IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 258 OF 2021 (DDJ)

IN THE MATTER OF THE GRAND COURT RULES 1995 (AS AMENDED)

AND IN THE MATTER OF JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND (IN PROVISIONAL LIQUIDATION)

BETWEEN:	**JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND (IN PROVISIONAL LIQUIDATION)**		**PLAINTIFF**
AND:	**(1)**	**POWERFUL WARRIOR LIMITED**	**FIRST RESPONDENT**
	(2)	**SHI KAIYI**	**SECOND DEFENDANT**
	(3)	**HU JING**	**THIRD RESPONDENT**
	(4)	**YANG DONGMEI**	**FOURTH RESPONDENT**

IN CHAMBERS

Appearances:	**Mr. Matthew Goucke and Miss Harriet Ter-Berg, Walkers (Cayman) LLP, on behalf of the Plaintiff**
Before:	**The Hon. Justice David Doyle**
Heard:	**2 September 2021**
Ex Tempore Judgment Delivered:	**2 September 2021**
Draft transcript of Judgment circulated:	**13 September 2021**
Transcript of Judgment Approved:	**15 September 2021**

HEADNOTE

Ex parte application - application for the appointment of receiver over shares –exercise of Court's discretion to appoint receivers to protect the subject matter of dispute – injunctive relief (alone) insufficient - serious issue to be tried – balance of convenience

JUDGMENT

Introduction

1. I shall now deliver a judgment in proceedings that are yet to be allocated an FSD number. I describe these proceedings as the receivership proceedings and I state the following by way of introduction. Jian Ying Ourgame High Growth Investment Fund (the **Fund**), which is in provisional liquidation, has filed a summons (the **Application**) which it wishes the court to consider on an *ex parte* without notice basis. The joint provisional liquidators of the Fund are Christopher Kennedy of Alvarez & Marsal Cayman Islands Limited and Tiffany Wong of Alvarez & Marsal Asia Limited (the **JPLs**). The Respondents to the Application are Powerful Warrior Limited (**Powerful Warrior**, a company stated to be incorporated in the British Virgin Islands) and Shi Kaiyi, Hu Jing and Yang Dongmei (collectively, the **Individual Recipients**), who are individuals apparently resident in the People's Republic of China (**PRC**).

2. By the Application, the Fund seeks an order appointing Edward Simon Middleton of Alvarez & Marsal Asia Limited (the **Receiver**) as a receiver to receive 132,464,366 shares (the **Subject Shares**) in the Seventh Defendant to the Writ, Ourgame International Holdings Limited (**Ourgame**), with powers to exercise the rights conferred on a holder of the Subject Shares (but no right of sale), and associated injunctive relief.

3. Ourgame is a Cayman Islands incorporated company limited by shares listed on the Hong Kong Stock Exchange.

4. The purpose of the relief sought is to preserve the value of the Subject Shares pending determination of the claim, in which the Fund asserts a continuing proprietary interest in the Subject Shares. It is

mainly to prevent further transfers of the Subject Shares and to address continuing potential dilution concerns.

5. The general endorsement on the Writ of Summons states that the Plaintiff, namely the Fund, seeks a declaration that the purported transfer of 132,464,336 shares in Ourgame and share certificates numbered 046 to 049 to Powerful Warrior on or around 31 March 2021 (the **March Transfer**), was entered into as a result of the breach of fiduciary duty of Mr Xiong Hui and Mr Zhang Jian without proper authority and it was void and/or voidable. There is also relief sought in connection with the subsequent transfers of the shares and an application for an order rectifying Ourgame's register such that the Plaintiff is recorded as the holder of the Subject Shares. There are claims in respect of setting aside the March Transfer, equitable compensation, accounts, declarations in respect of constructive trusts, restoration, rectification of the register, interest and costs.

6. The Defendants to the Writ of Summons are Mr Xiong Hui, Mr Zhang Jian, Powerful Warrior, the Individual Recipients, and Ourgame.

The *ex parte* without notice issue

7. The first issue to deal with is whether it is appropriate to proceed on an *ex parte* without notice basis. The JPLs of the Fund say that if the Application was made on notice to the Respondents, there is a real risk that its purpose would be frustrated. There is specific evidence of this: see for example paragraph 8 of Kennedy 5.

8. The purpose of the relief sought is to preserve the value of the Subject Shares and such purpose can be achieved by (i) ensuring that the Subject Shares are not transferred or purportedly transferred into the hands of further recipients and (ii) taking steps to safeguard against the potential dilution issue.

9. I accept that in view of the circumstances in which the Subject Shares were transferred from the Fund, there is good reason to suppose that if the Application was made with notice, yet further transfers may be made. I note that there has been some correspondence with Powerful Warrior and the Individual Recipients without substantive responses, but simply one confirmation of receipt.

10. The transfer of the shares to Powerful Warrior and then to the Individual Recipients, and the lack of explanations in that respect, causes this Court some considerable concern. It is unfortunate that the JPLs and Segal J were not aware at the hearing on 27 July 2021 that Powerful Warrior had transferred the Subject Shares to the Individual Recipients on 2 July 2021.

The relevant law on the *ex parte* without notice issue

11. I now refer briefly to the relevant law on the *ex parte* without notice issue. Recently, on 24 August 2021, I delivered an *ex tempore* judgment in *Cathay Capital Holdings III, L.P. v Osiris International Cayman Limited* (unreported, 30 August 2021) with the transcript being approved on 30 August 2021 and being put online. In that judgment, I touched upon the position in respect of *ex parte* without notice hearings. I referred to Lord Hoffmann's judgment in *National Commercial Bank Jamaica Ltd v Olint Corpn. Ltd* [2009] UKPC 16 at paragraph 13, and also section B1.2 (a) (ii) of the Financial Services Division Guide, indicating that applications should be made on notice unless: *"there are good reasons for making the application without notice, for example because giving notice would or might defeat the object of the application"*.

Determination of the ex parte without notice issue

12. In the circumstances of the case presently before me I am persuaded, largely for the reasons advanced in the skeleton argument of the JPLs of the Fund dated 27 August 2021, that this is one of those exceptional cases where it is appropriate to proceed without notice. Frankly, the circumstances in which the Subject Shares have been transferred on two occasions, excites suspicions.

13. In summary, if notice is given, I am satisfied that there is a real risk that the Subject Shares could be further transferred and as such may frustrate or defeat the Fund's claim. If notice is given, further steps may be taken in an endeavour to defeat the efforts being made by the JPLs in respect of the Subject Shares. This is a good reason to proceed without notice. The purpose of the *ex parte* without notice hearing would or might be defeated if notice were given.

The evidence

14. I have considered, in detail, the evidence filed in support of the Application. I note that as at 30 March 2021, the Fund, alongside two other shareholders, Glassy Mind Holdings Limited (**Glassy Mind**) and CMC Capital Partners (**CMC**) (together with the Fund, the **Independent Shareholders**), was in a position to exercise voting control of Ourgame.

15. It is stated that during April and May 2021 the Fund acting at that time by its directors offered assurances and undertakings and adduced, throughout the contested proceedings which led to the appointment of the JPLs in respect of the Fund, unsworn evidence to the effect that the Fund continued to hold the Subject Shares, but it had subsequently transpired that, in fact, the Subject Shares had already been transferred to Powerful Warrior by the March Transfer.

16. A review of the history of this matter shows that Ourgame gave notice of an EGM to take place on 28 July 2021, (the **July EGM**), whose apparent purpose was to pass an ordinary resolution granting the board a general mandate to issue an additional 20% of shares in Ourgame. The Fund says that if this had been taken forward, the Independent Shareholders would have lost the ability to block an ordinary resolution.

17. The JPLs of the Fund applied for injunctive relief against Ourgame (the **Injunction Application**). Segal J did not make an order adjourning the July EGM as sought in the Injunction Application, but was satisfied that there was a serious issue to be tried as to the setting aside of the March Transfer of the Subject Shares.

18. Segal J granted an Order (the **Injunction**), in effect prohibiting Ourgame from allowing Powerful Warrior to cast any vote or accept any vote cast by Powerful Warrior or any other person in respect of the Subject Shares.

19. Importantly, since Segal J's Injunction, further information has emerged:

    (1) Contrary to the position represented to the JPLs and Segal J by Ourgame, the Subject Shares had in fact been transferred, on 2 July 2021, to the Individual Recipients (the **July**

Transfer). That is a matter of great concern.

(2) The JPLs have contacted Powerful Warrior and the Individual Recipients but have received no substantive responses. I think the JPLs are justified in saying that if there was an innocent explanation, that could and should have been provided promptly. The silence further excites suspicion that something irregular is going on.

(3) The JPLs are now able to say with greater certainty that the Fund received no consideration in respect of the March Transfer.

20. Very few details are available in respect of the previously concealed July Transfer. The JPLs have sought assurances from Ourgame which they say, if given, may have obviated the need for the present Application. The responses have not provided any comfort to the JPLs. Of more concern is that there have been no substantive responses from Powerful Warrior or the Individual Recipients and the real fear is that there may be, or indeed may already have been, further transfers. The urgent assistance of the Court is requested to prevent further transfers pending the determination of the dispute in respect of the Subject Shares.

21. By email dated 30 July 2021 Maples and Calder (Cayman) LLP (**Maples**), on behalf of Ourgame, wrote to Walkers, the attorneys acting for the JPLs, indicating that "*the interest transferred from the Fund to Powerful Warrior Limited was subsequently transferred in three separate tranches to three individuals, Shi Kaiyi, Hu Jing and Yang Dongmei, by three instruments of transfer dated 2 July 2021*". This was news to the JPLs. It is, to say the least, somewhat unfortunate that such information was not put before the JPLs and Segal J in respect of the application for the injunction.

22. I have also seen the minutes of a meeting of the directors of Ourgame, stated to be held via telephone on 5 July 2021 and chaired by Mr Li Yangyang, at which the share transfers were "*approved, confirmed, and ratified*".

23. I also note the various correspondence including: (i) Walkers' letter on behalf of the JPLs to Maples on 1 August 2021, especially paragraphs 5, 6, and 14, (ii) communications on 2 August 2021 sent by the JPLs to the Individual Recipients, seeking various confirmations and asking whether they

had any connection with Ourgame and each other, and (iii) the various reminders, including on 17 August 2021. I have looked at the correspondence between Maples and Walkers. The relevant correspondence gives no comfort in respect of the *prima facie* irregularities regarding the transfers of the Subject Shares.

The relevant law on the appointment of receivers over shares

24. I have also considered the relevant law. As is well known under section 11(1) of the Grand Court Act (2015 Revision), this Court, in effect, has the same jurisdiction as the High Court of Justice of England and Wales. At paragraph 31 of the Skeleton Argument of the Plaintiff, dated 27 August 2021, the English statutory provision is set out as follows:

"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."

25. Mr. Goucke has also, helpfully, brought my attention to the authorities, and I am grateful to him for his assistance to the Court. I shall just refer to three authorities.

26. The first is the decision of Sears J in *Ka Wah International Merchant Finance Ltd v Asean Resources Ltd* (1986) 8 IPR 241, High Court of Justice of Hong Kong. Sears J at page 248 stated:

> *"...In my judgment there is here clearly a serious risk to the defendants' investment in Ocean Front and that, as I have said before, is the only clean asset. In order to control these shares and preserve their value it is necessary for Receivers to be appointed in the manner proposed. It is pointless for the court merely to grant an injunction in the Mareva form restraining the defendants from disposing of these shares. What is important is to control the operations of Dato Yap and the Lows in Singapore. Now, I accept that this appears, at first blush, to be a radical step in that a Hong Kong court is seeking to control a company which is operating in a foreign jurisdiction, but what I am doing is to appoint Receivers who are officers of this court and answerable to this court, to take such steps as are considered right so that the value of these shares is preserved.".*

27. The second is the decision of Males J in *Cruz City 1 Mauritius Holdings v Unitech Ltd & Others* [2014] EWHC 3131 (Comm). At paragraphs 48 and 49 Males J states:

"The assets of subsidiaries

48. Receivers can be appointed to exercise the rights of shareholders. Thus in Ka Wah International Merchant Finance Ltd v Asean Resources Ltd (1986) 8 IPR 241, receivers were appointed with a power of management over shares to exercise the rights of shareholders. More recently, Lakatamia Shipping Co v Nobu [2014] EWCA Civ 636 shows that a receiver can only be appointed over the assets of the judgment debtor itself and that assets of a company in which the judgment debtor holds shares are not assets of the judgment debtor, even in the case of a 100% shareholding. (I leave on one side, for this purpose, any possibility of such an order pursuant to the Chabra principles). However, a receiver would be able to exercise the judgment debtor's rights over its shareholdings which are assets of the judgment debtor itself. That could include a sale of the shares, the exercise of voting powers, the appointment of directors and seeking a winding up of the subsidiary companies and, in consequence, a distribution of any of their surplus assets.

Ancillary orders

49. As appears from the passages cited above from Derby v Weldon (No. 6), the English court will, in an appropriate case, do what it can to render the appointment of receivers effective. That must include the making of appropriate ancillary orders to assist the receivers in the performance of their functions including, where appropriate, to assist the receivers in the exercise of the judgment debtor's rights as a shareholder of subsidiary companies. Such orders were made in Masri where they were approved by the Court of Appeal (see [23] and [183], and the order set out in the Appendix to the judgment) and in TMSF (see [8] and [61]). Lawrence Collins LJ's reference in Masri at [183] to the demands of justice being the overriding consideration was expressly made in the context of the need "to make orders to render any other order of the court effective"."

28. Thirdly, Mr. Goucke also properly drew my attention to Kawaley J's unreported judgment in *Hudson Capital Solar Infrastructure GP, LP (suing in its capacity as general partner of Hudson Solar Cayman LP) v Sky Solar Holdings Limited* (unreported, 27 August 2021). At paragraphs 25 and 33 of that judgment Kawaley J stated:

" 25. Generally, the applicant for interim injunctive relief in the form of a freezing or receivership order must demonstrate (a) a good arguable case on the merits of the claim, (b) a real risk of unjustified dissipation, and (c) that it is just and convenient to grant the relevant relief. In the present case (a) was not in dispute, and the main focus was on limb (b). It was self-evident that if limb (b) was not satisfied, limb (c) could not possibly be met."…

> 33. *Absent "solid evidence" of a risk of "unjustified dissipation" it will not generally be just and convenient to grant intrusive interim relief such as a freezing order or (especially) the appointment of a receiver. These principles were all expressly or impliedly accepted by the Plaintiff's counsel at the ex parte hearing. These principles are, it must be admitted, often easier to state in the abstract than they are to apply in an infinite variety of different commercial contexts. The pivotal analysis will generally focus on whether the impugned transaction appears in substantive terms to be either a legitimate or a bogus one*."

29. All these cases, of course, depend on their own precise facts and circumstances. The facts and circumstances of *Hudson Capital* were very different to the facts and circumstances of the case presently before me. *Hudson Capital* concerned a go-private transaction and an application for a freezing order as well as a receivership order.

Determination of the Application

30. I shall now come to my determination of the Application. Stripped of its volume and complexity and reduced to its bare essentials, the context of the present application is quite simple and straightforward. The position of the JPLs of the Fund is as follows.

31. The Fund held the Subject Shares in Ourgame. Prior to the appointment of the JPLs, the Fund transferred the Subject Shares to Powerful Warrior on 31 March 2021 for a stated much reduced value. The JPLs of the Fund now say that on review no monies have been received by the Fund and the JPLs of the Fund have commenced proceedings for the return of the Subject Shares to the Fund.

32. An EGM of Ourgame was due to take place on 28 July 2021, at which an ordinary resolution was going to be passed, granting the board a general mandate to issue an additional 20% of shares in Ourgame. If that had taken place, there would have been a dilution of the shares held by the Fund and other entities described as Independent Shareholders.

33. The JPLs of the Fund on 26 July 2021 urgently applied for an injunction to stop the EGM taking place. Shortly before the hearing, Ourgame permitted the JPLs to attend the company's offices in Beijing to inspect the register of members. The register indicated that the registered holder of the Subject Shares was Powerful Warrior. Ourgame for reasons, best known to itself, did not at that

time disclose that the Subject Shares had been transferred again from Powerful Warrior to the Individual Recipients on 2 July 2021 with the board of directors of Ourgame approving such transfer on 5 July 2021, well before the hearing on 27 July 2021. An objective bystander might reasonably and rhetorically ask the question, "Exactly what is going on here?"

34. It appears from what I have read and heard to date that something irregular is happening in respect of the Subject Shares. Firstly, they were transferred to an entity whose name was not initially forthcoming. The stated consideration was at a considerable undervalue and it has recently been confirmed that, in fact, the Fund appears to have received no monies in respect of the transfer. The JPLs and Segal J at the time of the hearing on 27 July 2021 were not aware that the Subject Shares had been transferred from Powerful Warrior to the Individual Recipients. The JPLs have asked for explanations, but nothing of comfort has been forthcoming. It is no wonder that the suspicions and concerns of the JPLs have been excited and aggravated.

35. Pending the determination of the claims by the JPLs, further transfers of the Subject Shares should be prevented and the value of the Subject Shares must be preserved. This is best and most appropriately done by the appointment of receivers. This is a proportionate response to the circumstances presently put before the Court. Without such an Order, the Subject Shares may be further transferred and effectively put out of the practical reach of the JPLs of the Fund, and without such an Order, there may be further attempts to dilute the position of the Independent Shareholders.

36. I should add that at this stage, I am satisfied with the identity of the now proposed receivers. Initially, it was proposed to have one receiver resident out of the jurisdiction. And I had two thoughts in my mind. Firstly, was the receiver sufficiently independent in fact and perception? Secondly, was the fact that he was resident outside the jurisdiction a concern, and should the receiver, like one of the JPLs, be resident in the Cayman Islands? My mind, at least at this stage of the proceedings, has been put at rest by the submissions of Mr Goucke and the matter has progressed in two ways.

37. First of all, it is now proposed that a Mr Barry Lynch of Alvarez & Marsal Cayman will be a joint receiver. So that deals with the jurisdictional concern. I also note the confirmations that the

proposed receivers have not had any prior involvement with the case, and that appropriate ethical walls will be put in place.

38. I note also that under the Order that if the Second to Fourth Respondents or any of them disagree with the manner in which the receivers propose to exercise the voting powers that they may apply to the Court.

39. In my judgment, justice requires the appointment of the receivers in respect of the Subject Shares pending the determination of the legal proceedings recently commenced by the Writ of Summons or further Order. It appears to me that the appointment of the receivers is, in the circumstances of this case, just and convenient.

40. I have considered the balance of prejudice and the level of disruption likely to be caused. The appointment of the receivers is to assist in the preservation of the very property, the Subject Shares, which is the subject of the dispute. The appointment of the receivers, in this case, is the classic interim way of preserving the property, which is the subject of the dispute, until the rights of those interested can be properly determined at a full trial. The appointment of the receivers in this case will ensure that the Subject Shares are not transferred to yet further recipients. It will also ensure that the rights attaching to the Subject Shares are exercised in a manner which properly protects the interests of those allegedly interested in them. This step is essential so that the value of the Subject Shares is preserved.

41. There is plainly a serious issue to be tried in relation to a claim to set aside the March Transfer and to require the Subject Shares to be re-transferred. There has been no openness or transparency in respect of the March Transfer or the subsequent transfers and any justifications for them. There is also a serious issue to be tried that Powerful Warrior and the Individual Recipients were not *bona fide* purchasers for value of the Subject Shares. There is a serious risk that damages would be an inadequate remedy. To the extent that any damage or loss is suffered, the Fund's cross-undertaking in damages will be available, albeit limited to the assets available (I think, at the moment, at least HKD 12 million). In my judgment the balance of convenience clearly favours the appointment of receivers. In my judgment, injunctive relief would not, of itself, be sufficient. The appointment of

receivers is much more appropriate than the granting of a further injunction. I agree that the value of the Subject Shares is best preserved by the appointment of receivers.

42. I also accept that there is a risk that the Respondents may act in disregard of an injunction. I appreciate that it is the conduct of the directors which is the main cause of concern and that their undertakings previously transpired to be futile and of no protection.

43. The Court does not presently have full evidence before it as to the complete circumstances in which the Individual Recipients came to be said to hold the Subject Shares, but they are out of the jurisdiction and they may feel themselves able to ignore any injunction granted by this Court, unless and until at least it is reinforced by orders made against them in their home country. That, if it happens at all, may take some considerable time. This all reinforces the need for receivers to be appointed.

44. The existing injunction granted by Segal J will not prevent successive transfers of the Subject Shares, and the application at that stage of the proceedings was not directed towards that eventuality. The July Transfer was at that stage unknown. An injunction granted by this Court restraining the transfer of the Subject Shares is practically inadequate to deal with the real and genuine concerns of the JPLs. This reinforces the need for receivers to be appointed. The injunction granted by Segal J ensures that the Subject Shares would not be voted at the July EGM, but the appointment of receivers now provides a more effective means of ensuring that the value of the Subject Shares is preserved and that there are no further transfers of the Subject Shares.

45. I have considered the position in respect of intrusion, expense, interference, and prejudice. I accept that the terms of the appointment of the receivers go no further than is necessary and proportionate to protect the Plaintiff's rights. Any dividends and other benefits must be held by the receivers subject to further Order. The draft Order filed with the Court at paragraph 2(a)(ii) gave the receivers the right to receive dividends and other benefits in relation to the Subject Shares, but these should be retained pending further Order. It may be that the JPLs will be successful in setting aside the transfers, but if they are not, the dividends and benefits should be available for the rightful owner of the Subject Shares once that has been determined at a full trial.

46. The appointment of receivers will, of course, impact on the ability of the persons claiming entitlement to the Subject Shares to exercise the rights attaching to those shares, whether by voting or by selling them. I am satisfied however that this intrusion is necessary to preserve the position, pending the determination of the dispute.

47. I grant an Order in terms of the draft, helpfully submitted in advance of this hearing to the Court, such Order to include the amendments specified during my exchanges with counsel.

48. That is my judgment in respect of the application for the appointment of receivers.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT