IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NOs.: FSD 268, 269 and 270 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF LONG VIEW II LIMITED

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED

Appearances:	Mr John Wardell QC and Mr David Lee, Mr Andrew Jackson and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner (in each of FSD 268, 269 and 270 of 2021 (DDJ))
Before:	The Hon. Justice David Doyle
Heard:	17 September 2021
Date Ex Tempore Judgment delivered:	17 September 2021
Draft transcript of Judgment circulated:	27 September 2021
Date transcript of Judgment approved:	29 September 2021

HEADNOTE

Just and equitable winding up proceedings brought by contributory - ex parte application for the appointment of provisional liquidators over three related Cayman Islands registered funds on grounds set out in the Companies Act (2021 Revision) s. 104(2)(b)(i), (ii) and (iii)

JUDGMENT

Introduction

1. On 8 September 2021, on the application of Mr Chai Hsing Wang ("Mr Wang"), I made an order appointing Mr Michael Pearson and Ms Trudy-Ann Scott of FFP Limited as receivers over shares beneficially owned by Mr Wang and held by Credit Suisse London Nominees Limited ("CSLN"). The receivers' appointment over the shares was for the purpose of instructing attorneys to: a) commence just and equitable winding up proceedings in the name of CSLN in respect of certain funds incorporated under the laws of the Cayman Islands; and b) make such related or ancillary applications in the name of CSLN as the receivers shall deem appropriate including but not limited to applications for the appointment of joint provisional liquidators over the funds.

2. There are now three urgent *ex parte* summonses in these proceedings which were filed by Appleby (Cayman) Limited on the afternoon of Wednesday 15 September 2021 in the name of CSLN. The Applicant is stated to be a contributory of the three companies, namely:

   1) Principal Investing Fund I Limited ("PIF");

   2) Long View II Limited ("Long View"); and

   3) Global Fixed Income Fund I Limited ("GFIF")

(together the "Cayman Funds")

3. CSLN seek the *ex parte* / without notice appointment of provisional liquidators over the Cayman Funds, all of which are incorporated under the laws of the Cayman Islands.

Appearances

4. Mr John Wardle QC and Mr Andrew S Jackson appear for CSLN and I am very grateful to them for their considerable assistance to the Court and the timely production of some eleven bundles of relevant pleadings, evidence, skeleton argument and authorities and draft orders.

Background

5. I now deal with some further background. Mr Wang is stated to be the ultimate beneficial owner ("UBO") but not the registered shareholder of all non-voting participating shares in PIF and Long View, and the UBO of 34% of the non-voting participating shares in GFIF. He is also the UBO of 97.2% of the non-voting participating shares in a related regulated British Virgin Islands ("BVI") domiciled fund named Real Assets (RA) Global Opportunity Fund I Limited ("RAGOF").

6. All of the issued management shares in the Cayman Funds and RAGOF (together the "Floreat Funds") are held by entities owned and controlled by the 'Floreat Group', which comprises Floreat Merchant Banking Services Limited and its affiliates and/or one or more of Messrs Mutaz Otaibi, Hussam Otaibi and James Wilcox (together the "Floreat Principals").

7. Mr Wang appears to have obtained his wealth from his father and says that he himself is not financially minded. Mr Wang met Mr Wilcox in July 2013 and May 2014 at group healing seminars, run by a Brazilian faith healer in Basel, Switzerland, and Salzburg, Austria, respectively. Mr Wang says that he had discussions with Mr Wilcox and Mr Wilcox indicated that Floreat could help to supervise his financial affairs. As Mr Wilcox was a devotee of the same spiritual healer, Mr Wang says that he felt that Mr Wilcox was a kindred spirit and that he would be trustworthy. Mr Wang seemed happy to let Floreat take over.

8. The Floreat Funds' directors delegated their respective investment management powers to Floreat entities, which respectively served as the Floreat Funds' investment managers and investment advisors. On what I have read and heard to date, none of the Floreat Funds' respective directors appear to have exercised any real oversight regarding the exercise of such powers. The reality appears to be that each of the Floreat Funds is under the ultimate control of the Floreat Principals.

Mr Wang's allegations of wrongdoing

9. Mr Wang, who says he has invested approximately US$500million in the Floreat Funds, makes very serious allegations of misconduct by the Floreat Principals in respect of the Floreat Funds over the course of several years.

10. As regard to the Cayman Funds, the main allegations are that:

1) The Floreat Principals have used substantial sums invested by Mr Wang in PIF to acquire, display and enjoy at their personal residences, offices and other property nearly 100 expensive art pieces valued at over US$10million.

2) GFIF invested US$61.5million in aviation notes issued by Floreat Fixed Income SA which generated inappropriate and disproportionate fees for its Floreat owned investment manager.

3) GFIF made an investment to fund the development of land on Holbox Island, Mexico, with benefits appearing to accrue to an entity owned by Mr Mutaz Otaibi.

4) Mr Mutaz Otaibi is alleged to have agreed purportedly on behalf of GFIF that a loan termination fee of more than US$2million due to GFIF would not be repaid to it but would instead be split equally between two companies which he and former Floreat employees respectively owned in their personal capacities

5) Unnecessary investment management fees have been charged in respect of Long View for its holding of traded securities generally in firms which are household global names.

11. Furthermore, it appears that each of the Floreat Funds has failed to provide net asset valuation calculations on an appropriately regular basis, leading one of the banks to write the value of Mr Wang's investments in both RAGOF and PIF down to zero.

12. Mr Wang further complains that, to make matters worse, his straightforward requests for documents and information regarding the Floreat Funds was met with aggression.

13. Mr Wang is also concerned over a significant risk that the directors of the Cayman Funds will be coerced into wrongly and unfairly exercising powers to sell and/or compulsorily redeem the shares which Mr Wang ultimately beneficially owns in the Cayman Funds with a view to undermining the legal proceedings. I note the reference to the orchestrated attack by the Floreat Principals and the misuse of the resources of the Floreat Funds in this respect.

14. Mr Wang has lost all trust and confidence in Floreat and the Floreat Principals.

15. In short it is said that the evidence demonstrates the very real risks that if provisional liquidators are not urgently put in place to hold the ring and further to investigate the affairs of the Floreat Funds and the Floreat Principals:

(a) the Cayman Funds' assets will be further diminished;
(b) Mr Wang will continue to be oppressed; and
(c) that there will be further misconduct and mismanagement, including a risk that relevant books and records may be destroyed and/or fabricated.

Related BVI proceedings in relation to RAGOF

16. I should record that Mr Wang has taken the same approach with respect to RAGOF in proceedings before the BVI High Court. On 26 August 2021, Mr Wang successfully obtained an *ex parte* order appointing receivers over his shares in RAGOF. I am informed that the BVI High Court made a further order, again *ex parte*, on 1 September 2021 appointing provisional liquidators over RAGOF.

The relevant law

17. I now turn to the relevant law.

18. Section 104(1) of the Companies Act (2021 Revision) ("Act") provides as follows:

> *"Subject to this section and any rules made under section 155, the Court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally."*

19. Section 104(2) of the Act provides as follows:

> *"(2) An application for the appointment of a provisional liquidator may be made under subsection (1) by a creditor or contributory of the company or, subject to subsection (6), the Authority, on the grounds that-*
>
> *(a) there is a prima-facie case for making a winding up order; and*
>
> *(b) the appointment of a provisional liquidator is necessary in order to-*
>
> > *(i) prevent the dissipation or misuse of the company's assets;*
> > *(ii) prevent the oppression of minority shareholders; or*
> > *(iii) prevent mismanagement or misconduct on the part of the company's directors.*"

20. In my recent judgment in *In the Matter of ICG I* (Unreported, FSD 192 of 2021 (DDJ), 4 August 2021) I referred to the four main hurdles applicants seeking the appointment of provisional liquidators pending the determination of a winding up petition had to jump. At paragraph 17(3) of my judgment I stated:

"(3) It can immediately be seen from the plain wording of these provisions that an applicant seeking the appointment of a provisional liquidator pending the determination of a winding up petition has four main hurdles to jump:

> *(a) The applicant must satisfy the court that a winding up petition has been duly presented and a winding up order has not yet been made (the "presentation of the winding up petition hurdle");*
> *(b) The applicant must satisfy the court that the applicant has standing to make the application i.e. the applicant is a creditor, contributory or the Authority (the "standing hurdle");*
>
> *(c) The applicant must satisfy the court that there is prima-facie case for making a winding up order (the "prima-facie case hurdle"); and*
>
> *(d) The applicant must satisfy the court that the appointment of the provisional liquidator is necessary in order to prevent the dissipation or misuse of the company's assets; and/or the oppression of minority shareholders; and/or mismanagement or misconduct on the part of the company's directors (the "necessity hurdle")."*

21. In another recent judgment in *Cathay Capital Holdings III LP v Osiris International Cayman Limited* (Unreported, FSD 245 of 2021 (DDJ), 30 August 2021) I endeavoured to outline the legal principles to consider when a Court is being asked to proceed *ex parte* and without notice.

22. Order 4 Rule 1(2) of the Companies Winding Up Rules 2008 ("CWR") provides that the company is entitled to at least 4 clear days' notice of the application for the appointment of a provisional liquidator *'unless the Court is satisfied that there is some exceptional circumstance which justifies the application being made ex parte*.'

23. Section B 1.2(a) of the Financial Services Division Guide under the heading, '*Ex parte interlocutory applications*' provides:

"All applications should be made on notice to the other party/parties (if any), even if that notice has for good reason to be short, unless
(i) any Rule or PD provides that the application may be made without notice; or
(ii) there are good reasons for making the application without notice, for example, because giving notice would or might defeat the object of the application."

24. I agree with Mr Wardell, who represents the Applicant, when he submits that the introduction of CWR Order 4 Rule 1(2) cannot have been intended to require any

circumstance more exceptional than those circumstances which would justify any interlocutory application in civil proceedings being made *ex parte* / without notice.

The *Ex Parte* issue

25. The first issue to determine is whether it is appropriate to proceed *ex parte*.

26. I am persuaded that in the exceptional circumstances of these cases there is good reason to proceed on an *ex parte* basis.

27. I agree that giving notice to each of the Cayman Funds would enable the alleged wrongdoers in control of the funds to defeat the object of the applications either entirely or to some significant extent.

28. I have noted the serious concerns of the Applicant, including the concerns over:

    1) the risk of further dissipation and misuse of the assets of the Cayman Funds;

    2) the risk of inappropriate action to compulsorily redeem or sell shares in the Cayman Funds which belong to Mr Wang beneficially and which are legally held and registered in the name of the applicant CSLN on behalf of Mr Wang;

    3) the risk of destruction and/or fabrication of relevant fund documents and records, at least some of which may not be held by external service providers who, particularly if regulated, may be trusted to preserve them.

Determination

29. I turn now to the four hurdles that must be cleared prior to the appointment of provisional liquidators. I am satisfied that the Applicant has jumped the four hurdles I outlined in *ICG I* (as set out above). I briefly set out my conclusions and reasons as follows in respect of each of the hurdles in respect of each of the three matters before the Court.

The presentation of the winding up hurdle

30. Winding up petitions have been duly presented in respect of each of the Cayman Funds and winding up orders have not yet been made. That hurdle has therefore been jumped.

The standing hurdle

31. The Applicant has standing to make the applications in its capacity as a contributory - see the Second Affidavit of Mr Michael Pearson at paragraph 6.

The prima facie case hurdle

32. I have carefully considered the Applicant's concerns and note the reference to:

1) a justifiable loss of trust and confidence in the management of the Cayman Funds due to the lack of probity on the part of the management;

2) oppression by those wielding the votes with respect to each of the Cayman Funds;

3) the alleged fraud from the inception in respect of the Cayman Funds;

4) an irretrievable breakdown in the underlying relationship of mutual trust and confidence; and

5) a pressing need for an investigation into the affairs of each of the Cayman Funds.

33. Concerns (1) and (5) in particular have persuaded me that there is a *prima facie* case.

34. It is well settled that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in management, for example, on account of serious misconduct or serious mismanagement of the affairs of

the company by the directors or the majority shareholders (see the judgment of Martin JA in *Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited* 2019 (1) CILR 481 at paragraph 22). I also accept, as did Martin JA at paragraph 23 of his judgment in the *Tianrui* case, that it is also well settled that a winding up petition will not succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue.

35. In my judgment, the Applicant as a contributory has a tangible interest in any winding up and has no alternative remedy reasonably available to it. Moreover again, based on what I have read and heard to date, it can reasonably be said on an objectively justifiable basis that the Applicant, as a contributory, has lost trust and confidence in the management of the Cayman Funds in light of the serious wrongdoing identified by the Applicant.

36. Moreover, Smellie CJ in *In re GFN Corporation Limited* 2009 CILR 135 (at paragraph 42) helpfully confirmed that the need for an investigation into the affairs of a company can be a free-standing basis for making a winding up order on the just and equitable ground. The Chief Justice also stated (at paragraph 43 of his judgment) that the liquidators should have the power to investigate as widely in the circumstances as may be required, including an investigation into the reasons for the company's failure and the conduct of those concerned in its management.

37. Floreat and the Floreat Principals should welcome and fully cooperate with an independent investigation if they have nothing to hide.

38. Whichever test is applied, I am satisfied that the Applicant has jumped the *prima facie* case hurdle. On the face of it, there appears to be a strong case for winding up on the just and equitable ground. Of course, I keep my mind open to persuasion and at a subsequent hearing, having heard all the relevant evidence and arguments, winding up orders may or may not be made.

39. At this stage, on the basis of what I have read and heard, I am satisfied that there is at least a *prima facie* case for the making of winding up orders.

The necessity hurdle

40. I turn now to the necessity hurdle. I am also satisfied that the appointment of the provisional liquidators is necessary to prevent the dissipation and misuse of the assets of the Cayman Funds and the possible oppression of minority shareholders and also the mismanagement and misconduct on the part of the directors of the funds.

41. It is necessary to take this step of appointing provisional liquidators as no other more proportionate and reasonable alternatives are available to the contributory.

42. I am satisfied that there is a serious risk that those in control of the Cayman Funds will engage in dealings with the assets of the Cayman Funds which may result in those assets, or at least a proportion of them, ceasing to be available to the fund to which they belong, ultimately to the detriment of those financially interested in that fund.

43. In particular, in respect of the PIF, the Shanti artwork can be readily moved and/or sold. Long View holds traded securities which can be sold immediately and the proceeds dissipated. In respect of GFIF, the diversion of the loan termination fee demonstrates a serious risk of further dissipation of assets.

44. There is force in the submission that absent the appointment of provisional liquidators such risks of dissipation and misuse of assets could only be heightened by the threat of winding up orders " which would signal that they should take what more they can while they can" as it is put at paragraph 139 of the skeleton argument.

45. I also note the submission in respect of the oppression of minority shareholders, that those in control cannot be trusted to fairly exercise the powers they have to compulsorily redeem the shares held by CSLN over which the receivers have been appointed. These powers are contained in the Articles of Association of each of the

Cayman Funds - Article 12 of PIF's Articles, Article 13 of Long View's Articles and Article 12 of GFIF's Articles. There is a real concern over potential oppression of minority shareholders and the exercise of powers for improper and unfair purposes.

46. As regard to mismanagement or misconduct, Segal J in *In the matter of Asia Strategic Capital Fund, L.P.* (Unreported, FSD 42 of 2015 (NSJ), 30 April 2015) at paragraph 60 stated that the wording in section 104(b)(iii) connotes culpable behaviour involving a breach of duty or improper behaviour involving a breach of the relevant entity's governing documents and governance regime and that this:

> *"…could involve inaction where such inaction would give rise to a breach of duty and action was needed and possible to protect the interests of the* [relevant legal entity]"

47. I agree that this may include situations where the evidence shows that the directors have delegated their powers and wrongfully failed to properly supervise the exercise of such powers thereafter.

48. Another form of misconduct which is relevant and a serious risk in this case is the loss or destruction of the relevant entity's documents and records.

49. I also agree that the balance of convenience with respect to each of the Cayman Funds weighs strongly in favour of provisional liquidators being appointed over each of them.

<u>Full and frank disclosure obligation</u>

50. I should record that in concluding it was appropriate to proceed *ex parte* / without notice and to grant the substantive relief requested I had full regard to all that was written and said in respect of full and frank disclosure.

51. In particular, I had regard to:

1) paragraphs 150 to 186 of the Applicant's skeleton argument;

2) Mr Wang's second affidavit, especially at paragraphs 240 to 287;

3) Herbert Smith Freehill's letter dated 9 April 2021 to Lipman Karas LLP in London; and

4) the first witness statement of Hussam Otaibi dated 21 July 2021 in the English Pre-Action Disclosure Proceedings and the second witness statement of Hussam Otaibi dated 24 August 2021 in those proceedings. I note that permission had been obtained to use such in the BVI proceedings and in the proceedings before this Court.

52. I have also carefully considered all the factors so properly and eloquently put before the Court by Mr Wardell on behalf of the Applicant this morning, including the further comments made in respect of the Shanti artwork allegations on behalf of the respondents at a hearing in the High Court in London earlier today. I note that a short affidavit confirming this information will be provided to the Court, for the court record, before 3:00pm next Wednesday.

The Order

53. I am most grateful to the attorneys for their valuable assistance to the Court in respect of these matters.

54. In summary, I am persuaded that it is appropriate to appoint joint provisional liquidators on an *ex parte* basis for the brief reasons provided in this *ex tempore* judgment. I therefore make orders in the terms of the drafts helpfully filed prior to today's hearing, such orders to incorporate the amendments which I specified during my exchanges with counsel.

55. That is my judgment in respect of these matters.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT