



**IN THE GRAND COURT OF THE CAYMAN ISLANDS  
FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 113 OF 2024 (DDJ)**

**IN THE MATTER OF THE COMPANIES ACT (AS REVISED)  
AND IN THE MATTER OF BAOSHENG MEDIA GROUP HOLDINGS LIMITED**

**Before:** The Hon. Justice David Doyle

**Appearances:** Richard Fisher KC, Christopher Levers and Corey Byrne of Ogier  
(Cayman) LLP for Orient Plus International Limited  
Stephen Moverley Smith KC, Mark Ffrancon Dowds of Carey Olsen for  
Baosheng Media Group Holdings Limited

**Heard:** 17 October 2024

**Draft judgment circulated:** 28 October 2024

**Judgment delivered:** 30 October 2024

*Determination of an application to strike out a winding up petition*

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## **JUDGMENT**

### **Introduction and summary**

1. In this case a petitioner by way of a petition dated 9 April 2024 seeks a winding up order against a company on the just and equitable ground.
2. By consent order made on 30 April 2024, it was ordered that within 28 days the company publish an advertisement, in respect of the presentation of the petition and its hearing on a date to be fixed, on the company's website and file a copy of it with the United States Securities and Exchange Commission. It was further ordered that the petition shall stand as the petitioner's particulars of claim. Inspection of relevant documents was ordered to take place by 1 October 2024 with evidence thereafter. The parties were ordered to apply for the petition to be listed for a case management conference on the first available date following service of reply evidence.
3. By a summons dated 10 July 2024 the company applied for an order striking out the winding up petition. Evidence and skeleton arguments were filed and on 17 October 2024 I heard legal submissions for and against the striking out of the winding up petition. I then reserved judgment which I now deliver.
4. For the reasons which follow I have decided to dismiss the strike out application.

### **The Summons**

5. Baosheng Media Group Limited (the "Company") applied by summons dated 10 July 2024 (the "Summons") for an order that the winding up petition dated 8 April 2024 (the "Petition") brought against the Company by Orient Plus International Limited (the "Petitioner") be struck out pursuant to Order 18 rule 19(1)(a), (b) and (d) of the Grand Court Rules ("GCR") and/or pursuant to the inherent jurisdiction of the court on the grounds that (a) it discloses no reasonable cause of action; (b) it is frivolous or vexatious; and/or (c) it is otherwise an abuse of the process of the Court. The Company also seeks an order that its costs of and incidental to the proceedings be paid by the Petitioner forthwith and on the indemnity basis.

**The Background**

6. Before turning to the specific grounds specified in the Summons, I set out some of the basic background to the Petition.
7. The Company was incorporated in December 2018 as a holding company for an international corporate group which provides online marketing services in the People’s Republic of China (“PRC”).
8. The Petitioner says that in February 2021 the Company filed a final prospectus and an initial public offering (the “IPO”) was completed on 10 February 2021. The Petitioner says that it, Golden Genius International Limited (“Golden Genius”) and Union High-Tech Development Limited (“Union High-Tech”) purchased shares in the Company following the IPO.
9. On 2 March 2021 Golden Genius acquired 700,000 ordinary shares in the Company from Univest Securities LLC for a total consideration of US\$3.5 million. On 17 March 2021 the Petitioner (for a total consideration of US\$4 million) and Union High-Tech (for a total consideration of US\$6 million) acquired 784,314 and 1,176,470 ordinary shares in the Company (respectively).
10. The Petitioner alleges that, in November/December 2020, the Company’s management was questioned by criminal authorities in the PRC in relation to an investigation which resulted in a fine levied against the Company (the “Alleged Criminal Investigation”). The Company denies these allegations, does not recognise them and says it has filed evidence which contradicts the Petitioner’s stated case in relation to the Alleged Criminal Investigation.
11. The Petitioner alleges that the Company, in conjunction with Beijing Sogou Information Services Co Ltd (“Sogou”), provided search ranking advertising services to a gaming company based in Wuxi, Jiangsu Province China which was said to be the basis for the Alleged Criminal Investigation. The Petitioner says that the Alleged Criminal Investigation was concluded in the second half of 2021 and it was determined that the Company was liable for promoting a gaming company in contravention of PRC law. The Petitioner alleges that the Company was fined RMB 10 million by the PRC government and Sogou was fined RMB 1.4 billion. The Petitioner alleges that at no time did the Company disclose the Alleged Criminal Investigation to the investors and this amounts to a material misstatement and omission pursuant to the Securities Act 1933.

12. The Petitioner says that Sogou merged with Tencent Holdings Limited (“Tencent”) and, in April 2021, the Company and Sogou’s authorised agency agreement expired and the Company lost authorised agent status for its largest customer.
13. According to the Petitioner, “in or around 2021”, Tencent began an investigation (the “Tencent Internal Investigation”) into possible fraud and corruption among certain of its business lines (including suppliers and other third parties with whom Tencent did business). The Company does not admit this.
14. According to the Petitioner, on 16 January 2023, Tencent announced that its investigation had resulted in the termination of 70 of its members of staff, and “blacklisted” certain third-party suppliers, including members of the Company’s group at the operations level in the PRC. The Company does not admit this.
15. The Petitioner says that it is inferred that, as a result of the Tencent Internal Investigation, Tencent determined that it would not renew Sogou’s relationship with the Company “as a result of findings of unlawful conduct on the part of the Company and its management” (paragraph 51 of the Petition).
16. The Petitioner says that the blacklist included two subsidiaries, namely Beijing Baosheng Technology Company Limited and Baosheng Technology (Horgos) Company Limited.
17. The Petitioner alleges that certain 2021 and 2022 related party transactions with Horgos Zhijrancheng Technology Co. Ltd. (“HZT”), which relate to a Channel Cooperation Agreement, were entered into for an improper purpose and/or were not transactions bona fide in the best interests of the Company. The Company denies these allegations.
18. The Petitioner alleges that on 21 June 2023, Dong Hu and Hu Yanjun had a telephone conversation during the course of which the pair discussed, amongst other things; (1) the Petitioner taking a controlling interest in the Company; and (2) the Alleged Criminal Investigation. The Company denies these allegations and notes that Hu Yanjun has said that the transcript of the telephone conversation is “false” and a “fabrication”.
19. On 17 November 2023, the Company entered into a securities purchase agreement with a counterparty pursuant to which the Company agreed to issue that counterparty senior convertible

promissory notes in an original amount of not more than US\$42 million which were convertible into the Company's ordinary shares of par value of \$0.0096 per share (the "Kaboom SPA). The Company later identified this counterparty as Kaboom Technology Limited ("Kaboom"). On 13 December 2023, the Company and Kaboom entered into an amendment agreement in response to comments from the NASDAQ on the Kaboom SPA. The Petitioner alleges that the Kaboom SPA (as amended) was entered into for an improper purpose on the part of the Company's directors and/or is oppressive to existing shareholders of the Company. The Company denies these allegations.

20. On 29 January 2024, US lawyers instructed by the Petitioner, Golden Genius and Union High-Tech wrote to the Company notifying it that they intended to issue proceedings in relation to the alleged non-disclosures prior to the IPO. The letter attaches a transcript of the alleged telephone call between Dong Hu and Yanjun Hu on 21 June 2023.
21. On 1 February 2024, the Petitioner, Golden Genius and Union High-Tech together issued proceedings against the Company in the Southern District of New York (the "US Proceedings").
22. On 7 February 2024, the Company entered into a securities purchase agreement with VG Master Fund SPC for the issue of ordinary shares to it (the "VG SPA").
23. On 4 April 2024, the Petition was filed.
24. On 12 June 2024, the Company announced to the NASDAQ that the Kaboom SPA had been terminated on 31 May 2024 and the VG SPA had been terminated on 4 June 2024.

### **The Petition**

25. The 24-page Petition seeks the winding up of the Company on the just and equitable ground. It is stated that the Petitioner holds a total of 40,850 ordinary shares in the Company.
26. Two other shareholders (Golden Genius with 700,000 shares and Union High-Tech with 61,275 ordinary shares) are supportive. Although not stated in the Petition, it was common ground at the hearing that the Petitioner holds 2.66% of the issued share capital and the other two supporting shareholders 3.99% and 2.37% respectively making a total of 9.02% in support of a winding up order.

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27. At paragraph 71 of the Petition, under the heading “Grounds for Winding Up”, it is stated that the management of the Company have acted unfairly and/or oppressively towards the Petitioner, other investors and other minority shareholders and/or the affairs of the Company have been conducted with a lack of probity and the Petitioners and the other investors have justifiably lost confidence in the management of the Company.
28. At paragraph 72 of the Petition it is stated that the Petitioner’s loss of trust and confidence in the conduct of the Company’s affairs is justified by:
- (1) the significant concerns held by the Petitioner regarding the accuracy of the IPO disclosures by the Company;
  - (2) the management of the Company following the IPO resulting in significant downturn in revenue for which no explanation has been provided;
  - (3) the failure by the directors of the Company to disclose: the Alleged Criminal Investigation, a merger agreement entered into on 29 September 2020 between Sogou and Tencent and completed in September 2021, an internal investigation by Tencent in or around 2022 and the blacklisting of the Company by Tencent, to shareholders and prospective investors in the Company;
  - (4) the entry by the Company into what are described as related party transactions with HZT (with US\$11,298,397 being paid by the Company to HZT in 2022 and US\$4,464,919 in 2022) (“Related Party Transactions”) in breach of its management's obligation to act in the best interests of the Company and/or for proper purposes;
  - (5) the entry into on 17 November 2023 of the Kaboom SPA pursuant to which the Company agreed to issue the Noteholder senior convertible promissory notes (the “Notes”) and/or the issue of the Notes to the Noteholder which, upon conversion, would lead to a substantial shift in control and significant dilution of the Petitioner’s and other investors’ interest in the Company and was therefore entered into and/or issued in breach of its management's obligation to act in the best interests of the Company and/or for proper purposes.

29. At paragraph 73 of the Petition, it is stated that the Petitioner also considers that there is a need for an independent insolvency practitioner to be appointed to investigate:

- (1) the current financial circumstances of the Company;
- (2) the conduct of the Company's management including causing the Company to enter into Related Party Transactions and the Kaboom SPA;
- (3) the availability of claims against current or former directors of the Company in relation to their management of the Company.

30. I also note the Petitioner's answers to the request for further and better particulars of the Petition and the Defence.

31. The Petitioner seeks a winding up order. It does not seek any alternative orders. Under section 95(3) of the Companies Act (2023 Revision) it is provided as follows:

“If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely

–

- (a) an order regulating the conduct of the company's affairs in the future;
- (b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;
- (c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
- (d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly.”

### The Evidence

32. I have carefully scrutinised, insofar as it is relevant, all the evidence in the hearing bundles.

### The Law

33. Counsel referred to my judgments in *Aquapoint LP* (FSD unreported judgment 23 November 2021) and *New Silk Route Advisors LP* (FSD unreported judgment 10 February 2022). In *Aquapoint*, the sole basis for the strike out application was that the Petitioner should follow the exit route provided for in the limited partnership agreement. I endeavoured to set out the relevant law at paragraph 10(1)-(12) as follows:

- “(1) A winding up petition will not normally succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. If it is clear at an early stage that the petition will fail on this ground it may be struck out as an abuse of process (Martin J.A. at paragraph 23 in *Tianrui (International) Holding Company Limited v. China Shanshui Cement Group Limited* 2019 (1) CILR 481);
- (2) In considering an application to strike out a winding up petition on the just and equitable ground there are two main questions to be addressed (i) whether there is an alternative remedy available to the petitioner; and (ii) whether the petitioner is acting unreasonably in not pursuing that alternative remedy. If a court is satisfied that both of those questions should be answered in the affirmative, then it can be expected to take the view that the presentation is an abuse of its process or, alternatively, that the petition is bound to fail because it would not, in those circumstances, be “just and equitable” that the relevant entity be wound up (Chadwick P. at paragraph 77 in *Camulos Partners Offshore Limited v. Kathrein and Company* 2010 (1) CILR 303; Martin J.A. in *Tianrui* at paragraph 23);
- (3) It is sometimes impossible to say, prior to trial, that a shareholder is necessarily acting unreasonably if he takes the view that an equitable solution to the



breakdown in the relationship of trust and confidence upon which a quasi-partnership was established would be for the company to be wound up;

- (4) It is sometimes impossible, in advance of hearing the evidence at trial, for a judge to properly reach the view that a petitioner is acting unreasonably in refusing to pursue an alternative remedy (cf Chadwick P. at paragraph 46 *Asia Pacific Limited v. Arc Capital LLC and Haida Investments Limited* 2015 (1) CILR 299 in respect of a refusal of an offer to purchase shares not in respect of an alternative remedy). In all but a plain and obvious case, it is likely to be necessary for the facts underlying a just and equitable 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. Unless 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 make a winding up order, the petition should proceed (Martin J.A. in *Tianrui* at paragraph 29);
- (5) The hearing of a strike-out application is not the place for resolution of disputed factual issues (Martin J.A. in *Tianrui* at paragraph 19). At the strike out hearing the court should not conduct a mini trial or attempt to resolve disputed factual issues. For the court to examine and finally determine whether there was in fact a justifiable loss of trust or lack of confidence in the conduct of management of a company's affairs will normally require a trial (Parker J at paragraph 52 in *Martin v Circumference Holdings Limited* FSD; unreported judgment 3 May 2021). The Court must normally assume that the facts asserted by the petitioner are true at the strike-out hearing stage. If the court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour on the petition, then it must let the petition go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing and thereby to protract the uncertainty that hangs over the company (Peter Gibson J in *Re a Company No*

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003096 of 1987 [1998] 4 BCC 80 at page 81). A court should be prepared to scrutinize the properly available undisputed evidence supporting the allegations and to strike out the petition if it is obviously unsustainable (*RCB v Thai Asia Fund* 1996 CILR 9 Smellie J as he then was at page 18). Whether the evidence is adequate and whether it justifies winding up on the just and equitable ground will normally be a matter for the hearing of the petition (Moses J.A. at paragraph 63 in *Familymart China Holding Co. Ltd v. Ting Chuan (Cayman Islands) Holdings Corporation* 23 April 2020 subject to an appeal to the Judicial Committee of the Privy Council, leave having been given on 29 September 2021);

- (6) There is a danger at the hearing of a summons to strike out a just and equitable winding up petition of pre-judging the outcome of the hearing of the winding up petition. It is only if it can clearly be 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 (paragraph 28 Martin J.A. in *Tianrui*). There is clearly a danger in pre-judging the outcome of the hearing of a petition and the court's strike-out jurisdiction needs to be exercised carefully. Equally the court needs to be careful to ensure the winding up procedure is not being improperly used (Parker J paragraph 59 *Martin v Circumference*);
- (7) It is important to note that the right to petition for a just and equitable winding up is a remedy available as of right provided by statute (paragraph 47 Martin J.A. in *Tianrui*);
- (8) Where the remedy which the party presenting the petition seeks is indeed genuinely a winding up order, there is no alternative method of seeking that remedy (paragraph 43 Chadwick P. in *Asia Pacific*). It needs to be shown that the winding up procedure provides the only sufficient remedy to deal with the wrong about which the petitioner complains and that there is no adequate alternative available to the petitioner (paragraph 43 Parker J *Martin v Circumference* 3 May 2021);
- (9) It has to be borne in mind that the jurisdiction to strike out should not be exercised unless it is perfectly clear that the petition which is to be struck out cannot succeed

(page 297 Dillon LJ in *Re Copeland v Craddock Ltd* [1997] BCC 294 (judgment 20 August 1992));

- (10) It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the plaintiff is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed (Bingham LJ in *Copeland* at paragraph 300);
- (11) Facts rendering it just and equitable to obtain a winding up order cannot be reduced into categories. Illustrations may be used but general words should remain general and not be reduced to the sum of particular instances (Lord Wilberforce in *Ebrahimi v. Westbourne Galleries Ltd* [1973] AC 360 at pages 374-5). The caselaw, however, establishes various areas when the courts have intervened to grant relief including cases in which the company's substratum has gone, cases in which the management and conduct of the company are such that it is unjust and inequitable to require the petitioner to continue as a member, cases in which the courts have recognized legitimate expectations outside the company's constitution, cases in which legal rights are subjected to equitable considerations and cases involving cessation of trust and confidence (Derek French *Applications to Wind Up Companies* Fourth Edition at paragraph 8.162). Lack of probity in the conduct of the legal entity's affairs is a well-established basis for a just and equitable winding up (Parker J at paragraph 53 of *Martin v Circumference*; Moses J.A. in *Familymart China* at paragraph 30). Lack of probity complaints can be based on allegations of breaches of fiduciary duties (Moses J.A. in *Familymart China* at paragraph 31);
- (12) It is well established that a company can be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the management or the majority owners (paragraph 22 Martin JA in *Tianrui*). For a loss of confidence ground to

succeed it has to be a justifiable loss of confidence in the conduct and management of the company's affairs and not a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company (*RCB v Thai Asia Fund* 1996 CILR 9 at pages 22 – 23 per Smellie J as he then was). This loss or lack of confidence must be grounded on the conduct of management, not in regard to their private lives or affairs, but in regard to the company's business; lack of probity in the conduct of the company's affairs may make it just and equitable that the company be wound up (Lord Shaw in the Judicial Committee of the Privy Council in *Loch v. Blackwood Ltd* [1924] AC 783 at 788);”

34. In *New Silk Route*, the basis for the strike out application was that the petition disclosed no reasonable cause of action and was an abuse of the process of the court. Counsel highlighted my comments at paragraph 32:

“32. In my judgment in *AquaPoint L.P.* (FSD; 23 November 2021) at paragraph 10(5) I referred to authority which indicated that the hearing of a strike out application is not the place for resolution of disputed facts. The parties in the case presently before me sensibly acknowledged that to determine the loss of trust and confidence ground would require a trial. The court must normally assume that the facts asserted by the petitioner are true at the strike out hearing stage. If the court, on a review of the material that has properly been put before it, finds that there are facts in dispute which are or may be material to a determination in the petitioner's favour on the petition, then it must usually let it go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing. A court should be prepared to scrutinize the properly available undisputed evidence supporting the allegations and to strike out the petition if it is obviously unsustainable. In *AquaPoint*, I reiterated the obvious point that it is only if it can clearly be seen that the just and equitable ground for winding up cannot be established that it will be appropriate to strike out the petition. There is clearly a danger in pre-judging the outcome of the hearing of a petition and the court's strike

out jurisdiction needs to be exercised carefully. Equally, the court needs to be careful to ensure the winding up procedure is not being improperly used.”

35. Mr Moverley Smith KC, for the Company, also stressed the comments of Hoffmann LJ (as he then was) in *Re Saul D Harrison & Sons plc* [1994] BCC 475 at 492, in the context of an appeal against the striking out as an abuse of process of a contributory’s petition for an order under section 459 of the Companies Act (of England and Wales) and to wind up on the just and equitable ground:

“... the question in this case is whether the evidence taken as a whole and assuming in favour of the petitioner any disputed questions of primary fact, there is any case to answer. Of course it is always possible that discovery and cross-examination may produce some written or oral confession that the board were indeed acting in bad faith. But I do not think that the petition can be allowed to proceed to trial simply in the hope that something may turn up ...the respondent who applies to have the petition struck out ... must still satisfy the court that the petitioner’s case is plainly and obviously unsustainable. But I think that the consequences for the company mean that a court should be willing to scrutinize with care the allegations in a s.459 petition and, if necessary, the evidence proposed to be adduced in support, in order to see whether the petitioner really does have an arguable case. This is particularly so when the petition rests on allegations of bad faith akin to fraud ...”

36. Smellie J (as he then was) in *RCB v Thai Asia Fund Limited* 1996 CILR 9 at pages 18-19 made reference to the above comments of Hoffmann LJ.
37. Segal J in his comprehensive 118 page judgment in *Uphold Ltd* (FSD unreported judgment 25 April 2024) at paragraph 109 adopted my summary of the applicable law at paragraph 10 (5)-(13) of *Aquapoint* and also at paragraphs 117-120 referred to the comments of Hoffmann LJ in *Saul Harrison* and the comments of Smellie J in *RCB*. At paragraph 111, Segal J noted that the court’s power to strike out a petition should only be sparingly used in clear cases and the court has no jurisdiction to do “rough and ready justice at the interlocutory stage” (*Hollington on Shareholders’ Rights* 10<sup>th</sup> ed. 2024 at [9.23]).
38. Segal J at paragraph 46 referred to Kawaley J’s judgment in *Ctrip Investment Holding Limited v eHi Car Services Limited* 2018 (1) CILR 641 at paragraph [25]:

“The strike out jurisdiction ... is not limited to cases which disclose no reasonable cause of action. It may be engaged in relation to claims which are unsustainable on their merits as well.”

39. At paragraph 121, Segal J adopted the approach of Smellie J and Hoffmann LJ to the effect that, where the strike out is based on there being undisputed primary facts which show that the petition is “clearly unsustainable and bound to fail”, the court may scrutinise the evidence to decide whether there are indeed such undisputed facts.

40. At paragraph 121, Segal J referred to the comments of Peter Gibson LJ in *Re Legal Costs Negotiators Ltd* [1999] BCC 547 CA (Civ Div) at 551 (in the context of an unfair prejudice petition):

“The court can ... look at the realities of the case. It is entitled to take the pragmatic view that the petition should not be allowed to proceed where the likelihood of the trial judge exercising his discretion to grant the claimed relief is so remote that the case can be described as perfectly hopeless ...”.

41. Mr Fisher KC, for the Petitioner, referred to pages 470-474 of *Hollington on Shareholders’ Rights* 10<sup>th</sup> ed. 2024 in respect of “Want of probity or mismanagement leading to a justifiable loss of confidence”. Mr Fisher stressed that this ground can apply where there has been “a failure to act in accordance with basic principles of fair dealing” and the word ‘probity’ embraces concepts of both honesty and decency (paragraph 10-14). Mr Fisher referred to Mangatal J’s approach in *Re Washington Special Opportunity Fund* (FSD unreported judgment 1 March 2016) and the following summary of what needed to be established under this ground for winding up:

“an unfair abuse of powers and an impairment of confidence in the probity with which the company’s affairs are being conducted ... a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.”

42. Hollington also refers to *Seahawk China Dynamic Fund* (FSD unreported judgment DDJ 9 August 2022) commenting that “Doyle J ... did not need to, and declined to, resolve the issue as to whether the need for an investigation is a free-standing basis for a winding-up order on the just-and-241030 *In the matter of Baosheng Media Group Holdings Limited – FSD 113 of 2024 (DDJ) - Judgment*

equitable ground, but commenting that he was not convinced that first-instance decisions to that effect were plainly wrong.”

43. Mr Fisher also referred to *Re Copeland & Craddock Ltd* [1997] BCC 294 (an appeal in respect of an unsuccessful strike out application) and reminded me of the words of Dillon LJ and Bingham LJ in the Court of Appeal in England and Wales. In respect of conflicting affidavit evidence Dillon LJ on page 298 stated:

“... these raise issues which we cannot resolve ... they are matters which could only be resolved after a full hearing with cross-examination ...”

44. Bingham LJ on page 300, in a passage frequently quoted by those seeking to resist strike out applications, stated:

“It has been often and rightly said that the court’s jurisdiction to strike out a claim advanced by a plaintiff or a claimant or a petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the claimant is none the less entitled to the court’s adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed. In this case the judge clearly regarded the plaintiff’s claim to wind up this company as one which was unlikely to succeed, but he did not feel that the claim was so manifestly unarguable as to justify him in striking it out. Having heard Mr Snowden’s very clear and well presented argument, I share the judge’s view that this claim is unlikely to succeed. I am indeed persuaded that the case is very close to the borderline where striking out would be appropriate. But I am not quite persuaded that the claim is unarguable whatever comes out relevant to the petition on discovery and in the course of oral evidence.”

45. When I first read into this case I searched the Petition long and hard to see if there was a statement in respect of the overall percentage of shares held by the Petitioner and the two shareholders supporting it. My search was in vain. It was not there. In the Company’s skeleton argument dated 10 October 2024 at paragraph 4, it was stated:

“On the Petitioner’s own case, the Petitioner, Golden and Union High-Tech hold 0.014% of the Company’s issued share capital, rounded to three decimal places (or 0% when rounded to one decimal place). There is no evidence before the Court that any of the other 99.9% shareholders of the Company ... support the Petition or are otherwise unhappy with the conduct of the Company’s affairs.”

46. At first glimpse that appeared a powerful point. On reading the second affidavit of Dong Hu, at paragraph 10 it was asserted that together the Petitioner, Golden Genius and Union High-Tech “hold approximately 6.4% of all shares in the Company calculated based on 1,534,487 ordinary shares of the Company issued and outstanding as of 31 December 2023.” I was concerned over the discrepancy between the 0.014% asserted by the Company and the 6.4% asserted by the Petitioner. At the hearing the parties agreed that the total percentage of all 3 shareholders (the Petitioner, Golden Genius and Union High-Tech) was 9.02%, still a relatively small percentage.
47. The fact that a petitioner only holds a small percentage of the issued share capital does not however of itself prevent a winding up order being made if a ground for that drastic remedy of last resort is otherwise in existence. However in such cases the court must be especially vigilant to guard against abuse and to ensure that the winding up petition is not simply presented by a holder of a very small percentage of the issued share capital, who has made an investment that has turned out not to be profitable and wants to exit at an inflated price, and is simply seeking to put undue pressure on the Company to pay it out on terms favourable to him, rather than genuinely seeking a winding up order.
48. In *Uphold* it appears from paragraph 126(a) of the judgment that there was an argument to the effect that there was no prospect of the court at trial ordering that the company be “wound up on the petition of shareholders holding just 1.62 per cent of its shares on a fully diluted basis when the petition was not supported by the other shareholders and the Company was successful and thriving.” Segal J dealt with that argument at paragraph 128 as follows:

“... I agree with the Petitioners that it cannot be said that their application for a winding up order (and alternative relief) was bound to fail and was clearly unsustainable because of the small size of their shareholding. This is so not only because all shareholders have standing and a statutory right to petition even if they only hold one share, but because this is a case where the Petitioners’ primary (and legitimate) purpose is to obtain section 95(3)



relief for their own benefit and not to wind up the Company. It seems to me that shareholders with only a small shareholding, in a case where they can make out the grounds for a winding up based on the misconduct of mismanagement and show that it would be wrong to require them to remain as members of the company, cannot be deprived of an alternative remedy merely by reason of the size of their shareholding. This reasoning is not changed by the fact that a substantial majority of the Company's (independent and small) shareholders have not come forward to support the Amended Petition or sought section 95(3) relief (they appear not to have expressed any view at present). This can be relied on by the Second to Fourth Respondents as evidence that there is no reasonable basis for the Petitioners' lack of confidence in management (because it appears that management has retained the confidence of the other shareholders), and no doubt the attitude of other shareholders will be relevant at trial, but the lack of support from the other shareholders is insufficient of itself to show that the Petitioners' complaints are unsustainable. I note that it was held in *Bryanston Finance v De Vries (No 2)* [1976] Ch 63 that the fact that a petitioning member only held 62 of the company's 7,414,938 shares did not mean that the petition was bound to fail."

49. In *Bryanston Finance Ltd v De Vries (No 2)* [1976] 1 Ch 63 Buckley LJ at page 75 stated:

"In my judgment, the smallness of a minority shareholder's holding is no bar to his petitioning for a winding up order if what he may hope to recover in a liquidation of the company is likely to be appreciable in relation to the size of his shareholding. If it would be de minimus, he might well be treated as having no locus standi, but otherwise he should be treated as having as good a right to seek a winding up order as any other contributor. He must have what Sir George Jessel M.R. called a "tangible interest" in the winding up ... But whether his interest has this character should be judged in relation to the size of his shareholding. The defendant asserts that his shares in the company would in a winding up be worth much more than the 7p a share offered by A.T.S.O. If he can frame a petition demonstrating a prima facie probability of this, the small number of shares which he holds should not, in my opinion, be any objection to his petition."

50. Buckley LJ at page 78 added:

“The right to petition the court for a winding up order in appropriate circumstances is a right conferred by statute. A would-be petitioner should not be restrained from exercising it except on clear and persuasive grounds.”

51. I should make it plain that the Company does not suggest the Petition is bound to fail because only 9.02% support the making of a winding up order but the percentage of shareholding was touched upon in the skeleton argument and oral submission, and counsel therefore must have thought it of some relevance, so I thought I should set the above out.
52. Part of the Summons seeks a strike out on the basis that the Petition “discloses no reasonable causes of action”. That phrase has a special meaning in the context of a winding up petition based on the just and equitable ground.
53. Section 92 (1)(e) of the Companies Act (2023 Revision) provides:

“A company may be wound up by the Court if ... (e) the Court is of opinion that it is just and equitable that the company should be wound up.”
54. Moses JA in *China CVS (Cayman Islands) Holding Corporation/FamilyMart Holding Company Limited v Ting Chuan (Cayman Islands) Holding Corporation* 2020 (2) CILR 201 at paragraph 51 referred to a petition for winding up being required to disclose “a concise statement of the grounds upon which the petitioner claims to be entitled to a winding up order” (Companies Winding Up Rules 2018 Form No 2 paragraph 4). Moses JA suggested that a “cause of action” did not need to be identified but rather “a description of the foundations on which the petition relies in support of the assertions that the company should be wound up on the just and equitable ground.” This part of the judgment appears untouched by the Judicial Committee of the Privy Council in the subsequent appeal [2023] UKPC 33.
55. Order 3 rule 2(2) of the Companies Winding Up Rules (2023 Consolidation) (“CWR”) provides that every winding up petition shall comply with the requirements of GCR Order 9 and shall contain “(e) a concise statement of the grounds upon which the winding up order is sought.”
56. Order 3 rule 2(5) of the CWR provides that “GCR Order 18, rule 19(1) and (2) shall apply to any pleading and to any petition as though it were a pleading.”

57. Order 18 rule 19(1) and (2) of the GCR provide as follows:

- “(1) The Court may at any stage of the proceedings 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 –
- (a) it discloses no reasonable cause of action or defence, as the case may be; or
  - (b) it is scandalous, frivolous or vexatious; or
  - (c) it may prejudice, embarrass or delay the fair trial of the action; or
  - (d) it is otherwise an abuse of the process of the court,
- and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under subparagraph (1)(a).”

### **The Submissions**

58. I have considered the skeleton arguments and the oral submissions. I am grateful to Stephen Moverley Smith KC and his team on behalf of the Company and to Richard Fisher KC and his team on behalf of the Petitioner.

#### *The Company's main submissions*

59. I endeavour to provide a high level concise summary of the Company's main submissions as follows:

- (1) this is a “plain and obvious case” and there is no prospect that the Petition will succeed at trial;
- (2) the Petition is almost entirely predicated on an untrue allegation that the Company was subjected to a criminal investigation in 2020 which was purportedly not disclosed;

- (3) the Petitioner's case has been derived from the contents of hearsay statements purportedly made by Hu Yanjun. Hu Yanjun has unequivocally stated that the contents of these purported hearsay statements are false, and contrary to his understanding. Put very simply, the very source of the Petitioner's belief has confirmed that such belief is false;
- (4) the Petitioner's conduct is an abuse. In February 2024 the Petitioner, Golden Genius and Union High-Tech commenced the US Proceedings against the Company and other parties. The US Proceedings remain afoot, are grounded in the same complaints which give rise to the Petition and represent an available and adequate avenue for the Petitioner to obtain the relief it seeks;
- (5) the Petition has been brought for an improper collateral purpose namely to exert commercial pressure on the Company.

*The Petitioner's main submissions*

60. I endeavour to provide a high level concise summary of the Petitioner's main submissions as follows:
  - (1) the strike out application is a bold application given that the Company is relying on evidence from Hu Yanjun which appears (given the existence of a contemporaneous recording of his discussion with Dong Hu of the Petitioner) to be demonstrably false and which demands investigation at trial. Allied with the need for sustained argument (as demonstrated by the significant exchange of evidence in respect of the Summons) it is questionable whether the court should entertain the summons at all;
  - (2) in any event, the Petitioner maintains that the Summons has no merit, however it is put, and should be dismissed. In particular:
    - (a) the factual basis on which the Petition is brought plainly falls within the scope of circumstances which may justify an order being made to wind-up the Company on the just and equitable ground, and the Petition is adequately pleaded;

- (b) even if factually disputed, there is clearly a sufficient *prima facie* evidential basis to allow the Petition to proceed (i.e. it cannot be said to be clearly impossible for it to succeed, irrespective of what might come out of disclosure or at trial);
- (c) there is no proper basis to suggest that the Petitioner is unreasonably refusing to pursue an alternative available remedy or bringing the Petition for a collateral purpose such as to render it an abuse of process.

### **Determination**

61. I do not prejudge the outcome of the hearing of the Petition and I keep a mind open to persuasion. However, at this interlocutory stage and based on what I have read and heard to date, the Petition appears on its face to be a weak one which is unlikely to succeed at trial. I cannot however say that I am satisfied that it cannot succeed or that it is manifestly unarguable.
62. On the face of the Petition I cannot say that, if the facts asserted in the Petition are true, it is bound to fail. The Petition is not obviously unsustainable.
63. The less said about the evidence and indeed the merits at this stage the better. Suffice to say, in a nutshell, the Company has failed to persuade me that I should strike the Petition out on any of the grounds specified in the Summons.

#### *The three grounds for the strike out*

64. The Company sought a strike out on three grounds (1) no reasonable cause of action (2) frivolous and vexatious and (3) abuse of process. I deal with those three grounds as follows.

#### *No reasonable cause of action ground*

65. There is a “reasonable cause of action” disclosed on the fact of the Petition. On this ground and at this stage I assume that the facts asserted by the Petitioner are true. There is sufficient on the face of the Petition for it to be arguable that a court could conclude that a winding up order should be

granted on the just and equitable ground. I leave determination of disputed facts to the hearing of the Petition. It is not plain and obvious that the Petition could not succeed at trial.

*Need for an investigation?*

66. On the need for an investigation I am not able to say at this interlocutory stage that the court is bound to reject it as a basis for a winding up order. Although I think it wrong to elevate, as Mr Moverley Smith nearly does at paragraph 59 of his 45 page skeleton argument, my reference to the existence of an “unsatisfactory situation” in *Aubit International* (FSD unreported judgment 16 October 2023 at paragraph 34) to a statutory requirement, I do accept Mr Moverley Smith’s submission that this self-standing ground is not “a free for all” and remains subject to the overarching requirement in section 92(e) that the court considers it is just and equitable that the Company be wound up. Moreover, in certain cases (see *Seahawk China Dynamic Fund* FSD unreported judgment 9 August 2022) a court may conclude that there is no need for any further investigations into the affairs of the company which would justify the court taking the drastic step of making a winding up order and in effect killing the company just for the purpose of an investigation into its affairs (paragraph 135 *Seahawk*).
67. On the face of the Petition I accept the need for an investigation appears to be based on a very slender foundation but that does not equate to being satisfied that it is plain and obvious that such ground is bound to fail. Despite all the strong points raised by Mr Moverley Smith, I remain unconvinced that the Petition is bound to fail on this ground. The need for an investigation will have to be further considered at trial.

*General*

68. Mr Moverley Smith meticulously went through the Petition but many of the points he raised and arguments he presented are trial points and arguments. The Petitioner’s case is not unsustainable as a matter of both fact and law. For present purposes, I must assume the existence of the Alleged Criminal Investigation.
69. In addition there is more to the Petition than simply the Alleged Criminal Investigation. The Petition also relies on allegations in respect of Related Party Transactions.

70. The non-disclosure points appear especially weak, particularly when you look at the chronology. The Petitioner at trial will have the burden of proving the non-disclosures, and if (and that may be a very big if) proved, persuading the court to make a winding up order on that basis. The Related Party Transactions may be more troublesome for the Company. The genuine need for an investigation appears weak but not unsustainable.
71. Taking the evidence as a whole, and assuming in favour of the Petitioner any disputed issues of primary fact, I cannot say that this is a plain and obvious case where there is clearly no case to answer.
72. I cannot say that looking at the realities of the case and taking a pragmatic view that the Petition should not be allowed to proceed as the likelihood of a winding up order being granted is so remote that the Petition can be described as “perfectly hopeless.”

*Frivolous or vexatious ground*

73. The Petition is not one which trifles with the court’s process or one which contains an “element of impropriety” or is “obviously unsustainable”. As will be seen from the next sub-section of this judgment I am not persuaded that the Petition seeks to place improper pressure on the Company in relation to the US Proceedings and/or generally.

*Abuse of process ground*

74. There are two areas covered by this ground. Firstly, the Company says the Petition is an abuse of process because the Petitioner has failed to exhaust an alternative remedy and is pursuing parallel proceedings, seeking in effect the same relief as it seeks in the Petition, i.e. a “clean break” with the Company. Secondly, the Company says that the irresistible inference arises that the Petition has been presented to exert improper pressure on the Company and is therefore abusive.

*Alternative remedy?*

75. In my judgment, based on what I have seen and heard to date, the US Proceedings do not amount to an adequate alternative remedy. This is one of those cases where it is necessary for the facts to be established before the adequacy of the US Proceedings as an alternative remedy can be properly

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assessed. At this stage, the US Proceedings cannot be seen to be capable of satisfying all of the Petitioner's concerns to the extent that it would make it clearly impossible for the Petitioner to persuade the court that it would be just and equitable to make a winding up order. The Petition should proceed. Mr Fisher is right to focus on the words of Martin JA in *Tianrui* at paragraph 37:

“... If the actions of the company ... have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns. It is entitled to have the circumstances investigated in the context of a winding-up petition that it is entitled to bring ...”.

76. I agree that there are significant differences between the Petition and the US Proceedings not the least being that the Petition seeks only one remedy, namely the winding up of the Company. The US Proceedings could not achieve that result. Based on what I have read and heard to date, the US Proceedings do not amount to an adequate alternative remedy. This issue will require further consideration at trial.

*Improper collateral purpose?*

77. Furthermore, I am not persuaded that the Petition is an abuse of process because it was filed simply to improperly exert commercial pressure upon the Company. The Petitioner is entitled to present the Petition. On the evidence presently before the court, I am unable to conclude that the Petition was presented for an improper collateral purpose and as such is an abuse. This issue will require further consideration at trial.

*Conclusion*

78. Despite all the apparent weaknesses of the Petition and the evidence in support, and although he got very close, Mr Moverley Smith has failed, even with all his engaging eloquence, to persuade
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me that this is a case where I should take the bold step of striking out the Petition and not letting it go to trial.

### **Order**

79. I therefore dismiss the Summons. Counsel should within 7 days following the delivery of this judgment provide a draft order reflecting the determinations in this judgment.

### **Ancillary issues**

80. I am willing to deal with any ancillary issues on the papers. If costs cannot be agreed then concise written submissions (no more than 3 pages) should be filed and served within 21 days of the delivery of this judgment and I would be minded to deal with the same on the papers without an oral hearing.

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**THE HON. JUSTICE DAVID DOYLE**  
**JUDGE OF THE GRAND COURT**