



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

FSD CAUSE NO. 268, 269, 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED

AND IN THE MATTER OF LONG VIEW II LIMITED

AND IN THE MATTER OF GLOBAL FIXED INCOME FUNDS I LIMITED

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

- and -

PRINCIPAL INVESTING FUND I LIMITED

LONG VIEW II LIMITED

GLOBAL FIXED INCOME FUND I LIMITED

First Respondents

- and -

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED

LV II INVESTMENT MANAGEMENT LIMITED

FLOREAT INVESTMENT MANAGEMENT LIMITED

Second Respondents

*230417- In the matter of Principal Investing Fund I Limited et al. – FSDs 268, 269 & 270 of 2021 (IKJ)—
Ex Tempore Judgment*

IN CHAMBERS¹**Appearances:**

Mr James Collins KC instructed by Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited for the Petitioner and the Non-Party Applicants

Mr Michael Bloch KC instructed by Mr Ben Hobden and Mr Alan Quigley of Forbes Hare for the Second Respondents

Mr Ben Valentin KC instructed by Mr Jason Mbakwe of Carey Olsen for the Joint Provisional Liquidators

Before: The Hon. Justice Kawaley

Heard: 17 April 2023

Judgment Delivered: 17 April 2023

HEADNOTE

Application to further particularise Amended Defence to just and equitable winding-up petition in support of collateral purpose defence-late application-allegation that Petitioners' beneficial owner conspired with a provisional liquidator prior to his appointment to "bring down" the Fund Managers' principals-public interest in airing

¹ The hearing took place in private. Counsel will be afforded an opportunity to suggest any redactions and to make corrections to the appearances before the Judgment is published.

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RULING ON SECOND RESPONDENTS' AMENDMENT SUMMONSES

The application

1. This is a Summons filed by the 2nd Respondent in each of the three Petitions dated 15 April 2023 which seeks the following principal relief:
 - (1) an Order permitting the Second Respondent to further particularise its Amended Defence dated 21 June 2022 by the serving and filing if necessary of the Further and Better Particulars of Defence as shown in Schedule 1 to this Summons;
 - (2) Secondly, an Order requiring the Petitioner to give discovery and simultaneous inspection of the documents referred to in paragraph 11 of the First Affidavit of David Lee and electronic communications and electronic records of communications between 6 July 2020 and 5 July 2021 in relation to the identification, selection and engagement of the following persons to act court appointed joint provisional liquidators: (a) personnel of Ernst & Young and (b) personnel of Kroll and its predecessor firms, Mr Cosimo Borrelli;
 - (3) Thirdly, an Order requiring the Joint Provisional Liquidators to give discovery and inspection in relation to the identification, selection and engagement of Mr Cosimo Borrelli to act as a court appointed joint provisional liquidator;
 - (4) Fourthly, an Order that the Second Respondent has permission to adduce two further affidavits sworn on 6 April 2023 as evidence in chief of the deponents at the hearing of the Petition in these proceedings.
2. The new particulars which it is sought to file in substance but not in form by way of amendment to an existing collateral purpose plea essentially rely on the evidence said to have been collected by private investigators through covert observations of Mr Wang, the Petitioner's beneficial owner, and also one of the Receivers, Mr Pearson. I do not think the observations actually mention Mr Pearson other than as being part of the conversations;

but more significantly it is suggested that conversations involving Mr Borrelli were overheard and recorded by the private investigators.

3. In essence, the allegations are that Mr Wang conspired with Mr Borrelli, in particular, before his appointment as one of the joint provisional liquidators to, in the words of one of the notes, “bring them down”, the “them” being Floreat whose principals are behind the 2nd Respondents.

The respective arguments

4. The application was vigorously opposed by the Petitioners and Mr Collins KC submitted that the applications should be dismissed applying the following legal principles. Firstly, he referred to the 1999 *White Book*, paragraph 20/0/2, which says this:

“The overriding principle with regard to amendments is that contained in rule 8, namely that generally speaking all amendments will be allowed at any stage of the proceedings and of any document in the proceedings other than a judgment or order on such terms as to costs or otherwise as the court thinks just. This principle is subject to the countervailing rule of practice that an amendment will be refused or disallowed when, if it were made, it would result in prejudice or injury which cannot be properly compensated for by costs. Accordingly, as a general rule, either party is allowed to make any amendment in his own pleadings or other proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of and occasioned by the amendment, provided there has been no undue delay on his part and provided also that the amendment will not injure or prejudicially affect any vested rights of his opponent. But if the application is made mala fides or if the proposed amendment is sought to be made after undue delay or will in any other way unfairly prejudice or cause detriment to the other party or is irrelevant or useless or would raise merely a technical point, leave to amend will be refused.”

5. The application was advanced by Mr Bloch KC on the fairly straightforward basis that the allegations might be true or false in the final analysis, but the nature of them was such that the Court could not simply brush them aside. The allegations, if true, would decisively undermine any entitlement of the Petitioners to obtain winding-up orders because if the Petitions were, in fact, brought for the collateral purpose of bringing down Floreat and not to seek legitimate relief, and if at least one partial provisional liquidator had been

informally retained before formally appointed, the Court could not possibly grant the relief sought.

6. The application was opposed on the broad basis that it is difficult to imagine an application which was so unreasonably late and which would cause so much disruption to the trial process. In this regard reference was made to the fact that the application does not simply seek to amend, to bring the pleadings into line with existing evidence but also seeks leave to adduce entirely new evidence at almost the latest imaginable stage. In the Petitioner's Skeleton Argument, reference was made to the law relating to late evidence. In paragraph 11.2 it was submitted:

“The Court does have jurisdiction to extend time, even where the application is made after the expiry of the period set by a previous order, but in such cases, the party is in reality seeking relief from sanction. Consequently, the Denton principles apply: In re Wolf Rock (Cornwall) Ltd [2020] EWHC 2500 (Ch). These principles were considered by the Grand Court in Cedrus Investments Limited v Abidin and Tata Artha Group [2019] (1) CILR 39 and summarised in McGrath Tonner (A Firm) v Khatidja McLean (Unreported, Walters J, 1 February 2022):

‘a) The court should identify and assess the seriousness and significance of the failure to comply with any rule, practice direction or court order;

b) The court should consider why the default occurred; and

c) The court should evaluate all of the circumstances of the case so as to deal with the case justly.’ ”

Findings

7. I accept that the overarching duty of the court is to serve the interests of substantive justice. Reliance was also placed on the 4 April 2023 decision of Doyle J in *In the Matter of New Frontier Health Corporation*, FSD 74 and 72 of 2022 (DDJ), Judgment dated 4 April 2023 (unreported), where he emphasised the importance of compliance with Court orders and promoting effective case management in FSD cases.
8. Looking at the question of the seriousness and significance of the delay, there is no question that in this case there is no reasonable explanation for the delay. However, in considering why the default has occurred, this new claim is not a standard and routine one. It seeks to

advance a case of a serious misuse of the processes of this Court using evidence obtained in a very unorthodox, although not unfamiliar, way. In these circumstances, in my judgment, it is not as straightforward as it might otherwise be to simply conclude that, because this application has not been brought forward earlier, it is being brought forward for the predominant purpose of disrupting the Court proceedings.

9. As far as evaluating all the circumstances of the case in regard to admitting new evidence, the Court is bound to have regard to the question of not just will justice be done, but will justice be seen to be done. As regards will justice be done, any disruption to the trial timetable will obviously diminish the Petitioner's right to have their civil rights determined within a reasonable time. But equally, ignoring these allegations and allowing the 2nd Respondents to be left with the impression that the Court is keen to sweep unpleasant allegations under the carpet, will diminish their fair hearing rights and very arguably diminish the standing of this Court for upholding not just justice, but also the appearance of justice².
10. In my judgment, the most pivotal consideration as to whether this application should be granted or refused is the materiality of the allegations that have been raised to the disposition of the Petitions. Mr Bloch KC beguilingly proposed that the entire trial going forward should actually be devoted to considering this issue. What that submission did is to indicate that if this new allegation were to succeed, it would quite possibly be dispositive of the Petitions; and if these allegations were to fail, it would likely be dispositive of the Petitions in the other direction.
11. In my judgment, the question as to whether or not there has been an attempt by the beneficial owner of the Petitioners to misuse the processes of this Court is something which is material to a significant extent to the way the Court will analyse the evidence that is

² In the course of the hearing of the Petitioners' Confidentiality Summons, heard three days earlier on 14 April 2023, reference was made to *R-v- Sussex Justices ex parte McCarthy* [1924] 1 KB 256 at 258 where Lord Hewart CJ famously stated that "*it is not just of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.*"

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already before it. And, in these circumstances, as reluctant as I am to accede to the present application, due to its unusual nature, I feel compelled to accept it.

Ancillary matters

12. As regards the question of directions, I will hear counsel further on directions. But I am inclined to accept, broadly, the proposals made by the 2nd Respondents because it seems to me that, for the various reasons urged by Mr Collins KC for the Petitioners and Mr Wang and by Mr Valentin KC for the Joint Provisional Liquidators, that if as they contend these allegations are misconceived, they should not need much more time than the 2nd Respondents propose they should have to discredit them.
13. The further issue that I am asked to decide is whether there has been a collateral waiver by the Petitioners through their concession that privilege should be waived in relation to documents relating to the approach to Ernst & Young. And in my view, there is no basis for finding that that express waiver embraced the further subject matter that the 2nd Respondent sought to gain access to.
14. As far as the Joint Provisional Liquidators are concerned, Mr Valentin KC pointed out that their position is ultimately simple, that they have nothing further to disclose and, in those circumstances, accepting that this Court must have some jurisdiction to order disclosure on the part of its officers. I decline to make any order for discovery by them.
15. I will hear Mr Collins KC to clarify what his position is on the disclosure that is sought against the Petitioners.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT