority for the proposition that this is a "*most important feature of the declaratory judgment.*"

63. JCM takes the position that the general principle demonstrating the Court's broad powers is set out in ***Financial Services Authority v Rourke*** [2002] CP Rep 14 (per Neuberger J), which was recently cited by Marcus Smith J in ***Bank of New York Mellon, London Brach v Essar Steel India Ltd*** [2018] EWHC 3177 (Ch) at [21] (per Marcus Smith J):



> "*It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.*"

64. It was further submitted that the Court's approach as to how it exercises its discretion to grant declaratory relief "*will be guided by the equitable principles governing all discretionary remedies*": *Zamir & Woolf* at 4-31. It was submitted that this includes the following well-known principles that: (1) "*he who comes into equity must come with clean hands*", and (2) "*he who seeks equity must do equity*": *Snell's Equity*, 33rd Ed, 5-009, and 5-010.

65. However, learned Counsel has also referred to another decision of Marcus Smith J, in ***High Commissioner for Pakistan in the United Kingdom v Prince Muffakham Jah*** [2018] EWHC 3715 (Ch) at [23]-[24] where the judge said:

> *"In this case, declarations are sought by all parties as to the respective entitlements to the Fund created in 1948. The books are unclear as to how the remedy of declaratory relief is to be classified. Pakistan, for her part, asserts that the relief is an equitable one, to which the "clean hands" doctrine applies. That does not appear from the books to be an entirely uncontroversial proposition: in most, the declaration appears to be treated as a form of sui generis relief, not equitable relief. However, to refuse Pakistan's application for permission to amend on the ground that a declaration is not equitable relief, such that the "clean hands" doctrine cannot apply, would be wrong. Neither the proper classification of the nature of declaratory relief nor the ambit of the "clean hands" doctrine were fully argued before me, and it seems to me that it would be an unduly technical point on which to refuse Pakistan's application to amend. I proceed on the basis that the clean hands doctrine can, in principle, be invoked in this case."*

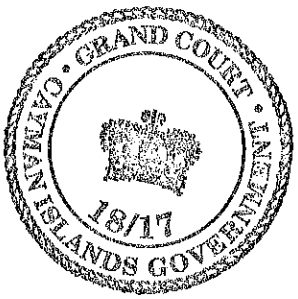
(2) The argument that there should be a refusal to grant relief in respect of past wrongdoing

66. It was submitted that the Court may refuse to grant declaratory relief in circumstances where there is a sufficiently close connection between alleged misconduct of the person seeking the declaration, and the relief sought. It was submitted that this is derived from the "*clean hands*" principle and that plainly, the use of the Court's processes to seek relief in respect of previous wrongdoing will fall foul of the principles.

67. JCM say that there is a direct connection between Ms. Li's previous, alleged misconduct as a delinquent fiduciary and the relief she claims. At paragraph 17 of JCM's written closing submissions, it is stated as follows:

"....Two facts are worth emphasizing and which demonstrate such a connection.

a. First, Athene deliberately failed to attend meetings at which, had she in fact attended, would have required her to transfer the directorship of XIO GP-the very company in which she now seeks a declaration that she has retained her directorship of.



b. Second, Athene objects that there was never a properly convened partners' meeting. However, in truth, she was in effect deliberately avoiding such a meeting. In that context, there was no unfairness in the other three partners taking the decision they ultimately did take in the manner in which they did so."

68. It was further submitted that Ms. Li seeks a declaration that there was never any partnership between herself and JCM in order to escape liability for her misappropriation of partnership assets and having to account to her fellow partners for her actions.

(1) The refusal to grant relief due to conduct in the proceedings

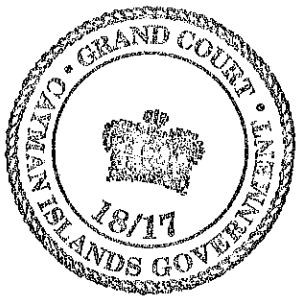
69. It was argued that Ms. Li has provided knowingly false and misleading evidence in these proceedings and that this fact alone is a sufficient basis for the refusal of the declaratory relief sought.

(2) The refusal to grant relief where such relief will be used for future wrongdoing

70. In this regard, JCM argue that declaratory relief may be refused where it is sought to be used to facilitate future wrongdoing. It was submitted that the following factors would be relevant:

a. The motive of the party seeking declaratory relief. Reference was made to ***Everett v Griffiths*** [1924] 1 K.B. 941, as a decision in which the Court took into account the motives of the plaintiff, being resentment and revenge, when refusing declaratory relief.

b. Whether the grant of declaratory relief would be useful in order to achieve a lawful purpose. Reference was made to ***Guaranty Trust Co. of New York v Hanney*** [1915] 2 K.B. 536 at 572, as follows:



> *"There is, however, one limitation which must always be attached to it, that is to say, the relief claimed must be something which it would not be unlawful or unconstitutional or inequitable for the Court to grant or contrary to the accepted principles upon which the Court exercises its jurisdiction."*

c. Whether the grant of relief would be contrary to public policy or would result in the Court's processes being used as an instrument of fraud or to perpetuate a future fraud. Reference was made to the recent decision of the Supreme Court in ***Takkar v Gracefield Developments Ltd*** [2019] 2 W.L.R. 984 at 996.

71. It was submitted that any declaratory relief sought by Ms. Li will be used by her to continue acting as a delinquent fiduciary.

XiO GP'S Submissions in Reply

72. Mr. Levy first addressed the general submissions advanced by JCM, for example, where in paragraph 3, they state that they do not seek to show *"that the declarations are false."*

73. The submission describes this admission by JCM as *"extraordinary"*. This is because, if JCM are not asserting that the declarations sought are false, then it follows that they accept:

(1) That JCM's purported resolutions of 2 April 2019 were invalid;

(2) And therefore that they were never validly appointed as directors of the XiO GP;

(3) That Ms. Li was never validly removed as a director of the XiO GP;

(4) That they have never resolved to cause XiO GP to issue new shares to each of JCM;

(5) That WFG were never validly appointed to represent the Fund.

74. XiO GP has also made submissions contesting the point made about standing, upon a number of bases. First, they say there is a distinction to be drawn between standing and conduct (whether within or outside proceedings). The former goes to the right of a party to seek relief and the latter being relevant only to the question of whether the Court should exercise its discretion to grant relief. XiO GP also makes arguments to counter JCM's argument that Ms. Li lacks standing to be granted relief because: (1) the granting of relief would render her a delinquent fiduciary; (2) Ms. Li has given knowingly false testimony, and (3) she is seeking relief to further a supposedly delinquent breach of fiduciary duty.

Extracts of Evidence in Cross-examination of the Relevant Parties

75. I think it is useful to look at aspects of the cross-examination of the parties who attended. These are simply extracts, but touch and concern some of the matters that I think are relevant to the issues before the Court. Mr. Bloch referred Ms. Li to an email she sent to Carsten Geyer, dated 1 May 2015. In that email, Ms. Li said:

> *"Happy birthday, and wish u a wonderful time. I'm feeling so lucky to have u as my partner."*

76. In response, Ms. Li said that she simply wanted to encourage Mr. Geyer. Her evidence was that reference to "*partner*" was simply done by her in order to encourage him. She said reference to being a "*Partner*", is simply a title. The witness gave examples, she said that for example, Morgan Stanley, J.P. Morgan utilize the services of a lot of people at the director level, but that in actuality these people are not really "*directors*" of the respective entities. Ms. Li further indicated that it would have been "*extremely rude*" even though someone is simply an employee, to say "*Happy to have you as an employee*". She said that this would not have been good for team spirit. As to the conference calls in which she referred to the respective members of JCM at various times as "*Partners*", Ms. Li says that it simply meant that they were senior employees.

Ms. Li vehemently denies that there was any "*XIO Group Structure*". She states that it was simply a matter of "*economics*", and that the mention of *"partners"* or *"directors*", was not about equity in the XiO GP; it was simply about the "*carry"*, and not about equity holding. Her evidence was that *"carry*" means any of the profits that the equity fund had obtained. She said each of them, Pacini, Geyer and Murphy had letters dealing with carry.

78. Ms. Li also gave evidence that she told the Hong Kong Court about XiO Group, but that it is not a true entity; it was a term they used collectively. She claims she never told that Court that it was an entity, and that it refers to "*20, 30 entities*" altogether.

79. As to the arrangements with Joseph, Ms. Li's evidence was that Joseph never brought in significant investors' money, only she did, and therefore the agreement is that it is solely her firm. She said that although Joseph was to bring in money, he had signed a "*Non-Compete*" with Blackrock, and so it was Ms. Li who set up and paid for everything. Joseph got a sign on bonus, got $1 Million a year bonus, plus a significant amount of carry, where each deal could be in the region of twenty or thirty million dollars.

80. Ms. Li indicated that her view was that, whatever she said to Joseph, Carsten or Murphy about being partners, they did not have an interest in the business, and this could not create a partnership unless the partnership was registered in a register.

81. Questioned about the number of law firm's that she had had hired on behalf of the Fund, Ms. Li agreed that she had instructed numerous law firms, including Clifford Chance, Quinn Emanuel, Boies Schiller Flexner, Campbells, Forbes Hare, Freshfields, Shearman & Sterling, and others.

82. As regards the Boies letter, Ms. Li states that she had no intention of misleading and had only read documents very quickly before she signed them. She admitted that in fact money did go from Alcentra through to JD Power.

Joseph Pacini

Mr. Pacini was the next witness to be cross-examined. He confirmed that there are no partnership documents, no partnership deed, no partnership accounts, and no capital accounts. He admitted that, although this alleged partnership would now be some 5 years old, yet none of these professional people who allegedly are the partners saw fit to draw up documents recording the partnership.

84. Questioned by Mr. Levy QC about the meeting of 2 April 2019, Mr. Pacini said that Ms. Li declined the invitation to participate in many meetings of XiO Group Partners prior to that meeting. Mr. Pacini first said that he agreed Ms. Li was not invited to the meeting on 2 April 2019. Then (in my view, oddly), he said that he knew that he did not invite her "*but I did not know if she had not been invited.*"

85. It was the witness' evidence that, on the morning of the meeting of 2 April 2019, they were not directors on the Registry. However, he disagreed with a suggestion that the three of them (JCM) had been validly removed as directors before the meeting. He denied that they had only quibbled about percentages, and not about being removed as directors.

86. Mr. Pacini was cross-examined about a number of Know Your Client ("**KYC**") documents which consistently showed that Ms. Li was held out as being the 100% beneficial owner, both internally and externally. Mr. Pacini could not deny these documents, and only pointed out that one of them, in which the structure of the LLP is described, labels Ms. Jacqueline Petts as General Counsel for the *"XIO Group"*, and said: "*an entity that somehow Ms. Li does not think existed in 2016.*"

87. Quite understandably, Mr. Pacini was cross-examined about emails between the JCM parties in which they appear to be exploring what percentages to claim, which tends to suggest there were never any agreed percentages. These emails are very instructive and I have set them out in full elsewhere. Mr. Pacini denied a suggestion from Mr. Levy that this email chain represents a "*casting around*" for a case by JCM, when there was never a

true partnership. He instead referred to algebraic formulas and documents, forming a model, which as Mr. Levy correctly states in his closing submissions, were not foreshadowed in pleadings or skeleton arguments in advance of the hearing of the trial.

Carsten Geyer

88. In response to cross-examination, Mr. Geyer, who was called by JCM as a witness after Mr. Pacini, gave evidence that the Partnership between him, Mr. Pacini, Ms. Li and himself is inside an algebraic model that was shared with him prior to joining. He claimed that this showed a business plan, and a part of the profits, that at a minimum they would be receiving. Mr. Geyer concedes that he never made a capital contribution. He also admits that the documents to do with him mention employment, but not equity. However, Mr. Geyer claims to have been told that there was no need for him to make a capital contribution because there was pre-funding from an investor base of over US$15 million.

Murphy Qiao

89. Murphy declined to attend for cross-examination, and as a result JCM were forced to withdraw reliance on his evidence.

90. However, as XiO GP's closing submissions persuasively point out (at paragraph 65), Murphy not attending to give evidence means that:

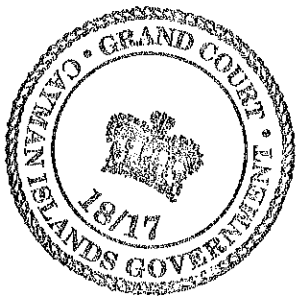
i. Murphy has not denied the following:

(a) His contemporaneous position that he was "*fine to provide*" KYC documents showing Ms. Li to be 100% owner of XiO GP;

(b) That he was hired as a managing director and not as a partner; and

(c) As recently as December 2018 he had not agreed any percentage in relation to a supposed partnership share, and considered it was not a true partnership arrangement.

ii. Most fundamentally, JCM cannot establish that Murphy has any partnership share or beneficial interest in the share in XiO GP. This is because JCM's case is that the alleged agreement in relation to Murphy was reached with



Ms. Li (see paragraph 9 of the JCM Defence and Counterclaim), and given that Ms. Li denies that allegation, the only person who could give direct evidence to the contrary would be Murphy. There is therefore no direct evidence of any agreement that Murphy should be an equity partner.

DISCUSSION AND ANALYSIS

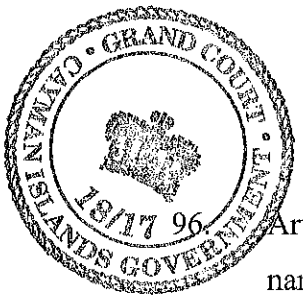
91. It does seem to me that there have been some major concessions by JCM as to questions to do with Ms. Li being sole director and shareholder, and which mean that I will not have to go into the detail I would otherwise have needed to. However, since there are a number of matters of law, I will briefly discuss the relevant provisions of XiO GP's Articles of Association.

92. Article 1.2 defines "*member*" as having the meaning assigned to it in the ***Companies Law***. Further, *"shareholder"* also means a member. Section 38 of the ***Companies Law*** defines *"member"* as being limited to those whose names are entered on the register of members.

93. "*Ordinary Resolution*" and *"Special Resolution"* are also defined in Article 1.2. It is also expressly provided that any resolution, whether ordinary or special, can only be carried if Ms. Li votes with the majority.

94. Article 1.2 (j) provides that in the Articles the word *"may"*, shall be construed as permissive, and the word *"shall"*, as imperative.

95. Article 9 provides that, except as required by law or otherwise provided by the Articles, no person shall be recognized as holding any shares upon any trust, and the company shall not be bound by or be compelled in any way to recognize, even when having notice thereof, any equitable, contingent, future or partial interest in any share or any interest in any fractional part of a share or any other rights in respect of any share except an absolute right to the entirety thereof in the registered holder.



Articles 10.1 and 11, contemplate shares that are jointly owned being registered in the name of the joint owners.

97. Article 20.4 provides that no person "*shall*" be entitled to vote at any general meeting unless that person is registered as a member in the Register on the date of such meeting. It would seem clear, given the definition of "*shall*" in Article 1.2 (j), that plainly only registered members may vote.

98. Article 27 provides that, leaving aside the initial directors of the company, directors can only be appointed by either the existing registered directors (Article 27.1) or the members by special resolution (Article 27.2). As regards appointment by members by special resolution, in light of the provisions of Article 1.2, a special resolution removing or appointing a director would have to have included Ms. Li voting in favour of such appointment.

99. Article 27.2 makes clear that only members can remove directors, and only by special resolution.

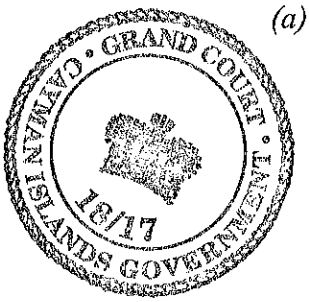
The Resolutions dated 2 April 2019 upon which JCM rely

100. The document that purports to appoint JCM as directors is headed "*Minutes of a Meeting of the XIO Group Partners*" and it bears the date, to which XiO GP says it makes no admission, of 2 April 2019.

101. The other document of 2 April 2019 is the purported resolution of XiO GP. It purports to be executed by JCM as directors of XiO GP. Obviously, if JCM were not validly appointed as directors, this purported board resolution would be a nullity.

Other Key Contemporaneous Documents

102. Some other key contemporaneous documents include the following:

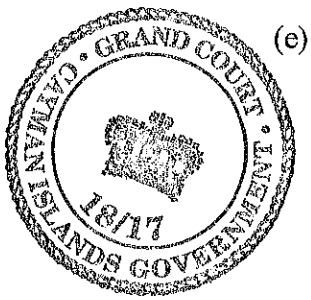


(a) KYC declaration sent to Citibank (signed by Mr. Pacini and copied to Mr. Geyer), and KYC information sent to Citibank by Jacqueline Petts. (Ms. Petts was, according to Mr. Pacini, the *"Chief General Counsel"* and her email sign off reflects this (see for example C/15/3 describes her as *"Chief Legal Officer and Execution Officer"* of XiO Partners HK Ltd.)) In this chain of emails, a member of XiO staff had been asked by Citibank *"to be clear, Athene is the 100% owner of the GP?" and Ms. Petts says* "[I] *confirm this to be the case.*" The same question was asked about XiO Cayman Limited (which of course, on JCM's case, is a partnership company owned as to ¼ by each of them and Ms. Li). Michael Roth of Citibank asked *"is Athene the 100% owner/beneficiary of XiO Cayman Ltd?"*. Ms. Pett's response was *"Hello Michael, I confirm this. Thank you."*

(b) Information proposed to be sent to HSBC. This related to the *"XiO Group mastergroup onboarding KYC"*.... In those communications Ms. Petts stated that Ms. Li was the *"100% owner"*, and, when asked to provide copies of the passports of anyone with 10% or more beneficial ownership (which, on JCM's case, would have included them), replied simply "*Athene*". Also, when asked who the key controllers were, the answer was *"Just Athene"*.

(c) Information (approved by Murphy) proposed to be sent regarding the Laguna sale: this was in the context of a KYC enquiry. Murphy approved sending a structure chart that showed Ms. Li as the 100% owner of XiO GP.

(d) Information and KYC letter sent to ADP. The letter states that *"Ms. Li Xiang (Athene) is the sole ultimate controlling shareholder of the structure..."*.



(e) Information sent to Deloitte in response to the following request: *"the names of individuals behind"* XiO Cayman Limited and XiO Partners Hong Kong Ltd. The answer given was *"Athene (Xiang) Li. She is ultimately the sole controller."*

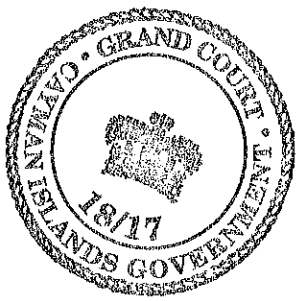
(f) Paul Hastings LLP (in respect of the JD Power (Jefferson) deal). This document, under the heading *"Ultimate controlling shareholder and authorized signatory"*, refers solely to Ms. Li.

(g) Information provided to the Sanne Group.

(h) Correspondence from the Chief Financial Officer, Paul Wong.

(i) The offer letters and employment contracts entered into by Pacini, Geyer, and Murphy. These are complex matters. I note that there is an employment agreement for Ms. Li too, but hers is signed by her in both her personal capacity and for the company, whereas those of Pacini, Geyer and Murphy were signed by them personally, and by Ms. Li for XiO GP. According to Ms. Li, this was for visa and salary tax purposes. The letters and contracts entered into by JCM were as follows:

i. Mr. Pacini. His initial offer letter and employment terms, were produced by him based on his Blackrock contract. (I note that this was stated to be with "*XIO Group Limited*", but no party has suggested that there is in fact any entity with that name). There is also the detailed contract of employment signed by Mr. Pacini in May 2018. It is also to be noted that the draft contract refers to equity ownership and a partnership agreement. However, while there is reference to a partnership agreement, the employment contract states *"included separately*". However, no Partnership Agreement was attached



or ever provided, and nor, it seems, did Mr. Pacini attempt to put one in place. Reference may also be made to paragraph 9 of Ms. Li's fifth affirmation, where she also explains/claims that the initial contract was put in place in a rush because Mr. Pacini needed it for immigration purposes. Importantly, the detailed contract of employment signed by Mr. Pacini in May 2018 contains no such clause.

ii. Mr. Geyer. Reference here to his counter-signed offer letter and his contract of employment.

iii. Murphy. His counter-signed offer letter and his contract of employment.

(j) The email trail of December 2018. It may be useful to set their contents out in full.

" *To:* *Joseph Pacini<Joseph.Pacini@xiogroup.com>*
Sent: *7 December 2018 (00.45)*
To: *Marianne Rajic*
CC: *Murphy Qiao, Carsten Geyer*

Subject: Draft Letter re GP interest and Athene's ability to act a sole D and SH

My apologies for confusion.

When Athene and I both set up the firm we agreed to 40% me, 40% her and 10% each for the two partners who would join. That is the evidence that I have from the starting.

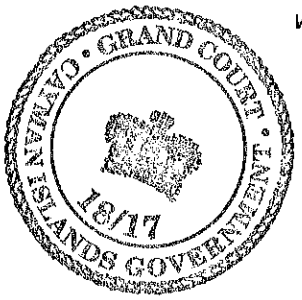
However, that is obviously based on the lie of a diversified 3.2 billion fund and all sorts of Athene other lies.

Obviously, without any contracts we are entitled to 25% each.

That means that the 3 of us are 75% to Athene's 25%.

Additionally, I think we should sign a resolution removing her as director. Marianne – can you please draft?

Sent from my iPhone.



On 6 Dec 2018, at 3.45 pm, Marianne Rajic <Marianne.rajic@xiogroup.com> wrote:

Thanks both. The numbers are not mine. Why don't we keep it vague as per the attached revision.

Regards,

Marianne

Marianne Rajic
General Counsel
XIO GROUP

From: Murphy Qiao
Sent: Thursday, December 6, 2018 11.37 PM
To: Carsten Geyer<Carsten.Geye@xiogroup.com>
Cc: Marianne Rajic<Marianne.rajic@xiogroup.com>; Joseph Pacini<Jospeh.Pacini@xiogroup.com>
Subject: Re Draft letter re GP interest and Athene's ability to act as sole D and SH

No, I never agreed to 10% either. She proposed 25% verbally last month, but I refused since it is not a true partnership arrangement for four of us. However, I am flexible to mention any number just in this letter if it can really help us to sit in a strong position.

Thanks,

Murphy.

Carsten Geyer<Carsten.Geyer@xiogroup.com>

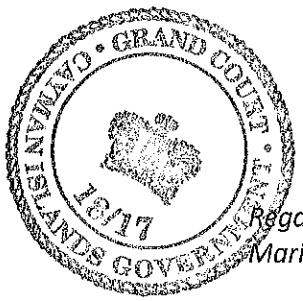
My point is that I never agreed to 10% - so the question is whether in absence of an explicit arrangement, it would be 25% each. Not that important, but I'm not sure we should codify the 40% on her end

---

From: Marianne Rajic
Sent: 06 December 2018 15:18
To: Joseph Panici< Jospeh.Pacini@xiogroup.com>; Carsten Geyer<Carsten.Geyer@xiogroup.com>; Murphy Qiao<Murphy.Qiao@xiogroup.com>
Subject: draft letter re GP interest and Athene's ability to act as sole D and SH

Hi all,

Please can you review and give me and Joseph your comments.



Regards,
Marianne

Marianne Rajic
General Counsel
XIO GROUP

From: Joseph Pacini
Sent: Thursday, December 6, 2018 10:45 PM
To: Carsten Geyer<Carsten.Geyer@xiogroup.com>; Murphy Qiao<Murphy.Qiao@xiogroup.com>; Marianne Rajic<Marianne.rajic@qiogroup.com>

Subject: Please review

<Letter re interest in GP revised docx>

From: Carsten.Geyer<Carsten.Geyer@xiogroup.com>
Sent: 07 December 2018 01:33
To: Murphy Qiao; Joseph Pacini
Cc: Marianne Rajic
Subject: Re: draft letter re GP interest and Athene's ability to act as sole D and SH

Agreed. Marianne – please recirculate.

Thanks

From: Murphy Qiao
Sent: 06 December 2018 17:31
To: Joseph Pacini<Joseph.Pacini@xiogroup.com>
CC: Carsten.Geyer<Carsten.Geyer@xiogroup.com>; Marianne Rajic <Marianne.rajic@xiogroup.com>
Subject: Re: draft letter re GP interest and Athene's ability to act as sole D and SH

For any cases, we three have the majority for sure. Let's try to send the letter out asap

On Dec 7, 2018, at 00:45, Joseph Pacini<Joseph.Pacini@xiogroup.com> wrote:

> *Let's do 25% each.*

Sent from my iPhone

On 6 Dec 2018, at 4:39 PM, Carsten Geyer<Carsten.Geyer@xiogroup.com> wrote:

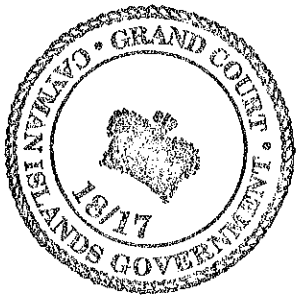
> *Maybe we say something like while the exact percentages have not been agreed (which be default means 25% each), even on her own case, she holds a maximum of 40%*

> *From: Carsten Geyer*
> *Sent: 06 December 2018 16:36*
> *To: Marianne Rajic <Marianne.rajic@xiogroup.com>; Joseph Pacini<Joseph.Pacini@xiogroup.com>*
> *Subject:Re: draft letter re GP interest and Athene's ability to act as sole D and SH*
>
> *We don't have agreed percentages*
>
> *We should revise that*
>
> *Thanks*
>
> *Carsten Geyer*
> *Partner & Head of Europe*
> *XIO (UK) LLP The Shard*
> *15th floor 32 London Bridge Street, London, United Kingdom SE1 9SG*

On 6 Dec 2018, at 15:45, Marianne Rajic <Marianne.rajic@xiogroup.com> wrote:

> *Thanks both. The numbers are not mine. Why don't we keep it vague as per the attached revision.*
>
> *Regards,*
> *Marianne*
>
> *Marianne Rajic*
> *General Counsel*
> *XIO GROUP*

> *From: Murphy Qiao*
> *Sent: Thursday, December 6, 2018 11:37 PM*
> *To: Carsten Geyer<Carsten.Geyer@xiogroup.com>*



CC: Marianne Rajic<Marianne.rajic@xiogroup.com>; Joseph Pacini<Joseph.Pacini@xiogroup.com>
Subject: Re: draft letter re GP interest and Athene's ability to act as sole D and SH

No, I never agreed to 10% either. She proposed 25% verbally last month, but I refused since it is not a true partnership arrangement for four of us. However, I am flexible to mention any number just in this letter if it can really help us to sit in a strong position.

Thanks,
Murphy

Carsten Geyer<Carsten.Geyer@xiogroup.com>

My point is that I never agreed to 10% - so the question is whether in absence of an explicit arrangement, it would be 25% each. Not that important, but I'm not sure we should codify the 40% on her end

---

From: Marianne Rajic
Sent: 06 December 2018 15:18
To: Joseph Panici< Jospeh.Pacini@xiogroup.com>; Carsten Geyer<Carsten.Geyer@xiogroup.com>; Murphy Qiao<Murphy.Qiao@xiogroup.com>
Subject: draft letter re GP interest and Athene's ability to act as sole D and SH

Hi all,

Please can you review and give me and Joseph your comments.

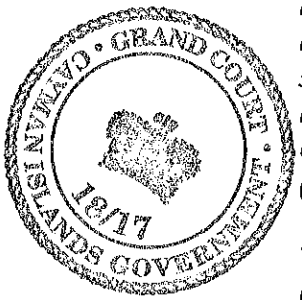
Regards,
Marianne

Marianne Rajic
General Counsel
XIO GROUP

From: Joseph Pacini
Sent: Thursday, December 6, 2018 10:45 PM
To: Carsten Geyer<Carsten.Geyer@xiogroup.com>; Murphy Qiao<Murphy.Qiao@xiogroup.com>; Marianne Rajic<Marianne.rajic@qiogroup.com>

Subject: Please review

<Letter re interest in GP revised docx>



By Email:
Philip Korogolos
Boies Schiller Flexner
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USA
(pkorologos@bsfllp.com)

Willliam Robinson
Freshfields Bruckhaus Deringer
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Taikoo Place, Quarry Bay
Hong Kong
(William.robinson@freshfields.com)

Emmanuel Gaillard
Shearman & Sterling
7 rue Jacques Bingen
75017 Paris
France
(EGaillard@Shearman.com)

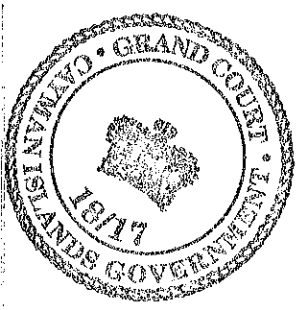
Dear Sirs,

XiO GP Limited ("XiO GP")

We understand that you act for XiO GP, and that Athene (Xiang) Li ("Athene") is claiming to be the sole director and the sole shareholder of same and thus the sole person authorized to instruct you in respect of your engagement.

Each of us was appointed a director of XiO GP on 12 October 2017. Carsten Geyer and Murphy Qiao resigned as directors on 1 December 2018, with Joseph Pacini deciding to continue with his appointment, given that he was provided a number of statements and sworn affidavits in support of XiO GP in respect of various proceedings pertaining to XiO GP and XiO Fund 1. We have reason to believe however, that unbeknown to us, Carsten and Murphy apparently ceased to be directors on 27 November 2018 and Joseph on 29 November 2018. None of us were ever notified of any such purposed removal.

Furthermore, each of Carsten, Murphy and Joseph are partners with Athene in respect of XiO Fund 1 (the "XiO Parters"), such that Athene holds the single share in XiO GP for and on our behalf in agreed percentages, that being 40% for Joseph, 10% each for Carsten and Murphy and 40% for Athene. Accordingly, in respect of the matters that affect all of the XiO Partners, Athene is not authorized to act singularly and cannot take any action or give or purport to give any instructions on or for behalf of XiO GP, without the approval of the remaining 60% of the XiO Partners.



In addition, XiO GP has delegated all of its functions in respect of XiO Fund 1 LP to XiO Cayman Limited as the investment manager. Carsten, Joseph and Murphy are all senior officers of the manager and as such are contractually authorized to act on behalf of XiO GP in respect of XiO Fund 1.

In the this context, notwithstanding that Athene is the sole director and shareholder of record, she is not capable of acting alone and you must not take her to be the sole person authorized to instruct you on behalf of XiO GP especially of matters pertaining to XiO Fund 1.

Yours faithfully,

Joseph Pacini

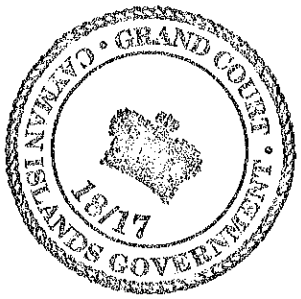
Cc

Athene Li
(athenexli@gmail.com)"

Declaration

103. There is quite a bit of debate in the cases and authorities on whether the declaration is an equitable remedy. I have found paragraphs 4-01, 4-05, 4-24, 4-31 (and footnote) and 4-32 of ***Zamir & Woolf***, particularly helpful. The learned authors state as follows:

> "***Discretion***
>
> *1. Introduction*
> ***The importance of a declaration being a discretionary remedy***
> *A most important feature of the declaratory judgment is that it is a flexible and discretionary remedy.*
> *This helps to explain its increasing popularity with litigants and judges both in the private and public law fields. Its flexible and discretionary nature enables the court to exercise precise control over the circumstances and terms in which relief is granted. Although a claimant or applicant may have proved his case, he still has to persuade the court both that it should in its discretion make a declaratory judgment and, if it does, that the terms he seeks are appropriate.*
> ....
> ***The discretion is that of the trial judge***
> ....
> *4-05 Whilst the court's jurisdiction to grant declarations is extremely wide, its general approach is that if a party has succeeded in his action he*



should not usually be sent away empty handed. Indeed in some cases the court may be particularly minded to grant relief as a way of showing their disapproval of a parties conduct or if they consider that the declaration is in the public interest because it assists in protecting the public or on account of the importance of due process by law officers. If a litigant who has succeeded, either wholly or in part, is to be refused relief, which the court can grant in its discretion, it is vital that the discretion is, and is seen to be, exercised judicially. Thus, reasons should be given which make it clear that the discretion is not being exercised in a selective and discriminatory manner, and neither arbitrarily or idiosyncratically. Otherwise, the rights of the parties could become, or at least appear, dependent upon judicial whim

……

1. Equitable principles

4-24 Is the declaratory judgment an equitable remedy and, accordingly, governed by equitable principle? For example, must a person who seeks a declaration come to court with clean hands?

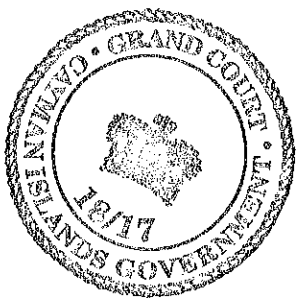
……

4-31 From a practical point of view, however, whether or not a declaratory judgment was originally an equitable remedy is no longer likely to be of any significance and a court's approach as to how it should exercise its discretion will be guided by the equitable principles governing equitable remedies.

[FOOTNOTE 74] *Girvan J. in Belfast West Power Ltd. v Belfast Harbour Commission [1998] N.I.112 at 121 considered that the debate about whether declaratory relief is equitable or statutory was "arid and academic". He considered that it was clear that declaratory relief was discretionary and has "an affinity with equitable remedies". In Kung v Country Section of the New Zealand Indian Association [1996] 1 N.Z.L.R., 663, Hammond J. considered that the traditional equitable principles were relevant in deciding whether to grant relief, including whether the claimant had clean hands. The declaration sought related to whether a meeting of the Association was properly constituted. Hammond J considered that it was not. But even if it had been he indicated that he might have refused relief on the basis that the meeting had been packed with supporters of Kung. A similar view was also taken in Hong Kong Bank of Canada v Wheeler (1993) 100 D.L.R. (4th) 40; cf. also British Columbia Workers' Compensation Board v CIBC (1998) 157 D.L.R. (4th)193 where lack of clean hands was regarded as a possible ground for refusing relief.*

….

The nature of the declaratory remedy



> *4-32 If, however, the declaratory judgment is not equitable, as the Court of Appeal decided in Chapman v Michaelson (a decision which has never been overruled), and if, for the reasons already explained, it is also not statutory in the private field, then what is it? Most works concerned with equity do not deal with the declaratory judgment and it is certainly not a common law remedy. "In truth", Younger L.J said,* [In *Gray v Spyer* [1921] 2 Ch. 549 at 547] *"these abstract declarations whatever else they may be, are neither law or equity either. It seems that declarations should be regarded as sui generis." The least unsatisfactory solution is probably to accept that while declarations are for the most part statutory in origin, they have throughout their history had a close affinity with equitable remedies which has left its mark upon them. This is especially evident in the discretionary nature of the declaration. This discretion is employed, as it was originally employed with regard to all equitable remedies, primarily to do justice in the particular case before the court. It is wide enough to allow the court to take into account most objections and defences available in equitable proceedings. Thus, in one declaratory action the court took into consideration the motives of the claimant in bringing the action; in another, the court held that the claimant had waived his right to take proceedings and, further, assumed that the claim might also be dismissed on the grounds of undue delay (laches)...."*

104. In my judgment, as stated by Girvan J in ***Belfast West Power Ltd v Belfast Harbour Commission,*** the question of whether or not the declaration was originally an equitable remedy is indeed an arid debate. This is because, in any event, the Court will be guided by the equitable principles governing equitable remedies when considering how to exercise its discretion. In my judgment, the clean hands and other principles are relevant. However, as stated in a number of authorities, including by Lord Scott in ***Grobbelaar v News Group Newspapers*** [2002] 1 W.L.R. 3024, at paragraph 90, cited by Mr. Levy QC:

> *"The grime on the hands must of course be sufficiently closely connected with the equitable remedy that is sought in order for an applicant to be denied a remedy to which he ordinarily would be entitled..."*

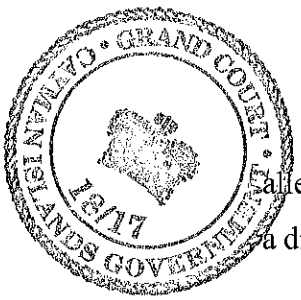
105. I accept the summary of the issues in ***Grobbellaar*** proferred in Ms. Li's Reply Submissions at paragraph 13, as being accurate, i.e. In ***Grobellaar,*** the House of Lords permitted the Claimant, a footballer of great reknown, to bring an action for an injunction to restrain The Sun newspaper from printing false allegations about him *actually*

throwing matches, when a jury had convicted him of *conspiring* to throw matches in return for bribes but not of *actually* doing so.

106. In paragraph 90, Lord Scott continued:

> *"In the present case it has seemed to me well arguable that it would be an affront to the "clean hands" principle if an injunction were granted to Mr. Grobbellaar. He entered into two successive corrupt agreements to throw matches in return for bribes and, as part of the inducement to his co-conspiritor to enter into the second such agreement he represented that he had thrown or attempted to throw matches pursuant to the first agreement. He has brought a defamation action based first on his false denial that he entered into these agreements and, secondly, on his denial of the truth of his admission that he had thrown matches pursuant to the first agreement. The question is whether the dishonesty that attended his entry into the corrupt agreements, and his denial in court that he had done so, so taints his success in persuading the jury to accept his denial of the truth of his match fixing admissions as to disqualify him from the grant of an injunction. I can well understand that your Lordships may be concerned that, in the absence of an injunction, the "Sun" may repeat the allegation that Mr. Grobbelaar did actually throw matches. If the "Sun" does so, it will be repeating that which Mr. Grobelaar has succeeded in establishing is not true. I am, somewhat reluctantly, persuaded, on balance, that the grime on Mr. Grabelaar's hands is not such that he should be exposed to a repetition of that allegation. I therefore agree that he should be given liberty to apply in this action to the High Court for the grant of a suitably worded injunction."*

107. In my judgment, in the instant case, even if there were any "*dirt*" or "*grime*" attaching to Ms. Li (and for the avoidance of doubt, I do not make any finding to that effect), it would not, without more, preclude declaratory relief. On the facts, it is not alleged that the removal of JCM as directors was unlawful or invalid. Further, JCM do not assert that the declarations sought would be false. There are allegations being made in the arbitrations, but those are at this stage unproven. In any event, the issues there are entirely unrelated to the issues in these proceedings. The principle of "*clean hands*" does not allow relief to be refused on the basis of any general moral culpability but rather there must be a sufficiently close connection between the alleged misconduct and the relief sought. The



alleged wrongdoings of Ms. Li are irrelevant to the question of whether Ms. Li is or is not a director of XiO GP and the question of whether or not JCM are directors.

108. In my judgment, JCM's claim that there was a partnership between themselves and Ms. Li is a weak claim, and must fail. This so called partnership is entirely undocumented, inconsistent with documents that have been signed, and inconsistent with representations made to third parties in relation to KYC provisions. This alleged partnership never produced minutes of meetings, an account or records of partners' contributions. Importantly, as one can see from the emails, there was constant changing of positions and tactical changes in an attempt to bolster the claim that there was a partnership.

109. In addition, there was intentionally, it would appear, no notice given to Ms. Li about the convening of the meeting on 2 April 2019. Neither Mr. Pacini nor Mr. Geyer was aware of any notice, telephone call, email or letter inviting Ms. Li to the meeting. So even if a partnership existed, which in my view it did not, no meeting of this alleged partnership was properly convened, and no partnership decisions taken.

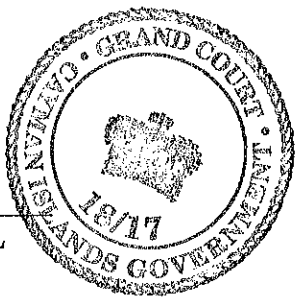
110. It is my view that there is no proper basis or reason for the Court not to exercise its discretion in granting the declarations sought.

111. In my judgment, the purported self-appointment as directors by JCM on 2 April 2019 is a nullity, whether analysed in corporate terms or otherwise.

112. In my judgment, XiO GP, the Plaintiff in FSD 57 of 2019, is entitled to a declaration that JCM were not validly appointed as directors and Xiang (Athene) Li was not validly removed as a director of XiO GP Ltd, on or as a result of the events of 2 April 2019. I have determined that Ms. Li and JCM were not partners, nor was she partner with any of them, and further that Ms. Li's use of that term "*partner*" was just as she said; simply a title, and mark of respect.

113. Any other issues that have not been resolved, as agreed by the parties, will have to be set down for trial in the Financial Services Division at a later date.

114. In relation to costs, I will hear applications in due course.



THE HON. JUSTICE INGRID MANGATAL
JUDGE OF THE GRAND COURT