



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

**Cause No. FSD 236 of 2020 (RPJ)**

**BETWEEN:**

**(1) KUWAIT PORTS AUTHORITY**

**(on its own behalf and on behalf of The Port Fund L.P)**

**(2) THE PUBLIC INSTITUTION FOR SOCIAL SECURITY**

**(on its own behalf and on behalf of The Port Fund L.P)**

**(3) THE PORT FUND L.P.**

**PLAINTIFFS**

**AND**

**(1) PORT LINK GP LTD. (IN VOLUNTARY LIQUIDATION)**

**(2) MARK ERIC WILLIAMS**

**(3) WELLSPRING CAPITAL GROUP, INC**

**(4) KGL INVESTMENT COMPANY ASIA**

**(5) GOLDEN SHAHIN GENERAL TRADING & CONTRACTING COMPANY**

**(6) APACHE ASIA LIMITED (A HONG KONG COMPANY)**

**(7) RONALD HENRY AYLIFFE**

**(8) KGL INVESTMENT COMPANY KSCC**

**(9) APACHE ASIA LIMITADA (A MACAO COMPANY)**

**DEFENDANTS**

**(10) CHRISTOPHER KENNEDY**

**(11) BARRY LYNCH**

**PROPOSED DEFENDANTS**

**Appearances:**

Ms Rachael Reynolds KC instructed by Ms Jennifer Fox and Mr Harry Clark of Ogier (Cayman) LLP for the Plaintiffs

Mr Graham Chapman KC instructed by Mr Andrew Pullinger and Ms Katie Logan of Campbells LLP for the Second, Third and Fourth Defendants

**Before:**

The Hon. Raj Parker

<b>Heard:</b>	9 May 2023
<b>Date of decision:</b>	9 May 2023
<b>Draft Judgment circulated:</b>	7 June 2023
<b>Judgment delivered:</b>	16 June 2023

### HEADNOTE

*Injunction-pending Judgment to be handed down-maintenance of status quo-abuse of process-jurisdiction-discretion- Section 11 of the Grand Court Act (2015 Revision)- Section 37 of the English Senior Courts Act 1981- -GCR Order 30-breach of undertaking-serious issue to be tried-appointment of joint voluntary liquidators.*

### REASONS FOR REFUSING INJUNCTIVE RELIEF

#### Introduction

1. The Court has now determined a joinder and receivership application heard on 24 April 2023, having reserved Judgment (the “Receivership Application” and the “Joinder Application”).
2. The Judgment was handed down on 25 May 2023. The Court ruled in favour of joinder and the appointment of Receivers to manage litigation on behalf of D1 (the General Partner). It also gave some guidance on the terms of the Receivership which the parties are to use to agree an appropriate Order for the Court’s approval. The Court gave further directions as to the terms of the Order on 29 May 2023.
3. According to Mr Williams (D2), after the hearing and, among other things, in light of the Plaintiffs’ conduct in not informing the Court or D2-D4 of what he says was critical information in relation to the Receivership Application, namely the terms of the Receivers’ engagement letter, he determined that the most appropriate course of action was for voluntary liquidators (JVLs) to be appointed.

4. The Plaintiffs brought an application for interim relief following the appointment of the JVLs to stop the ensuing process continuing (which they feared would likely lead to the application for a supervision order and an application for official liquidators to be appointed in due course) which they argued would undermine the Receivership Application on which Judgment had been reserved.
5. The Court dismissed the application for interim relief. These are the reasons for that decision.

#### Plaintiffs' case

6. Ms Rachael Reynolds KC appeared for the Plaintiffs.
7. She applied for an interim order for a short period of time until the Court had handed down judgment on the Receivership Application to ensure the maintenance of the status quo as it existed before the actions of Mr. Williams to appoint JVLs.
8. In summary, she argued that Mr Williams had abused the process of the Court and breached undertakings he had given:
  - (a) On 28 March 2023 the Plaintiffs issued the Receivership Application on an urgent *ex parte* basis, but put the other existing defendants ("D2-D4") on notice. The Receivership Application was originally listed to be heard at 8am on 31 March 2023.
  - (b) In order to secure the Plaintiffs' agreement to vacate the original hearing date, D2-D4 (acting by Mr Williams) gave an undertaking not to procure the appointment of directors, officers or officeholders to the General Partner and/or not to seek default judgment or to take steps to have the General Partner admit the Crossclaim, "*pending the hearing*" of the Plaintiffs' Receivership Application and Joinder Application (the "Undertaking") if the Plaintiffs agreed to the original *ex parte* hearing date being vacated.
  - (c) The Plaintiffs agreed on the basis of the Undertaking, to vacate the *ex parte* listing of the Receivership Application, and the Receivership Application was listed to be heard on an *inter partes* basis at a hearing on 24 April 2023 (the "Hearing").
  - (d) At the Hearing, in response to an observation from Parker J that "*with funding comes an element of control*" Leading Counsel for the Plaintiffs, Mr Allison KC, explained that this concern is addressed "*by not having a funding agreement which fetters what*

*the officers can do" and offered to "provide the funding agreement if it would assist" further confirming that in this particular instance "there are no fetters on how [the proposed receivers] use the money. It is up to them".*

- (e) Following the Hearing, the Plaintiffs provided a copy of the funding agreement entered into between themselves and the proposed receivers (the "Funding Agreement"). They also confirmed various factual points concerning the Funding Agreement including the lifting of a USD 300,000 cap with immediate effect.
  - (f) On 28 April 2023 the attorneys to D2-D4 wrote to the Court stating that Mr Williams had suffered a personal bereavement and requested that the Court refrain from handing down judgment on the Receivership Application until they had responded to the attorneys to the Plaintiffs.
  - (g) On or before 1 May 2023 Mr Williams allegedly canvassed views from the General Partner's alleged creditors seeking their support for the voluntary liquidation (without canvassing the views of its largest contingent creditor, namely the Plaintiffs); and
  - (h) On 2 May 2023 Mr Williams placed the General Partner into voluntary liquidation without any prior notice to the Court or the Plaintiffs. Mr Williams did so having asked the Court to delay judgment on the Receivership Application on compassionate grounds and without responding to the attorneys to the Plaintiffs.
9. Ms Reynolds KC argued that by placing the General Partner into voluntary liquidation in this way Mr Williams both (a) acted in clear breach of the Undertaking (because the hearing of the Receivership Application had not yet concluded as judgment was reserved), and (b) sought to frustrate the Receivership Application when judgment on it was pending.
10. She argued that Mr Williams' apparent aim is to have the business of the General Partner conducted by his own nominees based on information provided solely by those who are accused of conspiring with the General Partner to defraud the Limited Partners rather than by a truly independent and Court supervised office holder.
11. Moreover, she submitted, by placing the General Partner into voluntary liquidation, Mr Williams has triggered a statutory time line which will force the JVLs to take certain steps by the end of May 2023.

12. One of those steps is a Court application which could be heard and determined before a different Court. This gives rise to a risk of inconsistent judgments and an outcome which could be difficult to unwind.
13. Ms Reynolds KC submitted that, taking into account all of these circumstances, Mr Williams' conduct clearly amounts to an abuse of process<sup>1</sup> and it would be manifestly unfair to the Plaintiffs should they be left without redress.<sup>2</sup>

#### Defendants' case

14. Mr Graham Chapman KC appeared for D2-D4. In summary he submitted:
  - a) The wording of the undertaking limited the undertaking in terms of time to the commencement of the hearing only. After the 24 April hearing, the undertaking was spent and no longer effective.
  - b) The belated disclosure of the Engagement Letter and its terms caused Mr Williams' concerns about the Plaintiffs' motives and objectives in seeking to appoint the proposed Receivers only to increase and it is this that informed his decision to cause the JVLs to be appointed. That decision was one that was freely open to him to make and was an entirely reasonable one.
  - c) There are no grounds for seeking the injunctive relief that the Plaintiffs seek on the present Injunction Application, and, in any event, such relief is unnecessary in light of various undertakings that have been given.
  - d) Even if the Receivership Application had been granted at the conclusion of the hearing on 24 April, it would have remained open to Mr Williams to cause the sole

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<sup>1</sup> See *In the Matter of Youbi Capital (Cayman) GP* (Parker J, Unreported April 4, 2023), at paragraph [38] Parker J stated "there are no set criteria for what is and is not an abuse of process."

<sup>2</sup> Lord Diplock, in *Hunter v Chief Constable of West Midlands Police* [1982] AC 529, described the court's jurisdiction in the context of an abuse of process as "... the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

shareholder of the General Partner to voluntarily wind up the General Partner in accordance with its statutory right to do so under sections 116 and 117 of the Act.

- e) Placing the General Partner into voluntary liquidation therefore could not “frustrate” the Receivership Application, and means that there is no basis for the Plaintiffs to have brought the Injunction Application.

## Determination

### The law

#### *The test for granting injunctive relief*

15. Section 11 of the Grand Court Act (2015 Revision) provides that

*“(1) The Court shall be a superior court of record and, in addition to any jurisdiction heretofore exercised by the Court or conferred by this or any other law for the time being in force in the Islands, shall possess and exercise, subject to this and any other law, the like jurisdiction within the Islands which is vested in or capable of being exercised in England by*

*(a) Her Majesty’s High Court of Justice; and*

*(b) the Divisional Courts of that Court,*

*as constituted by the Senior Courts Act, 1981, and any Act of the Parliament of the United Kingdom amending or replacing that Act.*

*(2) Without prejudice to subsection (1), the Court shall have and shall be deemed always to have power to make binding declarations of rights in any matter whether any consequential relief is or could be claimed or not.”*

16. Section 37 of the English Senior Courts Act 1981 relevantly provides that

*“(1) The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so.*

*(2) Any such order may be made either unconditionally or on such terms and conditions as the court thinks just.”*

17. GCR Order 30 provides for the granting of an injunction in support of a receivership application on an *ex parte* basis:

*(2) An application for an injunction ancillary or incidental to an order appointing a receiver may be joined with the application for such order.*

*(3) Where the applicant wishes to apply for the immediate grant of such an injunction, he may do so ex parte on affidavit.*

*(4) The Court hearing an application under paragraph (3) may grant an injunction restraining the party beneficially entitled to any interest in the property of which a receiver is sought from assigning, charging or otherwise dealing with that property until after the hearing of a summons for the appointment of the receiver and may require such a summons, returnable on such date as the Court may direct, to be issued*

18. The courts have granted injunctions in order to enforce an undertaking given to the court. In *Ottercroft Ltd v Scandia Care Ltd* [2016] EWCA Civ 867 at [12] the important factors that weighed with the judge in favour of the grant of an injunction were that he was “overwhelmingly” influenced by the undertakings given by both Scandia Care and Dr Rahimian. At paragraph 36 of his Judgment he said:

*"The claimants accepted these contractually binding promises instead of coming to Court to seek interim relief, which they would surely have obtained unless the defendants had been able to demonstrate that they would voluntarily have complied with their obligations. Unless parties accept undertakings in lieu of Court Orders, in all areas of the law the Courts would be clogged with applications for interim relief. What more could the claimants reasonably have done to protect their position? I believe that the claimants must be treated as being in no worse position than if they had come to court and obtained Interim Orders.*

19. The principles for granting injunctive relief were summarised by *Mangatal J* in *Re Xie hikun v XiO GP Limited* (unreported, 9 June 2017) at [101]

*(a) Is there a serious issue to be tried; do the Plaintiffs have a real prospect of succeeding in their claim for permanent injunctions at the trial?*

*(b) If there is a serious issue to be tried, will the Plaintiffs be adequately compensated by damages for the loss they would have sustained as a result of the Defendants continuing to do that which it was sought to be enjoined, and are the Defendants in a position to pay the damages?*

*(c) If damages would not provide an adequate remedy for the Plaintiffs, if the Defendants were to succeed at trial, would they be adequately compensated under the Plaintiffs' undertaking as to damages?*

*(d) It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of the balance of convenience arises.*

*(e) Where other factors appear to be evenly balanced and it is a counsel of prudence to take such measures as are calculated to preserve the status quo.*

*The Court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.*

20. Gee at 2-020 says:

*"The fundamental objective of the court, when weighing up all the factors, is to take the course which involves the least risk of injustice at the end of the day, if the court's decision to grant or refuse an injunction should turn out to have been "wrong" by reference to the final result at trial. So the court considers (1) the risk of injustice to the defendant if it were to grant an injunction to the claimant who at trial is, or if there was a trial would be, unable to establish his right to an injunction and (2) the risk of injustice to the claimant if it were to refuse to grant an injunction against the defendant when at trial the claimant is able to establish his entitlement to an injunction, or if there was a trial would be able to establish such an entitlement. Where the factors are evenly balanced it may be a counsel of prudence to preserve the status quo".*

*The status quo means "the state of affairs before the most significant recent...change": ESL Fuels v Fletcher [2013] EWHC 3726 (Ch) at [17] or "the position as it stands immediately before the claim is issued, or if there has been an unreasonable delay before the application for an injunction, the position immediately before the issuing of that application."*

*If the Court considers the adequacy of damages to be uncertain, it should grant injunctive relief: Leo Pharma A/S and another v Sandoz Ltd [2008] EWCA Civ 850.*



***Determination***

*Was there a breach of undertaking by Mr Williams?*

21. The Court does not accept the Plaintiffs' submission that on an objective<sup>3</sup> analysis it was clear from the terms of the Undertaking itself (and its defined terms) that it lasted until the Court determined the matters applied for on the Receivership Application.
22. The Court has carefully examined the affidavit evidence<sup>4</sup> and contemporaneous correspondence in reaching this conclusion. It has also reviewed the relevant submissions of Leading Counsel both in writing before and from the transcript of the hearing.
23. The Court has concluded that a distinction was made in the negotiations between undertakings lasting until a determination, and undertakings lasting until the hearing. An objective analysis of this material leads the Court to conclude that the undertakings given lasted only until the hearing.
24. That may explain why Mr Allison KC said “*those undertakings expire at the end of this hearing. That is the basis upon which they have been given to tide us over to today*”.<sup>5</sup>
25. As the Court, on an objective analysis of the relevant evidence, has been persuaded that the relevant undertaking agreed to elapsed in time on 24 April 2023 (the date of the Hearing), there is no breach and no serious issue to be tried. That finding is dispositive of the present Injunction Application.
26. The Court is also satisfied that even were there to have been a breach there is no arguable case for permanent relief which any interim relief would secure on an interim basis.
27. There has not, in the Court’s view, been an abuse of process. An interim injunction is not necessary or appropriate in these circumstances.
28. The Court has nevertheless taken note of the circumstances in which the *ex parte* Receivership Application was avoided, by the various undertakings proffered and countered. It has also taken note of the facts immediately preceding the appointment of JVLs in relation to the attorney communications and Mr Williams’ request that Judgment on the Receivership Application be delayed. The parties should be aware that the Court remains alive to any misuse of its procedure.

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<sup>3</sup> *Investors Compensation v West Bromwich* [1997] UKHL 28.

<sup>4</sup> From Mr Thomson and Mr Williams.

<sup>5</sup> And see § 95 (a) of his skeleton argument.

29. In the Court's view Mr Chapman KC is correct to submit that the JVLs could have been appointed even if the Court had granted the receivership order on 24 April 2023 (and given reasons later as it has now done).
30. The Court does not accept Mr Chapman KC's submission that the engagement letter on its terms provides evidence to support the allegation that the Receivers are to be in office but not in power *'so as to achieve an outcome which enabled the Plaintiffs to conduct those parts of the proceedings they wished to, namely the defence of the GP to D2-D4's cross claim, leaving the GP's defence to the Plaintiff's own claim and the pursuit of the GP's counterclaim against the Plaintiffs to 'wither on the vine'* through want of funding. That is not the case as can be seen by the terms of the Court's Judgment dated 25 May and directions given on 29 May 2023.
31. As to costs, the Court has given directions that the costs of the Receivership Application and this Injunction Application are to be dealt with together.



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