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# OFFSHORE CASE DIGEST:

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- BRITISH VIRGIN ISLANDS
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# ABOUT THE DIGEST

This digest attempts to give the reader a high level summary of the major commercial cases decided in Bermuda, the British Virgin Islands and the Cayman Islands in the last four months. We hope that the Digest will be a useful reference tool for clients and practitioners who are interested in the development of case law in each of these jurisdictions.

The cases are digested by jurisdiction, for your ease of reference we have also created a case subject matter index on pages 26 and 27.



We would welcome feedback and suggestions from readers on the content. If you would like to obtain further information on any of the cases feel free to contact any of the Conyers Dill & Pearman litigation team.

# BERMUDA SUPREME COURT

## January

**PROCEDURE – INTERPLEADER – STAY OF PROCEEDINGS – LIFTING PRIOR STAY**

**Oil Basins Limited v Conticommerce S.A. and Foundation Anora - 2004 Civil Jurisdiction No. 171 [original location: SC Vol. 76 p. 167]**

The Defendants, based in Switzerland Lichtenstein respectively, were in dispute in Switzerland as to which of them should receive certain royalty payments held by the Plaintiff. The Plaintiff, a Bermuda company, placed the royalties in escrow and in 2004 commenced an interpleader action in the Bermuda Courts to determine which defendant was the proper recipient.

Also in 2004, the Defendants successfully stayed the Bermuda proceedings (with liberty to apply to vary or set aside the stay) to enable determination of the Swiss proceedings and separate proceedings in Lichtenstein involving the Second Defendant.

In September 2011, the Second Defendant applied in the stayed Bermuda proceedings for information relating to the monies paid by the Plaintiff into escrow. The First Defendant opposed this contending the application purported to vary the previous interim order in circumstances where there had been no material change in circumstances. The interlocutory dispute came before Kawaley J.

The Court acknowledged that the First Defendant was correct in the law relating to the variation of interim orders, but nonetheless found that the Second Defendant's application, when properly framed, went beyond that narrow variation issue because it also focused on asset preservation by the interpleading Plaintiff. The Court held: *"A more flexible approach should be adopted to an application seeking clarification of the [Plaintiff] stakeholder/trustee's ancillary duties and powers under Orders…"*

This was because, where an interpleader *"holds the funds under the Court's direction, such claimant is effectively acting as an officer of the Court."* The Plaintiff is therefore implicitly empowered to inform the Defendants about its compliance with the Court's Orders.

## February

### COMPANIES – SCHEME OF ARRANGEMENT – CLASSES – SHAREHOLDERS SCHEME

**In the matter of Dominion Petroleum Ltd and in the Matter of the Companies Act 1981 s99, 2011 Civil Jurisdiction (Com) No. 428 [original location: SC Vol. 76 p 177] (3 February 2012)**

Dominion, a Bermuda exempted company listed on AIM engaged in oil and gas exploration in East Africa, sought the court's sanction of a scheme of arrangement under section 99 of the Companies Act 1981 whereby Dominion would merge Ophir plc, another AIM listed company, also in the business of East African oil and gas exploration. The scheme was a share cancellation scheme where shareholders of Dominion would receive 0.0244 Ophir shares for each of their scheme shares.

Directions were obtained and a shareholders meeting was convened in November 2011. There was one class of shareholders, namely the holders of the common shares in Dominion. The scheme was approved by a resounding majority. A shareholder and former officer and employee objected to the scheme. His objections were summarised by the court as: (1) the Board of Directors was improperly constituted since November 2008 and not capable of validly promoting the Scheme; (2) the constitution of a single class of shareholders for voting purposes was said to be erroneous in law having regard to the distinctive interests of certain noteholders and officers. The note holders were also shareholders and the notes were to be paid in full as a condition of the scheme proceeding; (3) the Company had failed to disclose material facts in the Scheme alleging that the votes of certain noteholders placed them in a different class and their votes should be disregarded on fairness grounds.

The court sanctioned the scheme. The court held that notwithstanding the fact that at one time the board had been invalidly constituted, it was validly constituted when the Board resolved to promote the scheme. On the issue of classes, the court held that the need for separate classes of shareholders *"is to be determined by dissimilarity of* [share]*rights not dissimilarity of interests"*: applying the principles set out by Nazareth J (as he then was) in *In re Industrial Equity (Pacific) Ltd.* [1991] 2 HKLR 614 at 624; *Re BTR plc* [2000] 1 BCLC 740 at 747-748. The court confirmed the well known elements necessary for the sanction of a scheme. The shareholder had claimed that the payment to noteholders under their notes was unfair as, he argued, the market value of the notes was on his case below their face value. The court held on the facts that the scheme was not unfair as the noteholders were simply getting no more than their express contractual rights. The court went on to hold that the material non disclosure arguments were wholly lacking in substance.

### COMPANIES – COMPANIES ACT S. 111 – UNFAIR PREJUDICE – STRIKE OUT

**In the Matter of Full Apex Holdings Ltd. Annuity and Life Re Ltd, et al v Full Apex Holdings Ltd et al, 2011 Civil Jurisdiction No. 191 [original location: SC Vol. 76 p 184] (6 February 2012)**

This was an application to strike out an unfair prejudice petition in oppression proceedings brought by shareholders in respect of Full Apex, a company in the business of producing PET pre-forms and bottles which is listed on the Singapore Stock Exchange. The petitioners allege that the conduct of the majority of the company was unfairly prejudicial on the basis (1) that there had been manipulation of the company's accounts and a delisting proposal put forward on the basis of the accounts manipulation; (2) that the requests for explanations and information had been ignored; (3) a transaction involving a reorganisation and the sale of certain assets was a transaction at an undervalue.

The Respondents sought to strike the petition out on the basis that: (a) the Petitioners lacked standing to bring the petition for two reasons under section 163(a) as they were

not "contributories", not having held their shares for more than six months – a requirement of bringing a winding up petition. Second the 3rd Petitioner had no shares in his name at the date of the petition. They also argued that the petitioners cannot complain about affairs which occurred prior to their acquisition of shares in the company; (b) the de-listing proposal had been blocked by the shareholder at a special general meeting convened for the purpose; (c) No sustainable case of oppression was pleaded in connection the alleged undervalue transaction; (d) in connection with the failure to provide an explanation no sustainable case of oppression or unfair prejudice was pleaded.

On the first standing point, the court held that the definition of contributory under s 163 was not applicable to section 111 applying *Re a Company* [1986] BCLC 391. On the second, the court held that the 3rd Petitioner had no standing. The court held that the petition was not liable to be struck out on the basis of matters complained of pre dating the petitioners acquisition of shares registered in their own names applying *Lloyd v Casey and others* [2002] 1 BCLC 454. The allegations in connection with the delisting proposal and accounts manipulation were struck out primarily on the basis that the transaction was defeated and because they were highly speculative. In respect of the allegations in connection with the alleged transaction at an undervalue, the court held that the allegations were insufficiently particularised but that applying the low threshold of sustainability that the court applies in such cases, the court gave the petitioners leave to amend the petition. The court held that there is no express or implied duty on a company to its shareholders to provide answers to queries about the company's affairs which are "satisfactory" as pleaded and strike out the claims made in that respect. The court did not strike out the respondents' claims of abuse of process regarding the acquisition of shares in the company after the commencement of the proceedings.

Note: the same petitioner currently has proceedings **Annuity & Re Life Ltd v Kingboard Chemical Holdings Limited, Jamplan (BVI) Limited, Kingboard Laminates Holdings Limited, Excel First Investment Limited and Kingboard Copper Foil Holdings Limited,** 2011 Civil Jurisdiction Commercial Court No. 255 [original location: SC Vol. 76 p. 154] pending against a Hong Kong listed company. The respondents applied to strike out the petition in that case. The application failed but it is worth noting that the court was unwilling to allow allegations of unfair prejudice in relation to a transaction where the shareholder had been able to block the transaction itself.

## TELECOMMUNICATIONS – JUDICIAL REVIEW - BIAS

**Telecommunications (Bermuda & West Indies) Ltd (Trading as Digicel) and Another v Bermuda Digital Communications Limited (CellOne) and Others, 2011 Civil Jurisdiction No. 387 [original location: SC Vol. 76 p 201] (28 February 2012)**

The Bermuda telecoms industry, which is undergoing consolidation, is locked in litigation pending the passing of regulatory reform. This ruling was the latest in a running dispute between Digicel, its competitors and the Government as to the legality of service bundling and the proper forum for deciding such issues.

The parties had been heading to trial on whether the service bundling was legal when, last year, the Supreme Court stayed the proceedings to allow the telecoms regulator to determine the issue. The latest twist was a (failed) attempt to reverse this decision on the grounds that the regulator was biased. The resulting interlocutory ruling deals (briefly) with the following issues:

(1) interplay of private and public law actions and precedence to be given to statutory processes for determination of disputes;
(2) bias presented when civil servants present an official position when the Government Minister may later play a quasi-judicial role under a statutory appeal process;
(3) the ability of the Courts to re-consider previous interlocutory decisions.

In the event, the Chief Justice ruled that there was no material change of circumstances which would warrant his reconsidering the previous decision to stay the proceedings.

## March

### EMPLOYMENT – SPRINGBOARD RELIEF – RESTRICTIVE COVENANTS

**In the Matter of an Injunction Application for 'Springboard' Relief), 2011 Civil Jurisdiction No. 35 [original location: SC Vol. 76, p. 239], [2012] SC (Bda) 15 Com (9 March 2012)**

In the first decided case in Bermuda on the developing area of 'Springboard' relief, the Court granted the Plaintiff company *ex parte* injunctive relief against a group of former employees who had resigned in concert from the Plaintiff and, it was alleged, had taken confidential information with a view to assisting a competing business.

The Plaintiff sought and obtained various injunctive orders, including that the Defendants deliver up material taken, be restrained from use of confidential information, honour their contractual restrictive covenants, and provide sworn evidence answering the allegations.

In reliance on the English decision in *UBS Wealth Management UK Limited v Vestra Wealth LLP* [2008] EWHC 1974 (QB), the Court also applied the balance of convenience test before ordering an initial period of 'Springboard' relief. This was to prevent the Defendants from using their own wrongdoing as a springboard from which to gain an unlawful head-start with the competing business.

The Order for springboard relief was subsequently discharged at a later hearing although the other restraints continued. This decision shows the Bermuda Court is prepared to restrain parties where appropriate under this equitable doctrine.

### COMPANIES – WINDING UP PETITION – JPLS' STANDING TO BRING PETITION

**Re Kingate Management Limited and the Companies Act 1981, 2011 Commercial Court Jurisdiction No. 301 [original location: SC Vol. 76 p 232] (6 March 2012)** , is a case involving another round in the 'Kingate' litigation, a multi-party action commenced in 2009 after the Bernard Madoff collapse. The substantive case concerns whether subscription monies paid for shares in a now-insolvent Fund are repayable as a debt or held on trust for the would-be subscribers.

The recent application concerned the winding-up of the named (related) company, which was sought by the Joint Provisional Liquidators ("JPLs") or, in the alternative, by the Company itself (acting by its shareholders the directors having resigned). The Court took the opportunity to articulate the legal basis for jurisdiction under the Companies Act 1981 and, more specifically, ss. 161 (grounds for winding up by the Court) and 175(1)(a) (applying to JPLs).

In so doing, the Court confirmed that JPLs lacked jurisdiction to wind-up a company under s.175(1)(a) in circumstances where there was no practical impediment to the Company itself, or its creditors, seeking the Order. The Court wound up the Company on the basis that the grounds were made out by the Company under s.161(a) or by any potential creditor under s.161(e). In the alternative, the Court could, of its own motion, wind the Company up pursuant to those sections where, as here, the Company was insolvent.

## COMPANIES – WINDING UP PETITION – STATUTORY DEMAND – DEBT COLLECTION

**In the Matter of Gerova Financial Group Limited, 2011 Companies (Winding-Up) Commercial Court No. 369 [original location: SC Vol. 76 p. 264], [2012] SC (Bda) 18 Com (19 March 2012)**

In this case the Court re-visited the well-travelled ground of the use of insolvency procedures as a method of debt-collection. The case involved, inter alia, the withdrawal of a winding-up petition and consequential arguments on costs.

On the juxtaposition of insolvency law and commercial debt collection, the Court held: *"…in my judgment there can be no impropriety in threatening or bringing winding-up proceedings where a company fails within a reasonable time to pay what reasonably appears to the unpaid creditor to be an undisputed debt."*

The Court cited the right of access to the Court under the Constitution and the costs of a writ action *"against offshore companies in a highly internationalized commercial environment"* and concluded: *"it can hardly be abusive to threaten or commence winding-up proceedings in the hope that one's debt will be paid more inexpensively and expeditiously than by other enforcement means."*

At the same time the Court emphasised that: *"What is and will likely always be recognised as abusive is the actual or threatened presentation of a petition based on a debt which is in fact disputed in good faith on substantial grounds."*

The Judge (Kawaley J.) also cautioned would-be petitioners that it may be wise for petitions to be forecast: *"…it seems to me that in most cases where a petitioning creditor has a comparatively modest presently due debt and the debtor company is not already involved in winding-up proceedings, one would expect some demand for payment to be made (coupled with a warning that winding-up proceedings may be commenced) before a petition is presented. Failure to take such a step could be found to be unreasonable because of the potentially draconian consequences of winding-up proceedings, in terms of both commercial damage and legal costs."*

## COMPANIES – WINDING UP – FAILURE TO HOLD AGM – ADVERTISEMENT

**In the Matter of Proview International Holdings Limited 2011: No. 231**, concerned a Petition to wind-up a company granted at a hearing where only the Petitioner was present. The Court allowed the Petition thereby winding-up the Company by reason that it had failed hold an AGM in compliance with s. 72 of the CA 1981.

The Company successfully applied to set aside the winding-up Order on the grounds that, *inter alia*, the Petitioner lacked standing under the 1981 Act and also that the Court had been mislead by the Petitioner when it granted the Order. The Judgment is therefore largely about the consequential costs dispute, but, parenthetically, the Court commented on three important practice matters.

First, the Court endorsed the submission by the Company that where the insolvency rules (ie. those under the Companies (Winding) Rules 1982) were silent on any matter, Rule. 159 served as a regulatory gateway through to the rules and practice contained in the Rules of Supreme Court 1985.

Second, the Court regarded as *"hopeless"* a submission by the Petitioner that s.72 of the CA 1981 (relating to the requirements to hold AGMs) was somehow freestanding from the requirements ss. 161 and 163 of that same act (relating to the circumstances and provisions for winding-up). The Court held: that Part XIII of the Act *"was a comprehensive code for the winding-up of companies under the [1981] Act. It is generally recognised that while other statutory provisions might complement the grounds for winding up set out in section 161, petitioners must nevertheless meet the standing requirements*

*of section 163 (unless these requirements have clearly been modified by the provision the petitioner relies upon).”*

Third, the Court observed that where, as was the case with this company, the vast majority of creditors were based abroad and might well be unaware of proceedings, it was the modern practice from a natural justice point of view, “*to advertise abroad to ensure that the widest number of people were aware”*. Although this remark was *obiter*, foreign advertisement of petitions may well be prudent if there is any risk that interested parties may be unaware of the petition.

## April

### INJUNCTION – ANCILLARY PROCEEDINGS IN BERMUDA SEEKING IDENTICAL RELIEF IN TEXAS

**E.R.G. Resources LLC v Nabors Global Holdings II Limited (PDF) 2012 Civil Jurisdiction (Commercial Court) No. 110 [original location: SC Vol. 76 p. 347-362], [2012] SC (Bda) 23 Com (5 April 2012)**

In this decision, the Supreme Court set out the parameters to be applied by a Bermuda court in the exercise of its discretion where an injunction is ancillary to the court where the proceedings are being conducted.

ERG launched proceedings in Harris County, Texas and sought a temporary restraining order against Nabors prohibiting the sale of shares in a subsidiary. The Texas Court refused a temporary restraining order. Two days later, ERG issued proceedings in Bermuda claiming identical relief to that claimed in Texas. ERG sought and obtained, ex parte, an injunction in its favour against Nabors preventing the disposal of the shares. The following week Nabors applied to have the injunction discharged and sought a stay and/or dismissal of the Bermuda proceedings. At the inter partes application the Supreme Court granted Nabors’ application, discharged the injunction and stayed the proceedings. It did so on substantive grounds and on the basis that there had been material non disclosure by ERG when it made its ex parte application to the Bermuda court.

The court held that the existence of parallel proceedings provided the context against which the traditional considerations as to whether to grant injunctive relief must be taken into account. It held that where interim relief is sought in one jurisdiction in support of a substantive cause of action which either arises under foreign law or is being pursued in a foreign court, the question of whether the foreign court would be willing to grant the interim relief is an important factor in determining where the balance of convenience lies in deciding how the discretion to grant injunctive relief should be exercised.

Applying the decisions of *Walsh v Deloitte and Touche* [2000] UKPC 37, *Credit Suisse v Cuoghi* [1998] QB 818 and *Refco Inc v Eastern Trading Co* [1999] 1 Lloyds Rep 159 and *Motorola Credit Corporation v Uzan et al* [2003] EWCA Civ 752 the court held that the role played by the Bermuda court in such a case was ancillary to that of the foreign court, the Bermuda court provides assistance to the court exercising primary jurisdiction. In a case such as this the court must, as a practical matter, look at the where the substantive dispute is being tried and must, in the interests of comity recognise that its role is subordinate and supportive of the primary court. In doing so, it will not grant relief either where application had been made to the primary court and refused or where such an application, if made to the primary court would inevitably have been refused.

In this case the court was satisfied that the judge in Texas was not willing to grant an interim restraining order and even though the test for whether or not an interim injunction should be granted is less onerous in Bermuda than Texas. In Bermuda under the classic American Cyanimid formulation the law requires only that there be an arguable case as opposed to good prospects of success which is the threshold under Texan law. The court therefore granted Nabors’ application.

# BVI COURT OF APPEAL

## December

### PROCEDURE – BVI APPEALS – STAY OF PROCEEDINGS PENDING APPEAL – ENFORCEMENT OF SHARE CHARGES

**Cukurova Finance International Limited and Cukurova Holdings AF v Alfa Telecom Turkey Limited**

This claim concerned the enforcement of share charges given by Cukurova to secure sums totaling approximately US$1.352 billion advanced under a loan facility by Alfa to Cukurova. The Court of Appeal previously granted several declarations which concerned Alfa's rights and ownership of 51 shares following default under the loan facility. The Court of Appeal brought clarity and certainty on the law concerning the jurisdiction of the Court of Appeal to stay the execution of its own order when granting leave to appeal to the Privy Council. It had been contended that the code of procedure for appeals to the Privy Council constituted by the **Virgin Islands (Appeals to Privy Council) Order 1967** and the **Judicial Committee (Appellate Jurisdiction) Rules Order 2009** ("the 2009 Judicial Committee Order") has impliedly and altogether excluded the Court of Appeal's inherent jurisdiction to stay an order of its own and continue or grant an injunction pending an appeal to the Privy Council, where to do otherwise may render the appeal, if successful, nugatory. The court held that section 39 of the 2009 Judicial Committee Order, recognizes the existence of that inherent jurisdiction and empowers the Court of Appeal to stay an order appealed from and grant an injunctive order, or continue or discontinue an injunctive order made in the court below. The Court also confirmed that a declaratory judgment cannot be stayed since it merely proclaims the existence of a legal relationship and does not contain any order which may be enforced against an appellant/applicant.

## January

### PROCEDURE – LEAVE TO APPEAL – LEAVE APPLICATION TO BE EX PARTE

**CAGE St Lucia Limited v Treasure Bay (StLucia) Limited and The Gamining Authority and The Attorney General of Saint Lucia and the National Lotteries Authority (Court of Appeal) (St Lucia)**

This concerned an action arising from an application made to the High Court by CAGE to be joined as a party to judicial review proceedings in the court below. The trial judge had dismissed the application. CAGE applied for permission to appeal that order (the first application) and for an order staying the judicial review proceedings pending the hearing of the appeal (the second application). The first application was heard by a single

judge on paper and granted without hearing the parties. The second application was considered by a separate single judge and was granted following an *inter partes* hearing. Treasure Bay then applied to the Full Court to revoke, vary, or discharge both the orders of the single justices. The Court of Appeal held that CPR 62.16(A) which gives the Court jurisdiction to vary discharge or revoke any order or direction or decision given by a single judge only applies to interlocutory orders made within the context of a pending appeal. The jurisdiction would necessarily not arise where a Notice of Appeal had not been filed because then it could not be said that the orders were made within "the context of a pending appeal". The order granting a stay was said to be a nullity. Second, the court citing *Jolly v Jay* [2002] All E.R. (D) 104 held that an application for leave to appeal was essentially a without notice procedure and such applications were not strictly interlocutory applications. It was said that dealing with applications for leave to appeal in this manner promoted proportionate, cost-effective and expeditious resolution of cases, was in keeping with the overriding objective, while at the same time mindful of the constitutional guarantees to all litigants. The Court was of the view that denying a respondent the opportunity to participate at the leave stage would not prejudice the respondent's substantive rights. Treasure Bay therefore was not entitled to file a notice of objection or otherwise oppose CAGE's application for leave to appeal.

### COMPANIES – RECTIFICATION OF REGISTER – BVI BUSINESS COMPANIES ACT S. 43 – SCOPE OF JURISDICTION

**Royal Westminster Investments S.A and Bhagwan Mahtani and Sunder Dalamal and Nari Dalamal v Nilon Limited and Manmohan Varma**

The issue on appeal was primarily whether the scope of the Court's discretion under section 43 of the BVI Business Companies Act (BCA) permitted the Court to order the rectification of the register of members where the Applicant could not demonstrate that it clearly had a present right to be registered. The judge at first instance said it did not because the purpose of section 43 of the BCA was to enable the court to ensure that the company's register of members accurately reflected the state of its membership and was not there to establish title to shares. The Court of Appeal disagreed.

The case concerned a joint venture agreement entered into by the second appellant, third appellant, fourth appellant and second respondent whereby it was agreed that they would carry on the business of importing and selling rice in Nigeria, carried out through a company to be incorporated. It was agreed that each joint venturer was to contribute to the capital of and subscribe for shares in that company in agreed proportions. The second defendant caused the first defendant to be incorporated and procured that the shares would be allotted to himself only. The claimants sought, inter alia, rectification of the register in order to reflect the terms of the joint venture arrangements. The Court of Appeal held applying *Re Hoicrest Ltd* [2000] 1 BCLC that the discretion conferred on the court by section 43(2) of the BCA to determine any question relating to the right of a party to rectification proceedings to have his name entered in or omitted from the register of members was wide enough to permit inquiry into the substantive cause for the inclusion or omission, even if that question arises between the members or alleged members and does not involve the company. The Court is required in such proceedings to have regard to the equitable as well as the legal rights vested in such a party. The Court also held applying *Re Starlight Developers Limited* [2007] B.C.C 929, that it was not obliged to strike out an application for rectification of the register where the party claiming such relief is unable to assert a present entitlement to registration.

## February

### COMPANIES – INSOLVENCY – STATUTORY DEMAND – DISPUTED DEBT – EVIDENCE

**Angel Wise v Stark Moly Limited**

The Appellant company sought to appeal the decision to appoint liquidators over it following the Appellant's failure to set aside a statutory demand served on it. The grounds of appeal included an allegation that the Learned judge misdirected himself by substituting his own opinion for that of the expert relied on by the Appellant in the court below. Applying the dicta in *Eng Mee Yong & ors v Letchumanan* [1980] A.C. 331, the Court held that although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that the judge is bound to accept uncritically every affidavit statement however equivocal and lacking in precision it may be as raising a dispute of fact which calls for further investigation. In order to determine whether a dispute was substantial the Court had to carry out a preliminary assessment of the facts on which the injustice was raised. It was for the Judge to determine in the first instance whether statements contained in affidavits that are relied on as raising a conflict of evidence on a relevant fact, have sufficient prima facie plausibility to merit further investigations as to their truth. The appeal was dismissed.

## March

### PROCEDURE – CPR 7.3(3)B – CPR 8.13 – SERVICE OUT – CLAIM "AFFECTING A CONTRACT" – RESTITUTION

**Marty Steinberge, Receiver and Lancer Offshore Inc, The Omnifund Limited v Swisstor & Co and Wise Global Fund Limited**

The claim was essentially one for repayment of money mistakenly and/or fraudulently paid under a contract. The respondents, Swisstor and Wise Global and others, had invested in funds held by Lancer and Omnifund, which were operated as a Ponzi scheme. Swisstor and Wise Global had benefitted from dishonestly calculated redemptions by several million dollars each. The Receiver began proceedings in the BVI seeking restitution of the moneys paid to Swisstor and Wise Global. The court below granted the Receiver permission to serve the claim form out of the jurisdiction under CPR rule 7.3(3)(b) on Swisstor and Wise Global Wise. Leave was subsequently set aside by the Commercial Judge. The Receiver appealed. The Court of Appeal made three (3) notable findings. First, that the Learned Commercial Judge construed CPR 7.3(3)(b) too narrowly. The Court followed *E.F. Hutton & Co (London) Ltd. v Mofarrij* which held that a claim sufficiently "affected" a contract if there was a "sufficient direct link" to the contract. Second, the power in CPR 8.13 to extend the validity of the claim form is only to be exercised for "good reason". Third, that Swisstor and Wise Global had a right to be sued by means of a claim issued within the statutory period of limitation and served within the period of the validity of the claim form. The court observed that the statutory limitation period should not be made elastic at the whim or sloppiness of a litigant and the public interest required that claimants adhere strictly to the time limit for service or else provide a good reason for dispensation. In coming to this decision the Court applied City & General (Holborn) Ltd. v Royal & Sun Alliance plc [2010] 131 ConLR; [2010] BLR 639; [2010] EWCA Civ 911.

### COMPANIES – INSOLVENCY – WINDING UP ORDER – PROCEDURE FOR CHALLENGE

**Igors Kippers et al v Stanford International Bank Limited (In Liquidation)**

This appeal brought under s. 11 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act concerned the jurisdiction of the Master to raise an issue and pronounce on the validity of claims brought after Stanford International Bank was placed into compulsory liquidation. The Court held, inter alia, that in the absence of local statutory provisions and rules regulating the practice and procedure for challenging a winding up order made pursuant to section 304 of the International Business Act or relating to proceedings during the pendency of the winding up proceedings against or on behalf of the Company in liquidation, The Third Group of Parts: Part V11 in the English Insolvency Rules 1986 as amended relating to the Court Procedure and Practice Direction PD5 relating to the Distribution of Business of the Companies Court

in England applied. This decision has far reaching implications for the British Virgin Islands because section 11 of the Eastern Caribbean Supreme Court (Antigua and Barbuda) Act and Practice Direction are identical to the corresponding provision in the BVI which means that the English Insolvency Rules will apply to challenges to winding up orders in BVI as well as in connection with bringing claims in the liquidation.

## April

### BVI – S. 11 EASTERN CARIBBEAN SUPREME COURT ACT – RECEPTION PROVISIONS – EXTENT AND SCOPE OF THE APPLICATION OF ENGLISH LAW TO BVI CASES

**Veda Doyle v Agnes Deane**

This appeal concerned the construction of section 11 of the West Indies Associated States Supreme Court (Grenada) (the Supreme Court Act) a provision which for the most part duplicated in the Supreme Court Acts of the other eight (8) Eastern Caribbean Territories. The Court held that the English law intended to be imported by section 11(1) of the Supreme Court Act is the procedural law administered in the High Court of Justice in England and not English substantive law, nor English procedural law which is adjectival and purely ancillary to English substantive law. The wording of section 11(1) indicates that the focus on the importation of any law, rule or practice from England is in respect of the exercise of the jurisdiction as distinct from the importation of English law so as to give jurisdiction. *Panacom International Inc. v Sunset Investments Ltd. and Another* (1994) 47 WIR 139 followed; *Dominica Agricultural and Industrial Development Bank v Mavis Williams* Commonwealth of Dominica Civil Appeal No. 20 of 2005 (delivered 29th January 2007, unreported) distinguished. This decision has injected much needed clarity into the interpretation of section 11 which hereintobefore was said to either constitute the common law of England and not Statute or the entire laws of England including statute. This decision has clearly said that it is neither. In the Learned Judges' views "the notion that all Member States are subject to the importation of English substantive law by virtue of section 11 would leave much to be desired in any sovereign State not to mention the state of uncertainty as to what laws a citizen of the State may be subject at any given point in time and without regard to its own parliament which is charged with the making of laws for the State as it may deem necessary for that State's good governance. Section 11 certainly could not have been intended to have this effect...the focus on the importation of any law, rule or practice is in respect of the exercise of the jurisdiction, as distinct from the importation of English law so as to give jurisdiction."

# BVI HIGH COURT

## December

### COMPANIES – BVI – S. 31 BCA – UNOPPOSED SUMMARY JUDGMENT APPLICATION – DEALINGS BETWEEN COMPANY AND THIRD PARTIES

**Potential Might Group Limited v GST International Management Ltd (Commercial Division) BVI December 2011**

The Claimant applied for summary judgment of its amended statement of claim which sought declarations that a subscription agreement entered into between it and GST International was binding, that the resolution of the Board which Potential relied on making its investment is valid and that the Claimant holds three million shares in GST. The claim and the application were undefended. The Court held that an application for summary judgment should not be treated as if it were an application for default judgment. Even if the application is unopposed the discretion presented by CPR rule 15.2(b) means that the Court must be satisfied that there is no real prospect of a successful defence being raised to the claim being made. In the course of the hearing the court was required to construe section 31 of the Business Compnaies Act 2004, which deals with dealings between companies and other persons. The Court held that

subsection 31(b) requires that a person be held out as a director by the company. If a person holds himself out then the section would not be engaged. Further, subsection 31(1)(d) which dealt with ostensible authority and subsection 31(1)(d) applied when a company sought to challenge the validity of a document issued by a director with actual or usual authority to issue such a document. The Court went on to conclude that this section applied to documents issued by director *de jure* or *de facto* but not to documents issued by imposters. On section 31 generally, it provides with a series of statutory defences to particular specific attacks that may be made by the company on the validity of transactions by which it is prima facie bound but that the converse would not apply. In that it does not provide that a company cannot in any circumstances successfully challenge the validity of a transactions by which it is prima facie bound. The Court also took the opportunity to consider a question of procedure. Where a claim is undefended the claimant seeking a judgment on the merits will have to "leap the very high hurdle" of proving a negative - that the absent defendant has no real prospect of defending the claim. He was of the view that the better course in such situations would be to apply for judgment in default.

## February

### COMPANIES – UNFAIR PREJUDICE – BVI BUSINESS COMPANIES ACT S. 1841 – STAY

**Tawney Assets Limited v East Pine Management Limited, Guildron Trading Limited, SI Capital Partners Limited, Rudy Amirkhanian and Elena Lokteva (Commercial Division) (BVI) February 2012**

This case involved a claim for damages for conspiracy/procuring a breach of contract by Tawney Assets Limited (the Claimant) against East Pine Management Limited (the first defendant) arising out of a joint venture agreement between the claimant and the first defendant for the merger of two agricultural machinery businesses formerly carried on by them separately in the Russian Federation. The claimant and the first, second and third defendants are BVI registered companies. The court was asked to consider two applications one brought by the second defendant for a stay of the proceedings in favour of courts in Russia and the other on behalf of the first defendant to strike out the amended statement of claim. The court dealt with the strike out first and found that although it will usually be a hard thing to strike out a pleading of an implied term, it is not difficult where no basis for the need to make the implication could be found within the pleading and where the term sought to be implied was itself was inconsistent with an express term of the agreement into which the terms is sought to be implied. The claims in contract and tort were consequently struck out. The decision to strike out made the forum argument redundant, however the Court heard argument as to whether the third, fourth and fifth defendant (who were not members, shareholders or directors) could be proper respondents to a claim for unfair prejudice under section 1841 of the BVI Business Companies Act. The court after considering the cases of Re a Company No: 5287/85 (1985) BCC 915, Re BSB Holdings Ltd [1992] BCC 915, Supreme Travels Ltd v Little Olympian Each Ways- Ltd [1994] BCC 947, Re Baltic Real Estates [1992] BCC 629, Re Fahey Developments Ltd (1996) BCC 320 held that while it was very difficult to extract a unifying thread of principle from the authorities a non-member respondent might be a party and could be compelled to provide relief in unfair prejudice proceedings.

### PROCEDURE – EFFECT OF NONPAYMENT OF COURT FEES

**Alexey Bobrov v Lenta Ltd (Commercial Division) (BVI) February 2012**

In the course of considering whether a matter should be transferred from the High Court to the commercial list, the Court held that it had the jurisdiction to stay a claim on its own initiative where it turned out that neither party had been paying the court fees at the rate prescribed by the Commercial Claims (Fees) Order 2011. The court justified the stay as necessary to give effect to section 8 of the Courts of Justice Fees Act

(Cap 202) which required that documents ought not to be received, filed used or admissible in evidence if it does not bear the appropriate stamp. The court found that the court clearly had the jurisdiction to prevent the further prosecution of proceedings that were in effect an abuse of the courts process until the defaults were cured.

## March

### COMPANIES – WINDING UP – STANDING – BURDEN OF PROOF – RELEVANCE OF INSOLVENCY WHERE PETITIONER HAS NO STANDING

**Liao Chen Toh and Silverstate Enterprise Limited v Triple Dragon (Commercial Division) (BVI) March 2012**

This was an application on behalf of the Applicants for the appointment of a liquidator over the Respondent Company on the grounds that it was insolvent. The court refused the petition and held that an applicant claiming to be a creditor of a Company over which he seeks the appointment of a liquidator has the burden of persuading the Court, on the balance of probabilities that he is a creditor of the company in question. If he is unable to do so he does not have standing to bring the application and the Court would not need to consider whether the evidence establishes that the Company is insolvent within the meaning of section 8(1) (c) of the Insolvency Act, 2003. Although the Learned Commercial Judge did go on to consider whether the Company was insolvent within the meaning of the Act he only did so on the assumption that he was wrong about locus standi. The court also observed that the general rule that a debt is repayable on demand must be repaid within the time needed by the debtor to collect funds from the bank would have no application to an alleged debt where a substantial part of the indebtedness was likely to have been statute barred when the demand was made.

### COMPANIES – WINDING UP – TRANSACTION APPROVAL PROCEEDINGS – DUTIES OF LIQUIDATOR

**Farnum Place LLC v Joanna Lau and Kenneth Krys (Commercial Division) (BVI)**

The Claimant Farnum Place LLC applied under section 273 of the Insolvency Act, 2003 for an order compelling Fairfield Sentry (by its Liquidator) to seek the approval of the court of the terms and conditions of a contract entered into between Sentry and Farnum (the Trade Confirmation) and to take the necessary steps to bring to fruition certain other conditions to which the contract is expressed to be subject. The terms of the Trade Confirmation is governed by New York law. The liquidator maintained that he either never has been or else is no longer bound by the Trade Confirmation and that he is entitled to walk away because of the existence of a "fiduciary out" clause in the Trade Confirmation. The Court held that if it is in the Liquidators honest opinion that endeavoring to obtain BVI court approval for the terms and conditions of the Trade Confirmation would be contrary to his duty generally towards stakeholders in his conduct of Sentry's administration, then pursuant to the fiduciary out he was not requested to do so. His failure to seek approval has no effect contractually and it does not entitle the liquidator to abandon the contract and deal with the claim in the market. The Court also held that the Liquidator did not require the approval of the Court to cause Sentry to enter into or complete performance of the Trade Confirmation. However the Court went on to consider whether it would in any event give approval and held that it would ordinarily withhold approval where for example there was a feature of the sale overlooked by the liquidator which rendered the bargain defective or which it considered made completion objectionable on public policy grounds. The Court approved the Trade Confirmation. It was persuaded by the fact that it was negotiated at arms length by sophisticated parties with full awareness of the market and with the benefit of skilled professional advice. The Court considered irrelevant, the fact that the market has risen since the transaction closed. All other considerations aside, the Court said it would be unwise for it to refuse approval thus destroying the bargain struck unless it had before it compelling evidence that the liquidator was in a position to engage with a purchaser willing to contract in terms no less advantageous to those of the Trade Confirmation and at a higher price.

## April

### ENFORCEMENT OF JUDGMENTS – SUBMISSION TO FOREIGN JURISDICTION

**Star Reefers Pool Inc v JFC Group Co Ltd (Commercial Court) (BVI)**

This was an application made without notice to register a money judgment of the English High Court in the British Virgin Islands. The issue was whether the Applicant could be said to have voluntarily appeared or otherwise submitted or agreed to submit to the jurisdiction of the English Court. If it did not then since the Respondent neither carried on business nor was ordinarily resident in England, section 3(2)(b) of the Reciprocal Enforcement of Judgments Act 1922 (Cap 65) would preclude registration. The Court concluded that the Respondent had submitted to the jurisdiction of the High Court of England by actively participating in post-judgment freezing order proceedings taken by the Applicant. In doing so it applied paragraph 14-067 of Dicey, Morris & Collins, The Conflicts of Law, 14th Edn., which states that such an intervention would constitute submission. More importantly the court held that acknowledging service and seeking unsuccessfully to challenge jurisdiction to argue forum could not be seen as submission to the jurisdiction. In so doing the court declined to follow the decisions in *Harris v Taylor* [1915] 2 KB 580 and *Henry v Geopresco* [1976] 1 QB 726. The Court held that since these authorities were no longer part of the laws of England, having been abrogated by the United Kingdom Civil Jurisdiction and Judgments Act 1982, and were now "dead letters in the jurisdiction in which they previously applied", they would not be introduced in the law in the BVI as such an archaic rule would "throw English and BVI practice and procedure out of alignment". He held section 11 of the Eastern Caribbean Supreme Court (Virgin Islands) Act encouraged uniformity in the law and practice between the jurisdictions and it would be a "retrograde step and contrary to the spirit of these provisions of our legislation, for me to introduce into the law the BVI rules which ceased to be part of the law of England thirty years ago." A possible effect of this finding may in fact be that any previous decision or line of authority in England which has now been superceded by legislative developments may not be applied in the BVI by the Commercial Court. This is a significant development indeed.

### COMPANIES – UNFAIR PREJUDICE – BVI BUSINESS COMPANIES ACT S. 841 – STRIKE OUT – NO UNFAIR PREJUDICE WHERE DERIVATIVE ACTION LIES

**Nigel Gray v Allan Leddra and Pro-flex Packaging Co Limited (Commercial Court) (BVI)**

Here the Applicant Allan Leddra applied to strike out the Claimant's unfair prejudice claim under section 1841 of the BVI Business Companies Act on the basis that the claim as pleaded included claims in respect of a wrong actionable at the suit of the company which amounted to an unauthorized derivative claim. The Applicant relied on the case of *Re Chime Corp Ltd* (2004) 7 HKCFAR where Lord Scott held that while the Courts of Hong Kong had jurisdiction in the strict sense to entertain within the confines of an unfair prejudice application a claim for relief in respect of a wrong actionable at the suit of the company in question such a claim would ordinarily not be allowed to be advanced unless the claim for recovery corresponded precisely with the company's claim and it was clear from the pleading that that quantification of the value of the claim could be made conveniently at trial. The Court disapproved of Lord Scott's treatment of conflicting authority in the Chime case as "unsatisfactory" and found the case unhelpful. In his judgment, the position in the BVI was clear. A derivative action requires permission under section 185C of the Act and in light of the nature of the conditions which the court must be satisfied before granting permission it would be an abuse of process to attempt to mount in the context of an unfair prejudice action a derivative claim without the consent of the Court.

# CAYMAN ISLANDS

## December 2011 and January 2012

### MAREVA INJUNCTION – JURISDICTION TO ISSUE AGAINST NON CAUSE OF ACTION – DEFENDANT OUT OF JURISDICTION

**VTB Capital PLC v. Malofeev et al, Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 141 of 2011, per Creswell, J. (13 December 2011 and 10 January 2012)**

***Background:*** VTB (the "Bank") loaned money to a Russian company under a facility agreement that was entered into primarily for the purpose of enabling the company to acquire an interest in a target company in BVI. The Bank commenced proceedings in England in December 2010 claiming, among other things, that it was induced to enter into the facility agreement by fraudulent misrepresentations. One of the central allegations in the English action is that the transaction underlying the facility agreement was not, as the Bank was led to believe, a genuine commercial transaction between two independent companies for the sale of shares at market value. The Russian company and the owner of the target shares were instead alleged to be companies controlled by the same beneficial owners, whose ultimate controlling mind was Mr. Malofeev. Action was brought in England against Mr. Malofeev, the vendor of the target shares, and two intermediary companies. The Bank applied to the English Court for a worldwide freezing order against all of the parties in the English action, and for an order for alternative service on Mr. Malofeev, both of which were granted. Permission was granted to enforce the order against Mr. Malofeev's assets in several jurisdictions, including the Cayman Islands, where he is alleged to hold interests in two Cayman companies. The freezing order and the order granting leave to serve Mr. Malofeev outside of the jurisdiction were reversed on appeal, a decision that is proceeding to the Court of Appeal in England.

***The Cayman Proceedings:*** An *ex parte* application was brought before the Grand Court of the Cayman Islands for a worldwide freezing order against Mr. Malofeev and the two Cayman companies, as well as for permission to serve Mr. Malofeev outside the jurisdiction. No substantive relief was sought in the Cayman Islands. The two Cayman companies are not defendants to the primary action in England. The Cayman Court refused leave to serve Mr. Malofeev outside of the jurisdiction (a decision subsequently upheld on appeal). However, the Court did grant limited relief against the Cayman companies, issuing a time-limited freezing order to enable the parties to fully argue before the Court whether the BVI decision *Black Swan Investment I.S.A. v. Harvest View Limited and Sablewood Real Estate* (as subsequently explained by the same judge in *Yukos CIS Invesment Limited and Wincanton*

*Holdings BV v. Yukos Hydrocarbons Investments Limited),* was a correct statement of the law in Cayman. (*Black Swan* stands for the principle that where a defendant has assets in another jurisdiction, the court of that jurisdiction may be willing to act in aid of the claimant's prospective entitlement to a money judgment, if such judgment would be enforceable in the jurisdiction where the assets are located.) The Court also considered the application of *TSB Private Bank International v. Chabra* to the facts at hand. (The *Chabra* decision stands for the proposition that where a party holds assets that may ultimately be available for enforcement to satisfy a judgment against another party, a freezing order can be obtained even though there is no cause of action against the party holding the assets.) The question before the Grand Court in the instant decision was therefore whether, on the basis of the combined principles of *Black Swan* and *Chabra*, the temporary freezing order ought to be continued against the Cayman companies.

**The Decision:** The Court reached a series of conclusions, the cumulative effect of which was a determination that it did not have the jurisdiction to grant the relief sought. Emphasizing that the present case did not involve any proprietary claims (for example, proprietary claims arising from a breach of trust) the Court reached the following conclusions: **(1)** Where a defendant is served within the Cayman Islands with proceedings claiming substantive relief, there is jurisdiction to grant a domestic or exceptionally a worldwide *Mareva* injunction; **(2)** When a defendant is served outside of Cayman with proceedings claiming substantive relief under GCR Order 11, there is jurisdiction to grant a domestic or exceptionally a worldwide *Mareva* injunction. However, a claim for a free standing *Mareva* injunction is not a case where there is jurisdiction to grant leave to serve outside of Cayman; **(3)** There is no equivalent to section 25 of the Civil Jurisdiction and Judgments Act 1982 of England (which empowers the Court to grant interim relief in English proceedings brought solely for that purpose, the interim relief being granted in support of foreign proceedings either commenced or to be commenced) in the Cayman Islands. Cayman does not have equivalent legislation that would have the effect of permitting *Mareva* relief in Cayman proceedings for the purpose of preserving assets, so that the assets will be available to satisfy a judgment obtained in foreign proceedings which would be enforceable in Cayman; **(4)** Where a defendant is served within Cayman with proceedings claiming substantive relief, there is jurisdiction to grant a freezing order in aid of foreign proceedings when the proceedings (for substantive relief in the Cayman court) against the defendant (served in the Cayman Islands) are stayed; **(5)** Where a defendant is served within Cayman with proceedings claiming substantive relief there is again jurisdiction to grant a freezing order in aid of foreign proceedings, even through the parties have no intent to litigate the substance of their dispute in Cayman; **(6)** The Cayman court has jurisdiction to grant a *Mareva* injunction against a non-cause of action defendant in a case where such an injunction would be ancillary and incidental to the effective enforcement of a prospective judgment against a defendant against whom there is a pleaded cause of action, because assets to which the non-cause of action defendant is itself entitled beneficially (as well as assets in which the cause of action defendant has a beneficial interest) may become available to satisfy a judgment against the cause of action defendant. The purpose of this *Chabra* jurisdiction is to ensure that enforcement of a future judgment of the Court against a cause of action defendant is not frustrated by the dissipation of assets in the hand of the non-cause of action defendant which would or might otherwise be available to satisfy that judgment; **(7)** Although the Cayman Court has jurisdiction to grant a *Mareva* injunction in aid of foreign proceedings as described above, it does not have jurisdiction to grant leave to serve out against a person who owes no allegiance to this jurisdiction, and is not present in this jurisdiction, simply in order to enable an injunction in aid of foreign proceedings to be granted. Concluding that *Chabra* relief is not available in the Cayman Islands where there is no cause of action defendant in the proceedings in the Cayman Islands, the Court lamented the gap in the law and encouraged legislative intervention. The application was dismissed.

## January

### COMPANIES – WINDING UP – TRANSACTION APPROVAL PROCEEDING COSTS

**In the Matter of the Companies Law (2011 Revision) and In the Matter of Emergent Capital Limited (In Liquidation) between KTC and RAAL Limited, Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 29 or 2011, per Jones, J. (5 January 2012)**

The company's official liquidators brought a sanction application seeking directions in respect of a dispute about the respective shareholdings of the company's only two shareholders. Pursuant to the directions of the Court in that application, the matter was conducted as though it were an action *inter partes* between those two shareholders. The official liquidators had no ongoing involvement in the application: One shareholder defended against the other's claim in its own interest. At the conclusion of the matter, the Court held that costs should follow the costs in the cause. Leave to appeal of the order for costs was sought and denied. The decision turned on the proper characterization of the application. If properly characterized as a sanction application, principles contained in Companies Winding Up Rules ("CWR") Order 24 would apply, in which case costs would ordinarily be payable out of the assets of the company. If properly characterized as an *inter partes* application between the shareholders, the principles contained in GCR O. 62, r. 4 would apply, under which costs would generally follow the event. The Court found that as a matter of procedure the application was a sanction application. However, in substance, this application was conducted as an action between the only parties in interest. CWR Order 24, r.9(5) permits the Court to have regard to the substance of the matter and not merely its procedural form. Given the substance of the matter, it was appropriate to order costs as though this were an action *inter partes*. Despite the fact that KTC lost (or withdrew its pleading) on all but one of the issues, it was nevertheless correctly identified as the successful party overall. The issues on which KTC lost did not add to the costs of the application in a very material way. As such, it was appropriate to treat KTC as the successful party and it should have the whole of its costs of the application.

### COMPANIES – SCHEME OF ARRANGEMENT – MAJORITY IN NUMBER – COUNTING CUSTODIAN VOTES

**In the Matter of Sections 15 and 86 of the Companies Law (2010 Revision) (as amended) and In the Matter of the Grand Court Rules 1995 Order 102 and In the Matter of Little Sheep Group Limited, Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 182 of 2011, per Jones, J. (20 January 2012)**

The company, listed on the main board of the Hong Kong Stock Exchange, sought to privatize by way of a scheme of arrangement under Section 86 of the Companies Law. Under that section, a scheme becomes binding only if (a) it is approved by a majority in number representing seventy-five percent in value of the Company's members and (b) it is sanctioned by the Court. An application for directions was brought to the Court on the question of how to calculate the statutory majority requirement in the context of a company whose shares are held primarily through a single custodian or clearing house. It was acknowledged that the phrase "majority in number" implies a simple head-count. However, the Court noted that in this context it was perfectly entitled to take notice of the fact that custodians and clearing houses are not the beneficial owners of the shares registered in their names. Such an entity can only vote the shares registered in its name in accordance with the instructions received from its members or clients. When shares are registered in the name of a custodian or clearing house, the Court is bound to treat it as a member of the company but it is also entitled to treat it as a multi-headed member for the purpose of the count. As such, the clearing house was permitted to vote both for and against the scheme in accordance with the instructions from its participants. The head count would be calculated by figuring the number of votes cast in favour of the scheme and the number of participants on whose instructions they are cast and the number of votes

cast against the scheme and the number of participants on whose instructions they are cast. The number of participants from whom the clearing house received instructions (both for and against) will determine the number of votes attributable to the clearing house for the purpose of determining whether the majority in number has been achieved.

## PROCEDURE – INSURANCE – STRIKING OUT – ABUSE OF PROCESS

**Embassy Investments v. Houston Casualty Company, Grand Court of the Cayman Islands Financial Services Division Cause Number FSD 94 of 2011 (Formerly 278/05 and 127 and 128/06), per Quin J. (26 January 2012)**

***Background:*** The Plaintiff purchased the Hyatt Hotel, Grand Cayman, in December 2003 and obtained property and business interruption insurance for it from various insurers in three layers. Part of the second layer of insurance was provided by the London office of a Texas insurance company (the "Texas insurer"). In September 2004 Hurricane Ivan devastated Grand Cayman and the Hyatt was badly damaged. The Plaintiff claimed on all of its policies. The claim was not paid and action was brought in Cayman by the Plaintiff against its insurers. During the discovery phase of litigation the Plaintiff threatened to bring a separate action for punitive damages in Texas against the Texas insurer. Settlement negotiations followed, during which the parties entered into a standstill agreement whereby neither party would file any new legal proceedings in any jurisdiction until the Cayman litigation was either settled or went to judgment. Protracted negotiations followed during which the Plaintiff alleged that a settlement had been reached (thus concluding the standstill agreement) but funds not paid. The Plaintiff commenced the punitive damages action against the Texas insurer in Texas. Eventually, settlement was reached with all of the second layer insurers save the Texas insurer. The Texas insurer made a full tender offer, plus costs and interests, without prejudice to the Texas claim, an offer which sat open for some ten months and was neither accepted nor declined by the Plaintiff. The Plaintiff took no formal steps in its action against the Texas insurer in Cayman for a period of over three years. The Texas insurer then brought this application to strike out the claim against it. During this drama, the Plaintiff made repeated statements to the press accusing the Texas insurer of, *inter alia*, dishonesty and bad faith. The Texas insurer counterclaimed against the Plaintiff for damages to its reputation, upon which summary default judgment was granted. Application was brought for an order setting aside the judgment on the counterclaim, but affidavit evidence in support of that application was not filed for some four months.

***The Decision:*** The Court of the Cayman Islands has an inherent jurisdiction to strike out a case which is an abuse of process and actual prejudice does not need to be shown. The sole responsibility for the inordinate delay in the progress of the Plaintiff's claim falls entirely on the Plaintiff, which did not want to settle the policy claim in these proceedings, because it wished to maintain and magnify the allegation of the Texas insurer "blocking" a settlement to further its claim for punitive damages in Texas. On the facts there was no difficulty in finding that the Plaintiff's intentional and contumelious conduct, together with its inordinate and inexcusable delay, amounted to an abuse of process of the court. With respect to the application to set aside the summary default judgment, the Court was guided by the principles set out in Alpine Bulk Transport Co. Inc. v. Saudi Eagle Shipping Co. Inc.: The Court has discretion in granting relief in such applications. In matters of discretion, no one case can be authority for another. The primary consideration is whether the defendant has merits to which the Court should pay heed. As a matter of common sense rather than as a condition precedent, the Court took into account the explanation as to how it came about that the defendant found himself bound by a judgment to which he could have set up some serious defence. It is not sufficient to show a merely arguable defence that would justify leave to defend. The defence must have a real prospect of success and carry some degree of conviction. If proceedings are deliberately ignored, this conduct (although not amounting to an estoppel at law) must be considered before exercising the discretion

to set aside. In this case, the Plaintiff had, by its blatant and continuous breaches of the rules of the Grand Court shown what could only be described as a contemptuous disregard for the Court's practice and procedure. The Plaintiff failed to file any substantive evidence which either carries some degree of conviction or demonstrates a real likelihood that its draft defence to the counterclaim could succeed. Given that the Plaintiff had conducted this part of the proceedings improperly, unreasonably and negligently, the application to set aside the judgment was dismissed and costs were ordered against the Plaintiff on an indemnity basis.

## PROCEDURE – SECURITY FOR COSTS FOREIGN RECEIVER – STAY

**Cigna Worldwide Insurance Company (by and through its Court appointed receiver, Josie Senesie, and in respect of the assets, undertakings and affairs of its licensed Liberian branch and business) v. Ace Limited, Grand Court of the Cayman Islands Financial Services Division, Cause FSD 96 of 2011 (Originally Cause No. 39 of 2008), per Creswell J. (27 January 2012)**

***Background:*** Cigna Worldwide Insurance Company is a Delaware insurance company with operations in various countries around the world. Ace, a Swiss insurer originally incorporated in Cayman, acquired by agreement certain assets and assumed certain liabilities of Cigna's property and casualty business, including liabilities pertaining to Cigna's Liberian business. Competing and conflicting judgments have been issued in the United States and in Liberia with respect to Cigna's liability for certain policy claims from the time of the Liberian civil wars. Complex issues of sovereign immunity, conflicts of laws, enforcement of foreign judgments, discovery and the legal status of foreign receivers are being considered in various proceedings. Assorted stays and anti-suit orders have been issued. Against this backdrop, the Cayman action was commenced by the Liberian court appointed receiver of what is described as Cigna's registered branch insurance business in Liberia. In this action, the Plaintiff seeks recognition of his appointment and indemnification for two judgments rendered by the Liberian Court in favour of the insureds. It is alleged in various proceedings that the receivership appointment is invalid and the Plaintiff in fact acts at the behest of private individuals who had purchased the claims. This application is brought by Ace for, *inter alia*, an order that the Plaintiff provide security for costs and for an order that the Cayman action be stayed pending the final determination of the proceedings, and any appeals therefrom, in the U.S. matters.

***Security for costs:*** It was uncontested that the Court had jurisdiction to make an order for security for costs in this situation, but the Plaintiff argued that the Court should not exercise its discretion to do so in this case on the basis of inpecuniosity. The Court disagreed. A plaintiff who alleges that an order for security for costs will stifle the claim must adduce satisfactory evidence that the plaintiff does not have the means to provide security and that the plaintiff cannot obtain appropriate assistance to do so from any third party who might reasonably be expected to provide such assistance if they could. The affidavit evidence provided by the Plaintiff in this case was not satisfactory, as it did not set out the grounds of the affiant's statement of information or belief. As such, it was appropriate to make an order for security for costs. In determining the amount of security, the court must take into account the amount the respondent is likely to be able to raise. The court should not normally make a continuation of the claim dependent upon a condition which it is impossible for the respondent to fulfil. Where a respondent opposes the making of an order for security or seeks to limit the amount of security by reason of impecuniosity, the onus is on the respondent to put proper and sufficient evidence before the court, and make full and frank disclosure. If the respondent gives an incomplete or misleading account of its resources, the court may, in exercising its discretion, set an amount which represents the Court's best estimate of what the respondent can afford. In this case, the Court considered that the Plaintiff had not made full and frank disclosure, nor had he given anything approaching a complete account to the Court. Given the complexity of the issues, the length of time required to hear them, and the

retaining of leading counsel from London, security for costs to the end of the five days scheduled for hearing was set at $850,000. The Defendant's impromptu request that the Court order that the receiver identify the persons who are funding him in these proceedings so that any unsatisfied order for costs could be enforced against them was deflected on the basis that there was no formal application for such an order before the Court.

***Stay of proceedings:*** The Court should only in the most compelling circumstances (if at all) exercise its case management powers to impose a temporary stay on proceedings commenced as of right in the Cayman Islands, in order to force the plaintiff to commence parallel proceedings in a foreign jurisdiction in which he would not otherwise choose to litigate. The Court has a duty to further the overriding objective of the Rules of Court by actively managing proceedings, and regard may be had to the existence of litigation in other jurisdictions, to the extent appropriate in the circumstances. In this instance, it was appropriate to issue a stay until the Plaintiff complies with the order for security for costs, following which a case management conference will be held to set the timetable of these proceedings and in doing so the Court will have regard to any developments and anticipated developments in the other proceedings.

## February

### COMPANIES – INSOLVENCY – S. 103 COMPANIES LAW – ORDER FOR DELIVERY UP OF DOCUMENTS AGAINST AUDITOR

**In the Matter of the Companies Law (2010 Revision) and In the Matter of ICP Strategic Credit Income Funds Ltd (In Liquidation) and In the Matter of ICP Strategic Credit Income Master Fund ltd. (In Liquidation), Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 82 of 2010 and FSD 269 of 2010, per Jones, J. (3 February 2012)**

An application was brought by the joint official liquidators of certain hedge fund companies for an order pursuant to section 103(3) of the Companies Law requiring the funds' auditor to deliver up all property or documents belonging to the funds in their possession, custody or control. For the liquidators to succeed with an order under section 103(3) for the production of documents, the Court must be satisfied that the auditor is a "relevant person" within the meaning of section 103(1) and that it has in its possession documents which can fairly be said to belong to the funds. The liquidators argued that the auditor was a relevant person on the basis that it was a "professional service provider" within the meaning of section 103(1)(c). In its ordinary business usage, this expression has a very wide meaning which probably does include auditors. However, the statutory power to compel persons to co-operate with official liquidators for the ultimate benefit of the creditors and/or shareholders is intended to apply only to those who were involved in the company's promotion or management. The Court is not empowered to make such orders against outsiders whose only relationship with the company is that they have done business with it or contracted to provide it with goods or services. For this reason the expression "professional service provider" is narrowly defined by section 89 of the Companies Law to mean "a person who contracts to provide general managerial or administrative services on an annual or continuing basis". Auditors fall outside of that definition because they are not engaged to provide general managerial or administrative services. The auditor could also not be characterized as an "advisor" within the meaning of sub-section 103(1)(d). This sub-section in this context relates to persons who are appointed under section 30(3)(d) of the Mutual Funds Law to advise funds on the proper conduct of their affairs. By definition, an auditor cannot be an advisor within the meaning of section 103(1)(d). The court has no jurisdiction to make the order sought and the summons is dismissed.

## CONTRACT – CONSTRUCTION – CLAWBACK AGREEMENT

***Ennismore Fund Management Limited v. Fenris Consulting Limited*, Grand Court of the Cayman Islands Financial Services Division, Cause No FSD 65 of 2009, per Foster, J. (7 February 2012)**

The Plaintiff is an investment management company and the Defendant is a consultancy company set up to provide fund management services to the Plaintiff. The compensation agreement between the two parties was based on a system of bonuses which would be subject to claw back in respect of losses attributable to the relevant portfolios, a system that was memorialized in a badly drafted claw back agreement prepared by a non-lawyer. After catastrophic losses in the financial crisis, the Plaintiff brought an action on the claw back agreement which required the Court to determine its true meaning and construction and in particular whether, as a matter of interpretation, claw back was based upon and limited to the amount of reduction in the overall performance fee or on the individual performance of the portfolios managed by the Defendant. Further, the Court was required to determine the meaning of the words, 'attributable to' in the context of the claw back agreement.

The Court held that an agreement must be interpreted in light of all the background circumstances reasonably known by or available to the parties, which includes absolutely anything which would affect the way in which the language of the document would have been understood by the reasonable person having all such background knowledge. It is also appropriate in interpreting such an agreement that the Court should know and take account of the commercial purpose of the agreement, which itself presupposes knowledge of the genesis of the transaction, the background, the context, and the market in which the parties were operating. The poorer the quality of the drafting, the less weight should be given to semantic niceties that attribute to the parties an improbable and unbusinesslike intention. Having regard to these principles, the operation of claw back under the agreement was based upon and related to the individual performance of the Defendant in the management of the particular portfolios for which it was responsible and the profits and losses on those portfolios. Furthermore, while in some circumstances, "attributable to" may well require that the Court consider the notion of blame or fault, in this case, based on the overall construction of the contract, there is no inference to that effect to be drawn from the agreement. Here, "attributable to" means only that the investments in question were part of the Defendant's portfolio. Judgment was given for the Plaintiff.

## COMPANIES – WINDING UP – LOSS OF SUBSTRATUM – INJUNCTION TO RESTRAIN DISPOSAL OF SHARES

**In the Matter of the Companies Law (2011 Revision) and In the Matter of Merchantbridge Managers Inc. Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 5 of 12, per Smellie C.J. (9 February 2012)**

The respondent company, which is the management of company of an investment consortium, was characterized as a quasi-partnership between four persons. Two of the founders were killed in an air accident and one of them was subsequently bought out by the other. The family members of one of the deceased participants were appointed to the board of the company by the sole surviving shareholder, director and partner of the group, and they promptly removed him from the board. With the removal of the last remaining active participant in the management company, it is alleged that the company had been effectively paralyzed, as there was no one left with the capacity to carry on its functions and as a result the substratum of the company has failed. The Applicant filed (but has not yet served) a petition to wind up the company. The Applicant immediately brought an *ex parte* application for an injunction to prevent the board of the company from removing him as a director of nine special purpose vehicles which are the investment holding companies of the consortium. He also sought an injunction to restrain the management company from disposing of its shares in the holding company through which

the investment consortium was constituted and through which their shares are held. The injunctions were intended to retain the status quo until the petition for winding up can be heard or until further order of the Court. Considering the tests laid out in *American Cyanamid Co. v. Ethicom Ltd.,* the Court found that there is a serious issue to be tried. There was material to support the contention that a quasi-partnership existed (notwithstanding the fact that the legal structure employed by the founders was, in form, a company). The removal of the Applicant from the board could be found to justify his loss of confidence and trust, such that a petition to wind up on the just and equitable ground may be sustainable. The just and equitable ground is wide enough to found relief where there is a good reason for loss of confidence and trust leading to a breakdown of relationships underpinning a company formed and operated in the nature of a quasi-partnership. The balance of convenience lies with granting the injunctions to preserve the status quo until the petition can be heard. Relief granted and directions for service issued.

## PROCEDURE – STRIKE OUT – DELAY – STANDSTILL AGREEMENT

**Tempo Group Limited v. Fortuna Development Corporation, Grand Court of the Cayman Islands Financial Services Division, FSD 82 of 2011, per Henderson, J. (20 February 2012)**

The Plaintiff holds a minority interest in the Defendant Company. The action was commenced in June 2004 alleging a cause of action which arose at various times between September 2002 and April 2004. A related proceeding was brought which involved various interlocutory orders and appeals, including an application for leave to appeal to the Privy Council, which was not finally dealt with until February 2011, at which time this action was revived. The Defendant has brought an application to strike out the claim for delay. While the overall time period involved was at first glance excessive, there was in place a stand still agreement for a significant span of that time. No authority was cited in which a court has treated a delay which occurred during the currency of a stand still agreement as a reason for striking a claim. The Court found that it is an implied term of the stand still agreement that any delay which occurs during the currency of the agreement cannot be relied upon in any application for want of prosecution. The Court went on to find that if it was mistaken, and the period of the stand still agreement ought to count, the delay was excusable based on the conduct of the parties and all the circumstances of the case.

## COMPANIES – DIVIDENDS – PRE-JUDGMENT INTEREST ON UNPAID DIVIDEND

**Tempo Group Ltd. v Fortuna Development Corporation, Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 82 of 2011, per Henderson, J. (24 February 2012)** (For a summary of the background facts, see the digest above.)

Application was brought to determine whether the Court was able to award pre-judgment interest when it grants judgment to a shareholder for unpaid dividends, notwithstanding that the articles of association of the company state that no dividend shall bear interest against the company. While there is non-binding authority for the proposition that the court is not empowered to award interest on a dividend debt where the articles contain the usual provision that dividends do not bear interest, the better view is that the court retains the discretion to award interest but it should be exercised so as to give effect to the agreement of the shareholders, which is evidenced by the articles. Looking to the intention of the parties as memorialized in the articles, the shareholders clearly surrendered any right to interest on a dividend during the period between its declaration and the date set for its payment. There is nothing in the articles to suggest that the shareholders were giving up the right to claim interest on dividend debt litigation against the company. Such litigation was entirely outside the contemplation of the parties when they reached their agreement. As such, the Court exercised its discretion to award pre-judgment interest on the amount of the judgment from the date that litigation to force payment of the dividend was commenced.

## April

### COMPANIES – WINDING UP – INABILITY TO PAY DEBTS – LOSS OF SUBSTRATUM

**In the Matter of the Companies Law (2011) Revision and In the Matter of FIA Leveraged Fund (The Company") Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 0013 of 2012, per Smellie, C.J. (18 April 2012)**

The Petitioning investors were owed redemption proceeds by the company. Rather than paying in cash, the company sought to satisfy the redemption requests in specie by issuing promissory notes. The company's offering memorandum stated that shares could be redeemed in kind, and provided that the value of the assets paid out were to be determined by the board of directors in consultation with the company's investment manager, in the board's sole discretion. The investors were not satisfied with the promissory notes and applied to have the company wound up on the basis that the company could not pay its debts. Alternatively, the application claimed that the company should be would up on the just and equitable ground, the company having lost its substratum. Following the issue of the writ, the company transferred certain assets into a new Delaware entity and caused the shares in that entity to be registered in the Petitioners' names. The Court found on the facts that the proposed distribution of shares did not satisfy the obligation, as what was paid over did not realistically represent the value of the investor's entitlement. The Court also found that the 'sole discretion' vested in the board to value the assets did not give the board the absolute discretion to effect a distribution which would not give commercial efficacy to the obligations owed to the investors under the contractual documents. The directors' duties of care and good faith towards the investors were not impliedly swept aside by the contractual documents. As the assets selected for distribution were commercially worthless when measured against the value of the debt it purported to satisfy, the debt was not discharged. The facts justified a winding up order on the just and equitable ground as well as on the ground of insolvency.

### COMPANIES – SCHEME OF ARRANGEMENT – MAJORITY IN NUMBER

**In the Matter of Sections 15 and 86 of the Companies Law (2011) Revision and In the Matter of Alibaba.com Limited Grand Court of the Cayman Islands Financial Services Division, Cause No. FSD 38 of 2012, per Creswell, J. (20 April 2012)**

On an application for sanction of a scheme of arrangement under section 86, the Court again considered the proper manner in which the "headcount" aspect of the approval requirement should be calculated where a custodian holds a number of shares for investors. The traditional approach of the Courts as to the position of a custodian, assuming it is instructed to vote some of its shares in favour of and some against the scheme, has been to treat the custodian for the headcount test as one vote "for" and one vote "against." In the Little Sheep case (see digest above) the petitioner argued that for the purposes of the headcount test a custodian should be counted as one person having voted either "for" or "against" the scheme depending on its net voting position. This argument was rejected, with the Court instead finding that it was appropriate to count the parties from whom the custodian receives instructions. The Court expressed an inclination to apply the principle of judicial comity and follow the decision of Jones, J. in Little Sheep, he being a judge of co-ordinate jurisdiction. The Court directed that to the extent that the shares to which the proposed scheme relates that a registered in the name of custodians (a) such custodian may cast votes both for an against the proposed scheme in accordance with the instructions of its clients, and (b) such custodian shall specify the number of votes cast in favour of the scheme and the number of clients on whose instructions they are cast and the number of votes cast against the proposed scheme and the number of clients on whose instructions they are cast. Compliance with this direction will then enable the Court at the hearing of the petition to consider the question of whether a majority in number has been achieved, having regard to all of the facts.

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