

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

Cause No.: FSD 17 of 2018 (IMJ)

IN THE MATTER OF A PROTOCOL AGREEMENT DATED 14 AUGUST 2017

BETWEEN

**(1) DAVID JAMES BENNETT
(2) TSZ NGA GEORGIA CHOW**

Plaintiffs

AND

**(1) XIE ZHIKUN
(2) ATHENE (XIANG) LI**

Defendant

IN CHAMBERS AND IN PRIVATE

Appearances:

**Mr. Matthew Collings QC instructed by Mr. Christopher Levers
and Ms. Jessica Vickers of Mourant Ozannes on behalf of the
Plaintiffs**

**Lord Goldsmith QC instructed by Mr. Colin McKie QC and Mr.
Paul Smith of Maples and Calder on behalf of the 1st Defendant**

**Lord Grabiner QC instructed by Mr. Marc Kish and Ms.
Gemma Lardner of Ogier on behalf of the 2nd Defendant.**

Before:

The Hon. Justice Ingrid Mangatal

Heard:

31 May 2018

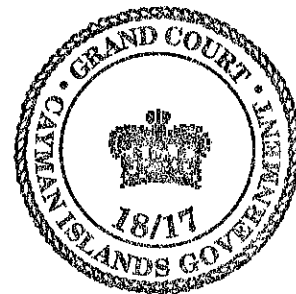
Draft Judgment

Delivered:

15 October 2018

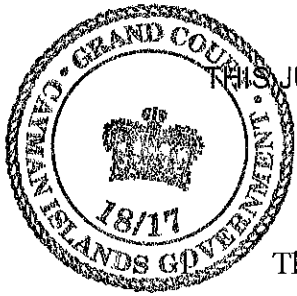
Judgment finalised

and released to the Parties: 22 October 2018



HEADNOTE

Protocol for Independent Directors - Construction of Protocol



THIS JUDGMENT IS RELEASED FOR PUBLICATION BY ORDER OF THE COURT ON 21
FEBRUARY 2019

JUDGMENT

This application arises in the context of other extant court proceedings. I am the presiding Judge in related proceedings, being FSD 25 of 2017 (IMJ) in which I have given judgment in private in respect of an interlocutory injunction application, delivered 9 June 2017.

2. The Plaintiffs are the independent directors (the “**Independent Directors**”) of Dorsey Ventures Limited (“**Dorsey**”), which is the limited partner in a valuable fund. The Defendants are in dispute as to, amongst other things, the beneficial ownership of Dorsey. One of the catalysts for the appointment of the Independent Directors was to “*hold the ring*” pending determination of that dispute.
3. In parallel with the Independent Directors’ appointment, the parties entered into a contract called the Dorsey Protocol (“**the Dorsey Protocol**”), one of the terms of which provided for the Independent Directors to report regularly to each of the Defendants.
4. A dispute has arisen between the Defendants as to the scope of that reporting provision. It has not been possible to resolve this dispute, so the Independent Directors have brought the issue before the Court for resolution by means of an Originating Summons. This case really concerns a question of contractual interpretation. The dispute between the parties has been ongoing since the Independent Directors’ first report was issued in October 2017 and each party’s position as to the correct interpretation has matured over time. The dispute as to the Independent Directors’ reporting obligations has also resulted in Ms. Li suggesting that she considers the Independent Directors’ to have committed an actionable breach of confidence for what they have already disclosed to date, because such disclosure goes beyond what she contends is the narrow scope of the reporting provisions.
5. The Independent Directors have sworn three statements: The First and Second Affirmations of Ms. Chow, and the First Affidavit of Mr. Bennett respectively.
6. Exhibited to Ms. Chow’s First Affidavit are the Dorsey Protocol and the correspondence between the parties leading up to the present application. Also exhibited are rival

opinions from Leading Counsel Mr. Lowe QC for the First Defendant Mr Xie, and Leading Counsel Mr. Midwinter QC for the Second Defendant Ms. Li. Mr. Bennett's exhibit contains the correspondence leading up to the appointment of independent directors to Dorsey and the entering into of the Dorsey Protocol.

Background

7. The fund is XiO Fund I LP (the "**Fund**"), which is a Cayman Islands exempted limited partnership, which has been registered under the Cayman Islands Exempted Limited Partnership Law. The Fund's general partner is XiO GP Limited ("**XiO GP**"). Dorsey is the Fund's sole limited partner.
8. Dorsey, which has an economic interest in the Fund as its limited partner (though the nature of that interest is another of the disputes between the Defendants), introduced a US\$70 million capital contribution. The Independent Directors say that the precise use of the initial capital contribution is being considered by them, and further, that the documents and information which are the subject matter of the Disclosure Proceedings (in FSD 38 of 2018 (IMJ)) would assist them in their view. The Fund's assets are shares in two valuable entities: Project Camping, a German fertilizer manufacturer; and Project Laguna, an Israeli medical device manufacturer.
9. Ms. Li is the sole registered shareholder of Dorsey, and the sole director and shareholder of XiO GP. XiO GP acts by Ms. Li and her colleague Mr. Pacini. Ms. Li's position is that Mr. Xie's role was limited to being an introducer of investors.
10. Mr. Xie on the other hand claims that he is the sole beneficial owner of Dorsey, and that the Fund was established on his instructions, on his behalf and for his benefit.
11. The respective claims are very complicated, and there are three arbitrations underway in Hong Kong, proceedings in the PRC, and before this Court. But Mr. Collings QC, who appears for the Independent Directors, observes that it can readily be seen that Dorsey is caught in the cross-fire, and indeed that its entire ownership is heavily in dispute, as is the nature of the interest it holds in the Fund. It was in these circumstances that the Independent Directors (who are directors of Grant Thornton Directorship Services



Limited in Hong Kong, Mr. Bennett being its Managing Director) came, by agreement between the warring parties, to be appointed as directors of Dorsey. Dorsey has to be stewarded, it was proffered, and it was obviously sensible for the parties to ensure that the value of what they are arguing about be protected and preserved by neutral professionals.

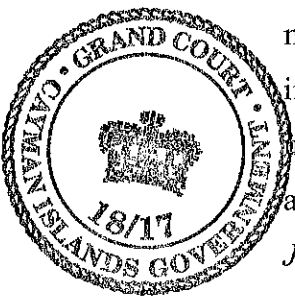
12. In parallel with the appointment of the Independent Directors, the Dorsey Protocol was entered into. The appointment was made by written shareholder resolution dated 11 August 2017. Mr. Xie signed the Dorsey Protocol on 4 August 2017, Ms. Li signed it on 11 August 2017, and the Independent Directors signed it on 14 August 2017, after their appointment.
13. The Independent Directors say that they are cognizant that their duties are to Dorsey, and not to its stakeholders (whoever they might be), but that in discharging their duties they should properly remain neutral as to the parties' respective positions, save to the extent those positions are prejudicial to Dorsey. They say that they have unfortunately found themselves in an impossible position, necessitating these proceedings.

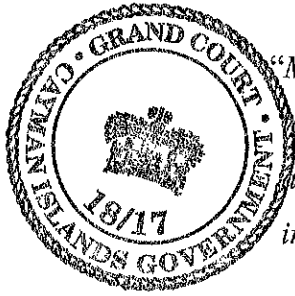
Directors Duties

14. Having been appointed as directors of Dorsey, the Independent Directors plainly owe the requisite fiduciary and other duties to Dorsey.
15. Mr. Collings maintains that these duties have not been sought to be interfered with by the Dorsey Protocol. They could not properly be abrogated by contract, and the Independent Directors say that they would not have accepted office had that have been the case. In any event, Mr. Collings asserts, where directors undertake to exercise their powers in a manner which would fetter their ability to act in the future in what may then appear to be in the best interests of the company, a term will be implied to the effect that such undertaking is subject to the limitation that they will not thereby be required to do anything which would be inconsistent with their fiduciary duties. Reference was made to *John Crowther Group Plc v Carpets International Plc* [1990] BCLC 460.

16. The Dorsey Protocol provides at clause 2.6 as follows:

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“Mr. Xie and Ms. Li agree that independent directors should be appointed to manage Dorsey on the basis stipulated in this Protocol and subject always to such directors’ overriding duty to exercise their own independent judgment when managing the affairs of Dorsey”

17. Clause 4.1 provides for specific obligations on the part of the Independent Directors but is prefaced as follows:

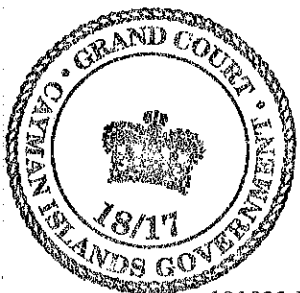
“Subject always to their overriding duties to act lawfully and in the best interests of Dorsey, the Independent Directors will...”

This is a *“without prejudice to the generality of the foregoing”* provision, argues Mr. Collings.

18. It is accepted that the Independent Directors are not in the position of insolvency practitioners, and do not therefore have specific obligations to investigate. But as directors (without previous involvement or knowledge of the company) they claim that they owe duties to properly inform themselves about Dorsey’s affairs in order to supervise and control them. They must acquire and maintain, on an ongoing basis, sufficient knowledge and understanding in order properly to discharge their duties. This will inevitably encompass ascertaining how Dorsey has got to where it is, particularly in circumstances where it has been named as a defendant to the claims brought by Mr. Xie and others in the substantive matter before this Court.
19. What the Dorsey Protocol therefore does is not impinge upon the discharge by the Independent Directors of their duties: rather, the argument continues, it adds on certain additional (and not inconsistent) contractual obligations. These are important because, without them, the Independent Directors’ obligations to Ms. Li and Mr. Xie as directors of Dorsey would be considerably less.
20. There is a Director Services Agreement for the benefit of the Independent Directors, to which Dorsey, Ms. Li and Mr. Xie are parties, but Mr. Collings opines that its terms are not relevant for present purposes.

The Issue

21. It is in respect of the contractual obligations in the Dorsey Protocol where a dispute has arisen as to their scope on a discrete point.
22. The point relates to the true scope of the reporting provisions under clauses 4.1(f) and 5.1. As set out a paragraph 17 of Ms. Chow's First Affirmation, Ms. Li's position is that clause 5.1 does not allow the Independent Directors to report on matters which occurred prior to their appointment. Ms. Li asserts that the "*financial and operational status of Dorsey*" means only its current status. Mr. Xie does not agree with this restrictive interpretation.
23. There is therefore a potentially important distinction between the ability of the Independent Directors to review past matters (prior to their appointment), and their ability to report them. The Independent Directors are not (consistent with their directors' duties) constrained as to the former; but may be as to the latter. Whether there is therefore any such distinction in practice depends upon the true construction of the width of the reporting provisions in the Dorsey Protocol.
24. The correspondence demonstrates that the Independent Directors have sought to resolve the dispute, but Mr. Xie and Ms. Li remain in disagreement.
25. The dialogue has, however, served to ventilate the issue of contractual construction between the Defendants, and in one important respect to narrow the issues by eliminating one consideration. That consideration concerned confidentiality provisions in the Amended and Restated Limited Partnership Agreement ("**the Amended LPA**") dated 25 July 2015 governing the relationship between the general partner and Dorsey (as the limited partner) in respect of the Fund. Although Mr. Xie claims that the Amended LPA is either invalid or should be rescinded (a matter to be determined in the substantive proceedings before this Court in FSD 25 of 2017 (IMJ)), it is presently extant and must be respected by Dorsey and its Independent Directors. Its confidentiality obligations previously constrained the Independent Directors' reporting abilities. However, this issue has now fallen away insofar as Ms. Li has accepted that her entry into the Dorsey



Protocol should be taken as her limited consent to the Independent Directors disclosing those matters which they are entitled (indeed obliged) to report upon pursuant to the Dorsey Protocol. That, of course, then begs the question as to the true scope of their obligations and ability to report, which is the issue of contractual interpretation now before the court.

26. There are two authorities that the Independent Directors seek to rely upon: they are *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 and the more recent the case of *Wood v Capita Insurance Services Ltd* [2017] AC 1173. The English principles of contractual construction have been applied in a Privy Council appeal from the Court of Appeal of the Cayman Islands: *Ennismore Fund Management Ltd v Fenris Consulting Ltd* [2016] UKPC 9.

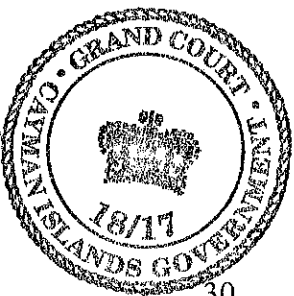
Conclusion on behalf of the Independent Directors

27. The dispute as to the correct scope of the reporting provisions in the Dorsey Protocol is principally one for the Defendants, both of whom have been joined for the purpose of being able to argue for their respective interpretations.
28. The Independent Directors say that they will abide by the outcome of the Court's determination of this issue of contractual interpretation, and will of course provide any assistance which the Court may require of them.

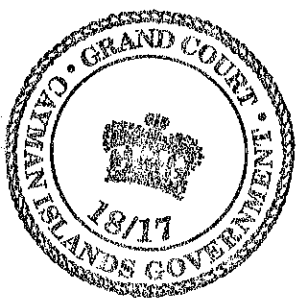
The Arguments advanced on behalf of Ms. Li

29. Lord Grabiner QC, who appears on behalf of Ms. Li, agrees that one of the purposes of the appointment of the Independent Directors was for "*holding the ring*" pending resolution of various disputes on foot in the Cayman Islands and Hong Kong. While this purpose is common ground between the parties, a disagreement has arisen as to the scope of the Independent Directors' reporting obligations under the Dorsey Protocol.

30. Ms. Li considers that the level of disclosure in the monthly reports to date has been adequate and in accordance with the purposes for which the Independent Directors were appointed.



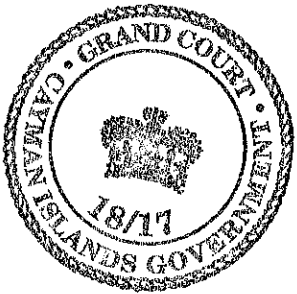
31. Lord Grabiner says that, however, Mr. Xie, on the other hand has sought to leverage the Independent Directors' appointment as a means of extra-judicial discovery and, from the publication of their first report in October 2017, has subjected the Independent Directors to intense and repeated criticism for amongst other things, failing to report information Mr. Xie asserts he is entitled to receive.
32. Ms. Li has separate concerns about the role of the Independent Directors, whose function appears to have evolved from that of independent directors appointed to hold the ring and report on the status, into a liquidator type role conducting investigations into the historical activities of Dorsey and the Fund. As a result, the costs of the Independent Directors have escalated exponentially, but without the checks and balances which are ordinarily built into the remuneration approval process for a liquidator. Consequently, as at 4 May 2018 the Independent Directors and their advisors had charged in excess of US\$3 million in remuneration and expenses, 50% of which is borne by Ms. Li and the Fund, pursuant to the terms of the Independent Directors' appointment.
33. These costs are out of all proportion, it was argued, to the costs one would reasonably expect an independent director to incur, let alone in respect of a dormant company.
34. It is now common ground that by executing the Dorsey Protocol, Ms. Li consented to limited confidential information about the Fund relating to the "*work done and actions taken by the Independent Directors and any other matters that the Independent Directors consider to be material to the financial and operational status of Dorsey*" being disclosed to Mr. Xie as part of the monthly reporting under the Dorsey Protocol. However, Ms. Li does not accept that this extended to the disclosure by the Independent Directors of confidential information which is not required to be disclosed by the Dorsey Protocol.
35. The question before this Court is therefore whether the language of the Dorsey Protocol requires the Independent Directors to report on matters which pre-date their appointments, or whether they are required to monitor and report only on matters post-dating their appointments and relevant to Dorsey's current financial and operational status.



36. Ms. Li submits that the Dorsey Protocol should be interpreted in accordance with the purpose for, and context in, which the Independent Directors were appointed and a plain reading of the Dorsey Protocol itself.

Purpose of the Directors' Appointment

37. Reference was made to clauses 4.1 and 5 of the Dorsey Protocol. It was submitted that it follows that:
- a. The information that the Independent Directors are entitled to request from the Fund is limited to information that Dorsey is entitled to receive under the Amended LPA;
 - b. The reports provided by the Independent Directors are limited in their subject matter to *“the work done and actions taken by the Independent Directors and any other matters that the Independent Directors consider to be material to the financial and operational status of Dorsey”*.
 - c. The level of detail to be included in the reports is a matter in the sole discretion of the Independent Directors; and
 - d. The Independent Directors are expressly not required to disclose all information that they possess in the reports.



38. Mr. Xie now claims to be entitled to detailed explanations and information relating to, amongst other things: (a) the application of Dorsey's funds; and (b) potential investments in assets such as JD Power and Meitav Dash. For the reasons explained below, Lord Grabiner suggests that this is not information to which Mr. Xie is entitled or which could properly be included in the reports.

Scope of the Independent Directors' Appointment

39. The investigations that the Independent Directors have sought to conduct since their appointment are characterised by Ms. Li as being akin to those required to be conducted by a liquidator. This is perhaps not surprising, Lord Grabiner offered, given that both

Mr. Bennett and Ms. Chow are experienced insolvency practitioners. However, the duties of independent directors appointed in support of an injunction intended to prevent dissipation of assets are, it was argued, readily distinguishable from those of a liquidator.

In particular because:-

- a. The role of a director tasked with preventing dissipation of assets is forward-looking. This is reflected in the terms of the Independent Directors' remit in clause 4.1 of the Dorsey Protocol, none of the subparagraphs of which refer to historical matters.
- b. An independent director does not have a statutory or common law duty to conduct investigations, unlike a liquidator.
- c. Consistent with both of the above, an independent director is not granted the suite of powers bestowed on liquidators to enable them to gather in the assets of the insolvency estate.



40. Accordingly, while the Independent Directors are subject to an overriding duty to act lawfully in and the best interests of Dorsey, those duties are framed by the scope of the remit in the document appointing them, such that they:

- a. Do not include any duty to investigate historical matters that pre-dated their appointment; and
- b. Are subject to the express limits set out in clause 4 of the Dorsey Protocol, all of which are activities concerned with 'holding the ring' (securing and preserving the assets of Dorsey, assessing its financial position).

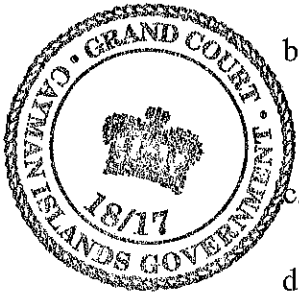
41. It was submitted that should the Court find that there is an obligation on the Independent Directors to conduct investigations into Dorsey and the Fund, such a finding would result in the perverse situation one sees currently in place whereby:

- a. Ms. Li is paying 50% of the Independent Directors' costs of investigating her own previous conduct as a director;

- b. Ms. Li is paying 50% of the Independent Directors' costs of investigating the affairs of the Fund, in respect of which she is the sole director of the XiO GP and its controlling mind;
- c. The Fund is paying 100% of the costs of the investigations by the Independent Directors in their capacity as directors of any of the Camping and Laguna subsidiaries into the transactions of the Fund;
- d. For every letter or email that the Independent Directors send to the Fund or Ms. Li, Ms. Li and/or the Fund pay for some or all or both sides of the communication.

42. This arrangement was said to be obviously unsustainable and cannot have been envisaged by reasonable parties negotiating the Dorsey Protocol, particularly in circumstances where:

- a. Dorsey has no assets save for its limited partnership interest;
- b. Dorsey had been dormant for some four years before the Independent Directors' appointment;
- c. Ms. Li took no salary when she was the sole director of Dorsey; and
- d. Ms. Li has never claimed any economic interest in Dorsey, but has nevertheless been required to pay in excess of half a million dollars in remuneration and expenses in a nine month window.



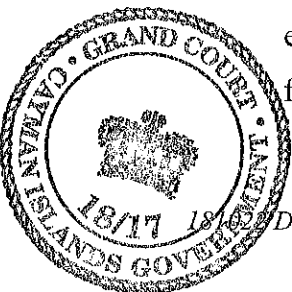
43. For the reasons set out above, if the Court determines that it is appropriate for the Independent Directors to conduct investigations into historical transactions of Dorsey and the Fund, those investigations should not have been, or continue to be undertaken at the expense of Ms. Li personally, or at the expense of the Fund and should result in a reimbursement of any and all sums so paid.

44. Lord Grabiner has also argued that the Independent Directors are wrong to consider that their duties could not be limited or were not limited by the Dorsey Protocol. Reference

was made to the fact that Ms. Li is the sole shareholder of Dorsey. Reference was made to her ability to alter the articles and otherwise limit the Independent Directors' powers and duties, whether by special resolution or informally under the *Duomatic* principle: *Re Duomatic Ltd.* [1969] 2 Ch. 365. Further, it was argued that by the Dorsey Protocol, Ms. Li curtailed the Independent Directors' powers, imposed certain additional obligations on them (such as the reporting obligation in clause 5.1) and gave directions as to their management and control of the company. Mr. Xie and the Independent Directors expressly agreed to this regime. The Independent Directors' general duties include acting in Dorsey's best interests, exercising independent judgment, acting within their powers and only using their powers for the purposes for which they were conferred. The Independent Directors, the argument continues, are obliged to observe these general duties in exercising their powers and performing their duties within their limited remit. However, they cannot rely on their general duties to enlarge the scope of their powers and override the sole shareholder's ability ultimately to control the affairs of the company.

Rationale for Mr. Xie's Position on the Dorsey Protocol according to Ms. Li

45. Mr. Xie has repeatedly in multiple jurisdictions, sought disclosure of confidential and commercially sensitive documents and information relating to the Fund, to which he is not entitled, says Ms. Li's eminent Counsel, unless and until he is found to be the beneficial owner of Dorsey by the SEA Arbitration.
46. Ms. Li sets out in her Affirmation Mr. Xie's numerous attempts to procure information about the Fund and its investments in court proceeding in the Cayman Islands and Hong Kong, as well as arbitral proceedings in the ICC.
47. In circumstances where the Independent Directors have been appointed by Mr. Xie and Ms. Li to manage Dorsey pending resolution of the SEA Arbitration, there is no need, says Ms. Li, for Mr. Xie to have access to information about Dorsey's or the Fund's assets. To the extent that Dorsey has rights under the Amended LPA, those rights can be exercised and are being exercised by the Independent Directors. It should be sufficient for Mr. Xie to receive confirmation from the Independent Directors that there is no risk of

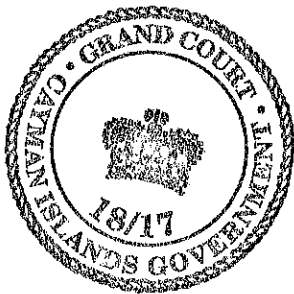


dissipation of the assets of Dorsey and that the Independent Directors are able to fulfil their role as independent directors.

48. That these assurances are not sufficient to satisfy Mr. Xie supports Ms. Li's view that Mr. Xie's constant pressure on the Independent Directors to provide further information in their reports, which has resulted in the present Application, is part of a further attempt by Mr. Xie to procure information to which he has no legal right.
49. Reference was also made to the Opinion obtained by Ms. Li from Mr. Midwinter QC. At paragraph 10 of his Opinion, learned Queen's Counsel encapsulates his opinion as follows:

"10. In my view:

- (a) It is likely that Ms. Li's agreement to the Protocol would be considered as a matter of Cayman Islands law to constitute the provision of written consent by the shareholder of XiO GP to the disclosure of information required to be included in the reports to be produced in accordance with clause 5.1 of the Protocol to Mr. Xie.*
- (b) The information that the independent directors are required (and therefore permitted) to disclose pursuant to clause 5.1 is information about Dorsey's financial and operational status - i.e. where it currently stands. This will include information about its current asset position and what (if anything) is now happening to those assets. There is nothing in the Protocol that would require or justify independent directors disclosing information about the past management of Dorsey's assets."*



The Law

50. Lord Grabiner submits that the correct approach to contractual construction is well established and has been most recently restated by Lord Neuberger in *Arnold v Britton* [2015] UKSC 36 at [15]:

"When interpreting a written contract, the court is concerned to identify the intention of all the parties by reference to "what a reasonable person

*having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean”, to quote Lord Hoffmann in **Charbrook Ltd v Persimmon Homes Ltd** [2009] 1 AC 1101, para 14. And it does so by focussing [sic] on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”*

51. Reference was also made to *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

CONCLUSION (On behalf of Ms. Li)

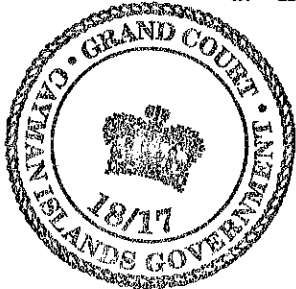
52. On behalf of Ms. Li, Lord Grabiner submits that this Honourable Court should direct that:

a. In respect of the Independent Directors’ reporting obligation:

- i. The Dorsey Protocol only entitles the Independent Directors to report on matters which are material to the current financial and operational status of Dorsey;
- ii. The Independent Directors are not required to report on matters which occurred prior to their appointment in August 2017;

b. In respect of the remit of the Independent Directors:

- i. They are not obliged to investigate matters which pre-date their appointment.



The Arguments Advanced on Behalf of Mr. Xie

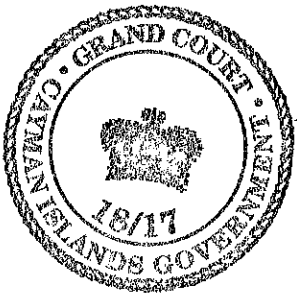
53. Lord Goldsmith on behalf of Mr. Xie submits that Ms. Li is desperate to delay and obfuscate Mr. Xie and now the Independent Directors from finding out what has happened to the US\$70 million of funding ultimately provided by Mr. Xie to Dorsey, which in turn injected those funds into the Fund, which was and is controlled by Ms. Li through her position as a director and sole shareholder of XiO GP, the general partner of the Fund. Ms. Li has gone to great lengths to avoid addressing that most basic question regarding Dorsey's position. Her conduct is described as alarming and is said by learned Counsel to be the type of behaviour of a person with something to hide.

54. This manifests itself in several ways. Relevant to this application is Ms. Li's adoption of indefensible positions on what the Independent Directors can and cannot do. Although Mr. Xie would have preferred that the Independent Directors had taken a more robust approach and seen Ms. Li's posturing for what it is, the Independent Directors felt they had no option but to come to Court to seek the Court's guidance on what they should do.

55. To the extent that there is actually a legal issue before the Court on this application regarding the construction of the Independent Directors' reporting obligation it is actually quite narrow. That issue is: what is the proper construction of the Independent Directors' reporting obligation set out in clause 5.1 of the Dorsey Protocol?

56. Mr. Xie's position is that:

- a. There are no temporal restraints on the Independent Directors' powers, or on what they may report to Mr. Xie.
- b. The discharge of the Independent Directors' fiduciary duties as directors of Dorsey requires that they do not ignore the matters that occurred prior to their appointment.
- c. In any event, the use to which the US\$ 70 million was put is a current issue e.g. because it will be an indicator of XiO GP's activities and it will reveal key matters such as (i) whether that sum was expended properly or improperly (ii) whether Dorsey has a claim in respect of it and (iii) whether it is correct to treat



Dorsey's claim against the Fund as merely being for the repayment of that sum (i.e. that Dorsey is not entitled to any profits that the Fund generated).

57. The Independent Directors themselves are of the same view (according to the Letter dated 9 February 2018 from Mourant Ozannes for the Independent Directors.)

58. The Court is respectfully invited to make clear that:

(1) Neither clause 5.1 of the Dorsey Protocol nor any other provision, rule or law contains any temporal or subject-matter restrictions, such that the Independent Directors may report on facts and matters prior to their appointment, including, without limitation:-

a. The expenditure by the Fund of the US\$70 million that Dorsey paid or procured to be paid to the Fund;

b. Any matters concerning JD Power;

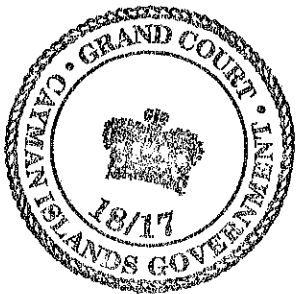
c. Any matters concerning Meitav Dash;

d. Any matters concerning any other deals that have been or may have been:

i. funded using the the Fund's, or any of its direct or indirect subsidiaries funds;

ii. acquired as a result of the entry by the Fund, or any of its direct or indirect subsidiaries, into an equity commitment letter or any other such undertaking or otherwise in reliance or any funds or assets of, or deriving directly from, and whether initially or subsequently, Dorsey, Mr. Xie or Fortune Favors or Shengshi View; or

iii. Any matters concerning any other deals in which the Fund issued an equity commitment letter or any other such undertaking or otherwise reliance or any funds or assets of, or deriving directly or indirectly from, whether initially or



subsequently, Dorsey, Mr. Xie or Fortune Favors or Shengshi
View, whether or not such deals were consummated;

- iv. Any matters concerning the steps the Independent Directors are taking to investigate and protect Dorsey's position.
- (2) Clause 6.1 of the Protocol permits the Independent Directors to communicate any information they consider appropriate to Mr. Xie and to receive any information they consider appropriate from Mr. Xie and there are no temporal or subject-matter restrictions when engaging in such communications.
 - (3) If the Court is prepared to entertain an examination of the Independent Directors' fiduciary duties, the Independent Directors would not be acting in breach of fiduciary duty in their capacity as directors of Dorsey by including in their reports issued to Mr. Xie and Ms. Li, pursuant to clause 5.1 of the Dorsey Protocol, or in their communications with Mr. Xie pursuant to clause 6.1 of the Dorsey Protocol, any information concerning matters prior to their appointment as directors of Dorsey, including, without limitation, any information concerning the expenditure by the Fund of the US\$70 million that Dorsey paid to the Fund and the other matters listed in the above (b) to (d); and
 - (4) If the reports issued pursuant to Clause 5.1 of the Protocol do not include full details concerning the expenditure by the Fund of the \$US70 million that Dorsey paid to the Fund and the other matters listed (b) to (d), then the Independent Directors have not complied with their obligations under clause 5.1 of the Dorsey Protocol.

Factual Context

59. In addition to other matters previously discussed, such as the previous proceedings commenced by Mr. Xie and entities connected with him, Lord Goldsmith submits that it is important that the Court take into account the following as part of the factual context:

- (A) The repeated requests by Mr. Xie for, and the consistent failure to provide by Ms. Li, information;
- (B) The resignation of the FTI Directors;



(C) The circumstances leading up to, and the negotiation of the Dorsey Protocol.

(B) The resignation of the FTI Directors

60. Ms. Li resigned as director of Dorsey and originally appointed two directors from FTI Consulting (“**FTI Directors**”) on 6 February 2017. The FTI Directors ultimately resigned on 2 May 2017, to take effect on 12 May 2017. Lord Goldsmith indicates that the FTI Directors’ reasons for resigning specifically refer to the lack of “*full, consistent and/or timely information*” provided by Ms. Li and XiO GP, leading them to conclude that their position was untenable.

(C) The circumstances leading up to, and the negotiation of, the Dorsey Protocol.

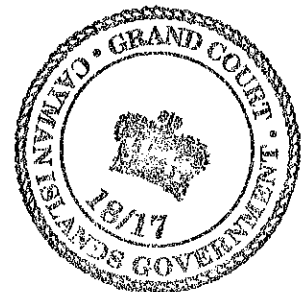
61. Mr. Xie’s Leading Counsel refers to the fact that, following the resignation of the FTI Directors, which took effect on 12 May 2017, at a hearing on 17 May 2017, before the Hong Kong Court, the Honourable Madame Justice Mimmie Chan urged the parties to seek to reach agreement regarding the appointment of directors for Dorsey. Mr. Xie and Ms. Li thereupon entered into negotiation as to the appointment of the directors of Dorsey.

62. It was pointed out that Mr. Xie had in the meantime, filed an application for the appointment of receivers over the shares in Dorsey. Accordingly, argues Lord Goldsmith, had no agreement been reached Mr. Xie could have pursued that application. If granted, there would have been Court-appointed receivers over the shares in Dorsey, who could in turn exercise the voting rights attaching to those shares and appoint themselves as directors of Dorsey. Further, that it is likely that those Court-appointed receivers would have had reporting obligations to the Hong Kong Court and the parties.

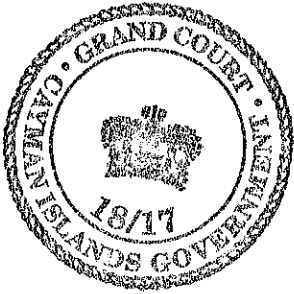
The monthly reports produced by the Independent Directors

63. It is Mr. Xie’s position that these reports have been deficient in a number of ways.

The Relevant Legal Principles



64. Lord Goldsmith referred to *Wood v Capita Insurance Services Ltd*, where Lord Hodge, (with whom the other members of the Supreme Court agreed), at paragraphs 13 and 14 stated as follows:



“13. *Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement.*

.....

14. *On the approach to contractual interpretation, the Rainy Sky and Arnold case were saying the same thing. The recent history of the common law of contractual interpretation is one of continuity rather than change.”*

65. Reference was also made to *Arnold v Britton*, at paragraph 17, where Lord Neuberger said:

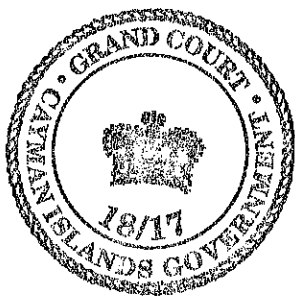
“reliance placed in some cases on commercial common sense and surrounding circumstances....should not be invoked to undervalue the importance of the language of the provision which is to be construed.

The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issues covered by the provision when agreeing the wording of that provision.”

66. In his helpful legal opinion, Mr. Lowe QC correctly points out that the confidentiality provision in the disputed Amended LPA (in clause 24.6(b)) is in unusual terms. It would seem that the Amended LPA treats the LP Shareholder as being bound to maintain confidential information which belongs to the GP Shareholder. The Limited Partner and the General Partner themselves are not treated as having any interest in the confidential information. At paragraph 21 Mr. Lowe concludes that consent for the purposes of the Amended LPA in relation to confidential information was given by Ms. Li entering into the Dorsey Protocol wearing both her hats, i.e. as the LP Shareholder and as the GP Shareholder.

67. At paragraphs 26-28, learned Queen's Counsel concludes as follows:

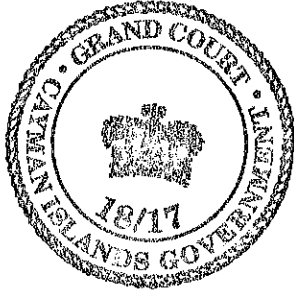
“Conclusion



26. *For the reasons set out above, I do not see how XiO GP can legitimately object to the production of detailed information to Mr. Xie, XiO GP does not have any right of confidence under Clause 24.6(b) or any right to withhold consent.*

27. *I do not see how Ms. Li as either the GP Shareholder or the LP Shareholder could object once she entered into the Protocol. This necessarily amounts to consent for the Dorsey directors to report on matters which are confidential under the LPA. Irrespective of whether under Clause 24.6(e) of the LPA the consent can be given by either the GP Shareholder or the LP Shareholder or needs to be given jointly, I consider that effective consent has been given for the reasons I have explained. On any view and at the very least, Ms. Li must have consented as the LP Shareholder. However, as I have said it is not reasonable to construe the Protocol as anything less than effective consent because that would mean that Ms. Li had not been acting in good faith and the Protocol would not make business sense if the reference to her was construed differently.*

She would also be taken to have acquiesced in the LP Shareholder giving consent to make disclosure in the form of the Protocol.



28. I take the view that the ways in which Dorsey's capital contribution of US\$70 million has been expended is of obvious materiality to the financial /operational position of Dorsey and that is information that the Protocol required to be included in the report. "

DISCUSSION AND ANALYSIS

The Dorsey Protocol

68. After setting out the various disputes and injunctions, the Dorsey Protocol, at clauses 2.6, 3, 4, 5, and 8 provide as follows:

"2. DISPUTES AND INJUNCTIONS

2.6 *Mr. Xie and Ms. Li agree that independent directors should be appointed to manage Dorsey on the basis stipulated in this Protocol and subject always to such directors' overriding duty to exercise their own independent judgment when managing the affairs of Dorsey.*

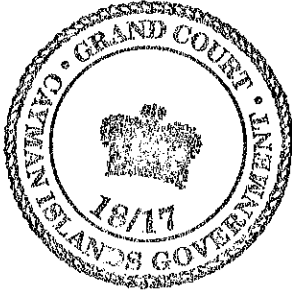
3. APPOINTMENT OF INDEPENDENT DIRECTORS

3.1 *Ms. Li will by way of a shareholder's resolution appoint David Bennett and Georgia Chow, each of Grant Thornton (the "Independent Directors") to each act as an independent director of Dorsey. Mr. Xie will agree to a variation of the Cayman and Hong Kong injunctions to allow the appointment of the Independent Directors on the terms of an agreed form shareholder's resolution.*

4. INDEPENDENT DIRECTORS' REMIT

4.1 *Subject always to their overriding duties to act lawfully and in the best interests of Dorsey, the Independent Directors will:*

- (a) *Secure and preserve the assets of Dorsey;*
- (b) *Request from XiO GP such information as the Independent Directors reasonably require and are entitled to obtain from XiO GP pursuant to the Amended LPA and any applicable law, in order to ascertain and monitor the assets and liabilities of the XiO Fund;*
- (c) *Assess the financial position of Dorsey;*
- (d) *Defend the Cayman Proceedings in any way they see fit;*
- (e) *Take any other legal action on behalf of Dorsey as they consider appropriate; and*
- (f) *Report to Mr. Xie and Ms. Li jointly about the work they have done, pursuant to clause 5 below.*



5. REPORTS BY THE INDEPENDENT DIRECTORS TO MR. XIE AND MS.

LI

5.1 *The Independent Directors will provide Mr. Xie and Ms. Li jointly with written reports on a monthly basis for the first nine months and quarterly thereafter unless otherwise agreed by all Parties, reporting the work done and actions taken by the Independent Directors and any other matters that the Independent Directors consider to be material to the financial and operational status of Dorsey (the “Reports”).*

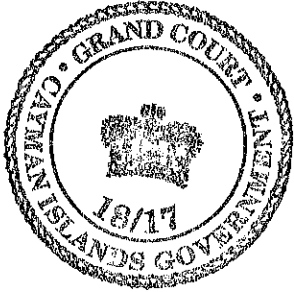
5.2 *The Independent Directors will be entitled to exercise their discretion as to the level of detail contained within the Reports, and there will be no presumption of any requirement that the Independent Directors inform Mr. Xie and/or Ms. Li about all information that the Independent Directors may obtain, possess or consider.*

5.3 *The Reports will be provided to Mr. Xie and Ms. Li simultaneously by email notice issued in accordance with clause 12 below.*

.....

8. NO INTERFERENCE IN THE INDEPENDENT DIRECTORS' PERFORMANCE OF THEIR DUTIES

8.1 *Neither Mr. Xie nor Ms. Li (or persons purporting to act on their respective behalf) will take any actions or steps which have the purpose and/or effect of influencing and/or intervening in the Independent Directors' decision-making and performance of their duties as directors of Dorsey."*



The Director Services Agreement

69. The Director Services Agreement (the "DSA"), dated 14 August 2017, was entered into by Dorsey, Ms. Li, Mr. Xie, Grant Thornton Directorship Services Limited and Mr. Bennett and Ms. Chow. Recital B of the DSA provides as follows:

"B. This Agreement is to be read in conjunction with the protocol agreed between Mr. Xie Zhikun, Ms. Athene (Xiang) Li and the Directors to be appointed to Dorsey Ventures Limited (the "Protocol"). Should there be any disagreement between any clauses in this Agreement and the Protocol, the terms of this Agreement will prevail over the Protocol."

It does not appear that there are any disagreements between the clauses or terms of the DSA and the Dorsey Protocol.

70. Clause 5.1 and 5.2 of the DSA, provide as follows:

"5. Time and attention

5.1 The Directors shall accept and hold office as directors of the Company subject to and in accordance with this Agreement, the Articles, applicable law and subject to and with the benefit of the



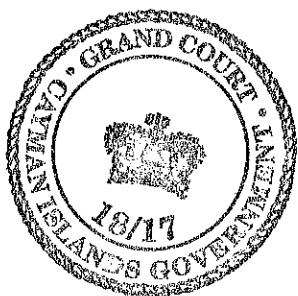
indemnification and other provisions contained in the Articles and this Agreement.

- 5.2 *The Directors shall discharge their duties and obligations as directors of the Company in accordance with the Articles and Cayman Islands law."*

Written Consent by Ms. Li - what was its nature, signification and scope?

71. In my view, this case turns on the construction of the Dorsey Protocol. The cases referred to by Counsel on all sides suggest that the Dorsey Protocol should be interpreted in such a way as to reflect the presumed intentions of the parties. One begins with considering the ordinary and natural meaning of the words that the parties have used and looking at them in their documentary, factual and commercial context. Where a term is capable of bearing a number of meanings, the Court will usually prefer the meaning which is most consistent with business common sense:- see in particular *Arnold v Britton* and *Wood v Capital Insurance*.
72. In my judgment, it will be the correct application of the principles of contractual construction and interpretation that will provide the solution to the present impasse. I do not think that the *Duomatic* principle takes the matter much further in this case.
73. In my judgment, Ms. Li's signing of the Dorsey Protocol should be interpreted as her signing wearing both of her hats, so to speak, as the sole Shareholder of the LP, Dorsey, as well as the sole Shareholder, of the GP, XiO GP. If clause 24.6(e) means that either the GP Shareholder or the LP Shareholder could give the relevant consent, Ms. Li has done so. If it means that they must do so jointly, in my view Ms. Li in fact gave such consent by entering into the Dorsey Protocol, wearing both hats. Certainly, there is no clear indication in the Dorsey Protocol that Ms. Li was not intending to bind herself in any given capacity, for example as shareholder of XiO GP, and therefore I am of the view that her signing was sufficient to bind her in her capacity as shareholder of XiO GP.

74. I am also of the view that, as accepted by Ms. Li (and so indicated in Campbell's letter of 15 January 2018), by entering into the Dorsey Protocol, Ms. Li consented to certain limited information relating to the work done and actions taken by the Independent Directors and any other matters that the Independent Directors consider to be material to the financial and operational status of Dorsey being disclosed as part of the reports to be issued by the Independent Directors pursuant to clause 5.1 of the Dorsey Protocol.
75. I think that the rationale provided at paragraph 22 of Mr. Midwinter's Opinion, is useful. That paragraph states:

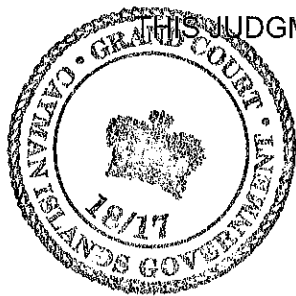


"...Dorsey's sole asset consists of its interest in the partnership. The definition of confidential information in the LPA is extremely broad. If the independent directors could not include some such information in the reports being provided to Mr. Xie, then there would be very little they could properly say. It is unlikely that the parties would have intended the independent directors to have an obligation to provide reports that they cannot in practice provide."

The Scope of Clause 5.1

76. It bears repeating that clause 5.1 itself defines the information that the reports are to include as *"the work done and actions taken by the Independent Directors and any other matters that the Independent Directors consider to be material to the financial and operational status of Dorsey."*
77. On the one hand, if one were to consider the phrase *"the financial and operational status of Dorsey"* in isolation, this could suggest that *"status"* may mean current position, as argued on behalf of Ms. Li. However, the relevant clauses have to be construed in context, and against the background of what knowledge the parties had. In that regard, clause 5 has to be construed in light of the remit of the Independent Directors. That remit in clause 4 is actually quite wide. Not only are the Independent Directors to secure and preserve the assets of Dorsey, but they have also been commissioned to:

"4. (c) Assess the financial position of Dorsey;



- (d) *Defend the Cayman Proceedings in any way they see fit;*
- (e) *Take any other legal action on behalf of Dorsey as they consider appropriate.”*

78. It is also plain that the factual background and context and the circumstances in which the Dorsey Protocol came to be in existence (as outlined at paragraphs 59-62 above), are relevant, and have to be taken into account in construing the terms of the Dorsey Protocol.

79. It is plain that the Independent Directors are not here serving as insolvency practitioners and therefore they do not have specific duties to investigate. However, it is difficult to see how the Independent Directors can lawfully carry out their duties without looking into and considering all matters affecting Dorsey, past or present. As, Mr. Goldsmith points out, the Shorter Oxford Dictionary defines “*status*” as “*Condition or position of a thing, especially with regard to importance*”. I agree with the submission that in order to properly understand the condition or position of Dorsey, it is necessary to understand its past. Any current financial or operational information would in my view need to explain the status of the US\$70 million paid by Dorsey to the Fund and what rights or liabilities attach to Dorsey as a result.

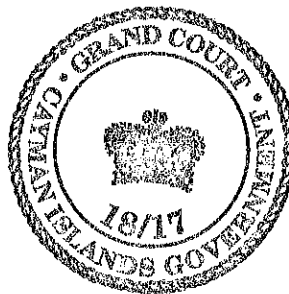
80. Further, given that the Independent Directors have been given the remit to defend the Cayman Proceedings in any way they see fit, and to take any other appropriate legal action on behalf of Dorsey, the Independent Directors would have to thoroughly examine Dorsey’s affairs, and its past management.

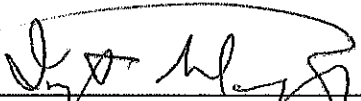
81. It follows that I take the view that the arguments advanced on behalf of Mr. Xie, and which are in substance supported by the Independent Directors, succeed. I broadly and in principle accept the matters set out at paragraphs 18, 19 and 56-58 above.

82. I accept the point made by Lord Grabiner that the costs associated with the activities of the Independent Directors has been substantial. However, from the affidavit evidence it would appear that substantial background investigation has already been carried out by

the Independent Directors. Therefore, now that this dispute has been resolved, which was mainly concerned with reporting, the scale of costs should be much less going forward.

83. In my judgment, the Independent Directors and Mr. Xie are entitled to their costs on a standard basis, to be paid by Ms. Li, to be taxed if not agreed.





THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT