ALEXANDERS HOLDINGS PLC

APPEAL BY SMALL SHAREHOLDERS AGAINST DECISION TO GRANT RULE 9 WAIVER

1. Introduction

1.1 Orb Estates PLC is seeking a Rule 9 waiver in respect of a reverse takeover of Alexanders Holdings PLC (hereafter "Alexanders"). Shortly before the reverse takeover, an offshore company, Sunneynook Limited, acquired shares in Alexanders through the exercise of an option; and a second offshore company, Gateside Holdings Limited, entered into an agreement to acquire shares from a director. Both these offshore companies have belatedly been found to be acting in concert with Orb Estates.

1.2 I am a small shareholder in Alexanders. My appeal is an appeal against

(a) the Executive's decision that Sunneynook's acquisition of shares is not a disqualifying transaction for the purposes of the whitewash procedure; and

(b) the Executive's decision that Gateside's agreement, details of which the proponents of the deal attempted to conceal, can be unravelled after its discovery; and

(c) the Executive's decision to grant a Rule 9 waiver without knowledge of the ultimate beneficial ownership of Orb Estates, the party seeking the waiver; and despite the pattern of material non-disclosure and mis-statement by or on behalf of the party seeking the waiver.

1.3 The remedy I seek is that the Panel revokes the decision to grant a Rule 9 waiver for this transaction.

1.4 This appeal has the following sections:

- The proposed transaction
- The facts relating to the waiver
- Mr Humm's payoff
- The beneficial ownership of Orb Estates
- Application of the Code to Sunneynook's acquisition of shares
- Conclusion
- Appendix: my background, and related procedural issues

2. The proposed transaction

2.1 I am conscious that this appeal is concerned with the propriety of the Rule 9 waiver, rather than with the financial merits of the transaction. However, if the proposed transaction had any semblance of fairness to independent shareholders, a small shareholder such as myself would not be going to the extraordinary lengths of making this appeal. So to give the background which explains why I *am* making this appeal, it is necessary to state the salient points, as follows:

- Shareholders in Alexanders currently have a clean cash shell with 25p per share in cash.

- They are being asked to exchange this for a minority holding in a highly geared property company with net tangible assets of only 19p per share, which (after a typical discount for a highly-geared, majority-owned property company) may have a market value of perhaps 10-12p per share. The counterparty in this deal is Orb Estates, a company whose ultimate beneficial ownership is undisclosed and of which Mr Helvert, Alexanders' chairman, is finance director.

- The difference between the 25p per share of cash now and the 19p per share of net tangible assets after the deal reflects the high price at which Alexanders is acquiring properties from Orb. The price is more than £10m in excess of fair value as assessed by Alexanders' chartered surveyors.

- Following completion Orb Estates will be paid £7m, the major part of Alexanders' cash balance. It will also control 75.1% of Alexanders' enlarged share capital. This is a cynically chosen fraction which is clearly intended to facilitate further detriment to the small shareholders at some point in the future. Also, a foreseeable development is that Orb Estates is likely to later acquire shares from offshore company Sunneynook (with whom Orb is now *agreed* to be acting in concert), and from offshore company Craigen (with whom I *suspect* Orb is acting in concert), thereby taking its holding to around 90%. The small shareholders will then be left as a tiny minority.

- Overall, it is difficult to make any economic sense of the transaction unless its proponents benefit in some undisclosed way from an increase in the net assets of Orb Estates.

2.2 I have managed to speak to small shareholders representing at least 12% of the shares (this is nearly 30% of the truly independent holders). Not one of them has a good word for the transaction. This appeal should be regarded as representative of this wider group of shareholders.

2.3 In short, from the small shareholder's viewpoint the transaction stinks.

3. The facts relating to the waiver

3.1 Please note that a number of these facts were not disclosed in the whitewash circular dated 4 July 2002 (hereafter "the original circular"), but have been belatedly disclosed in a supplementary circular dated 1 August 2002. The supplementary circular was prepared following small shareholders' observations, and the Executive's investigation.

3.2 Alexanders was formerly a motor distributor, which in the late 1990s sold its businesses and became a cash shell. At this stage a majority of the shares was held by Mrs Aleksandra Clayton, the former chairman.

3.3 On 2 October 2000 Craigen Estates Overseas Limited, an offshore company, acquired from Mrs Clayton shares representing 29.9% of the voting rights in Alexanders. Craigen nominated three directors to the board of Alexanders, all of them closely associated with Orb Estates:

- Charles Helvert (who was then, and remains *finance director of Orb Estates*)
- Jacques Delacave (who was then *a director of Orb Estates*, but has subsequently resigned from that directorship)
- Stephen Sinclair (who on 1 July 2002 was nominated to another UK listed company's board *as a representative of Orb Estates*).

3.4 At this time most of the previous directors (who had run Alexanders' motor business) resigned. The exceptions were Mrs Clayton and also Mr Humm, who both moved from executive to non-executive roles.

3.5 In the original circular prepared by Corporate Synergy PLC, neither Mr Delacave's nor Mr Sinclair's connections with Orb Estates were properly disclosed: they were both described as "independent directors" who advised shareholders to agree to the transaction with Orb. Subsequently Mr Sinclair has withdrawn from this role. Mr Delacave still purports to be an "independent director," despite his recent directorship of Orb Estates.

3.6 Notwithstanding the above revelations, the Executive has taken the view that the offshore company Craigen is not acting in concert with Orb Estates. In my view this remains extremely suspect, in the light of –

- Craigen's earlier actions in nominating two directors of Orb Estates and Mr Sinclair to the board of Alexanders
- the unknown ultimate beneficial ownership of Orb Estates
- the pattern of non-disclosure and mis-statement which has now come to light.

3.7 In June 2001, another offshore company, Sunneynook Limited, entered into a put option agreement with Mrs Clayton, covering her remaining shares representing 25.8% of Alexanders' share capital. The exercise price was 30p per share, and the consideration for the option was nil. This was a remarkable agreement, because the market price of the shares at the time was around 16p. It is difficult to see why Sunneynook should ever have entered into such an agreement, unless as part of some broader scheme to gain control of Alexanders.

3.8 At this time, Mrs Clayton also finally resigned her directorship of Alexanders.

3.9 On 27 June 2002 Sunneynook acquired shares through the exercise of the option.

3.10 Sunneynook is now agreed to be acting in concert with Orb Estates. (The original circular did not state this. The link between Sunneynook and Orb was hidden from all but the most careful readers by an erroneous cross-reference in the document.)

3.11 Mr Humm, the only director who held any shares in Alexanders, was offered a special payoff at 30p per share by a party acting in concert with Orb. This was itself a disqualifying transaction, and the details were concealed in the original circular. I deal with this further in section 4 below.

3.12 Subsequently a supplementary circular dated 1 August 2002 (hereafter "the supplementary circular") has been issued in an attempt to rescue the deal. Corporate Synergy PLC, who it turns out have an ongoing relationship with Orb Estates, have belatedly been deemed to be insufficiently independent to advise the "independent directors." Daniel Stewart & Company PLC have been appointed instead. Mr Humm's agreement to sell his shares at 30p has been unravelled.

3.13 We also learn from the supplementary circular that Mr Sinclair has withdrawn from the role of "independent director," but Mr Delacave (a *recent director of Orb Estates*) absurdly retains that role. Sunneynook has been disenfranchised from voting, but Craigen remains entitled to vote its 29.9% holding in favour of the deal.

3.14 In practice, given the very dispersed nature of the private shareholdings (there are more than 1600 holdings on the register) and the high proportion held in nominees (which often do not facilitate voting by beneficial owners), this means the proposed deal is almost sure to be approved on the strength of Craigen's 29.9% vote.

3.15 Any vote will be further distorted by the tactics which the company has adopted to ensure that as few small shareholders as possible are aware of recent developments. In particular, a summary of the original whitewash circular was published on RNS, but no summary of the supplementary circular (which is very much shorter) has been published on RNS. The company instead published on RNS a banal statement that a further circular is being sent to shareholders, but with no outline of its contents, or details of how or from where copies might be obtained. This selective disclosure effectively hides the further information in the supplementary circular from the majority of small shareholders who have nominee holdings. It is in my view a breach of the Code's General Principle 4.

3.16 In response to my complaint that this selective disclosure was unfair, the Executive stated that from its viewpoint the disclosure was satisfactory. In my view it is wrong for the Panel to endorse such a blatant trick against small shareholders, in such extraordinary and contentious circumstances.

4. Mr Humm's payoff

4.1 I noted above that the director Mr Humm had entered into a special agreement to sell his shares at 30p per share. This section examines this agreement in greater detail.

4.2 Mr Humm is the only director who holds shares in Alexanders. He appears to have acquired most of his shares by exercising executive options at a price of 18.5p per share.

4.3 As an aside, I note that it seems unlikely that Mr Humm was one of the true architects of the Orb deal, or that he has any indirect financial interest in Orb. It seems more likely that he has been caught up in a scheme not of his own making.

4.4 Mr Humm was no doubt aware of the extreme unattractiveness of the Orb deal which he was being asked to accept in respect of his own shares, and recommend to his fellow shareholders. It was therefore necessary for the proponents of the deal to arrange a payoff for Mr Humm. This was done by an offshore company called Gateside Holdings Limited (hereafter "Gateside"), which has belatedly been found to be acting in concert with Orb.

4.5 On 3 July 2002 Gateside entered into an agreement to pay Mr Humm 30p per share for his holding immediately after the vote to approve the transaction. The most recent market price at the time was 16.5p per share, and the value of Alexanders' cash pile was 25p per share. Other shareholders, remember, are being offered a highly geared property company with net tangible assets of 19p per share, with a market value of perhaps 10-12p per share.

4.6 The original circular prepared by Corporate Synergy PLC referred to this payoff only as "an agreement with a third party," concealing the explosive details regarding the price and the counterparty.

4.7 Remember that Mr Humm is the only director who holds shares in Alexanders. In relation to the financial merits of the deal, his attempt to get out speaks much louder than his recommendation to his fellow shareholders.

4.8 Mr Humm has, for the time being, now given up this special payoff. Nevertheless his complete lack of belief in the deal he has recommended to his fellow shareholders is still apparent, as he now intends to resign as a director (I quote from the supplementary circular) "so that he can sell his Ordinary Shares."

4.9 The agreement to purchase Mr Humm's shares was itself a disqualifying transaction, and the Rule 9 Waiver was sought on the basis of a deceit about this transaction. Following the discovery of the deceit, the Panel, rather than applying the City Code's provisions concerning disqualifying transactions, proposes to allow the transaction to be unravelled and a Rule 9 Waiver granted. Thus no penalty attaches to the deceit. This seems wholly wrong.

4.10 It is foreseeable that when the furore has died down, Mr Humm's acquiescence in the detriment to the small shareholders will probably be rewarded. He will probably get his 30p per share one way or another.

4.11 The Panel has asked to be informed of, and approve, any disposal of Mr Humm's shares in the next 12 months. This is a toothless sop to the small shareholders. The Panel will have *no effective sanction* against Mr Humm, who will be retired, or against whatever mysterious offshore company ultimately provides his payoff. Both parties to the payoff will be able to laugh in the faces of the Panel, and the hapless small shareholders trapped at maybe 10-12p per share in the company controlled by Orb. The effective sanction available to the Panel is the sanction it can impose *now* – that is, with-holding the Rule 9 Waiver.

5. The beneficial ownership of Orb Estates PLC

5.1 Orb Estates PLC will have 75.1% of Alexanders following the deal, and will in addition receive the major part of Alexanders' cash balance. According to the original circular, the price being paid by Alexanders for properties acquired from Orb is more than £10m in excess of their fair value. Because of the very disadvantageous terms of the deal for Alexanders' shareholders, the net assets of Orb Estates will be materially increased by the deal. The question of who benefits from an increase in Orb Estates' net assets is therefore of central importance to understanding the deal. Yet the ultimate beneficial ownership of Orb Estates has never been disclosed. It is difficult to make economic sense of this transaction in the round other than by assuming that its proponents benefit in some undisclosed way from an increase in the net assets of Orb Estates.

5.2 Since Orb Estates is a company registered in England, I should perhaps outline the devices by which the ultimate beneficial ownership, and any possible indirect interests of the directors or parties associated with them, are hidden. The original circular states that the ultimate parent of the Orb Group is Euro & UK Property Limited, which is registered in the British Virgin Islands. The circular further states that ordinary shares in this company carry only voting rights, and are held by a Jersey company. The income and capital rights are carried by preference shares, which are held by "*a group of high net worth individuals,"* whose identity is undisclosed.

5.3 Documents at Companies House confirm that shares of Orb Estates are held by a Jersey nominee company, presumably the first link in a chain to the ultimate parent as above. As regards directors' interests, the accounts contain the following statement:

> "Mitchell Higgins held 211,368 shares of Orb Estates plc at 30 June 2000 and 30 June 2001. No other director had any beneficial interests in the shares of the company or the Group undertaking *requiring disclosure under Schedule 7 of the Companies Act 1985…*" [my italics]

5.4 This appears to leave open the possibility that the offshore structure involving multiple companies with different classes of shares enables the directors to have indirect interests which they consider do *not* require disclosure under the Act.

5.5 In response to all this, the Executive has stated that on questions of acting in concert and related matters, parties outside of the list of presumptions in the Code are "innocent until proven guilty." But the parties seeking a Rule 9 Waiver for this deal are ***not*** "innocent." An astonishing pattern of non-disclosure and mis-statement has been uncovered, which casts great suspicion on the proponents of the deal.

5.6 In all these circumstances I believe that the onus of proof should now shift: before any Rule 9 Waiver is even contemplated, the parties should be required to *prove* beyond doubt their independence. Orb should be required to *prove* that it is not acting in concert with Craigen. The "independent director" Mr Delacave should be required to *prove* that he and any parties associated with him have no indirect beneficial interest in the net assets of Orb Estates.

5.7 However, I believe that irrespective of any proof of independence which these parties might provide, a Rule 9 Waiver cannot in fact be contemplated. This is because of the disqualifying transactions – firstly, Gateside's agreement to purchase Mr Humm's shares, as discussed above; and secondly, Sunneynook's purchase, which I discuss in the next section.

6. Application of the Code to Sunneynook's acquisition of shares

6.1 As noted earlier, on 27 June 2002 offshore company Sunneynook acquired 25.8% of Alexanders share capital. Sunneynook has belatedly been found to be acting in concert with Orb Estates.

6.2 Applying the Code to this transaction, I first note that Paragraph 3 of Appendix 1 (Guidance on the Whitewash Procedure) states that

> "(a) the Panel will not normally waive an obligation under Rule 9 if the person to whom the new securities are to be issued or any person acting in concert with him has purchased shares in the 12 months prior to the posting to shareholders of the circular…."

6.3 Appendix 1 does not further define the "purchasing" of securities. However, note 10 to Rule 9.1 (ie the rule from which a waiver is being sought) states that

> "In general, the acquisition of convertible securities, warrants or options does not give rise to an obligation to make a general offer *but the exercise of any conversion or subscription rights or options will be considered an acquisition of shares for the purpose of the Rule."* [my italics]

6.4 From this it seems that Sunneynook's acquisition of shares on 27 June 2002 is a disqualifying transaction.

6.5 The Executive has suggested to me that the acquisition of shares was the consequence of the exercise of an option whereby the shares were "put" onto Sunneynook, and that therefore Sunneynook did not "voluntarily" acquire the shares. But the Code as quoted above does not make any exception for shares acquired as a consequence of a put option.

6.6 It appears that the proponents of this deal *knew* that Sunneynook's connection with Orb was a problem when the deal was being planned. *They knew that if full disclosure was made, Sunneynook's acquisition was likely to be regarded as a disqualifying transaction.* Why else did the original circular seek to obscure the relationship between Sunneynook and Orb?

6.7 To suggest after all this that Sunneynook was not a "voluntary" purchaser seems a sophistry designed to resuscitate the transaction. It is a trick to foil the small shareholders at the last hurdle.

6.8 More generally, I have the impression that the Executive's approach to this matter, rather than trying to do what is fair for all shareholders in the light of new information, may have tended towards looking for any means of salvaging the circular which it previously approved. This is an understandable reaction, but it has most unfair consequences. It favours the party associated with previous non-disclosures and mis-statements over the small shareholders whom that party is seeking to disadvantage. It is wrong that the Panel should grant a waiver in favour of the guilty party, and to the detriment of the small shareholders, who make this appeal with clean hands.

7. Conclusion

7.1 I appeal against

(a) the Executive's decision that Sunneynook's acquisition of shares is not a disqualifying transaction for the purposes of the whitewash procedure; and

(b) the Executive's decision that Gateside's concealed agreement to purchase Mr Humm's shares, which was itself a disqualifying transaction, can be unravelled after its discovery; and

(c) the Executive's decision to grant a Rule 9 waiver without knowledge of the beneficial ownership of Orb Estates, the party seeking the waiver; and despite the pattern of non-disclosures and mis-statements which has now been uncovered.

7.2 The remedy I seek is that the Panel revokes the decision to grant a Rule 9 waiver for this transaction.

7.3 This would reflect the Panel's disapproval of the pattern of non-disclosure and mis-statements made in seeking the waiver. It would also rescue the small shareholders from the scam which has been foisted upon them, and which brings them here today to make this appeal.

7.4 If after considering this appeal the Panel remains minded to grant a Rule 9 waiver, I ask that *all* parties on whom suspicion has been cast by the previous pattern of non-disclosure and mis-statement should now be disenfranchised from voting on the deal. In other words, the offshore company Craigen should be disenfranchised, because it originally nominated two Orb directors and Mr Sinclair to Alexanders' board; and Mr Humm should be disenfranchised, because his credibility with shareholders has been destroyed by the previous non-disclosure of his extraordinary exit deal.

Guy Thomas
7 August 2002

(Appendix overleaf)

APPENDIX

A.1 In this Appendix I give some information about my background, and some ways in which this may have impinged on my dealings with the Panel. This is not central to my appeal, but may be useful context.

A.2 I am an actuary and academic, and until a few weeks ago I had only the faintest awareness of the City Code. However when I first looked at the original circular, I thought that the transaction seemed quite exceptionally disadvantageous to independent shareholders. After some research on the City Code I realised that there might be parties acting in concert, a point which I raised with the Panel.

A.3 Subsequently, I was very surprised to learn that the document I had read was a whitewash circular, which the Panel approves before it is sent to shareholders. Learning this immediately raised in my mind a concern of natural justice, which has never been dispelled: if the Executive had already committed itself by approving the circular, how could it consider fairly my objections to that approval?

A.4 I have at all stages made clear to the Executive my lack of experience in corporate finance matters. Whilst I have been treated most courteously on all the occasions of my contact with the Executive, as an inexperienced and unadvised party I feel I have not received any help at all to make my case. My impression is that the company and its expert advisers, on the other hand, have received a great deal of help and guidance in resuscitating the transaction. I feel that this imbalance may have influenced the outcome.

A.5 To elaborate on this point: if the Executive had been minded to treat the company and its advisers in a symmetrical manner to the way it has treated the small shareholders, I think the Executive might have said: "We have been made aware of information which makes us unwilling to grant you a waiver. We are not going to tell you what it is. We are conducting an investigation, but we are not going to tell you anything about its progress. If you want a waiver, go away and prepare new proposals, with complete disclosure, and we might consider it." But my impression is that the company and its advisers have actually been given a very great deal more help and guidance than this.