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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 140 OF 2022 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF YOUBI CAPITAL (CAYMAN) GP

Appearances:	Mr. Graham Chapman KC of Counsel and Mr. Nicholas Fox and Ms. Laura Stone of Mourant Ozannes (Cayman) LLP for the Petitioner Mr. James Eldridge and Mr. Malachi Sweetman and Ms. Christiana McMurdo of Maples and Calder (Cayman) LLP for the Company
Before:	The Hon. Justice Raj Parker
Heard:	20 & 21 February 2023
Date of Decision:	4 April 2023
Draft Judgment Circulated:	27 March 2023
Judgment Delivered:	4 April 2023

HEADNOTE

Winding up Petition-strike out-case management stay-New York proceedings -alternative remedy-standing-preliminary issue.

JUDGMENT

Introduction

1. By a petition dated 16 June 2022 ("the Petition"), the Petitioner, Jingjing Zhou, seeks an order that Youbi Capital (Cayman) GP ("the GP" or "the Company") be wound up pursuant to section 92(e) of the Companies Act (2022 Revision) on just and equitable grounds.

2. The Petitioner also seeks directions that the issue of her status as a shareholder in the GP (and thus her standing to bring the Petition on that basis) be tried as a preliminary issue.

3. The Company seeks orders that the Petition be struck out or, in the alternative, stayed pending the outcome of other proceedings presently before the Supreme Court of the State of New York ("the NY Proceedings").

4. These two applications were heard together.

5. The Company is a Cayman Islands exempted company which was incorporated on 17 January 2018. The registered office of the GP is at Walkers Corporate Limited, Cayman Islands. At the material time, the principal place of business was Chappaqua, Westchester County, New York.

6. The purpose of the Company was to act as the general partner for three separate Cayman Islands limited partnerships, namely Youbi Capital (Cayman) Series 1 LP ("ELP1"), Youbi Capital (Cayman) Series 2 LP ("ELP2") and Youbi Capital (Cayman) Series 3 LP ("ELP3").

7. Each of the three limited partnerships pooled together investor funds, which were then invested at the direction of the Company (acting as general partner) on behalf of each of the partnerships in early stage blockchain and cryptocurrency technology projects in either shares or tokens. The shares and tokens would then be sold in secondary markets for exchanging back to BTC, USDT or other liquid tokens, which were then distributed back to the investors after the Company had collected its management fees and performance fees.

8. In addition to managing the investments placed on behalf of ELP1, ELP2 and ELP3, the Company also generated income from its own separate investments.

9. The Company's Articles of Association and a Memorandum of Association are dated 17 January 2018. The authorised share capital of the Company was initially USD $50,000, divided into 50,000 shares with a par value of $1.00 each. It is not in dispute that the following individuals became shareholders and directors of the GP on 17 January 2018 and were allotted the following shares:

(1) The Petitioner 1,852 shares (18.52%)

(2) Yaofei David Chen 2,222 shares (22.22%)

(3) Chen Li 3,086 shares (30.86%)

(4) Na Zhang 2,222 shares (22.22%)

(5) Li Gong 618 shares (6.18%)

10. The Petitioner's position is that she remains a shareholder and director of the Company and continues to own 1,852 shares.

The New York Proceedings[1]

11. The Petitioner commenced litigation in the United States in September 2021. This was apparently prompted by suggestions that her shareholding had been "diluted" without a satisfactory answer as to what the true position was.

12. In addition, the Petitioner says she learned that the Company intended to make shareholder distributions in connection with profits earned by one of its limited partnership entities, ELP2. At about the same time, the individuals then in control of the Company terminated the Petitioner's access to the 'WeChat' text chain that the Company had created for its ELP2 investors.

13. These events were a cause for concern on the part of the Petitioner. At the time, she and the three individuals at the Company with whom she interacted, Yaofei Chen, Chen Li, and Hyejin Lee (collectively "the Individual Defendants") were all based in the north-eastern United States of America. The relevant conduct and communications between those individuals and upon which the Petitioner's concerns were based all occurred in the United States.

[1] *See Musumeci 1 at §§7-19*

14. Ms Zhou sought specifically to enforce her rights as a shareholder and director of the GP to receive distributions and have full access to the books and records of the GP, and she sought the immediate provisional relief of a temporary restraining order to prevent the Individual Defendants from dissipating the GP's assets while her claims were being considered.

15. The Petitioner initially filed her personal claims in federal court, the United States District Court for the Southern District of New York (S.D.N.Y.), but after that court raised questions about the sufficiency of its limited jurisdiction (given that the Petitioner and the Individual Defendants were, at the time, not United States citizens), the Petitioner voluntarily dismissed the federal case and refiled her claims in a court of general jurisdiction, New York Supreme Court in Westchester County on 17 September 2021, where she and Mr Qiao resided.

16. On 3 February 2022 the Petitioner filed an Amended Complaint in the NY Proceedings which added fraud and conversion claims against the Individual Defendants related to specific conduct by the Defendants targeted toward Ms Zhou individually.

17. At the same time, the Petitioner's husband, Mr Qiao, was joined as a co-plaintiff in connection with the fraud claims, as well as to bring claims in conversion that were independent of the Petitioner's shareholder claims and based on his own investment in ELP2. The Amended Complaint expanded the number of personal claims against the Individual Defendants brought by the Petitioner and Mr Qiao based on conduct specifically targeted against them.

18. In summary, on the basis of the Amended Complaint, the Petitioner and Mr Qiao bring a number of claims against the Individual Defendants and the Company including claims based on the Petitioner's contractual rights to profits and dividends payable to her as a shareholder of the GP (plus the valuation of her ownership interest in the Company), as well as claims relating to Mr Qiao's personal investment in ELP2 through the Company, claims premised on allegedly fraudulent statements that the Individual Defendants made to the Petitioner and Mr Qiao, conversion claims, and related claims arising from the Individual Defendants' breaches of fiduciary duty.

19. The relief sought in the NY Proceedings includes[2]:

    (1) An award for damages against the Defendants in the amount of no less than US$22,300,000.

[2] *Musumeci 1 at §17*

(2) An order preventing the Defendants from (a) diluting the Petitioner's membership in the Company, (b) distributing profits until the Petitioner's proportionate share is determined, and (c) dissipating assets until the dispute is resolved.

(3) A declaration that any dilution of the Petitioner's interest and the payment of dividends to other shareholders be declared null and void;

(4) That the books and records of the Company be made available for inspection; and

(5) Such other relief as the Court deems just and proper.

20. These claims are hotly disputed by the Defendants in the NY Proceedings and, further, the Defendants have brought various counterclaims of their own. The counterclaims in the NY Proceedings relate to allegations of misappropriation and breach of fiduciary duty by the Petitioner and Mr Qiao.

21. These counterclaims seem to have arisen from the fact that the Petitioner disclosed in the course of the litigation that she and Mr Qiao had access to certain Company documents which had been stored on a Share Drive.

22. On 30 January 2023 the NY Court dismissed the Petitioner's application to dismiss the Revised Amended Counterclaims and permitted the joinder of two further entities to the NY Proceedings, namely BBShares Capital Management Limited and BB Matrix Holding Pte. Ltd. (together "the BB Entities") as additional defendants to some of the counterclaims. The claims against the BB Entities allege misappropriation of trade secrets, breach of confidence and various other causes of action relating to the alleged misuse of information said to belong to the Company[3].

23. The NY Proceedings therefore comprise:

a) claims brought by the Petitioner in her capacity as a shareholder but also as a director.

b) claims by the Petitioner's husband, Mr Qiao.

[3] *Musumeci 2 at §27*

c) claims which are brought against not only the Company but also the Individual Defendants.

d) multiple causes of action including claims which are subject to both Cayman and New York law.

e) These claims are not only defended but sought to be met by various counterclaims. Those counterclaims are not only brought against the Petitioner but also Mr Qiao and, as a result of the ruling of 30 January 2023, against the BB Entities too.

24. The parties are apparently currently engaged in a lengthy discovery process in which a Discovery Referee has been appointed, but has yet to rule on the numerous issues between the parties.

Company submissions in summary

Strike out

25. Mr Eldridge submitted that the Petition should be struck out as an abuse of process because:

(a) It is highly duplicative of existing proceedings in New York (i.e., the NY Proceedings), which have been commenced, and which are still being prosecuted, by the Petitioner. That is a forum entirely of her choosing, and her subsequent Petition in the Cayman Islands is an obvious example of forum shopping.

(b) The monetary and other relief the Petitioner seeks in the NY Proceedings makes it clear not only that she does have alternative remedies, but that she is in fact actively pursuing those remedies.

(c) The overlap between the NY Proceedings and the Petition will result (and indeed has already resulted) in unnecessary duplication of cost and effort by the parties, and creates a risk of inconsistent decisions, on the standing question, among other issues.

Stay

26. In the alternative the Petition should be stayed pending resolution of the NY Proceedings because various issues in the Petition (or many of them, including the standing question) are also issues in the NY Proceedings.

27. Mr Eldridge argued that a strike-out in this case is the more appropriate order. The Petition ought not be permitted to hang over the Company's head. The Company is an investment company, and a company which operates as the general partner of two Cayman Islands limited partnerships. The very existence of a winding up petition (even one which is stayed) has the potential to cause significant prejudice.

28. Should the Petitioner succeed in the NY Proceedings, and should she consider the relief she obtains to be inadequate, she could then recommence the Petition. If the Petitioner succeeded in establishing in the NY Proceedings that she was still a shareholder in the Company, but remained dissatisfied with the other remedies awarded to her in that proceeding, then the Company accepts that she would have standing to file a just and equitable winding up petition in the Cayman Islands (reserving the Company's position as to the merits of such an application).

29. The Company further accepts that it (and the Petitioner) would be bound by the finding of the Westchester Court as to the Petitioner's standing as a shareholder (having joined issue on that point) and any other relevant matters properly before that court.

Preliminary issue application

30. Mr Eldridge argued this should be dismissed because:

(a) If the Petition is struck out or stayed, that is the end of the matter.

(b) The standing question is, on the Petitioner's own case, a core element to her action in New York. The Westchester Court has not sought, and does not require, this Court's assistance to deal with the standing question. Indeed, the Westchester Court was only recently informed of the existence of the Cayman Petition (and even then, only by the Company, rather than by the Petitioner). The Westchester Court is fully seized of jurisdiction, and can determine this issue. Its rulings will be binding on the Company. Once again, that is a forum of the Petitioner's own choosing, about which she now cannot now complain.

(c) Even if not for the existence of the NY Proceedings, the standing question would not be appropriate for determination by way of preliminary issue. It is on any account (including the Petitioner's own account in the NY Proceedings) a complex and factually dense issue, which requires further documentary discovery and examination of witnesses.

(d) The standing question is also not a discrete point, but a thread which runs through the entirety of the Petitioner's pleaded case on the Petition. In essence, says the Petitioner, it is appropriate to wind up the Company because she has been denied the rights which she says arise from her shareholding. But whether or not she is a shareholder at all, and the circumstances in which that came to be, is all part of the wider story, which in turn is inexorably linked to the relief she seeks in the Petition. This is exactly the kind of instance where the Court should resist the "siren song" of a "treacherous shortcut" of a preliminary issue.

Petitioner submissions

31. Mr Chapman KC submitted:

a) The Petition is not an abuse of process. The Petition is brought on proper grounds pursuant to the Petitioner's statutory rights and seeks relief which is only available from this Court. The Petitioner and her husband have also commenced proceedings in New York against the Company and a number of individual defendants asserting several causes of action relating to conduct in connection with the Company. The pre-existing NY Proceedings do not render the Petition abusive. In the context and course of the NY Proceedings, the Company and the individual defendants have put in issue whether the Petitioner remains a shareholder in the Company, despite clear evidence to the contrary.

b) In addition, it has emerged that the Company has been taking steps to the prejudice of the Petitioner and other stakeholders. That being so, the Petitioner has, as is her right, brought the Petition before this court to protect her position and that of other stakeholders. In doing so, she seeks relief that is not and will not be available to her in New York.

c) The rationale for the commencement of the winding up proceedings was that the Petitioner learned in the NY Proceedings of information which suggested far broader mismanagement of the Company's affairs, affecting both the Petitioner and others. This included, amongst other things, that the Individual Defendants had created a new entity with the name "Youbi Group" (which is, of course, suspiciously close to the name of the Company) to which they were moving all of the Company's assets. Additionally, discovery obtained from third parties and payment records from publicly available cryptocurrency platforms revealed self-dealing, including apparent use of

company funds to pay for personal expenses. The Petitioner also discovered that the Defendants in the NY Proceedings were withholding distributions from other investors simply because of the association of those investors with the Petitioner and her husband. This evidence of mismanagement and dissipation of funds belonging to the Company prompted the Petitioner to file the Petition for broader relief on behalf of all shareholders.

32. The relief sought by the Cayman Petition is that the Company be wound up on the just and equitable basis. The grounds relied upon for this are as follows:

(1) Loss of confidence in management, oppression and lack of probity.

(2) Breach of the Petitioner's legitimate expectations.

(3) Breakdown of quasi-partnership.

(4) Need for independent investigation

(5) Risk of further dissipation of assets.

33. Mr Chapman KC made the following additional points.

a) The Petitioner brings the Petition as of right, in order to seek relief which only this Court can grant in the form of a winding up order which would operate to protect the positions of all those with an interest in the Company. That is not available to her in New York and, moreover, is available here well in advance of the likely outcome of the NY Proceedings. Put another way, if the Petitioner awaited the outcome of the NY Proceedings then any relief thereafter granted on the Petition would likely prove to be worthless and of no utility. In this context, it is the Company that is seeking to secure a procedural advantage through its application.

b) The Petitioner's status as a shareholder is a threshold and straight-forward issue of Cayman law in this case that can and should be determined expeditiously by this court as a preliminary issue. That determination will not interfere with the NY Proceedings (where progress has, for a variety of reasons, been slow) and, following its

determination, appropriate case management directions can be given both here and in New York to ensure that the proceedings are not duplicative or disruptive of each other.

c) It is obviously more convenient and appropriate for the issue of whether the Petitioner is a shareholder in a Cayman company to be tried by this Court. This is an issue of Cayman law which this Court is best placed to determine, applying its own laws, as against it being determined by the New York court on the basis of expert evidence on Cayman law.

d) The Petitioner's status as a shareholder is one of many issues in the NY Proceedings but is a central, and potentially dispositive, issue on the Petition. A determination of that issue in Cayman is likely for all practical purposes to be dispositive of that issue (but not the claims overall) in New York. There is no real prospect of the issue being tried twice or of inconsistent findings being made if the issue is determined and determined first in Cayman. By contrast, a determination of the issue in New York on the basis of expert evidence (where Cayman law would be an issue of fact) would nevertheless leave scope for the issue to be considered on the Petition afresh as a matter of Cayman law.

e) Contrary to the impression sought to be given by the Company, the issue of whether the Petitioner remains a shareholder is a straight-forward one and ripe for determination as a preliminary issue. Its determination will require only limited discovery (where that already provided in the NY Proceedings can be redeployed) and limited witness evidence.[4] The Petitioner has effectively already set out her case and evidence in this regard.

34. Mr Chapman KC also submitted in relation to the standing issue:

a) It is not in dispute that the Petitioner became a shareholder in January 2018. The Company has provided various inconsistent and contradictory statements of its position. Its current position appears to be that the Petitioner ceased being a shareholder in November 2018. However, of the various different explanations provided by or on behalf the Company, the first, produced in September 2019 (and so nearly a year *after* the date that the Company now claims she ceased to be a shareholder) was to the effect

[4] *The Company suggests that evidence will be required from at least four witnesses: the Petitioner and her husband on the one part, and Chen Li and Yaofei Chen on behalf of the Company: Baker3 at [15]*

that she remained a shareholder and even included the provision of a screen shot of a document recording her shareholding as 1,852 shares.[5]

b) Next, after initially being reassured as to her status as a shareholder, she was told in May 2021 that her holding had been "*diluted*" before being provided with copies of resolutions allocating her shares.[6] Then in June 2021 a register of members from January of that year was produced which again recorded the Petitioner as holding 1,852 shares and remaining as a director.[7]

c) However, given the differences in explanations being provided on behalf of the Company, the Petitioner instructed US counsel to write requesting certain company information on 30 June 2021.[8] It was not until 14 December 2021 at the very earliest that it was suggested that the Petitioner had decided to "*withdraw*" her interest from the Company in November 2018.[9] This, in turn, was flatly inconsistent with documents produced by the Defendants in discovery in the NY Proceedings on and after December 2021, which have never properly been explained[10].

d) Since then the Company has variously suggested that the Petitioner was redeemed, repurchased or even surrendered her shares in November 2018, but has failed to articulate a consistent or clear case in this regard. It should be able to provide a clear documentary record of the position both in the form of relevant resolutions, memoranda and correspondence with its corporate service provider, but it has failed to do so. The only copies of the register of members that have been provided are flatly inconsistent with its case. In any event, on its latest version of events, the determination of the issue requires a limited and focussed factual inquiry into a very small period of time to assess whether anything happened in or about November 2018 which caused the Petitioner to lose her shareholding (on whatever basis).

35. As a result, he submitted, there are no grounds for striking out the Petition or for staying it. Instead, the Petition should be allowed to go forward and, in particular, go forward to an early trial of a preliminary issue to determine whether the Petitioner remains a shareholder in the Company.

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[5] *Zhou2 at [21]*
[6] *Zhou2 at [22]-[28]*
[7] *Zhou2 at [29]-[34]*
[8] *Zhou2 at [35]-[36]*
[9] *Baker3 at [7.6] and [8]*
[10] *Zhou2 at [31]*

The law

Strike out

36. The Court's jurisdiction to strike out a petition as an abuse of process, in addition to being part of the Court's inherent jurisdiction, is found in O.18, r 19(1)(d) of the Grand Court Rules ("**GCR**"):

> *(1) The Court may at any stage of the proceeding order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that –*
> ...
> *(d) it is otherwise an abuse of the process of the court*

37. CWR O.3 r.2(5) and GCR O.18, r19(3) make it clear that the rule applies equally to winding up petitions, and it is well established that the Court has jurisdiction to strike out a winding up petition as well as other pleadings[11].

38. There are no set criteria for what is and is not an abuse of process. As observed by Lord Bingham in *Johnson v Gore Wood and Co:*

> "*As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not…[I]t is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances*"[12]

39. In the specific context of winding up petitions and the availability of alternative remedies, this Court held in *Circumference* [13]:

> "*In considering whether to strike out a contributory's petition to wind up on the just and equitable ground the Court is required to address:*
>
> *(I) Whether there is an alternative remedy available to the petitioner; and*

[11] *In the Matter of Circumference Holdings Ltd (Unreported, Grand Court, 3 May 2021)*
[12] *Johnson v Gore Wood, pages 22 at C - D, and 31, at E – F*
[13] *Ibid.§§42 and 43*

(II) Whether the petitioner is acting unreasonably in not pursuing that alternative remedy.

Chadwick JA, in delivering the Judgment of the Court of Appeal in Camulos stated in relation to the questions set out above

"If a court is satisfied that both these questions should be answered in the affirmative, then it can be expected to take the view that the presentation of the petition is an abuse of its process or, alternatively that the petition is bound to fail because it would not, in those circumstances be "just & equitable" that the Company should be wound up"

The Petitioner needs to show that the winding up procedure provides the only sufficient remedy to deal with the wrong about which he complains and that there is no adequate alternative available to him."

40. On such an application, Mr Chapman KC submitted, and the Court accepts, that it should apply the following principles:

(1) The Court will only strike out a petition in a "plain and obvious" case.

(2) It is not appropriate to seek to resolve disputed issues of fact on an application to strike out: disputed issues of fact should be resolved when the petition is heard.

(3) If the actions of a company (through its directors) have resulted in a justifiable loss of confidence in the management of the company, then a contributory has a statutory right to petition for the winding of the company on the just and equitable ground. It cannot and should not be deprived of that right merely because the company can point to some other remedies that may legitimately go some way to compensating the contributory. On the contrary, the contributory is entitled to take the view that it would prefer for the company to be wound up as against having to pursue a series of piecemeal other steps[14].

(4) Nevertheless, the Court must consider whether there is an alternative remedy available to the Petitioner.

[14] *Tianrui ibid. at [37]*

(5) The Court must also consider whether the petitioner is acting unreasonably or improperly in pursuing the petition and in not pursing an available alternative remedy[15].

41. On the latter point, as was said in *Tianrui*:

> "*It is only if it can be clearly seen at the outset that the just and equitable ground for winding up cannot be established that it will be appropriate to strike out the petition…*
> *In all but a plain and obvious case, it is likely to be necessary for the facts underlying a petition to be established at trial before the adequacy of a suggested alternative remedy, and the reasonableness or otherwise of the petitioner in failing to pursue it, can be established. Indeed, the structure of the Cayman legislation indicates that in ordinary circumstances the decision on the suitability of an alternative remedy, at least a remedy specified in s.95(3) of the Law, is to be made after the allegations in the petition have been determined by the court and a prima facie case for a just and equitable winding up made out. Unless, therefore, an available alternative remedy can be seen, without full examination of the facts, to be capable of satisfying the petitioner's concerns to an extent that would make it clearly impossible for him to persuade the court that it would be just and equitable to wind up the company, the petition should proceed*."[16]

42. The bringing of parallel proceedings in different jurisdictions can also be an abuse of process depending on the circumstances. In *TMSF v Wisteria Bay Limited*[17], Smellie J, as he then was, observed that:

> "*It is well established that the Court has an inherent jurisdiction to stay or dismiss proceedings where, because there are parallel proceedings elsewhere, the continuance of the present proceeding would amount to an abuse of the process of the court… The court will, in a proper case, summarily prevent its machinery from being used as a means of vexation or oppression in the process of the litigation*."

43. Smellie J cited Buckley J in *Thames River Launches Ltd. v Trinity House Corp*:[18]

[15] *Tianrui ibid §§ 23-24*
[16] *Ibid.§§28-29*
[17] *TMSF v Wisteria Bay Limited* [2007] CILR 185, at paragraph 5
[18] *Thames Launches Ltd v Trinity House Corp.* [1961] Ch. 197, at 207

> *"As I understand it, the principle is that if two courts are faced substantially with the same question, it is desirable to ensure that that that question is debated in only one of those two courts if by that means justice can be done'.*

Case Management Stay

44. The Court's power to grant a case management stay arises under its inherent jurisdiction, consistent with the overriding objective and the obligation on the Court to strive to achieve the least expensive determination of every cause[19].

45. The Court needs to consider what is required in the interests of justice in the particular case, although it will usually be only in rare and compelling circumstances that it will be in the interests of justice to grant a stay on case management grounds. A Court will usually get on and hear the case before it rather than await the outcome of proceedings in another jurisdiction. [20]

46. In *Circumference*, the Court noted that "*There must be strong reasons for granting the stay to further the ends of justice, and the benefits which are likely to result from the stay must clearly outweigh any disadvantage to the Petitioner*[21].

47. Moses J.A. in the Court of Appeal in *Nanfong International Investments Limited*[22] endorsed the well-known ruling of Moore-Bick J in *Reichhold Norway ASA v Goldman Sachs Intl*[23] that a temporary stay should be granted in order to manage the order in which proceedings are heard:

> *"....not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other*".

48. Moses J.A. concluded that "*the proper approach is to apply the principles identified in Reichhold without qualification'*[24] and went on to say on the facts of that case:

> "*In light of that circumstance, it is inevitable, in my judgment, that the question of BHL's authority [to cause a winding up petition to be presented] has to be decided in two different*

[19] *Circumference,* paragraph 55
[20] *Per Males LJ Athena [2022]EWCA Civ 1051 at § 59*
[21] *Ibid. §57*
[22] *Re Nanfong International Investments Limited* [2018] (2) CILR 321
[23] *Reichhold Norway ASA v Goldman Sachs Intl* [1999] 1 ALL ER (Comm) 40 at 47 D
[24] *Nanfong*, paragraph 25

jurisdictions, at least absent any case management decision as to the order in which those two decisions will be made. It follows that there arises the real difficulty of inconsistent decisions. Absent a stay, two courts in two different jurisdictions will have to decide, in the case of the Samoan court, mixed questions of law and fact as to BHL's authority and, in the Cayman Islands, questions of fact which include Samoan issues of law, which themselves might require further resolution in the Samoan appellate process. If the proceedings in Cayman are stayed, then the Grand Court will have the benefit of the Samoan court's ruling on the issue of authority in a manner which is likely to be determinative of the issue in the Cayman Islands.

Moreover, it is difficult to foresee any particular disadvantage to BHL by granting a temporary stay. It will have to litigate the issues arising out of its purported resolutions in Samoa. A stay may well avoid unnecessary duplication of costs[25].

49. Those considerations resulted in the court finding compelling and very strong reasons for granting a temporary stay in order to manage the order of proceedings.

50. The test in *Nanfong* was recently applied by this Court in *New Silk Route Advisors L.P.*[26] where Doyle J granted a stay of the petition pending the outcome of proceedings in New York, even though those proceedings would not be determinative of the petition in the Cayman Islands[27].

51. In granting a stay, Doyle J held that:

a) The main prejudice to the petitioner was a delay in having the petition heard, but there had been a delay in the filing of the petition in the first place, and there appeared to be no pressing urgency in the hearing of the petition which to some extent dealt with historic complaints[28].

b) The proceedings in New York were well advanced, and their determination there would significantly assist the Court in the fair, just and cost-effective determination of the issues which arose in the petition[29].

[25] *Nanfong,* paragraphs 39 – 40
[26] *Re New Silk Route Advisors, L.P.* (Unreported, Grand Court, 10 February 2022)
[27] Ibid. paragraph 60
[28] Ibid. paragraph 61
[29] Ibid. paragraphs 61 and 62

c) The respondents to the petition agreed to be bound by the outcome of the proceedings in New York.[30]

d) The proceedings in New York would have an important effect on the proceedings in the Cayman Islands and there was significant overlap in the matters in dispute.[31]

52. In the matter of *New Silk Route Advisors LP* the Court reminded itself that "….*the right to petition for a just and equitable winding up order is a remedy available as of right provided by statute and such right should not be lightly interfered with".*[32]

53. Other factors that have been considered relevant to the exercise of discretion include the following:

(1) Whether the apparent benefits of a stay outweigh any disadvantage to the petitioner.

(2) Whether a stay would avoid the risk of inconsistent findings being made in two sets of proceedings.

(3) Whether an earlier decision in the proceedings in the foreign jurisdiction would be determinative of issues in the Cayman proceedings or the proceedings as a whole, or provide assistance to the Cayman court in determining the proceeding before it.

Preliminary issue applications

54. The authorities on proposed trials of preliminary issues often emphasise that they should be treated with great care. Judicial experience has shown that, while they are superficially attractive, they can be a 'treacherous shortcut'. Exceptional grounds or special circumstances are usually required to show that this pitfall can be avoided.

55. As an example, Lord Neuberger in *Rossetti Marketing Limited v Diamond Sofa Company Limited*[33] *said* :

> *"It represents yet another cautionary tale about the dangers of preliminary issues. In particular, it demonstrates that (i) while often attractive prospectively, the siren song of agreeing or ordering preliminary issues should normally be resisted, (ii) if there are nonetheless to be preliminary issues, it is vital that the issues themselves, and the agreed*

[30] Ibid. § 63
[31] *Ibid. paragraph 64, 65*
[32] *Ibid.§55*
[33] *[2013] Bus. L.R. 543 at paragraph*

facts or assumptions on which they are based, are simply, clearly and precisely formulated, and (iii) once formulated, the issues should be answered in a clear and precise way."

56. Lord Justice Thomas echoed a similar warning in *Greville v Venables*[34]:

"In my view this is a case which yet again underlines the necessity for great caution in the ordering of preliminary issues … this case should therefore stand simply as yet a further reminder of the necessity for great caution before preliminary issues are ever embarked on."

57. In this Court, Doyle J. in *Arnage Holdings v Walkers* helpfully summarised the general principles the Court should give consideration to when determining whether to exercise its discretion to order a preliminary issues trial:

(1) each case, of course, must be carefully considered in its own context and on its own facts and circumstances;

(2) the authorities require that a cautious approach should be taken and they warn against potential treacherous shortcuts. The trial of preliminary issues should not be taken unless to do so would be clearly conducive to the just and timely outcome of a case (Chief Justice Smellie in SPhinX)[35]*;*

(3) if considering a direction for a preliminary issues trial the court should examine the case as a whole, be assured that the issues to be singled out were amenable to proposed discrete treatment and should have regard to (a) whether determination of the issues would completely dispose of the case or at least a significant aspect of it (b) whether the costs and time involved in preparation for the trial itself would be significantly reduced (c) whether the issues could be determined on established facts or whether further examination of evidence was required (d) the degree of risk that a trial of preliminary issues would increase costs or delay the trial overall and (e) whether it would be just to make an order (Chief Justice Smellie in Ojjeh Trust, T Trust and TMSF);

[34] *[2007] EWCA Civ 878 at paragraph 51*
[35] [2009 CILR 28]

(4) the court should have regard to the factors outlined in the English case of Electrical Waste Recycling Group in particular (a) the possible saving of costs of a second trial (b) trial preparation (c) the inconvenience and strain on witnesses where evidence is required at both trials (d) complexity of a single trial (e) any particular prejudice to one or other of the parties if a split trial is held (f) difficulties of defining an appropriate split and whether a clear split is possible (g) risk of duplication, delay and appeals (h) whether a split trial would assist or discourage mediation and/or settlement (i) if an order for a split trial is made late in the proceedings whether the overall costs may actually increase (j) what is perceived to offer the best course to ensure that the whole matter is adjudicated fairly, quickly and efficiently as possible (Williams J in Herrara-Frederick and Gunn J in Edwards);

(5) *there must be a good and sufficient reason to split the trial to outweigh the sense and prescribed objective of dealing with as many aspects of the case as is practicable on the same occasion (Williams J in Herrara-Frederick);*

(6) where credibility and reliability of the parties and/or witnesses is interwoven throughout the issues in the case this would normally militate against a split trial as compartmentalising credibility in such circumstances is likely to cause prejudice to one or other parties by preventing the court from having all of the relevant information before it when making its assessment of their evidence (Gunn J in Edwards)."

58. In a case where facts are not agreed, Neuberger J, as he then was, encouraged the Court to consider carefully the extent that this impacts the value of a preliminary issue[36]:

"The more the facts are in dispute, the greater the risk that the law cannot be safely determined until the disputes of fact have been resolved. Indeed, the determination of a preliminary issue, if there are serious disputes of fact, will run a serious risk of being either unsafe or useless. Unsafe because it may be determined on facts which turn out to be incorrect, and this could even risk unfairly prejudicing one of the parties; useless because having been determined on facts which turn out to be wrong, it would be of no value."

59. It is normally in the interests of justice that all disputes should be tried together, and therefore the trial of preliminary issues should only be ordered in exceptional circumstances or on special grounds.

[36] *Steele v Steele* [2001] C. P. Rep 106 at page 5

Determination

Strike out

60. The Court is not persuaded that the Petition is an abuse of process. The Petitioner, as is her right, seeks on the face of the Petition an order winding up the Company on just and equitable grounds. This remedy is available in this Court and not available to her in the NY Proceedings, although other remedies are.

61. As set out above, the Petition identifies five grounds for a winding up order:

(1) Loss of confidence in the management, oppression and lack of probity;
(2) Breach of the Petitioner's legitimate expectations;
(3) Breakdown of quasi-partnership;
(4) Need for an independent investigation; and
(5) Risk of dissipation and/or further dissipation of assets.

62. These grounds have been particularised in the evidence. The evidence the Court has reviewed on this application is not suggestive of any collateral or improper purpose. The grounds need to be investigated at a trial.

63. It is not said by the Company that the Petition discloses no basis for the alleged loss of confidence (which would need to be objectively justifiable), although of course the allegations are denied and will need to be proved. It has not been suggested that the allegations are hopeless or bound to fail.

64. If the allegations set out in the Petition are true, it seems to the Court that they are capable of establishing that it would be just and equitable to wind up the Company.

65. As stated above, the Court is not persuaded that the Petitioner should be deprived of the right to have the Petition determined without a full investigation of the facts, because the Company points to other remedies which may compensate her in the NY Proceedings for what is alleged to have occurred.

66. The Petitioner has a statutory right to seek and obtain a winding up order if she shows, following a trial, that the grounds are made out. There is unquestionably overlap in the two sets of proceedings,

but the Petitioner cannot obtain equivalent relief to that which she seeks on the Petition in Cayman, in the NY Proceedings. Nor in the Court's view is there adequate alternative relief available in New York, such that she is behaving unreasonably or abusively in pursuing the Petition in Cayman to a trial.

67. Put another way, the Court is not persuaded that this is a plain and obvious case for the Court to be able to determine, without a proper analysis of the hotly contested facts, that it can be confident that an adequate alternative remedy is available in New York which the Petitioner should reasonably be content with.

68. The fact that the two sets of proceedings give rise to similar issues and investigations does not without more render the Petition abusive or the Petitioner's conduct vexatious.

69. A plausible explanation is given by the Petitioner in her affidavit evidence that she brought the Petition for good reason in light of developments in the New York Proceedings, which she alleges suggest widespread mismanagement at the Company to the prejudice of stakeholders including herself.

70. She also says that the relief she seeks is to protect her own interests and those of other stakeholders in the Company. That relief would be the appointment of liquidators to investigate the position, which is not available to her in the New York Proceedings. The Court accepts Mr Chapman KC's submission that the relief sought is directed towards present and ongoing misconduct and risk management that the Petitioner says affects her and other stakeholders. The relief in New York is based on alleged conduct that has to a large extent already occurred.

71. In the Court's view, it would not be right to find that, having decided to sue in New York the Petitioner is bound to continue to pursue her claims there (and only those claims there) until the conclusion of those proceedings. By bringing those proceedings in New York, in the Court's view, the Petitioner has not foregone her statutory rights to seek relief which this Court can grant her as a shareholder for the alleged wrongdoing that she claims has emerged as a result of information obtained in the New York Proceedings.

72. From what the Court can discern, notwithstanding the recent inter – attorneys correspondence which has been brought to the attention of the Court, the Petition has not delayed or disrupted the progress of the New York Proceedings, which are not at an advanced stage. The case is still in the

process of discovery with new cross claims and parties having recently been added. A trial is not expected until next year at the earliest.

73. This is not a plain and obvious case which would justify an order striking out the Petition. In relation to alternative remedy, the Court is not persuaded that the Petitioner is acting unreasonably or improperly in pursuing the Petition. The New York Proceedings will not provide the specific remedy she is seeking.

Case Management Stay

74. Having concluded that the Petition is not an abuse of process and should proceed, the Court is likewise not persuaded that it would be in the interests of justice to order a case management stay pursuant to its inherent jurisdiction and/or its case management powers.

75. Despite Mr Eldridge's forceful submissions, the Court has not been persuaded by the Company of any very strong reasons which require a case management stay in the interests of justice. Nor has the Court been persuaded of any apparent benefits of a stay to the Company which outweigh any disadvantages to the Petitioner. It seems to the Court that the scales are firmly tipped in the Petitioner's favour on this issue.

76. As such, the Court has formed the view that it would be in the interests of justice to allow the Petitioner to continue with the Petition. This will determine whether there has been wrongdoing as she has alleged.

77. It may well be the case that the Petition can be determined in the Cayman Court sooner than the timetable envisaged in the NY Proceedings, which includes more issues, parties, claims, and cross claims. Insofar as this Court can make out, the risk of any inconsistent decisions is thereby reduced and may be reduced further by sensible case management.

78. In coming to this conclusion, the Court has had in mind that any stay of the Cayman Petition pending the outcome of the NY Proceedings could last a long time (they are not likely to be determined this year) and lead to real prejudice in relation to the prosecution of the Petition.

79. The Court does not underestimate the additional expense caused by the overlapping cases which the parties will be litigating. They would do well to minimise this by sensible case management directions which this Court would be ready to assist with. However, the fact that there will be

parallel proceedings and overlap in the evidence does not lead the Court to conclude that the Petition should be stayed in the interests of justice.

Preliminary issue

80. Whether the Petitioner remains a shareholder in the Company may be a short point to identify, but it is a point of such significance between the parties that the Court does not underestimate the amount of factual analysis it will take to determine it.

81. It seems to the Court that the confidence expressed[37] on behalf of the Petitioner, that after hearing witness evidence from a handful of key witnesses about a small number of conversations, the Court could reach a quick and efficient conclusion, is overly optimistic given the background circumstances of this dispute.

82. As the affidavit on behalf of the Company evidence describes,[38] the standing question looks to realistically be a fact intensive and relatively complex issue. It will require discovery and the examination of witnesses whose credibility and reliability will be extensively tested. It would not dispose of the New York Proceedings, although the Company accepts it would narrow them.

83. The Company asserts (and the Petitioner denies) that the Petitioner and her husband Mr Qiao withdrew from participating as shareholders in the Company in November 2018 and the Company fully repaid their capital contribution to them. The Court accepts Mr Eldridge's submission that the time period to be covered may well be broader than just the November 2018 period. If the Company wishes to make it so the BB shares narrative will be part of the investigation, as well as what the Petitioner may have been communicating to others at the time of her involvement in the Company, as well as evidence relating to actual involvement between 2018 and 2021.

84. Discovery on these matters is still being produced in the NY Proceedings under the auspices of the Discovery Referee and this Court doubts that clean, confined and safe preliminary issues as to the Petitioner's standing could be achieved in all the circumstances.

85. There will also be legal questions which arise, based on the facts as to how the Petitioner, if she did, ceased to be a shareholder whether by way of repurchase or redemption. A factual enquiry

[37] *§20 Musumeci 2*
[38] *See § 10 – 15 of Baker 3*

would be necessary as to what the parties understood and agreed, which is likely to be hotly contested.

86. The Petitioner's standing is obviously an important if not critical issue in both sets of proceedings, but to order a preliminary issue to be heard in the winding up proceedings in Cayman would in the Court's view not be likely to be productive of a just and economic resolution of the issue which could be determined expeditiously. The Court is not persuaded that the standing issue can be neatly separated from the other issues between the parties, or that the issue is ripe for determination in Cayman.

87. The Court has considered whether ordering a preliminary issue in relation to the standing question would be likely to reduce delay and costs and has come to the view that it would not. The Court is of the view that the preliminary issue could not be determined on established facts and it is likely that further examination of evidence would be required, so that there is a material risk that a trial of a preliminary issue would increase costs and delay matters, to no safe, determinative purpose.

88. There are no special grounds or exceptional reasons to justify the Court exercising its discretion to order a preliminary issue in this case.

Conclusion

89. The Company's applications to strike out and / or stay the Petition are refused and the Petitioner's application for a preliminary issue is refused.

90. The Court is inclined to order that costs will follow the event to be taxed on the standard basis. If either party wishes to argue for a different costs outcome the Court will determine the matter on written submissions (no more than 5 pages in length).

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT