IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA 16 of 2018
(FSD 256 of 2017 (IKJ))

IN THE MATTER OF THE COMPANIES LAW (2018 REVISION)

AND IN THE MATTER OF NANFONG INTERNATIONAL INVESTMENTS LIMITED

BETWEEN

ORIENTAL KNOWLEDGE TANK LTD

Appellant/Respondent

-and-

BUSINESS INTELLIGENCE INVESTMENT LTD

Respondent/Petitioner

BEFORE:

The Rt. Hon Sir John Goldring, President
The Hon Dennis Morrison, Justice of Appeal
The Rt. Hon Sir Alan Moses, Justice of Appeal

Appearances: **Mr. Michael Green QC instructed by Ms Cherry Bridges of Ritch & Conolly for the Appellant**
Mr. Thomas Lowe QC instructed by Mr. Nick Hoffman and Ms. Gráinne King of Harney Westwood and Riegels for the Respondent

Hearing: **27 August 2018**

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Ruling Delivered: **14 September 2018**

COURT OF APPEAL · CAYMAN ISLANDS · 11/17

RULING

MOSES, JA

1. This is an appeal, brought by leave of the judge, The Hon. Mr Justice Kawaley, against his Order dated 25 June 2018. The judge refused a stay to Oriental Knowledge Tank Ltd ("Oriental"), the Appellant in this appeal, by which it had sought to stay a petition for the winding up of Nanfong International Investments Limited ("Nanfong"). It is important to identify, at the outset, the nature of the stay sought by Oriental: it was an application for a temporary case management stay pending the determination of certain issues being litigated in Samoa, which included authority to present the winding-up petition in the Cayman Islands. Oriental's application was not for a *forum non conveniens* stay; Nanfong was incorporated in the Cayman Islands, it can only be wound up by proceedings in the Cayman Islands, and, therefore, there can be no question but that the Grand Court of the Cayman Islands was the appropriate forum for the hearing of that petition. It is the immediate holding parent of the trading subsidiaries in China.

2. This appeal is yet another stage in the litigious warfare between two brothers, Mr Wu Xiao Wu (Mr Wu) and Mr Ng Hiu Nam (Mr Ng). Their differences are said to be irreconcilable and their only contact is through seemingly endless litigation conducted in Samoa, the Cayman Islands and the People's Republic of China, where the evidence suggests there have been some 40 cases. The corporate structure, of which Nanfong forms part, assists in explaining the nature of the dispute in the instant appeal.

3. Nanfong has two shareholders: Oriental holding 40% and Business Intelligence Investment Limited ("BIIL") holding 60%. BIIL is a Samoan company, which presented the petition to wind up Nanfong. Broadly speaking, BIIL is within Mr Wu's sphere of influence because 67% of its shares are held by Auch Holdings Ltd ("AHL"), a Samoan company wholly owned and controlled by Mr Wu, the other 33% being held by Violet Vine Corporation Limited ("Violet Vine"), a BVI company beneficially owned and controlled by Mr Ng. BIIL presented the petition to wind up Nanfong on the basis that it is just and equitable to do so on the grounds of misconduct, that is mismanagement by certain of the Directors of Nanfong, and failure to comply with statutory obligations of disclosure of the company's books and records to the petitioner. At the time of the alleged misconduct, the directors of Nanfong were Mr Ng, Mr Wu and Mr Lin, who is supportive

of Mr Ng. Oriental contends that BIIL had no authority to present the petition. Oriental's application for a stay is founded on the existence of proceedings in Samoa which, it says, will determine the issue of BIIL's authority and, accordingly, its right to pursue the petition to wind up Nanfong in the Grand Court of the Cayman Islands.

4. Accordingly, it is necessary to describe the proceedings which have taken place and continue to be live in Samoa, in relation to BIIL's actions and conduct. It is important to stress at this stage that my recitation of these events should not be interpreted in any way as a comment on the propriety of those events, which are entirely a matter for the court in Samoa.

5. On 2 May 2017 the Chief Justice of the Supreme Court Samoa granted an *ex parte* injunction, on Mr Ng's application, restraining BIIL from holding an EGM which its majority shareholder had sought to requisition in order to remove Mr Ng as a director of BIIL and reduce the quorum for directors' meetings from two to one. Following *inter partes* hearings on 31 May 2017 the Chief Justice refused to set aside the injunction.

6. On 20 July 2017, AHL, that is Mr Wu's company, filed a petition to wind up BIIL on a just and equitable basis on the grounds of management deadlock and sought the appointment of joint provisional liquidators to BIIL. Mr Ng had, unfortunately, become ill and for some months in 2017 the issue of the winding up of BIIL could not be pursued and was adjourned, more than once, to a hearing on 2 November 2017. The hearing was also adjourned at the behest of the Chief Justice on a number of occasions. Mr Wu contends that Mr Ng took an intransigent approach to the sensible course of winding up BIIL and the appointment of joint provisional liquidators, seeking to limit their powers to investigate the affairs of BIIL. By way of riposte to the delay in the hearing of the petition, on 9 October 2017, Mr Wu, on behalf of AHL, sought to convene an EGM of BIIL in Hong Kong on 3 November 2017. No detail was given of the purpose of the meeting other than that it was "*to consider management and any other business*". On 31 October 2017, Mr Ng formally opposed the winding up of BIIL, and the hearing of the petition was fixed for 2 November.

7. On 1 November 2017, the petition to wind up BIIL was adjourned to 8 November at the request of Mr Wu's Samoan counsel on the grounds that overseas counsel needed more time for preparation. No mention was made at the hearing on 1 November 2017 of the proposed EGM which was due to take place only two days later in Hong Kong. If the EGM were to have the effect AHL and Mr Wu wished, there would have been no need for the petition to be pursued. At the very least, it is not possible to identify any legitimate reason for failing to inform the court of what Mr Wu and AHL plainly had in mind by 1 November.

8. The EGM of BIIL did take place on 3 November. Mr Ng was not present; he says he received no notice of the meeting. A Mr Yeung, a friend of Mr Wu was appointed as an additional director. That appointment is said by Mr Ng to be unlawful under Samoan law, on grounds which are not limited to the alleged failure by AHL to give proper notice of the EGM to Violet Vine, BIIL's minority shareholder or notice to Mr Ng.

9. On 8 November, the day fixed for the adjourned hearing of the BIIL petition, Mr Wu's counsel in Samoa again successfully obtained an adjournment on the grounds that there was a relevant Privy Council case due for decision. There was, yet again, no reference to the EGM or to Mr Wu's attempts to obviate the need to wind up BIIL which had taken place five days earlier at the BIIL EGM.

10. On 13 November, at a board of directors' meeting of Nanfong in Hong Kong, Mr Ng with Mr Lin voted against Mr Wu's proposal, of which notice was given on 6 November, to convene a general meeting to address the affairs of that company and its subsidiaries and, accordingly, it was rejected. One day later, on 14 November, Mr Wu issued notices convening a BIIL board meeting on 20 November 2017. Mr Ng received no notice of that meeting and contends that Mr Wu must have known that he was unaware it was to take place.

11. But, on 20 November 2017 the board meeting did take place and the validity of resolutions made there lies at the heart of Oriental's application for a stay and of this appeal. At that board meeting, it

was resolved to authorise the issue of the winding up petition in the Cayman Islands against Nanfong. If that resolution was invalid, then BIIL had no authority to present the petition and the issues arising in relation to the winding up of Nanfong on the grounds of misconduct cannot, at least for the time being, be litigated.

12. At that board meeting BIIL also purported to resolve to increase its share capital and to allot new shares to existing shareholders, with a view to diluting, so Mr Ng says, his shareholding through Violet Vine to a paltry 0.01%. This was, he contends, to be achieved by provisions for taking up the allotment within a specified period which, absent due notice, it would not have been possible for him to fulfil.

13. Once Mr Ng learnt of these resolutions, on 23 February 2018 he took steps to set aside the appointment of Mr Yeung as a director, the allotment of new shares and, crucially, the resolution to issue the petition against Nanfong. He filed an application in the BIIL winding up petition in Samoa seeking injunctions and declarations against Mr Wu, AHL and BIIL. He seeks declarations that the appointment of Mr Yeung, the share issue and allotment and the decision to authorise the filing of the petition to wind up Nanfong in the Cayman Islands are all invalid.

14. The application to stay the petition to wind up Nanfong in the Cayman Islands was heard, as I have recalled, on 20 April 2018. At that time, although the Samoan court had been asked for a listing of Mr Ng's application and expert evidence had been filed by Mr Wu relating to the Cayman Court's ability and willingness to determine matters of Samoan law, no date had been fixed for a hearing at which, amongst other issues, the lawfulness of BIIL's resolution to petition the winding up of Nanfong would be determined.

15. We are now informed, in a recent affidavit, that the issues relating to the validity of BIIL's resolution will be heard at the end of October, 2018. I should emphasise that that was not the position at the time of Mr Justice Kawaley's decision and, therefore, it is not open to this court to take that into account unless and until it determines that it is appropriate to set aside the judge's

exercise of discretion and itself to exercise a fresh discretion. This court must consider whether case management considerations compelled a temporary stay, in the circumstances which existed at the time Oriental's application was heard (see *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd [2016 EWCA Civ 411 Paragraph 45]).*

a. *The Law*

16. It is important to re-iterate that Oriental sought a temporary stay to manage the order of proceedings in two jurisdictions, both of which were the appropriate forum for the determination of those proceedings in accordance with the principles identified in *Spiliada Maritime Corp v Cansulex* [1987] AC 460. This teaches that the essential quest where a stay is sought on the grounds of *forum non conveniens* is to identify which is the more appropriate forum in the interests of all parties and the ends of justice, in cases where there is more than one available forum having competent jurisdiction. In this case there is no question but that on *Spiliada* principles the appropriate forum for hearing the petition to wind up Nanfong is the Cayman Islands, where it is registered. That is not disputed; Oriental has never sought to argue for a stay on the grounds of *forum non conveniens* and could not do so.

17. Any stay of the hearing of the petition must therefore be based on principles other than those identified in *Spiliada*. Those relevant to the grant of a stay on case management grounds are to be found in *Reichhold Norway ASA v Goldman Sachs International [2000]* 1 WLR 173. In that case the Court of Appeal approved the principles applied by Moore-Bick J who stayed the hearing of an action for negligent misstatement by Goldman Sachs in relation to the sale of shares in a Norwegian Company pending an arbitration in Norway to be brought by Reichhold alleging breach of warranty under the sale agreement. If the arbitration proceedings were successful there would be no need for Reichhold to sue Goldman Sachs, the vendors' advisers.

18. Moore-Bick J emphasized that before a temporary stay of proceedings properly started in England should be granted there must be:

> "*very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the Plaintiff.* (p.492)

19. Moore-Bick J recognised that the grant of a temporary stay was a lesser interference with the Plaintiff's rights than a stay granted on grounds of *forum non conveniens*, which in practice determines whether a plaintiff can proceed at all in the jurisdiction of its choice. There is, he said, a "*very real burden*" on the applicant for a case management stay to satisfy the court that the "*ends of justice*" would be served by granting a stay, even if no greater than on the grounds *of forum non conveniens*, but that the factors to be taken into account in a case management decision will differ (p.495).

20. Applying those principles, Moore-Bick J concluded that a temporary stay should be granted in order to manage the order in which the proceedings were to be heard:

> "*not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other.*" (p.491)

21. The Court of Appeal, in upholding Moore-Bick J's decision, detected no error of law in his identification of the relevant principles. Lord Bingham CJ commented on the Appellant's argument that Moore-Bick J's order would open the door to a flood of applications, differing in merit, introducing uncertainty and a charter to evasive and manipulative defendants. (185H). His riposte gave rise to some debate in the instant appeal:

> "*I for my part recognize fully the risks to which (the appellant's counsel) draws attention but I have no doubt that judges (not least commercial*

judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."

22. Mr Green QC submitted that in cases where there were parallel existing proceedings the burden on an applicant for a temporary stay was less onerous and that, in such a case, Lord Bingham CJ was not propounding any test of compelling circumstances but merely making a prediction in answer to the fear of a flood of unmeritorious claims. I do not agree. Of course, the applicant may find it easier to establish a compelling reason for a stay where there are existing foreign parallel proceedings which, if heard earlier, could be expected to resolve the issues in the domestic proceedings, but that is no more than an example of a compelling reason. Such a circumstance does not give rise to any difference in principle. Nor does it water down Lord Bingham's approach. He was, it is true, making a prediction but he did so for the purposes of underlying the need to find a compelling reason and strong grounds and to encourage caution before granting a stay.

23. The cases which have followed *Reichhold* in this jurisdiction provide no warrant for any different approach. In *Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited* [2010] 2 CILR ("*AHAB*") there was no basis for saying that the proceedings of the Saudi Committee, on which the applicant and the Chief Justice had relied, would or might be determinative of the proceedings in the Cayman Islands, which the applicant sought to stay (para 118). The judgment of Chadwick P in the Court of Appeal was no more than the application of *Reichhold* principles, in a case where there were no apparent or effective parallel proceedings. He posed the question as to a case management stay:

"whether the benefits which were likely to result from imposing a temporary stay so clearly outweighed any disadvantage to the plaintiff that this was one of those cases in which "rare and compelling circumstances" provided the "very strong reasons" that justified doing so." (Para 117).

24. Similarly Cresswell J in *CIGNA Worldwide Insurance Company v ACE Limited 2012 (1) CILR 55* followed the *Reichhold* principles in a case where a stay would have forced the plaintiff to commence parallel proceedings in a foreign jurisdiction in which he would not otherwise have chosen to litigate (para 55). But it does not follow that in cases where parallel proceedings are in existence that the need to identify compelling reasons for a stay is diminished. The existence of parallel proceedings may be the compelling circumstance which affords a benefit; such a benefit is likely to be absent where there are no such proceedings and the effect of a stay would be to force a plaintiff to launch proceedings in a jurisdiction not of its choice.

25. In any event, there are ample examples of the Court of Appeal in England and Wales applying the principles of *Reichhold* even where there are parallel proceedings in existence (see in particular Longmore LJ in *The Princess of the Stars [2012] EWCA Civ 1341 (*para 22*), Racy v Hawila* [2004] EWCA Civ 209, *Konkola Copper Mines Plc v Coromin Ltd* [2006] EWCA Civ 5 and *Standard Chartered Bank* (qv supra). I conclude that the proper approach is to apply the principles identified in *Reichhold* without qualification. If the judge exercising his discretion adopted that approach, his decision cannot be impugned provided that:

> *"he left nothing out of account, took account of nothing of which he should not have taken account, and gave a fair and judicious summary of all the matters properly to be considered"* (Lord Bingham in *Reichhold* at186E).

26. The essence of the Appellant's case is that the logically prior question to consideration of the winding up petition in the Grand Court is whether BIIL could lawfully authorise its presentation. That turned exclusively on questions of Samoan law, which will, come what may, be determined in proceedings in the Samoan Supreme Court. That court will have to rule, in the BIIL winding up proceedings in Samoa, on the issues arising out of the purported resolutions at the Board meeting of BIIL on 20 November 2017. If the order of the decisions is managed so that the Samoan court rules on the lawfulness of the resolutions of that date before the hearing of the petition in the Cayman Islands, the Samoan decision will resolve the issue of authority. Without such a sequence of rulings there is a risk of inconsistent decisions, particularly since any appeal on Samoan law is likely to take

place in Samoa, questions of Samoan law in the Grand Court being questions of fact. This sequence of decisions, first in Samoa then in the Cayman Islands, has the additional benefit of saving costs and does not create any difficulty for BIIL who will, in the light of the issues about the share allotment and appointment of Mr Yeung as a director, be compelled to litigate the lawfulness of BIIL's activities and decisions in the Samoan Supreme Court.

27. Those were the issues before Kawaley J on 20 April 2018. We have a note of his *ex tempore* judgment given on that date. The judge recorded the submission that the Samoan Court "*needed to resolve the dispute in Samoa before the Petition could (sic) proceed*" (1.2.) and that the relief sought in the Samoan Court was a basis for the stay (1.3.(c)). He identified "*the crucial question*" as the legal test to be applied. He cited Chadwick P in *AHAB* Para 117 *(qv supra)*

28. The judge rejected Oriental's submission that this test did not apply:

> "*I find that the umbrella test where proceedings are brought in Cayman as of right and for a case management stay is that very strong reasons have to be made out.*" (1.7)

29. He then continued, after referring to *CIGNA* (*qv supra*):

> "*1.9 I accept that it is possible for the Samoan Court to decide these issues, but it is equally possible for this Court to decide them.*
>
> *1.10 It is accepted that some issues will have to be litigated before the Samoan Court. However, it is not a compelling enough reason that the issue could be determined conveniently by the Samoan Court.*

1.11 The Samoan legal system is not too different from our own. From perusing the judgment delivered by the Chief Justice of Samoa, Samoa is a common law jurisdiction that operates in a manner similar to our own.

112 The burden for a stay operation is a very high one. While there are factors capable of supporting a fair determination by the Samoan Court, they fall short of the very strong reasons that must be made out.

1.13 The application for the stay has been refused."

30. The judge then gave leave to appeal because he said he had had "*considerable difficulties with coming to this judgment*".

31. Before this court, Mr Green QC advanced the argument I have identified above as to the law, arguing for a less stringent test where existing proceedings are already on foot in a foreign jurisdiction. For the reasons I have already given, there is no warrant for imposing a different test. Nor, in my view, did the judge misdirect himself as to the law. He correctly identifies the principle in the judgment of Chadwick P. Whatever is meant by an "*umbrella test*", it seems clear to me that the judge applied the correct principles.

32. However, I have far greater difficulty with his approach to Oriental's grounds for a stay and his reasons, on the facts of this case, for refusing it. I accept that any ruling in a short case must be read in the light of the arguments advanced. No judge should be expected slavishly to repeat every submission and deal with everything advanced, irrespective of his own view as to their significance. It should not necessarily be inferred that the failure of a judge to refer to some point, if it was argued, has been ignored. But the judge must grapple with the essential arguments and expose, with clarity, his reasoning.

33. The essential argument in the instant case was founded on an identical issue in Samoa and in the Cayman Islands relating to BIIL's authority to issue the petition to wind up Nanfong. The judge was being asked to manage the order in which that issue should be determined. In resolving

whether to do so, it was nothing to the point to remark that the Samoan court could decide that issue and that the Cayman court could equally decide it. That was true, but the question went to the order of decision. The judge made no reference whatever to that point. He spoke of a "*fair determination*" by the Samoan court. But the point was not whether that determination would be fair. The point was whether the existence of the Samoan proceedings amounted to a rare and compelling circumstance for ordering a stay so that the issue of authority was decided in Samoa *before* the hearing of the Cayman petition.

34. The judge's failure to identify that central argument as to the order of events has further consequences. He gives no view as to whether he accepted that if the Samoan court decided the issue of authority first, that would dispose of an essential question arising in the Cayman Islands, namely BIIL's right to present the petition, nor as to whether that would save costs nor whether there was disadvantage to BIIL.

35. This court must not interfere with the exercise of the court's discretion absent any misdirection of law or the failures identified by Lord Bingham CJ in *Reichhold* (cited para. 25 of this judgment). But I am driven to the conclusion that the judge's failure to deal with the essential arguments advanced or his reasons for rejecting them vitiates the exercise of his discretion. In my view, the judge left out of account the factors which were crucial to determining whether a stay should be granted. There was no "*fair and judicious*" summary of those factors.

36. In those circumstances, in my view, this court should exercise its discretion afresh. The issue of BIIL's authority to present the petition to wind up Nanfong is an essential question in the consideration of the petition by the Grand Court in the Cayman Islands. Authority to present a petition is not an unusual issue, as Mr Lowe QC pointed out in his powerful and enticing submissions. Nor is it unusual, particularly in cases involving a number of holding companies registered in a variety of jurisdictions, for that issue to be governed by a law which differs from the law applicable to the winding up. It is dangerous, as he submitted, to categorize the question of authority as a preliminary issue to be determined separately from the determination of the petition. It is a preliminary question but it by no means follows that it should be determined separately.

37. Moreover, in the litigious warfare between Mr Wu and Ng, it makes good sense to bring their business relationship to an orderly conclusion. Nanfong is the immediate parent holding company of the trading subsidiaries in China. It needs, as Mr Lowe QC sagely pointed out, to be wound up to ensure a fair distribution of assets, and, so he predicted, it will inevitably be wound up since sooner or later the majority shareholders in Nanfong will be able to ensure that a petition will be presented. Although this seems to me a powerful plea to avoid doing anything which prolongs these fraternal disputes, it does not provide an answer as to how the interests of justice might best be served in the existing proceedings.

38. Many of the disputes, as Mr Lowe submitted, have only peripheral relevance to the hearing of the petition to wind up Nanfong. That the court in Samoa was kept in the dark as to BIIL's attempts to side-step the stymied winding up of BIIL has little if anything to do with the question of BIIL's authority to issue the petition. The only question of direct relevance is that question of authority. But that question will inevitably have to be decided in the Samoan proceedings which will consider, under Samoan law, the legality of the resolutions which BIIL purported to make on 20 November 2017.

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

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

41. In my view those considerations afford compelling and very strong reasons for granting a temporary stay in order to manage the order of proceedings. I am fortified in that view by a consideration that was not available to the judge and which this court would not be entitled to consider had we not been exercising our discretion afresh. The issue of the determination of authority is due to be heard shortly at the end of October. I accept that it would be wrong to attempt, by the process of appeal, to delay a hearing so as to be able to secure that a common issue in two jurisdictions will be heard earlier in the foreign court. But the judge himself, most unusually in a discretion case, gave leave and as it happened was right to have done so in the light of the decision I would make in this appeal.

42. There is no specific power contained within Cayman Islands legislation for the imposition of a case management stay. The courts invoke their inherent jurisdiction and their general case management powers derived from the preamble to the *Grand Court Rules* (Revised Edition) and the *Financial Services Division Guide,* 2nd ed., s.A-4 (pp.9 and 10) which reproduces the same text. (see *CIGNA Worldwide v ACE Ltd* [2012] (1) CILR at paragraphs 55-57). Section 5 of the *Court of Appeal Law* provides the power of the Court of Appeal to have all the powers of the Grand Court "*provided that no judgment of the Grand Court shall be altered or reversed in any case in which the Court is satisfied that the effect of the judgment is to do substantial justice between the parties.*"

43. For those reasons I would grant a temporary stay to ensure that the issue is decided in the order that will most likely further the ends of justice. That was the reason why the order was granted in *Reichhold.* In that case the court did have an interest in the order in which proceedings were pursued where concurrent proceedings may have given rise to inconsistent decisions and the outcome of one set of proceedings might have had an important effect on the conduct of the other. If those were sufficiently strong reasons and could properly be regarded as a rare case, so too, in my judgment are the circumstances of this application. If circumstances change in a way which cannot

at the moment be foreseen, then it is necessary to emphasise that this case management stay is temporary. But, for the time being it is necessary in the interests of justice and I would allow the appeal and grant the application.

MORRISON, JA

I agree.

GOLDRING, JA (President)

I also agree.