IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO.: FSD 300 OF 2023 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)

BETWEEN:

ASCENTRA HOLDINGS, INC. (IN OFFICIAL LIQUIDATION)

Plaintiff

-and-

(1) RYUNOSUKE YOSHIDA

(2) SHANG PENG GAO KE, INC. SEZC

(3) SPGK PTE LTD

(4) GROWTH TODAY INC.

(5) SCUDERIA BIANCO PTE LTD

Defendants

Before:	The Hon. Justice Parker
Appearances:	Ms Blair Leahy KC of Counsel instructed by Mr Guy Cowan, Ms Nienke Lillington and Ms Katie Logan of Campbells for the Plaintiff Mr Vernon Flynn KC of Counsel instructed by Mr Andrew Johnstone, Ms Jessica Williams, Ms Caitlin Murdock and Ms Kelsey Sabine of Harney Westwood & Riegels for the Defendants
Heard:	23 – 24 April 2024
Draft judgment circulated:	13 May 2024

Judgment delivered: 23 May 2024

HEADNOTE

Interlocutory proprietary injunction-Disputed ownership of funds-agency -fiduciary obligations trust-Jurisdiction-GCR Order 29-whether monies in bank account 'property'-specific fund-intermingling-serious issue to be tried-balance of convenience-delay-just and convenient-mandatory order for transference of funds from one jurisdiction to another-level of assurance -cross undertaking in damages-joint official liquidators-discretion-expenses.

JUDGMENT

Introduction

1. The Plaintiff (the "Company") is a Cayman Islands exempt company in official liquidation. It has obtained the Court's sanction to bring these proceedings.[1]

2. It seeks an interlocutory proprietary injunction in relation to cash at bank totalling c.US$250,000,000 (the "Funds") over the trial of its claim for declaratory relief in relation to the ownership of the Funds. The Company's main cause of action in the proceedings are its trust claims in relation to ownership of the Funds. This has been the sole cause of action (there are others)[2] considered on this application.

3. The Funds are said by the Company to represent the gross income from a profitable e-commerce business operated in the PRC until March 2021 (the "PRC Business"). The Company's essential case is that the PRC Business was operated in the name of the Second Defendant ("SPGK Cayman") on the Company's behalf and that the Funds are held on trust for the Company accordingly.

4. The Defendants' case is that the PRC Business was operated by SPGK Cayman for its sole benefit and it therefore owns the Funds.

[1] *In September 2023 from Doyle J.*
[2] *See Amended Statement of Claim.*

5. The majority of the Funds are held in bank accounts in Taiwan under the control of the First Defendant ("Mr Yoshida"). The remainder of the funds (c. US$72m) (the "Planet Payment Funds") are held in the 'disputed ownership account' of the US Court Registry Investment System of the US Bankruptcy Court of the Southern District of New York consequent upon the Chapter 15 recognition of the Company's liquidation in 2021. SPGK Cayman and the Third Defendant ("SPGK Singapore") have filed motions for the termination of the Chapter 15 proceedings and the release of the Planet Payment Funds.

6. Mr Yoshida is a former director of the Company and is said to be the controlling mind of the Second to Fifth Defendants (together, the "Corporate Defendants"). None of the Corporate Defendants are currently trading.

7. As to this the Company says: (1) SPGK Cayman ceased trading in March 2021;[3] (2) the Fourth Defendant ("Growth Today") is the 100% registered owner of the shares in SPGK Cayman and holds no other assets;[4] (3) SPGK Singapore is a wholly owned subsidiary of SPGK Cayman whose sole function has been to provide cash management services in relation to the PRC Business;[5] and (4) the Fifth Defendant ("Scuderia Bianco") is a Singapore Company whose sole function has also been to provide cash management services to the PRC Business.[6]

8. The Company says that in 2.5 years (during which time the Corporate Defendants have been inactive) Mr Yoshida has spent approximately US$26m on so-called "ordinary course expenses", which amounts to a 'burn rate' of US$10m per year. Those funds, it says, form the subject matter of the underlying proprietary claims which are being unjustifiably spent, where the ownership of the funds is disputed and forms the subject matter of the substantive claims.

9. The Company says that the Defendants' evidence is that the current 'burn rate' is likely to continue up to and over the trial of these proceedings, and possibly increase. The Company says that Mr Yoshida has paid himself personally approximately US$3 million from the Funds, including US$12,500 per month on his private apartment. Mr Yoshida has also confirmed that he thinks the annual expenses going forward (excluding legal fees) will be in the region of US$4.5 million. Ms Leahy KC for the Company described that this expenditure reflects Mr Yoshida "… *gallivanting*

[3] *Robinson 1, §33.*
[4] *Robinson 1, §10.*
[5] *Robinson 1, §9.*
[6] *Robinson 1, §11.*

around the world, meeting lawyers and staying in expensive hotels, trying to stop the joint liquidators getting their hands on any of the funds".

10. The Company, by its joint official liquidators ("JOLs"), applies for a proprietary injunction to effectively 'hold the ring' and put a stop on the spending until trial so the Funds are not further depleted. As at the date on which the Company's liquidation commenced:

    a) funds totalling approximately US$163 million were held in a bank account in Taiwan in the name of SPGK Singapore (D3) (the "SCSB Funds");
    b) funds totalling approximately US$15 million were held in a bank account in Taiwan in the name of Scuderia Bianco (D5) (the "SB Funds"); and
    c) the Planet Payment Funds (amounting to approximately US$72 million) were held in an account with BMO Harris Bank in the name of Planet Payment (pursuant to the terms of the PP Contract (as defined in paragraph 56 below).[7]

11. The Company says that it is at grave risk of injustice if matters are left where they are. The Company says the only just and proportionate way to rebalance the parties' interests is to ring-fence the Funds over the trial of these proceedings.

12. Mr Yoshida says no restraint should be put in place as this would prevent Mr Yoshida's ability to close-down the PRC Business and would prevent him from accessing funds necessary to defend these proceedings because he has personal savings of only US$500,000.

13. The Company says that it has always been willing to agree that the Funds may be used to meet the genuine, reasonable and proportionate expenses related to the winding down of the PRC Business out of the profits of that business.

14. As to legal expenses, the Company says the Defendants have spent US$14.5m to date defending these and related proceedings, and a very significant part of that sum has been spent on obstructing the JOLs' efforts to ring-fence the Funds pending determination of the Company's proprietary claim. It says that the sums paid to the Defendants' Cayman law attorneys to date (over US$6.5 million) should mean that those attorneys now hold sufficient funds to ensure that no further sums will need to be paid to cover future legal expenses. The Company says the total spent to date in relation to US attorneys alone is understood to be over US$2.5 million.

[7] *A large proportion of those Funds are no longer in that account.*

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15. The Defendants, through Mr Flynn KC, resist the application in its entirety, which he argued was misconceived on many bases and moreover the Defendants say the JOLs have not remained dispassionate or objective.

The procedural background

16. On 4 October 2023, the Company, after obtaining the sanction of the Supervising Judge (Doyle J), commenced the present Proceedings against the Defendants, filing a Writ of Summons accompanied by a Statement of Claim which it subsequently amended on 10 October 2023.

17. The Amended Writ of Summons and the Amended Statement of Claim were served on all the Defendants on 11 October 2023. All of the Defendants acknowledged service on 25 October 2023 and have submitted to the jurisdiction of the Grand Court.

18. The Defendants' Defence and Counterclaim was served on 22 December 2023. The Company's Reply and Defence to Counterclaim was served on 2 February 2024. The Defendants' Reply to Defence to Counterclaim was served on 8 March 2024.

19. At its core, the case involves a dispute as to the ownership of the Funds with each side claiming beneficial ownership of all the Funds. The Company says that in light of the Defendants' failure to engage constructively with the JOLs' efforts to agree a regime for the appropriate preservation of the disputed Funds pending trial, the Company issued the Summons on 7 February 2024, seeking an interlocutory proprietary injunction (and appropriate relief ancillary thereto).

Other proceedings

20. In addition to the present Proceedings, there have been (and continue to be) disputes between the Company/ JOLs and the Defendants.[8] They include contested recognition proceedings in the US and Singapore (the "Singapore Proceedings"), and a sanction application by the JOLs in relation to a sum of money (circa US$11 million) paid over to the JOLs by the Sanders Companies (as defined in paragraph 49 below) (the "BOW Funds").[9]

[8] *These are summarised in Robinson 1 and Robinson 2.*
[9] *Doyle J's judgment granted the JOLs permission to treat the BOW Funds as "unencumbered assets" of the Company's liquidation estate.*

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21. In the US, there are currently Motions (see below) which the Company says have as their sole objective the remittance of the Planet Payment Funds to Taiwan. The Defendants say the JOLs could and should have sought to restrain the Planet Payment Funds through the Cayman Islands Court instead of commencing satellite litigation in the US. They rely on a report prepared by AlixPartners dated 1 August 2022[10], which shows that in the ordinary course of business, the vast majority of the funds received by Planet Payment were transferred to SPGK Singapore's bank account with SCSB.

22. The Singapore Proceedings and the summons in relation to the BOW Funds were resolved in favour of the JOLs. In particular, the Company's liquidation is now recognised in Singapore[11], and the BOW Funds were held to be unencumbered assets in the Company's liquidation (and not to be held on trust for SPGK Cayman).

23. There are also funds totalling approximately US$25 million (the "HEC Funds") held in an account which are in dispute following the liquidation of HEC International Ltd ("HEC") a wholly owned subsidiary of the Company. Mr Robinson is also the Official Liquidator of HEC. SPGK Cayman asserted it has a proprietary claim over the HEC Funds and they did not form part of HEC's liquidation estate. The Official Liquidator did not accept that SPGK Cayman has a proprietary claim or that SPGK Cayman is a creditor of HEC. When SPGK Cayman and SPGK Singapore submitted a proof of debt (without prejudice to the proprietary claim) the OL rejected it on the basis that it was without merit. On appeal, Doyle J ruled that SPGK Cayman was required to proceed by way of section 97 of the Companies Act (and leave was required) and since SPGK Cayman had no genuinely arguable case he refused leave for SPGK Cayman to advance the proprietary claim against HEC either as part of the Proof of Debt Appeal or in separate proceedings. This dispute is apparently on appeal to the Cayman Islands Court of Appeal.[12]

24. The Company complains about the Defendants' conduct in these cases in seeking to frustrate the JOLs' efforts and further complains that the Defendants have spent US$14.5 million on legal proceedings since March 2021.

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[10] *See Yoshida 1, at §20 and RY-1 at pp 3-25.*
[11] *On appeal, the Singapore Court of Appeal recognised the current state of controversy with respect to the recognition of solvent liquidations, but decided to grant recognition to the JOLs in Singapore.*
[12] *Yoshida 1, §§36-46.*

Summary of the Company's case as pleaded [13]

25. In about 2004, two Japanese individuals, Yoshio Matsuura ("Mr Matsuura") and Motohiko Homma ("Mr Homma"), entered into business together and eventually traded that business through Interush Limited, a Hong Kong corporation which was incorporated in 2006 (although no business was conducted through it until 2010).[14]

26. Although the nature of the business evolved over time, by 2010/2011, it had become a cross-border e-commerce business selling beauty and health products and computer software to the Taiwan, Japanese and PRC markets through multi-level marketing (the "Business").

27. In particular, products were sold via a structure through which individuals (the "Affiliates") were encouraged to promote and sell the Company's products to other individuals and bring new recruits into the Business. Commission was thereby earned.

28. In about January 2010, Martin Matthews ("Mr Matthews") became involved in the Business on a full-time basis. From around 2011, Messrs Matthews, Matsuura and Homma ("the Major Shareholders") started to plan an initial public offering of Interush's shares on the Hong Kong Stock Exchange.

2013 Reorganisation

29. A reorganisation of the business was implemented in 2013 as follows (the "Reorganisation"):

   a) the Company was incorporated in the name of Interush Holdings, Inc. with the intention that its shares would be offered on the Hong Kong Stock Exchange, with Mr Matthews becoming its initial director;

   b) four additional directors including Mr Yoshida were subsequently appointed as directors of the Company;

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[13] *Mainly taken from the Amended Statement of Claim and also with reference to subsequent pleadings.*
[14] *Interush Holdings, Ltd, a Bermuda company owned beneficially by Mr Matsuura and Mr Homma in equal shares, was incorporated in 2007 and functioned as a holding company of the business until 2013.*

c) IR-P Holdings, Inc. ("IR-P") (a Cayman Islands exempted company) was incorporated to be an intermediary holding company between the Company and its Major Shareholders;[15]

d) Mr Matsuura and Mr Homma transferred their entire share capital in Interush to the Company and IR-P acquired preferred shares in the Company.

Hong Kong Proceedings

30. On 6 November 2013, Hong Kong's Commercial Crimes Bureau ("CCB") raided Interush's office in Hong Kong pursuant to a warrant which alleged a violation of the Pyramid Schemes Prohibition Ordinance.

31. As a consequence, in 2014, the Hong Kong authorities alleged that the Company's intended IPO was unlawful. These allegations resulted in negative publicity about the Company and direct action against Mr Matthews.

32. On 31 March 2015, the Hong Kong authorities charged Mr Matthews with offences contrary to the Organised and Serious Crime Ordinance, essentially relating to money laundering. Mr Matsuura was not charged with any offence.

Response to CCB

33. In about August 2015, the Company's directors were advised that the Business's multi-level marketing method of operating in the PRC contravened PRC law. At that time, the Company says that (through its subsidiaries) it earnt about 80% of its revenues through Affiliates resident in the PRC. That is why it is said by the Company that this was the most valuable part of the business.

34. On 21 August 2015, the Company's board resolved that it would no longer accept new business or new applications to become an Affiliate in the PRC until such time as a legally compliant business model could be implemented. The board further resolved to restructure the Company and rebrand it to preserve its business and to insulate it from the adverse effects of the Hong Kong Proceedings. How and to what extent that was done forms the major area of contention between the parties.

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[15] *The majority shareholders in IR-P were at that time, were Messrs Matsuura, Homma and Matthews through their respective corporate vehicles; Mr Matthews transferred his directly held shares in IR-P to INTL Media Holdings, LLC, a Delaware company, on 23 July 2014.*

35. On 30 May 2016, the Company's board resolved: (i) to change the Company's name from Interush to Ascentra Holdings, Inc. (a resolution actioned on 1 June 2016); and (ii) to incorporate SPGK Cayman (actioned on 14 June 2016, with Mr Homma becoming its sole director[16]) in order to remodel the PRC business to make sure it was compliant with PRC law.

36. In June 2016, Mr Homma indirectly held about 23% of the Company's issued share capital. At the time of SPGK Cayman's incorporation, the Company says that the Major Shareholders' intention was that, in exchange for conducting the PRC Business:

(i) SPGK Cayman would be indirectly wholly owned by Mr Homma[17];
(ii) SPGK Cayman would account for 77% of the income it generated to the Company; and
(iii) Mr Homma would relinquish his (indirect) ownership stake in the Company (the "Arrangement").

37. The idea, on the Company's case, was to run the remodelled business through SPGK Cayman. The purpose was to maintain the economic benefit to all three Major Shareholders of the Company continuing to operate its PRC Business, and with the existing management structure and control, but to do so under separate legal ownership.

38. However, the Major Shareholders were not able to reach an agreement on how the business should be separated and only got as far as a Memorandum of Understanding, but no contractually binding agreements were entered into. Some draft agreements were drawn up but never executed[18].

39. The (non-binding) Memorandum of Understanding dated 15 November 2016 (the "MOU") set out at clause 3 the Major Shareholders' intention that SPGK Cayman and the Company would enter into an Exclusive Distribution Agreement which would confer rights on SPGK Cayman to use the Company's PRC Affiliates list (the "PRC Affiliates List"), to sell its products and software, and receive support from the Company and its subsidiaries. At the same time, the Company would retain all of its liabilities.

[16] *The Defendants say he was a shareholder not a director (and Mr Wilcox was the director).*
[17] *Through a company called Growth Today.*
[18] *ASOC, §34.*

40. Somewhat confusingly, a cancellation agreement was then (allegedly) executed on 3 April 2018 (the "Cancellation Agreement")[19] which purported to cancel the non-binding MOU.

The Defendants' case on cancellation of MOU

41. The Defendants say this does not support the Company's case that all assets and monies held by SPGK Cayman were then held on behalf of the Company. The Defendants say that in any case no steps were taken under the MOU or to give effect to the Cancellation Agreement[20] As a result, the Defendants say that the Cancellation Agreement should be disregarded. They say it was prepared at Mr Matthews' behest, after he had removed Mr Matsuura and Mr Homma as directors of IR-P (the Company's largest shareholder) and Mr Yoshida as a director of the Company in an attempt to gain control of the Company (see below). At the time the Cancellation Agreement was prepared and executed, Mr Matthews, the Defendants say, was no longer a voting director of the Company and he had no authority to sign it. It was never ratified. The Defendants say that when Mr Matsuura and Mr Homma found out about what Mr Matthews had done, which was in breach of IR-P's shareholders' agreement, they confronted Mr Matthews who acknowledged his wrongdoing, apologised and took steps to unwind his actions.

The Company's case on MOU and Cancellation agreement

42. The Company accepts that the MOU and the Cancellation agreement have no legal effect. The Company says Mr Homma continued to be the legal owner (indirectly) of SPGK Cayman through Growth Today and the business continued to operate as usual. The Company says the net result was that the Major Shareholders were unable to reach agreement on the terms of separation of the PRC Business and were ultimately advised that a formal separation of the ownership of the Company and SPGK Cayman was unnecessary[21].

43. The Company's case is that SPGK Cayman (and the other corporate Defendants) operated the PRC Business on its behalf as an agent or fiduciary. As the Company's agent, it owed the Company fiduciary duties and is also liable to account to the Company for all monies received or profits made arising out of that business.

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[19] *ASOC, §§40 –41.*

[20] *In the Motion to Terminate Restraint filed in the US Proceedings by SPGK Cayman and SPGK Singapore §§ 24-25 (Exhibit to Robinson 1, page 81), it was said that Mr Yoshida had never heard of the supposed Cancellation Agreement until shortly before the JOLs commenced the US Proceedings.*

[21] *This is contested by the Defendants.*

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The Defendants' case on separation of business

44. The Defendants say that there was no agency or any other fiduciary-type relationship. SPGK Cayman simply purchased products and services from the Company (and other vendors) at arm's length, and on-sold these to its PRC customers. SPGK Cayman provided payment/consideration to the Company for these purchases and as such, the Defendants do not hold any of the Funds on trust for the Company. The Company was a supplier of products which SPGK Cayman purchased and on-sold in its own business and for itself (not the Company).

45. The Defendants' case is that in fact SPGK Cayman's business was always entirely separate and distinct from the Company's business. It was established as a separate e-commerce marketing business that was focused on the PRC market[22].

46. SPGK Cayman was intentionally not part of the Company (as a result of the CCB investigation), and was a wholesale purchaser of the Company's products which it then sold in the PRC. Given the CCB investigations against the Company in 2015, SPGK Cayman was established with an entirely new business model to that of the Company. SPGK Cayman's business model was compliant with PRC law. SPGK Cayman had a different ownership structure, different directors, operated in a different market and had a different business model to the Company. SPGK Cayman also put in place arm's length agreements between its group entities and various vendors including agreements with the Company's group entities.

The Company's case on separation of business

47. The Company by contrast, in support of its case, says SPGK Cayman did not employ any of its own staff and neither received revenue from the PRC sales nor paid expenses. Instead, the Company's PRC Business continued to be conducted by the same employees and services companies as previously. Mr Yoshida was one such employee, and he was remunerated for the services he provided. He was, says the Company, at all material times a Director of the Company.

48. The PRC Business also continued to be operated by the same management team as it had been previously. As to this, Mr Matsuura and (until he ceased to be a director in November 2018) Mr Matthews continued to participate in the day-to-day management of the PRC Business, and the

[22] *See Robinson 1, §8.*

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Company's Chief Financial Officer ("CFO"), Mr Theodore Sanders ("Mr Sanders"), was appointed a director of SPGK Cayman on 1 February 2017.

49. Further, the Company says two companies wholly owned by the CFO, Mr Sanders, Asian Offshore Services ("AOS") and SPGK International Ltd ("SPGK International") (the "Sanders Companies"), were used as pass-through vehicles for receipts and payments for the PRC Business. This was apparently necessary because there were certain banking difficulties encountered by the Company as a result of the investigation and proceedings in the PRC.

50. The customers of the PRC Business made payment by credit card. The credit card payments were processed by a third party ("Planet Payment") in the US. Planet Payment paid the proceeds to SPGK International and SPGK International distributed the proceeds to enable payment of the expenses of the PRC Business and the Business generally.

Fall out, transfer of ownership to Mr Yoshida and liquidation

51. Following the commencement of the Hong Kong Proceedings, the relationship between the Major Shareholders deteriorated. The disputes were mostly concerned with the management of the Company and Mr Matthews' role in it. In May 2017, Mr Matthews was acquitted of all charges in the Hong Kong Proceedings, and the prosecuting authorities were ordered to pay his costs of the proceedings.

52. In 2018, Mr Matthews briefly sought to (and did) gain control of the Company by removing Messrs. Homma and Matsuura as directors of IR-P (the parent company) between 23 February 2018 and 15 May 2018, and using his control of IR-P to remove Messrs. Homma, Matsuura and Yoshida as directors of the Company on 30 March 2018.

53. Shortly thereafter, at Mr Matsuura's request, Mr Homma transferred all of the issued shares in Growth Today into Mr Yoshida's name in exchange for US$1.

54. On 18 December 2018, Mr Homma resigned as a director of the Company and of IR-P, and Mr Yoshida was reappointed as a director of the Company, and appointed as a director of IR-P. On 15 May 2019, Mr Yoshida became a director of SPGK Cayman.

55. In early 2019, Mr Matsuura and Mr Yoshida decided to remove the Sanders Companies from their involvement in the PRC Business and both SPGK Singapore and Scuderia Bianco were incorporated on 2 May 2019 for the purpose of providing cash management services in relation to the PRC Business in place of SPGK International.

Executed agreements

56. These new relationships were reflected in the following documents:

a) a Business Services Agreement dated 1 June 2019, by which the Company and Scuderia Bianco agreed that Scuderia Bianco would provide marketing, business-consulting and cash management services to the Company and its subsidiaries, including HEC International, Ltd (now in Official Liquidation);

b) a Business Services Agreement dated 1 December 2019, by which SPGK Singapore and Scuderia Bianco agreed that Scuderia Bianco would provide marketing, business-consulting and cash management services to SPGK Singapore; and

c) a credit card processing contract (referred to as a Merchant Services Agreement) entered into by SPGK Singapore, in place of SPGK International, with Planet Payment on 29 September 2019 (the "PP Contract").

Transfer of ownership

57. In August 2020, Mr Homma, who had already transferred his shares in Growth Today to Mr Yoshida, also transferred his indirect holding in the Company to Mr Yoshida.

58. That was done through NSET (a company legally owned by Mr Homma) transferring its shares in IR-P to Lequios Holdings Ltd ("Lequios") (a British Virgin Islands company legally owned by Mr Yoshida).[23]

59. On 13 August 2019, Messrs Matsuura and Yoshida resolved to place IR-P into voluntary liquidation and appoint Mr David Lloyd as its voluntary liquidator.

60. Relations between Mr Yoshida and Mr Matsuura began to sour, and Mr Yoshida sought to leave the Business. By an email dated 31 December 2020, Mr Yoshida said that his "*appointment as President of HEC and SPGK was triggered by Mr Matsuura's request to me*" and requested from

[23] *The Company's share capital remains directly owned by IR-P, INTL and a group of former employees.*

Mr Matsuura that he receive a "*severance pay*" equivalent to 20% of "*SPGK's after-tax profit for FY2020*".[24] No severance pay (at a level acceptable to Mr Yoshida) was agreed.

61. At that stage, according to the Company, Messrs Yoshida and Matsuura were still aligned that the receipts from the PRC Business belonged to the Company.

Liquidation

62. SPGK Cayman ceased trading in March 2021. Mr Lloyd was replaced by Mr Robinson pursuant to a resolution of IR-P's shareholders. Mr Robinson was IR-P's voluntary liquidator from 28 May 2021 until 29 March 2022, at which point he was appointed as IR-P's official liquidator pursuant to a supervision order.

63. On 1 June 2021, the Company entered voluntary liquidation and Mr Robinson was appointed as its voluntary liquidator. The Company's directors did not file a declaration of solvency within the time prescribed by the Companies Act (as amended) (the "Act") and on 2 July 2021, Mr Robinson applied to the Grand Court under section 124(1) of the Act to bring the Company's liquidation under the Court's supervision.

64. The Company ultimately entered official liquidation on 17 September 2021. For completeness, HEC International, the Cayman Islands subsidiary of the Company, also entered voluntary liquidation on 29 September 2021, entered official liquidation on 7 December 2021, and Mr Robinson is also the official liquidator of HEC.

65. Pursuant to a supervision order dated 17 September 2021, the Company entered official liquidation and the JOLs were appointed as its joint official liquidators. On 23 September 2021, the JOLs filed a certificate of solvency.

66. In December 2021, the Company applied for recognition of the Cayman Islands liquidation proceedings as "foreign main proceedings" in the United States by petition to the US Bankruptcy Court of the Southern District of New York. Although SPGK Cayman and SPGK Singapore did not initially contest the Company's entitlement to recognition (and an order was agreed between the parties and approved by the US Bankruptcy Court), they have latterly sought to challenge the Company's recognition, and have also filed a second motion seeking that a restraint on the Planet Payment Funds be lifted (together, the "Motions"). The Motions, which were filed in June 2023, are said by the Company to be very costly for the Company's estate to defend and are pursued for

[24] *ASOC, §67.1.7.*

the purpose of putting Mr Yoshida in a position where he can move the Planet Payment Funds to Taiwan.

Evidence

67. The Court has reviewed the First Affidavit of Graham Robinson dated 7 February 2024 (*Robinson 1*), the First Affidavit of Ryunosuke Yoshida dated 14 March 2024 (*Yoshida 1*) and the Second Affidavit of Graham Robinson dated 5 April 2024 (*Robinson 2*) together with exhibits.

Issues to be determined

68. Two broad questions arise on this application:

i) Does the Court have jurisdiction under GCR, Order 29, r.2(1) and/or r.2(3)?

GCR, Order 29, r.2(1) provides:

> *"On the application of any party to a cause or matter the Court may make an order for the detention, custody or preservation of any* ***property*** *which is the subject matter of the cause or matter, or as to which any question may arise therein, or for the inspection of any such property in the possession of a party to the cause or matter*."(emphasis added)

GCR, Order 29, r.2(3) provides:

> "*Where the right of any party to a specific fund is in dispute in a cause or matter, the Court may, on the application of a party to the cause or matter, order the fund to be paid into Court or otherwise secured.*_"

ii) If so, should it make orders sought by the Company:

a) requiring the Defendants to transfer relevant cash balances into the Grand Court or into escrow?

b) requiring the Defendants to disclose copies of all bank accounts statements maintained by them, or in their name, as well as related information?

Does the Court have jurisdiction

69. Mr Flynn KC for the Defendants, argued that there was no jurisdiction to grant the relief sought on this application. There was 'no property' and 'no specific fund' identified for any proprietary injunction.

70. As to 'no property' he argued, relying on Singapore authority, that property does not include *choses in action*, which is what monies in a bank account represent.[25] It follows, he submitted, that the application must fail in respect of the funds in the three bank accounts. As for the Planet Payment Funds, he submitted that they are also not '*property'* under GCR Order 29, r.2(1).

71. Mr Flynn KC argued:

i) that monies in an active bank account with payments in and out are neither property nor a specific fund;[26]

ii) an identifiable fund in the hands of the Defendants which had been ring-fenced is essential for there to be a specified fund;[27] and

iii) because monies flowed in and out of the three bank accounts the funds in those accounts had been intermingled. As a particular sum of money (i.e. the property) cannot be separately identified, no proprietary injunction could be made.[28]

Decision

72. It seems to the Court instinctively that it would be a surprising outcome if there was no jurisdiction to protect and preserve alleged trust monies in interlocutory proceedings if the other elements of granting such relief are made out and if the justice of the case so required. If the Court was not able to use its jurisdiction to protect and preserve such funds then the monies at issue and which the

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[25] *Sang Cheol Woo v Charles Choi Spackman [2021] SGHC 42, §105; See also Potton Homes Ltd v Coleman Contractors Ltd (1984) 28 BLR 19 (CA) where May LJ held (at 32) that the old English RSC "Order 29, rule 2(1) on its proper construction is designed to enable the court to preserve until trial the subject-matter of litigation in specie: it cannot be used to freeze cash in the hands of a party, even though the source of that cash can readily be identified and is, maybe, directly connected with the other claims and counterclaims in the action."*

[26] *Wenden Engineering Service Co Ltd v Technic Construction Co Ltd (Unreported, HCCT 120/1997, 14 June 2001) (CFI), §13; although this point was conceded in the case.*

[27] *CPR 25.1(1)(l): LLC EuroChem North-West-2, [2023] EWHC 2720 (Comm), §22.*

[28] *Sum Mun Kid Frederick v Auto Italia Ltd [2018] HKCFI 1049.*

Company claims are its property, could well continue to be spent in large amounts before the outcome of the case is decided.[29]

73. There are reported examples of where the Court has made orders preserving monies in bank accounts, although each case will necessarily be fact specific[30].

74. There is, in the Court's view, jurisdiction in an appropriate case for it to use its equitable power to grant injunctive relief pending trial. [31] In one sense there is jurisdiction because the Defendants are parties to the proceedings and have submitted to the Court's jurisdiction. The related question is then whether it is right for the Court in the circumstances to make an order of the kind sought. Any such power needs to be exercised on a principled basis. This power it seems to the Court should not be limited or excluded by the provisions of GCR O.29, r.2.

75. The Court was referred to a Singapore authority on which the Defendants relied. In *Sang Cheol Woo* the Singapore Court decided that money in a bank account was not property within the Singapore equivalent of GCR O.29, r.2(1). Mr Flynn KC argued that Cayman law is to the same effect and property does not include a '*chose in action'*.

76. Whilst noting the clear ruling of the Singapore court, this Court notes that it went onto say that the applicant ought to have proceeded under the equivalent of GCR O.29, r.2(3).

77. The Court was also referred to *Potton Homes*, a decision of the English Court of Appeal. This lends support the proposition that '*choses in action'* are (unlike in the position in Singapore) to be regarded as property, at least under the pre-Civil Procedure Rules in England.

78. May LJ said:

> *"With respect to the learned judge, I do not think that the defendants' entitlement to payment under the performance bond was within the scope and proper construction of rule 2(1), and counsel for the respondents do not seek to support the finding before us.* ***Once the bank paid under the performance bond,*** *which, for the reasons I have indicated, I think that it was bound to do, the defendants' entitlement* ***ceased to be a***

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[29] *Mediterranean Reffineria Sicilliana Petroli SpA v Mabanaft GmbH (unreported, 1 December 1978) and Frabran Holdings Ltd v Daventree Trustees Ltd FSD 112 of 2023 (RPJ), and FSD 204 of 2022 (RPJ), at [152].*
[30] *See by way of example Frabran Holdings Ltd v Daventree Trustees Ltd FSD 112 of 2023 (RPJ) and FSD 204 of 2022(RPJ) where the trust assets were also monies in bank accounts; and PCW (Underwriting. Agencies) Ltd v Dixon [1983] 2 Lloyd's Rep 197 (Comm), at p.202.*
[31] *UTB, LLC v Sheffield United Limited [2018] EWHC 1663 (Ch), per Fancourt J, at [43].*

> ***chose in action, and I do not think that the cash proceeds of the bond can correctly be described as "property" within rule 2(1).*** *In my opinion Order 29, rule 2(1) on its proper construction is* ***designed to enable the court to preserve until trial the subject-matter of litigation in specie****: it cannot be used to freeze cash in the hands of a party,* ***even though the source of that cash can readily be identified and is, maybe, directly connected with the other claims and counterclaims in the action.****"(emphasis added)*

79. Two points are made in this passage. The first is as to entitlement under a performance bond ceasing to be a *choses in action* once the cash has been paid out, and the second is as to preserving the subject matter of litigation *in specie* (i.e. in its actual form).

80. The Court accepts Ms Leahy KC's submission that the Court of Appeal was pointing out that merely identifying monies related to a claim, once they were paid out, did not mean you had a proprietary claim to those monies. However, if the monies (*choses in action*) vested in the Company while in the bank account they are to be regarded as 'property'.

81. In the Court's view if monies derived from a fiduciary relationship remain in a bank account and can be identified they fall within GCR O.29, r.2(1).

82. As to a proprietary claim to a specific fund under GCR O.29, r.2(3) the Court is attracted to the approach (albeit *obiter dicta)* of Mr Justice Butcher[32] which draws a distinction between:

> *"..money which was not in any way segregated and in respect of which there was no claim to beneficial ownership but which was simply a sum claimed by way of debt or damages from one party by the other"*

and money in respect of which there was a claim to beneficial ownership.

83. In *UTB,* Fancourt J interpreted Rule 25.1(1) of the Civil Procedure Rules ("CPR") which by paragraph (c) allowed the Court to make an interim order for "*the detention, custody or preservation of relevant property".* Relevant property is defined by rule 25.1(2) as "*property (including land) which is the subject of a claim or as to which any question may arise on a claim".*

84. Fancourt J said that relevant property is (as the definition states) property which is the subject of a claim or as to which any question may arise on a claim and there is no exclusion of any particular

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[32] *LLC EuroChem North-West-2 v Société Générale SA [2023] EWHC 2720 (Comm), § 17.*

types of property. He was prepared to include intangible property, such as shares or some intellectual property within the definition.[33]

85. Having cited *Fancourt J* in *UTB ibid* Butcher J said:

> "*I agree with Fancourt J that 'property' need not necessarily be physical property, and am also inclined to agree, although it is not something I have to decide that the examples he gives -- of shares or some forms of intellectual property, or a portfolio of particular investments -- fall within the meaning of the term as it appears in CPR 25.1(l)(c). But Fancourt J was not considering an argument that 'property' embraced money which was not in any way segregated and in respect of which there was no claim to beneficial ownership but which was simply a sum claimed by way of debt or damages from one party by the other."*

86. Applying the CPR 25.1(1)(c), Butcher J said that this was not amenable to a preservation order under English CPR 25.1(1)(c) because:

> *"such amounts are not 'property (including land) which is the subject of a claim or as to which any question may arise on a claim' within CPR 25.1(3)"*

87. He said the definition of property in this context*:*

> *"envisages that the property shall be in some way identifiable and distinctive, such that that particular property can be said to be the 'subject of the claim' or that a question may arise in relation to it. Furthermore, CPR 25.1(1)(c) envisages that relevant property shall be capable of detention, custody, preservation, inspection, sampling, experimentation, sale, or may yield an 'income'. None of those naturally applies to a sum of money claimed by way of debt or damages. Reading CPR 25.1(l)(c) as a whole, I think it is clear that it does not envisage that such amounts will be 'relevant property'."*

88. The Court accepts Ms Leahy KC's submission that the proprietary claim in the present proceedings is to the Funds, as identifiable and distinct 'property' in respect of which the Company claims the beneficial interest under GCR O.29, r.2(3).

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[33] *Ibid, §42.*

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89. Were it not so and if it is not possible to identify the property, then the relief may not lie and the appropriate relief, if risk of dissipation can be shown, is for a freezing order. However, the property can be identified in this case and the basis of the Company's claim is not for debt or damages, but for specific funds as beneficial owner under a trust relationship. The application is for a segregated fund of money (the Funds) which are in identified bank accounts.

Intermingling

90. Mr Flynn KC argued that the evidence in the Alix report showed that there had been intermingling. He argued that the Company had not led evidence to suggest that there had been an obligation not to intermingle, which had occurred.

91. The Company points out that the Defendants (D2-D5) have not been trading since 2021. That is not a complete answer as to whether there had been intermingling before then, but it would suggest that those Defendants would not have caused any for the last few years.

92. Having reviewed the relevant evidence, the Court has not been shown good evidence of intermingling, such that the relevant funds cannot be identified and traced. The Court does not have evidence which shows that the monies were in active bank accounts with payments in and out and are therefore neither identifiable property nor a specific fund.

93. The Court has reviewed the Alix report both for monies going in and monies going out and finds that it is far from clear that there has been any intermingling. If the funds in the bank accounts represent the monies received via Planet Payment, i.e. the profits of the PRC Business, and they have only used the monies to pay "ordinary course expenses", that does not render the funds indistinct.[34]

94. If the Court is wrong about the intermingling analysis, that still leaves the Company with an arguable case, assuming that the Company is arguably right about the relationship of the Defendants as agents and fiduciaries. SPGK Cayman, on that hypothesis, existed to operate a business in the PRC on the Company's behalf, and was not a completely separate and independent entity operating for its own behalf. That places an obligation on the Defendants to have kept the Funds distinct for the benefit of the Company. If, as the Defendants contend, there was intermingling, that would be

[34] *Alix report, pp.315, 492.*

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a breach of that obligation and there would need to be an enquiry into the facts and whether the Funds could be traced.

95. In sum, the Court is satisfied that it does have jurisdiction to grant the relief claimed.

Should the Court make the orders sought by the Company

96. The next question to be addressed is, has the Company, applying *American Cyanamid* [35] principles, shown that there is a serious issue to be tried, that the balance of convenience favours the grant of an injunction, and that it is just and convenient to grant the relief sought.

Serious issue to be tried

97. The Company must show a serious issue to be tried, i.e., that there is a "*real, as opposed to a fanciful, prospect of success on the claim*"[36]. This is lower than the "*good arguable case*" threshold that applies in freezing injunction cases[37]. A serious issue to be tried has to be shown on the evidence, not by mere assertion or allegation.

98. Further, it follows from the nature of a proprietary injunction that the serious issue to be tried should be in respect of facts which, if proven, would afford the claimant a proprietary remedy.

Decision

99. The Court has assessed the pleaded case in detail and the evidence and has formed the clear view that the Company has a real prospect of success at trial of establishing that SPGK Cayman acted as its agent and had fiduciary obligations in conducting the PRC business on its behalf. Similarly, so did SPGK Singapore/Scuderio Bianco when they provided payment services on its behalf.

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[35] *Sukhoruchkin v Van Bekestein [2013] EWHC 1993 (Ch), at [7] as approved by the English Court of Appeal in the same case ([2014] EWCA Civ 399), at [18], and Smellie CJ in Classroom Investments Incorporated v China Hospitals Incorporated 2015 (1) CILR 451, at paragraphs [50]-[54], also: The Asset Tracing and Recovery Review (11th ed.), p.79.*

[36] *American Cyanamid [1975] AC 396, 408A–B.; VTB Capital v Nutritek [2013] AC 337, at §164. This is the same as the test for summary judgment: Altimo Holdings and Investments v Kyrgyz Mobil Tel Ltd [2012] 1 WLR 1803, at paragraph [82]; Create Financial Management LLP v Lee [2021] 1 WLR 78 (QB), §53(1).*

[37] *Sukhoruchkin v Van Bekestein (supra), at [7] ("it is generally understood that the requirement to show a good arguable case is more onerous than showing only a serious issue to be tried").*

100. The Court also takes into account that the relief sought in this case is for a mandatory order for the transfer of funds from one jurisdiction to another and it therefore needs to be satisfied that the Company has a good case with a good degree of assurance[38].

101. Mr Robinson states in his first affidavit: *"The Amended Writ of Summons and Amended Statement of Claim are based on genuine causes of action against the Defendants which, I believe, have at least a reasonable prospect of success. In particular, the Claim includes a proprietary claim in relation to various funds.... I believe that this proprietary claim is at least a good arguable claim…"*

102. Whilst not proof in itself, the Court has no reason to doubt that these beliefs are genuine and arise from the JOLs' investigations, including interviews with various officers of the Company[39] and the legal advice they have received. The Court does not accept the Defendants' submission that these independent office holders have '*descended into the arena'* and have in some way become partisan.

103. As to the essential question whether or not there is a real prospect of the Company succeeding with its claim that it is beneficially entitled to the Funds because the Defendants operated the PRC business on their behalf and not as a separate independent business, the Court has carefully considered the submissions put forward by Mr Flynn KC.

104. In particular, it has had regard to the submissions that there are fundamental defects in the Company's case because:

i) the nature or source of the funds is not pleaded;
ii) there has been intermingling such as to make it impossible to identify the property,
iii) there had to be a complete separation of SPGK Cayman to be compliant with PRC law going forward (not just a rebranding exercise) and the agreements actually entered into support that;
iv) the PRC business had not been transferred to SPGK Cayman; and
v) it was not clear whether the Company was saying it was entitled to 100% or 77% of the Funds.

105. The Court has concluded for the reasons given below that none of the arguments put forward by Mr Flynn KC provides a sound basis for doubting the Court's conclusion that there is a serious issue to be tried on the evidence.

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[38] *Zockoll Group v. Mercury Communications (No. 1) [1998] FSR 354, p.354, p.366, Phillips LJ.*
[39] *Campbells' letter of 15 December 2022.*

106. The Court also has had regard to the submission that ordinarily an agent will owe fiduciary duties to its principal, but it will not be in all cases that such duties mean that the agent holds on trust monies payable to the principal. That will depend upon whether a trust, in fact, has arisen which in turn depends upon the terms of the agency relationship. In this case, the Court has concluded that there is a serious issue to be tried, in the sense that it is a case with reasonable prospects of success, that there was such a relationship.

107. The Court has also taken into account the argument that there is no evidence from the Major Shareholders, which Mr Flynn KC submitted was 'striking'. The reasons for this may only be guessed at but they may have something to do with the criminal investigation and regulatory compliance. The Court does not consider that the JOLs have any power to compel their evidence.

108. The Court finds that it is arguable with a real prospect of success that there was no complete separation of SPGK Cayman going forward as the Defendants contend after the CCB intervention. There was no good contemporaneous material before the Court which established that there was a common understanding, (or indeed misunderstanding and complaint), as to the way the business was being operated.

109. In addition, the reorganisation in 2019 which led to SPGK Singapore and Scuderia Bianco being incorporated for the purpose of providing cash management services in relation to the PRC Business in place of SPGK International with new agreements in place[40] do not of themselves support the Defendants' case. The Court agrees with Ms Leahy KC that there is at least a plausible case on the evidence that these new agreements were put in place to reflect an arm's length commercial relationship between SPGK Cayman and the Company, but that no formal separation occurred and the operations carried on as before albeit with a new legal structure.

110. This is supported by the case that SPGK Cayman did not employ its own staff and neither received revenue nor paid for the products and services provided or expenses. Up until 2019, all the receipts from the PRC business and liabilities for the business were received and met by the Ascentra group. There is an arguable case that the Company's PRC Business continued to be conducted by the same employees and services companies as previously.

111. Whether or not the facts established at trial ultimately show that there was a transfer of the PRC business (however defined) to SPGK Cayman, or a transfer of assets or goodwill (for example the

[40] *§37 ASOC and §32 Defence and Counterclaim.*

Affiliates List) enabling SPGK Cayman to conduct business on behalf of the Company, the Company's case that SPGK Cayman was acting as an agent and fiduciary still has a real prospect of succeeding. It is by no means fanciful.

112. Mr Flynn KC stressed that the arrest of Mr Matthews and the criminal investigation, as well as the illegality in the PRC of the previous business model, meant that it was essential that an entirely new entity was set up, separate from the Company. That was why in return for taking the significant risk of further criminal investigations, Mr Yoshida was given the shareholding he received for $1. That it seems to the Court is a matter on which the Company has shown a serious issue to be tried.

The pleaded case

113. The first plea at paragraph 62 of the Amended Statement of Claim ("ASC") is that in conducting the PRC business and cash management on its behalf, SPGK Cayman, SPGK Singapore and Scuderia Bianco have been acting as the Company's agent.

114. Ms Leahy KC submitted that the Company's case at trial will be that each of these entities had the ability, as a practical matter, to alter the Company's legal relations with third parties and thereby incurred fiduciary obligations to the Company including fiduciary and trustee obligations in respect of the funds held by them in the course of conducting the PRC business and the cash management on the Company's behalf [41].

115. The second way the relationship is put is that in their dealings with external parties the Company was the undisclosed principal of SPGK Cayman, SPGK Singapore and Scuderia Bianco.[42]

116. The third basis is that in conducting the PRC business and cash management services on its behalf, these same entities have been acting as the Company's fiduciary.[43] The key test for the imposition of fiduciary duties was said by Ms Leahy KC to be whether there is a legitimate expectation that one party will act in the interest of another with discretion, power to act and vulnerability being the indicators of such an expectation. Here it was said that the Company could expect that those entities would act in the Company's interest to the exclusion of its own or a third party's.

[41] *Quantum Advisory [2024] EWCA Civ 247, §§31-32.*
[42] *Siu Yin Kwan v Eastern Insurance Co Ltd [1994] A.C. 199, p.207.*
[43] *Al-Dowaisan v Al-Salam [2019] EWHC 301 (Ch), at [108].*

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117. The Company argued that where a party gives up a substantial degree of control exposing itself to some risk and thereby trusts another, equity will respect this and the relationship will be fiduciary in nature[44].

The Defendants' response and the Court's conclusion

118. Mr Flynn KC submitted that the entire edifice of the Company's case in paragraphs 62 and 63 of the ASC is an inference from basic facts which is completely inappropriate in circumstances where the company could and should have adduced evidence directly from the beneficiaries (the Major Shareholders).

119. The Court does not agree. It does not approach the pleaded case on the basis of what evidence might or might not have been adduced on this application. It has reviewed the evidence that has been produced and has formed the view that the following facts can reasonably be said to support the conclusion that the Company has a reasonable prospect of establishing each of the relationships pleaded:

a) the transfer by Messrs Matsuura and Matthews of a valuable part of the business (the operations in the PRC) for no consideration to SPGK Cayman.

b) SPGK Cayman continued to benefit from the various services arrangements and employee support and that the Company continued to incur and discharge all liabilities.

c) Mr Matsuura's agreement that the shares in Growth Today be transferred by Mr Homma to Mr Yoshida, where the PRC Business was a key part of the group's Business.

d) Mr Yoshida had no interest (legal or otherwise) in SPGK Cayman before 2018, Mr Homma sold the shares in Growth Today to Mr Yoshida for the nominal sum of US$1.

e) The common management structure between SPGK Cayman and the Company. Mr Matsuura was involved in the management of SPGK Cayman's business, SPGK Singapore's business and the Company's business. Mr Yoshida, SPGK

[44] *Lac Minerals Ltd v International Corona Ltd [1989] 2 SCR 574.*

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Cayman, SPGK Singapore and Scuderia Bianco acted on Mr Matsuura's instructions and Mr Yoshida was both a director of the Company and SPGK Cayman.

120. The commercial basis for the proposition that there was a good reason to transfer ownership and therefore the profits of this business through Mr Homma to Mr Yoshida for nominal consideration needs to be properly tested at trial. The Court has noted the Defendants say this was because Mr Yoshida was prepared to take the risks arising out of the criminal investigation going forward. They also say there is no evidence as to what Mr Homma paid for his original shareholding. Those points reinforce the Court's conclusion that there is a serious issue to be tried.

121. The Court has concluded that the Company has tendered a plausible factual (and legal) basis for establishing at trial that the PRC Business was conducted on its behalf, and that the relevant Defendants provided cash management services to the Company and as the Company's agent. There is an arguable case on the evidence with a real prospect of success that they are all agents of the Company and hold monies as fiduciaries they have received on trust for the Company.

122. As to Mr Flynn KC's source of funds argument, the Court has concluded that there is also a serious issue to be tried that the funds are the profits generated by the PRC business.[45] Although this is contested,[46] this narrative has been adopted by the Defendants in the related litigation. The Court accepts the Company's case that the parties have proceeded in the other related proceedings on the basis that the source of the funds under the control of the Defendants are the profits of the PRC business and were only used to pay the expenses of those businesses.

123. There is a case with a real prospect of success on the evidence that SPGK Singapore (and through it, Planet Payment) and Scuderia Bianco were managing cash for the PRC Business, which was run on the Company's behalf by SPGK Cayman and the profits were in bank accounts in the respective names of Planet Payment, SPGK Singapore and Scuderia Bianco. There is a case with a real prospect of success that the funds are property which belongs beneficially to the Company and can be identified and traceable as such[47].

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[45] *Robinson 1, §§15 and 16.*
[46] *Yoshida 1, §§ 73(d) and 79.*
[47] *Foskett v McKeown [2001] 1 AC 102 (HL), 129F-G.*

Balance of convenience

124. The question in relation to this issue is which course is likely to involve the least risk of injustice, or irremediable prejudice to one party or the other[48]. The analysis will include the prejudice to the Company if no injunction is granted, or to the Defendants if it is, the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross undertaking, the likelihood of either party being able to satisfy such an award, and the likelihood that the injunction will turn out to have been wrongly granted or withheld.[49]

Prejudice

125. The prejudice to the Company is said to be that the Defendants have made plain their intention to continue to use the Funds at a rate of at least US$10m annually if not restrained in relation to assets which the Company says rightly belong to it. The Company says there is no good reason to preserve the status quo in these circumstances.

126. The prejudice to the Defendants is said to be a reliance on the funds to properly advance their cases in the litigation, pay for the wind down of numerous companies and to fund Mr Yoshida's personal expenses. The JOLs have said that they are content for those expenses to be paid out of the profits of that business, i.e. the Funds. For this reason, the Company says the injunction sought, if granted, would cause no practical prejudice to the Defendants.

Delay

127. As to delay, this is a relevant, but unlike in the case for a freezing injunction, not a critical factor. The Company set out its case for ownership of the funds in July 2021[50]. Neither party then moved to have the disputed funds arguments determined.

128. The Defendants themselves in 2021 sought an express carve out in the Chapter 15 proceedings to enable them to bring proceedings outside of the United States but have not done so.

129. The Company did not issue proceedings, with the sanction of the Court, until October 2023.

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[48] *Zockoll Group v. Mercury Communications (No. 1) [1998] FSR 354; National Commercial Bank Jamaica Ltd v. Olint Corporation Ltd: Practice Note [2009] 1 WLR 1405, at [19] per Lord Hoffman.*
[49] *National Commercial Bank Jamaica Ltd v Olint Corpn Ltd [2009] 1 WLR 1405 (PC (Jamaica)), §§17 – 18.*
[50] *Campbells' letter of 7 July 2021.*

130. As to further delay in applying for a proprietary injunction, until February 2024, reasons are given in the JOLs' evidence that there have been negotiations between the parties to try and agree an appropriate regime with monies being available to pay business expenses and the balance going into escrow, and those efforts have regrettably not succeeded. The Court also notes the JOLs' case that they relied on Mr Yoshida's assurances not to use the funds otherwise than in the ordinary course of business.

Decision

131. The Court notes that Mr Yoshida has said that he will not dissipate the disputed funds, and confirmed the position will not change even though the JOLs are seeking injunctive relief[51]. However, the Court has formed the view on the evidence that the funds have been dispersed at such a rate to date, and will continue to be so spent, that a proprietary order is appropriate. The balance of convenience, taking into account the arguments on prejudice and delay and the overall justice of the case, clearly favour the Company. If the disputed funds are dispersed at the level they have been to date, that risks prejudicing, perhaps irremediably, the Company's position in terms of enforcing its proprietary claim if it is ultimately successful at trial.

132. As to Mr Flynn KC's argument that it was not clear whether the Company was saying it was entitled to 100% or 77% of the Funds, it may be the case that Mr Yoshida is one of the ultimate beneficiaries of the funds (the Company says up to 23%, the Defendants 100%) and so the net claim would need to be reduced by an amount which would be calculated further down the line. That does not prevent the exercise of the Court's discretion to make an Order which effectively 'holds the ring' in the meantime while the ownership dispute is determined. The JOLs will in due course have to distribute the funds in accordance with the usual waterfall, pay the debts and expenses, and make a resulting distribution to the shareholders.

133. A further argument was raised by Mr Flynn KC, that three of these accounts are in Taiwan. He submitted that Taiwanese law does not recognise trusts. The Court has not been shown any relevant Taiwanese law, but assuming that is right, the submission proceeded on the basis that it would be

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[51] *...the Funds will not be used other than in the ordinary course of business (including the costs of closing down the business which is an ongoing process). The Defendants also stressed ... in keeping with their consistent position over the proceeding two years, there is plainly no risk of dissipation that any part of the Funds nor any threat the Defendants will seek to avoid the consequences of any judgment on Ascentra's claim (notwithstanding that the claim is denied in its entirety); nothing has changed and the issue of the Proceedings makes no difference to that position.". Yoshida 1, §56(c).*

very difficult to enforce the order in Taiwan and that was a powerful discretionary factor in refusing the mandatory order.

134. The Court does not find much force in Mr Flynn KC's submission. The practical answer to the point is that this would still leave a claim *in personam* in the Cayman Islands against Defendants who are subject to the territorial jurisdiction of the Court (all the Defendants having submitted to the jurisdiction, or in the case of D2 being a Cayman Island company).

135. As to the Planet Payment Funds, although they are in the custody of the US Bankruptcy Court, there are applications to change that position and remit them to Taiwan. Mr Yoshida has said as much in his deposition in the motion to terminate the Chapter 15 proceedings.

Cross-undertaking in damages

136. The usual practice of the Court is to require a cross-undertaking as a condition of the grant of interim relief. The reason for the undertaking is to mitigate the risk should it turn out that the injunction should not have been granted and the Defendants suffered loss and damage [52].

137. The question is one of discretion for the Court which depends on the facts of the individual case and considerations of fairness.

138. Mr Yoshida says there is no reason why an unlimited cross undertaking in damages should not be ordered and the Company's shareholders, who will be entitled to any distribution at the end of the liquidation, should be required to give it as the price of any injunction[53].

139. The Company says that the Court should direct that no cross-undertaking is required, alternatively that any cross-undertaking should be limited to the value of the unencumbered assets of the estate which remain at the end of the case.

Decision

140. The Court has decided that this is not one of those very rare cases where a cross undertaking in damages is not required.

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[52] *Per Lord Diplock in Hoffmann-La Roche & Co. A.G. v. Trade & Indus. [1975] AC 295, at 361;CICA in Ennismore Fund Management Ltd v Fenris Consulting Limited [2020 (2) CILR 147], at [37].*

[53] *Yoshida 1, §81(b).*

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141. The Court has considered the helpful analysis of Lewison J in *Pugachev*[54]

> *"The default position is that an applicant for an interim injunction is required to give an unlimited cross-undertaking in damages. That is regarded as the price for interfering with the defendant's freedom before he has been found liable for anything ... There is also a possible exception where the applicant has no personal interest in the litigation and is bringing the action on behalf of others. One example is where litigation is being brought by liquidators on behalf of an insolvent company where there are no large creditors who can be expected to indemnify them and where it has proved impossible to obtain insurance against unlimited liability on the cross-undertaking."*

142. The Company is in liquidation and acts through its JOLs. They say that the limited funds in the liquidation estate is due to the fact that Mr Yoshida has misappropriated the Company's money. If the claim does not succeed then, according to Mr. Robinson, there will be insufficient funds to make a distribution to the shareholders of the Company.[55] In terms of the expenditure incurred to date, the Company says it has used its free funds to pay for its own legal fees and other expenses, and to pay expenses relating to the PRC Business which Mr Yoshida has apparently refused to pay from the profits of that business (i.e. the Funds) under his control[56]. The Court has no evidence about the JOLs' recourse to the Major Shareholders (if there is any) or to insurance to cover the contingency.

143. The Court does not accept that there is no practical possibility of damage to the Defendants. It is true that the Defendants are not trading. Mr Robinson says[57] that there is no prejudice because the JOLs have indicated their willingness to permit legitimate business expenses to be paid out and the Defendants have confirmed that they only intend to use the relevant funds in the ordinary course of business.

144. However, that ignores the Defendants' case that the monies are theirs to do with as they see fit, an issue which will only finally be resolved at trial. The Court also takes into account Mr Yoshida's evidence [58] that there are substantial differences between the parties' understanding of what falls

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[54] *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev (CA) [2016] 1 WLR, p.160, §68.*
[55] *Robinson 1, §63.*
[56] *Robinson1, §64.*
[57] *Robinson 1, §62.*
[58] *Yoshida 1, §§76-80.*

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within and outside of the scope of 'legitimate business expenses' with regard to legal and related expenses and living expenses.

145. The Defendants, on the other hand, have spent in a fairly short period of time US$26m of the funds subject to the Company's proprietary claim, including US$14.5m on legal fees[59] and US$3m on Mr Yoshida's salary and living and travel expenses. There is evidence that there is $500,000 in Mr Yoshida's savings account and $2.79m in his lawyers' client account.

146. Mr Flynn KC makes the point that there is no way of assessing the amount spent in legal fees fairly without disclosure from the JOLs for comparison. The Court would not be much assisted by that. The expenditure has been incurred in very different factual contexts.

147. It is also the case that the Defendants have refused to pay any monies into escrow and are currently spending substantial amounts trying to have the Planet Payment Funds remitted to Taiwan.

148. It is also the case that Mr Yoshida (through his (alleged) 23% beneficial interest in the Company) stands to gain whether he wins or loses these proceedings. It would in the Court's view not be fair to expect a full indemnity from the other shareholders.

149. It of course remains a decision for the JOLs as to whether they are prepared to give one or not, but the Court has decided in its discretion, and taking into account fairness to all parties, that a limited cross undertaking should be given by the JOLs to be entitled to the relief they seek. In all the circumstances the Court has decided that the JOLs should offer a cross undertaking limited to the value of the unencumbered assets of the estate which remain at the end of the proceedings.

Just and convenient

150. Since the Court has decided that the balance of convenience favours the granting of the proprietary injunction, although the question whether it is just and convenient to do so is a separate matter, it would be unlikely that the Court found that it was not just and convenient.[60] For completeness, the Court finds that it is just and convenient to do so. There are no factors which suggest that it would not be just and convenient to do so.

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[59] The Company says a large proportion has been spent trying to stop the liquidators securing or ring-fencing the funds until the ownership dispute is resolved.

[60] *Madoff Securities International Ltd v Raven* [2011] EWHC 3102 (Comm), at [14].

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Legal expenses

151. As to legal expenses, a provision for legal expenses can be raised by way of an application for a carve out from the injunction itself. If such an application is made, then Mr Yoshida will need to satisfy the Court that he has no other source of funding available apart from the disputed funds, and that the balance of prejudice comes down in his favour[61].

Conclusion

152. The application is granted. The Company has shown a good arguable case for a proprietary remedy, and the interim remedies by way of injunction and disclosure sought ought to be made.

153. The parties are to liaise on the Order and its terms giving effect to this Judgment and submit it to the Court for approval.

154. To the extent that the Defendants seek payment of any of their expenses from the Funds they are by evidence to explain the nature of these expenses and the Court will consider the matter further, including if necessary by the making of Directions for determination of the matter.

155. If the parties are unable to agree costs the Court will deal with the matter on the basis of written submissions of no more than 7 pages in length.

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

[61] Civil Fraud: Law, Practice & Procedure (1st ed.), at §28-215 to 216.

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