



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

CAUSE NO: FSD 90 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

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

IN OPEN COURT

Appearances: **Ms Shelley White and Mr William Waldron of Walkers on behalf
of the Petitioner**

**Ms Harriet Ter-Berg of Walkers on behalf of the Joint Provisional
Liquidators**

Before: The Hon. Justice David Doyle

Heard: 14 September 2021

**Ex Tempore Judgment
Delivered:** 14 September 2021

**Draft Transcript of Judgment
Circulated:** 15 September 2021

**Transcript of Judgment
Approved:** 16 September 2021

HEADNOTE

Companies Act s.92(c) – circumstances in which a company may be wound up by the Court – the period, if any, fixed for the duration of the company by the articles of association expires, or whenever the event, if any, occurs, upon the occurrence of which it is provided by the articles of association that the company is to be wound up.

Companies Act s.92 (e) – circumstances in which a company may be wound up by the Court – the Court is of opinion that it is just and equitable that the company should be wound up.



JUDGMENT

Introduction

1. There is before the Court an application to discharge the provisional liquidation and to place Jian Ying Ourgame High Growth Investment Fund (the "**Fund**") into official liquidation. I have read the bundles put before the Court and the 34 page skeleton argument filed on behalf of Kinetic Creations Global Limited (the "**Petitioner**").
2. My reading was focused on:
 - (a) the winding up petition dated 9 April 2021 (the "**Petition**");
 - (b) the judgment of Segal J dated 11 August 2021 (the "**Injunction Judgment**");
 - (c) the short fourth affidavit of William Waldron sworn on 27 August 2021 and exhibit WW-4 exhibiting the notice of this hearing in the Cayman Compass on Friday 27 August 2021 and the South China Morning Post on Friday 27 August 2021;
 - (d) the first report of the joint provisional liquidators of the Fund dated 7 September 2021 (the "**JPLs**" and the "**JPLs Report**" respectively); and
 - (e) the affirmations of Qian Zhiyi sworn on behalf of the Petitioner.

The relief sought

3. In essence, the Petitioner seeks the discharge of the Order of Segal J dated 2 July 2021, and an order that:
 - (a) the Fund be placed into official liquidation; and
 - (b) the JPLs be appointed as the Joint Official Liquidators ("**JOLs**") of the Fund.
4. The application for the winding up order is made pursuant to:
 - (a) section 92 (c) of the Companies Act (2021 Revision) (the "**Companies Act**") on the ground that the period of the Fund as set out in the articles has expired; and/or



- (b) section 92 (e) of the Companies Act on the ground that it is just and equitable that the company be wound up.

No opposition

5. No notice of appearance has been received from anyone and no one has appeared to oppose the relief sought by the Petitioner. The application is made with the agreement and support of the JPLs and all procedural requirements in respect of the winding up of the Fund pursuant to the Petition have been met.

Appearances

6. Ms Shelley White and Mr Will Waldron appear on behalf of the Petitioner, and Ms Ter-Berg appears on behalf of the JPLs. I am grateful to all Counsel for their considerable assistance to the Court.

Developments and background

7. I note all the developments since the presentation of the Petition. The Petition was presented by the Petitioner in its capacity as a contributory. Segal J in the Injunction Judgment refers to the Fund being established for a limited term (the "**Fund Term**") subject to the extension of the term by agreement amongst the shareholders.
8. The initial Fund Term was for one year ending 20 December 2018 and was subsequently extended to 20 December 2019.
9. I note the background in respect of:
- (a) the application for the appointment of the JPLs;
 - (b) the validation application;
 - (c) the appointment of the JPLs;
 - (d) the JPLs' urgent injunction application; and
 - (e) the receivership application culminating in an order being made on 2 September 2021.



Grounds for winding up

10. I am satisfied that the grounds for winding up have been established.

Section 92(c) of the Companies Act - if the period of the duration of the Fund stated in the articles expires.

11. I have considered *Re Duet Real Estate Partners 1 LP* (FSD 22 of 2020 (IKJ), unreported, Kawaley J, 9 June 2020). At paragraph 35, Kawaley J in effect stated that once a petitioner under section 92(c) of the Companies Act establishes that the duration of the legal entity has expired the following additional standing requirements will usually have to be met:

- (a) showing that there is a tangible and practical need for the winding up; and
- (b) showing that there is no more appropriate remedies that the petitioner should be left to pursue as an alternative to a winding up order under section 92(c) of the Companies Act.

12. Under the terms of the Articles, the term of the Fund expired on 20 December 2019, nearly two years ago now. The Fund has had plenty of time to effect an informal wind down. The Petitioner has been kept out of its money for significantly longer than it ever agreed to under the Articles and the Fund documentation.

13. I have considered Article 40.1 and the definitions in the Articles, supplemented by the definition of 'Fixed Term' in the Private Placement Memorandum dated February 2019. Extended Term 1 expired on 20 December 2019, and the Petitioner did not consent to the extension of the Fund to Extended Term 2, and in any event, Extended Term 2 would have expired on 20 December 2020, nine months ago now.

14. Moreover I accept the submission of Ms White that in effect Article 40.1 trumps Article 41.1.

Section 92(e) of the Companies Act - the Fund may be wound up if the Court is of the opinion that it is just and equitable that the fund should be wound up

15. I agree that this is a paradigm case for the exercise of the just and equitable winding up jurisdiction. There are many issues of concern which require further investigation. It is crystal clear that the Petitioner has justifiably lost trust and confidence in the conduct of the affairs of



the Fund by its management and the acts and omissions by one or more of the directors of the Fund.

16. It warrants the Fund being placed into official liquidation so that independent liquidators can take appropriate steps to investigate and remedy the situation insofar as possible. The JOLs will be able to pursue the recovery of the Subject Shares for the benefit of those entitled to such and the Fund's stakeholders.
17. The Petitioner as a contributory has a tangible interest in the winding up. The Petitioner has no alternative remedy reasonably available to it.
18. Martin JA, delivering the judgment of the Court of Appeal in *Tianrui (International) Holding Company Ltd v China Shanshui Cement Group Ltd* 2019 1 CILR 481, at paragraph 22, stated:

"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..."

19. At paragraph 23, the Court of Appeal added:

"It is also well settled, however, that the petition will not succeed if there exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. If it is clear at an early stage that the petition will fail on this ground, it may be struck out as an abuse of process."

20. Lord Shaw, delivering the judgment of the Privy Council in *Loch v John Blackwood Ltd* [1924] A.C. 783 at 788 stressed that the justifiable loss of confidence in management must be grounded on the conduct of the directors in regard to the company's business. Furthermore, the lack of confidence must spring not from dissatisfaction at being outvoted. However, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, *"then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up"*.
21. The serious matters of concern in respect of mismanagement and misconduct are outlined in the Petition, and subsequent events have further justified the lack of confidence.
22. Cresswell J in *Fortune Nest Corporation* (FSD 88 of 2012 (PCJ), Unreported, Cresswell J, 5 February 2013) at paragraph 8, page 24 of 80, stated:



"The question whether it is just and equitable to wind the Company up must be answered on the facts which exist at the time of the hearing, although the Petitioner is confined to the heads of complaint set out in the Petition." (Citing *Re Fildes Bros Ltd* [1970] 1 All ER 923 at 927d-f).

23. Suffice to say there is no doubt that subsequent developments have confirmed the Petitioner's pleaded concerns that there has been serious mismanagement and misconduct.
24. I note *Re Freerider Ltd* 2010 (1) CILR 486 and *RCB v Thai Asia Fund Ltd* 1996 CILR 9 and I agree that it can reasonably be said on an objectively justifiable basis that the Petitioner has lost trust and confidence in the directors' ability and willingness to manage the Fund's affairs in the best interests of the Fund and its shareholders.
25. I have also considered the JPLs' helpful first report dated 7 September 2021.
26. I note the Petitioner's case on the breach of duties by the directors and their failure to comply with the Articles, the Private Placement Memorandum and the Subscription Agreement regarding the accrued fixed return. I also note the position in respect of the abrupt removal of the investment manager.
27. I agree that in view of the loss of trust and confidence that the Petitioner's concerns in respect of breaches of duties that there is a real need for a thorough investigation into the affairs of the Fund and its officers.
28. Chief Justice Smellie 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 the making of a winding up order on the just and equitable ground. The Chief Justice also added at paragraph 43 that the liquidators should have the power to investigate as widely as the circumstances may require including an investigation into the reasons for the company's failure and the conduct of those concerned in its management.

Summary

29. In summary, I am satisfied that the grounds for a winding up order have been made out and that I should discharge the Order appointing the JPLs and appoint JOLs.
30. I am satisfied that the relevant requirements of the Insolvency Practitioners Regulations 2018 have been duly complied with insofar as Mr Kennedy and Ms Wong are concerned.

Order

31. I refer to my exchanges with Counsel in respect of paragraph 7 of the draft Order in relation to the proposed powers of the JOLs and of Part 1 of the Third Schedule of the Companies Act. I record that I considered the judgment of Jones J in *UCF Fund Limited* 2011 (1) CILR 305 and I am satisfied that the powers that remain in paragraph 7 of the draft Order following my exchanges with Counsel are necessary, specific powers in the particular circumstances of this case. I make an order in the terms of the draft Order helpfully provided by the Petitioner in advance of this morning's hearing. Such Order to incorporate the amendments which were specified during my exchanges with Counsel, particularly existing paragraphs 7(e), (f), (g) and (i) to come out, and a new paragraph 16 to be inserted at the request of Ms Ter-Berg on behalf of the JPLs in connection with the expenses and disbursements of the JPLs that should be included in the order.
32. That is my judgment in respect of this matter.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT