IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 149 OF 2010 (IKJ)

(Originally Cause No: 383 of 2007)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

IN THE MATTER OF AVENDIS GLOBAL FUND LTD (IN OFFICIAL LIQUIDATION)

AND IN THE MATTER OF AVENDIS ENHANCED FIXED INCOME TRADING LTD (IN OFFICIAL LIQUIDATION)

CAUSE NO: FSD 24 OF 2012 (IKJ)

AND IN THE MATTER OF AVENDIS GLOBAL STRATEGIES TRADING LTD. (IN OFFICIAL LIQUIDATION)

CAUSE NO: FSD 25 OF 2012 (IKJ)

IN CHAMBERS

Appearances:	**Mr Chris Keefe and Mr Chaowei Fan, Walkers, on behalf of the Joint Official Liquidators of the Companies ("JOLs")**
	Coficap SA ("Coficap") did not appear
Before:	**The Hon. Justice Kawaley**
Heard:	**4 October 2022**
Date of decision:	**4 October 2022**
Draft Reasons circulated:	**14 October 2022**
Reasons delivered:	**25 October 2022**

HEADNOTE

Liquidators' summons to dismiss shareholder's application for their removal on grounds of want of prosecution-principles governing dismissal of summons filed within a winding-up- Companies Act (2022 Revision) sections 105(1), 107-Companies Winding Up Rules 2018 Order 1 rule (1A), (2), Order 5 rule 6-Grand Court Rules 41 rules 1 (1) (8) and 4-FSD Users Guide

REASONS FOR DECISION

Background

1. The JOLs were appointed in respect of Avendis Global Fund Ltd ("AGF") on 1 February 2008 and in respect of Avendis Enhanced Fixed Income Trading Ltd ("AEFIT") and Avendis Global Strategies Trading Ltd. ("AGST") on 20 March 2012. On 6 September 2007, the JOLs had been appointed as joint provisional liquidators of AGF. On 4 October 2007, the JOLs had been appointed as joint voluntary liquidators of AEFIT and AGST. By a Summons dated 19 November 2020 but issued on 18 December 2020 (the "Removal Application"), Coficap "*on its own behalf and derivatively as a shareholder on behalf of* [AGF]" sought the following primary Order:

> "*1. THAT Mr Malcolm Cohen and Glen Trenmouth (the 'BDO-JOLs') be removed as joint official liquidators of Avendis Global Fund Ltd (in Official Liquidation) ("AGF"), Avendis Enhanced Fixed Income Trading Ltd (in Official Liquidation) ("AEFIT") and Avendis Global Strategies Trading Ltd (in Official Liquidation) ("AGST") and replaced by Geoff Varga and Mark Longbottom of Duff & Phelps (The 'D&P Liquidators').*"

2. Supplementary relief included (a) a direction that the Sanction Order made by Clifford J on 24 February 2016 be partially set aside, (b) a direction that the D&P Liquidators recover certain assets of AGF (relating to the Charles Jourdan Group) said to have been paid in error by the JOLs to AEFIT and AGST, and (c) a direction that the D&P Liquidators investigate whether a claim should be brought against the JOLs in relation to their "*wilful, alternatively negligent*" categorisation of the said assets as belonging to AEFIT and AGST. No (admissible) evidence was ever filed or served in support of the Removal Application although an unsworn draft of an 86 page Affidavit, which was purportedly intended to be sworn by Coficap's principal, Philippe Rebourg, was provided to the JOLs on 24 December 2020. The Removal Application was never to any material extent actively pursued.

3. On 19 March 2021, the JOLs served Coficap's attorneys, Sinclairs, with a Summons seeking security for costs. This Court granted Sinclairs leave to come off the record as the Coficap's attorneys, pursuant to an Order which was served on the JOLs on 1 July 2021. Sinclairs had not been replaced as attorneys of record for Coficap by the date of the present hearing.

4. By a Summons dated 18 August 2022 (the "Dismissal Application") the JOLs sought the following Orders:

> "*1. The Summons dated 19 November 2020 filed by Coficap SA ("**Coficap**') seeking, among other things, the removal of the JOLs as liquidators of the Avendis Companies, be dismissed for want of prosecution.*
>
> *2. Coficap shall pay the Avendis Companies' costs of and incidental to the Removal application, to be taxed on the indemnity basis if not agreed.*
>
> *3. Such further or other alternative relief as the Court may consider necessary.*"

5. This Summons was supported by the 8th Affidavit of Malcolm Cohen ("Cohen 8"), one of the two JOLs. Both documents were emailed to Coficap on 31 August 2022, Mr Fan of Walkers deposed, together with confirmation that the Removal Application had been listed for hearing on 4 October 2022 at 10.00am. Coficap did not appear at the assigned hearing of the Removal Application. I dismissed the Removal Application on abuse of process grounds, relying upon a somewhat different legal ground than the want of prosecution ground originally relied upon by the JOLs.

6. As the central grievance which underpinned the JOLs' application was a failure to prosecute or withdraw an unmeritorious application causing wasted costs for the three liquidation estates, I considered it appropriate for the Court of its own motion to dismiss the application on alternative legal grounds in the exercise of the Court's inherent jurisdiction to ensure that its processes are not misused. Requiring the JOLs' counsel to amend their application or prepare supplementary submissions would only have exacerbated rather than mitigated the mischief the substantively meritorious application was intended to alleviate. Counsel for the JOLs sensibly welcomed this abbreviated approach.

7. The Removal Application was accordingly dismissed on 4 October 2022 on the alternative abuse of process ground. These are the reasons for that decision.

The factual basis for the Dismissal Application

Want of prosecution

8. Cohen 8, after explaining that Coficap is the assignee of one of the investors in AGF at the time of its liquidation, deposes as follows:

> "*20. Other than service of the Removal Application, Coficap has taken no substantive steps to prosecute the Removal Application. In circumstances where Coficap had taken no steps to engage alternative Cayman islands counsel for the purposes of responding to the Security for Costs Application or otherwise prosecute the Removal Application, Walkers sent a letter to Coficap on 18 May 2022 (almost 11 months after Sinclairs ceased to act for Coficap), as follows:*

(a) Noting that:

(i) Coficap has failed to take any steps to prosecute the Removal Application in the period since it was filed on 19 November 2020;

(ii) This delay is unacceptable and is in breach of the Overriding Objective contained in the Grand Court Rules, which requires that matters are dealt with in a just, expeditious and economical way, including by ensuring that the normal advancement of the proceeding is facilitated rather than delayed;

(iii) It is clear from its conduct that Coficap has no intention of prosecuting the Removal Application; and

(iv) The JOLs wish to complete the winding up of AGF and are now seeking to resolve all issues in the liquidation, including the conclusion of the Removal Application; and

(b) Offering to agree that there be no orders as to costs in respect of the Removal Application and the Security for Costs Application if Coficap agreed to withdraw the Removal Application within 21 days…

24. Plainly, Coficap has no intention of prosecuting the Removal Application and it elected not to avail itself of the JOLs' offer to terminate the Removal Application without any costs implications."

9. Cohen 8 exhibited Walkers' letter of 18 May 2022 sent to Coficap offering to agree to the withdrawal of the Removal Application with no order as to costs if the offer was accepted within 21 days otherwise an application would be made to dismiss the Removal Application for want of prosecution or to restore the JOLs' Security for Costs application. The letter went on:

> "…*In the event that it is necessary for our clients to take such steps, our clients will seek an order that Coficap pay the costs of those applications on the indemnity basis*."

10. Coficap replied by letter dated 9 June 2022, which was clearly an open letter despite its "*Without Prejudice*" heading. An additional 14 days to respond substantively was sought on the grounds that Coficap was "*currently in the process of retaining a new local counsel in order to properly respond to your proposition*". No response was ever forthcoming, either before the service of the Removal Application on 31 August 2022 (nearly 12 weeks after Coficap's own deadline) or at or before the hearing on 4 October 2022 four weeks later.

11. It is apparent from paragraph 8 of Cohen 8, that the Removal Application was served together with an Affidavit sworn by a Sinclairs attorney which exhibited the unsworn Rebourg Affidavit. There was in effect no evidence served with the Removal Application which substantively supported it; rather there was evidence which identified potential evidence which might at some future date be filed.

Prejudice flowing from the failure to prosecute the Removal Application

12. Cohen 8 further explains the prejudice flowing from the failure to prosecute the Removal Application:

> "*25. The Trading Companies were first placed into voluntary liquidation in 2007, with provisional liquidators having been appointed over AGF pursuant to an Order of this Honourable Court dated 6 September 2007. AGF was then subsequently*

ordered to be wound up by this Honourable Court on 1 February 2008 (that is, over 14 years ago).

26. The winding up of AGF was substantially concluded prior to the filing of the Removal Application and the JOLs were preparing to seek its dissolution. All of its assets have been realized and distributed, with a small amount of cash at bank retained to pay the JOLs' remuneration and to facilitate its dissolution.

27. AGF cannot be dissolved whilst the Removal Application remains extant. Moreover, the JOLs have incurred significant costs in responding to the Removal Application on behalf of AGF which may ultimately mean that there are insufficient assets in the liquidation of AGF to meet the JOLs' remuneration. This is entirely the result of an unmeritorious application filed almost 2 years ago, which Coficap has taken no steps to prosecute. The Removal Application should be dismissed forthwith so that the 14 year liquidation of AGF can be concluded and AGF dissolved.

28. Similarly, whilst the liquidations of the Trading Companies remain ongoing, the JOLs have incurred significant costs in responding to the Removal Application on behalf of the Trading Companies, which has ultimately reduced the assets available for distribution to creditors. It has also been necessary for the JOLs to make reserves for future costs to be incurred in responding to the Removal Application, which causes considerable uncertainty in the accounts of the liquidation estates and is prejudicial to the ongoing conduct of the liquidations.

29. The Removal Application is entirely unmeritorious and should never have been brought by Coficap. It has caused and continues to cause prejudice to the liquidations of the Avendis Companies and I respectfully submit that it should be dismissed forthwith for want of prosecution by Coficap."

13. This evidence makes it clear that the Removal Application was filed when the AGF liquidation was near completion and the bulk of its assets had already been distributed. As far as AEFIT and AGST, it is made explicit that those companies are insolvent and that the relevant interests engaged are those of creditors. On its face, the Removal Application is brought by Coficap in its capacity as a shareholder. Mr. Keefe in the course of the hearing confirmed that AGF was also an insolvent liquidation.

The factual merits of the Removal Application

14. In the Seventh Affidavit of Malcolm Cohen ("Cohen 7") sworn in support of the JOLs' security for costs application, it was deposed in paragraph 7 as follows:

"*(g)…In relation to the question of merits:*

(i) The Court will consider the bona fides of the claim. In this context, the Court will be asked to consider the motivation of Coficap, which is not solely that of a creditor of AGF, as well as its knowledge of the affairs of the liquidations, and its previous challenges (none of which has been progressed beyond correspondence) despite the passing of at least 4.5 years since the point was last raised by Coficap;

(ii) *It was inappropriate for the Removal Application to be brought without any letter before action, which might have significantly narrowed the issues. Coficap has already had to abandon one of its most serious allegations (although it is noted that Coficap has not formally withdrawn that allegation and it has failed to apologise for making that allegation)*…"

15. It is apparent from paragraph 30 of Cohen 7 that AGF's liquidation focused on distributions to "*redemption creditors and ordinary unsecured creditors*" and that "*Coficap, as a creditor of AGF, has benefitted from dividend payments in respect of its admitted claim of US$858,632.11 totalling 43.7 cents in the dollar*". On the face of the admissible material before the Court, therefore, the only standing Coficap has *qua* shareholder of AGF to make the Removal Application is seemingly based on the somewhat convoluted premise that assets allocated to AEFIT and AGST would, if allocated to AGF, have resulted in a surplus for AGF shareholders. There was no suggestion that Coficap was a major creditor and noteworthy that other creditors were not flocking to support its complaints about the JOLs' conduct of the liquidations.

16. However, Mr. Cohen further deposed (at paragraph 46) that it appeared that Coficap was collaterally motivated by a desire to assert its own claims in Switzerland and in certain French Proceedings over assets subject to liens in favour of AEFIT and AGST (the "Trading Companies"):

"*(g) For reasons that will be dealt with in the substantive application to be served, Coficap's assertions in relation to the claims of the Trading Companies are in any event misconceived. However, for present purposes, the relevant point is that Coficap appears to be seeking to call into question the actions taken by the JOLs over the past 10 years for its own benefit, and not for the benefit of the creditors of AGF as a whole.*"

17. Also noteworthy are the following averments in Cohen 7 in support of the JOLs' security for costs application with which Coficap never engaged and which the JOLs did not pursue after Sinclairs obtained leave to come off the record in June 2021:

> "*64…Coficap has also, (in 2016), made similar allegations without merit regarding the JOLs' conduct and threatened to make an application to enjoin the JOLs from proceeding to take proper steps in relation to the liquidations. In addition, Coficap threatened (…in 2011) to apply and have the JOLs' removed and replaced by the same two people now proposed….In both 2011 and 2016, the threatened applications were not pursued and resulted in those costs being borne by the liquidation estates which has ultimately been to the detriment of the stakeholders of each estate…*"

18. Coficap's 'claims', being raised at the very end of AGF's liquidation by an assignee of an original investor and then not pursued, seemed to be unmeritorious on an initial, superficial analysis. But by the time the JOLs' Dismissal Application came to be heard on an unopposed basis on 5 October 2022, the JOLs' evidence that Coficap's application was unmeritorious was not only unchallenged, the Removal Application itself was not supported to any substantive extent by any admissible direct evidence. Taking into account Coficap's past 'form' for not pursuing threatened removal applications on two separate occasions, the present instance of filing but not actually prosecuting the Removal Application appeared to be a paradigm case of 'déjà vu all over again'.

19. Only in the most artificial and technical sense was any 'evidence' ever filed in support of the Coficap's Summons. An unsworn affidavit filed and served in support of an urgent interlocutory application buttressed by an undertaking to file a sworn version as soon as is practicable may as matter of established practice and in the exercise of the Court's discretion, be taken into account[1]. However, an unsworn affidavit which has remained in

[1] GCR Order 41 rule 4 provides: "*An affidavit may, with leave of the Court, be filed or used in evidence notwithstanding any irregularity in the form thereof.*"

an inchoate state for almost 2 years is an entirely different matter. In surveying the evidential terrain, the Court may disregard the draft document entirely when assessing the merits of the application it was purportedly intended to support.

Legal principles applicable to the Dismissal Application

The JOLs' primary legal grounds

20. In their Skeleton Argument, the legal principles upon which the JOLs relied are best reflected by the following submissions:

> "*15. Both the House of Lords in Birkett v James and this Court in Cayman Islands Civil Aviation Authority v Island Air Limited recognised that a court would generally not dismiss actions that were instituted within, and still remained within, the statutory limitation periods. It would only do so 'only in exceptional circumstances', such as where the previous proceedings 'induced the defendant to do something which will create more difficulties for him in presenting his case at the trial than he would have had if the previous proceedings had never been started'.*
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> *16. As for the test to establish want of prosecution, this was set out in Birkett v James as follows (at 804):*
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> > *'The power [to dismiss for want of prosecution] should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.' (Emphasis added)*
>
> *17. This Court in Cayman Islands Civil Aviation Authority v Island Air Limited adopted a slightly different reformulation of the test in Birkett v James:*

'Where a defendant is seriously prejudiced by a writ being issued long after the cause of action has accrued, albeit within the limitation period, the action can only be dismissed for want of prosecution if (a) the delay subsequent to the issue of the writ exceeds the time limits prescribed by the rules of court; (b) the delay is inordinate and inexcusable having regard to the delay before the issue of the writ, and (c) the delay after the issue of the writ has increased, by more than a minimal amount, the prejudice already suffered by the defendant by reason of the delay in bringing the action.""

21. It was submitted that because no limitation period applied to applications to remove liquidators, the Court could nonetheless dismiss the Removal Application because the "exceptional circumstances" exception in *Birkett-v-James* applied. Aspects of the Removal Application (e.g. the reference to a derivative claim and the prayer for the replacement liquidators to be directed to sue the JOLs) hinted at an application within the liquidation which could have been pursued by way of separate action by writ outside of the liquidation. However, it appeared to me from the outset that the *Birkett-v-James* test was far more onerous than the dismissal test the JOLs were actually required to meet in relation to an interlocutory summons which had been prosecuted, by not prosecuting it properly at all, in a way which was manifestly an abuse of the process of this Court.

22. It was far from clear that, applying the *Birkett-v-James* principles in the way they are ordinarily applied in relation to a freestanding action, it was possible to fairly conclude (even in the context of an unopposed application) that (a) the delay was inordinate and inexcusable and (b) the prejudice complained of qualified as prejudice in *Birkett-v-James* terms. The type of prejudice usually contemplated in the want of prosecution context, where prejudice has to be shown because there has been no contumelious delay, envisages the trial of a writ action the fairness of which the delay has undermined. It seemed to me that the dismissal on want of prosecution grounds doctrine was only strictly applicable to applications to dismiss an entire action and that the abuse of process doctrine was a much more flexible tool available for use in relation to interlocutory applications such as an application made within a winding-up proceeding which had not been prosecuted with due dispatch.

The distinction between abuse of process and want of prosecution

23. The distinction between the doctrines of abuse of process and want of prosecution, and the way they may factually overlap, may be illustrated fairly shortly. In *Iceberg Ltd-v-Winegardner (The Bahamas)* [2009] UKPC 14, Lord Scott opined as follows:

> "7. *Their Lordships respectfully concur in the approach taken by the House in Grovit v Doctor. There had been over two years delay when nothing had been done to prosecute the action. This was because the plaintiff had 'literally no interest in actively pursuing this litigation'. The deputy judge had so found on the evidence. As Lord Woolf noted, delay in prosecuting an action and abuse of process are separate and distinct grounds on which an application to strike-out the action may be made but may sometimes overlap. Want of prosecution for an inordinate and inexcusable period may justify a striking-out order but 'if there is an abuse of process, it is not strictly necessary to establish want of prosecution.' (647H). Where, however, there is nothing to justify a strike-out order other than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorising the delay as an abuse of process without clarity as to what it is that has transformed the delay into an abuse and, where necessary, evidential support. In Grovit v Doctor the added factor was the judge's finding, made on the evidence, that the plaintiff had lost interest in the libel proceedings he had commenced and had no intention of prosecuting them to judgment. No comparable finding had been made by Lyons J in the present case and the evidential basis for any comparable finding is not apparent to their Lordships.*
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> *8.Birkett v James [1978] AC 297 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied -*
>
> > *'... either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have*

a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party' (per Lord Diplock at 318).

The present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible? ..."

24. These principles have been approved by this Court (Richard Williams J) in *Sandcroft-v-Reliable Industries Limited* [2019 (1) CILR 77]. The present case, like *Iceberg*, is also "*not one where there has been any contumelious default*". There was arguably, but not "*certainly*", "*inordinate and inexcusable delay*". But the present case was also a case where it was far from clear that "*the delay has given rise to a substantial risk that a fair trial will not be possible*". In short, the want of prosecution test seemed an ill-fitting suit for the legal and factual matrices of the present case despite the fact that in general terms it seemed incontrovertible that there had been serious delay causing prejudice to the liquidation estates.

25. At the same time, this non-alignment of the primary legal and factual dismissal grounds relied upon did nothing to detract from the obvious substantive merits of the application. The present interlocutory civil context was obviously far removed from the criminal context in which a lawyer for the Coficap would be entitled to jump up and exclaim: "*if the glove does not fit, you must acquit!*" But had Coficap elected to appear and oppose the application, the most cogent technical point which could have been raised was that the *Birkett –v-James* requirements were not met on the facts of the present case.

26. Abuse of process, as applied in relation to the dismissal of interlocutory applications (as opposed to applications to strike-out an entire action), appeared to me to be a more appropriate legal ground upon which to base the present strike-out application. As the final prayer in the Dismissal Summons explicitly invited the Court to grant, *inter alia*, "*alternative relief*", no question of any need to amend and re-serve the Summons arose.

Abuse of process in the interlocutory domain: governing principles

27. In *JSC VTB Bank-v-Skurikhin et al* [2020] EWCA Civ 1337, in the context of considering the jurisdiction to strike-out an interlocutory application on abuse of process grounds, Phillips LJ opined as follows:

> "*47. In Hunter v Chief Constable of the West Midlands Police [1982] AC 529 HL at 536C, Lord Diplock referred to:*
>
> *'.. 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…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.'…*
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> *49. The fact-sensitive nature of the enquiry was further emphasised in Laing v Taylor Walton [2007] EWCA Civ 1146, where Buxton LJ at [12], after setting out the passage above from Lord Diplock's speech in Hunter, stated:*
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> *'The court therefore has to consider, by intense focus on the facts of the particular case, whether in broad terms the proceedings that it is sought to strike out can be characterised as falling under one or other, or both, of the broad rubrics of unfairness or the bringing of the administration of justice into disrepute."*" [Emphasis added]

28. In summary, this Court possesses an inherent power which ought properly to be exercised to prevent a party to proceedings before it misusing the Court's processes in a way which either:

    (a) causes manifest unfairness to other parties; or

    (b) otherwise brings the administration of justice into disrepute.

29. In my judgment it is not accidental that the breadth and flexibility of the abuse of process doctrine was emphasised in the *VTB Bank* case where the issue was "*whether, and subject to what qualifications, it is an abuse of process for a party to apply to set aside an interlocutory order on the grounds that there has been a material change of circumstances when the party brought about the change itself*" (paragraph 1). The English Court of Appeal upheld the trial judge's decision to dismiss the interlocutory application on abuse of process grounds. There was no reference made to the principles developed in the parallel jurisdiction to dismiss or strike-out an entire action on abuse of process grounds, which classically requires a more cautious approach by the Court. As David Doyle J opined in *Re Aquapoint LP* FSD 157/2021, Judgment dated 23 November 2021 (unreported) at paragraph 10:

> "*(10) It has been often and rightly said that the court's jurisdiction to strike out a claim advanced by a plaintiff or petitioner is to be exercised very sparingly and only where the clearest grounds are shown for doing so. The reason for this practice is clear. Although a court may at a preliminary stage regard a claim as tenuous and having a negligible chance of success, the plaintiff is nonetheless entitled to the court's adjudication on it on the merits unless it is a claim which the court is satisfied cannot succeed (Bingham LJ in Copeland at paragraph 300)…*"

30. Dismissing or striking-out an entire action is almost invariably a far more 'draconian' order for a court to make than dismissing or striking-out an interlocutory application within a proceeding without directly depriving the applicant altogether of the right to a full adjudication of their substantive rights. Dismissing an entire action will typically extinguish the claimant's chose-in-action (or statutory right of an action); dismissing an interlocutory application will typically merely deprive the applicant of the ability to seek a particular remedy ancillary to its substantive property rights. Of course, substantive rights may in certain circumstances be determined by what are technically interlocutory applications within a winding-up (such as appeals against rejections of proofs of debt) in which case the distinction between an application to summarily dismiss an interlocutory application and an entire action may be less significant. The most pivotal practical consideration will usually be the extent to which it is possible to fairly determine the merits before the facts are fully explored at 'trial', a forensic task which will generally be more difficult if the 'trial' involves oral evidence and the cross-examination of live witnesses.

The legal characterisation of the Removal Application

31. The Removal Application was not a civil action to vindicate a private law claim which constituted a property right vested in Coficap. Nor was it a 'substantive' statutory right of action akin to the right to present a winding-up petition or the right conferred on creditors to prove their debts. Coficap's statutory application right was, most directly, ancillary to the Court's statutory supervisory jurisdiction over official liquidators which the Court is empowered to appoint and remove on the application of creditors and/or contributories. Less directly, the application right conferred on creditors and contributories to apply for the appointment and removal of official liquidators may be viewed as ancillary to their more substantive right to commence winding-up proceedings.

32. Dealing first with the appointment jurisdiction, section 105 of the Companies Act (2022 Revision) pertinently provides:

> "*(1) For the purpose of conducting the proceedings in winding up a company and assisting the Court therein, there may be appointed one or more than one person to be called an official liquidator or official liquidators; and the Court may appoint to such office such person as it thinks fit, and if more persons than one are appointed to such office, the Court shall declare whether any act hereby required or authorised to be done by the official liquidator is to be done by all or any or more of such persons.*" [Emphasis added]

33. Although as a matter of practice the Court will ordinarily have regard to the wishes of the majority of relevant stakeholders as regards who the official liquidators should be[2], the legal power to determine who to appoint is vested by the Act in the Court because an important part of the function of official liquidators is "*assisting the Court*" in relation to the winding-up proceedings which the liquidators are "*conducting*" under the Court's supervision. The removal jurisdiction must be construed in this closely connected statutory context:

> "**Removal of official liquidators**
> *107. An official liquidator may be removed from office by order of the Court made on the application of a creditor or contributory of the company.*"

[2] See e.g. *Re Parmalat Capital Finance Limited* [2004-05 CILR 22] per Henderson J at paragraphs 18-21.

34. Removal can only be justified if this is shown to be in the best interests of the liquidation and only a person entitled to a distribution generally has standing to seek such removal. As the Cayman Islands Court of Appeal (Rowe, Ag JA) held in *Johnson and Dinan-v-Deloitte and Touche* [1997 CILR 120][3]:

> "*McPherson, The Law of Company Liquidation, 3rd ed. (1987) was the only other academic authority cited. In dealing with removal of liquidators, the learned author cited several examples from the cases where the liquidator has been removed for impropriety, misconduct, unfitness or if the court is satisfied that it is in the best interests, i.e. the real, substantial and honest interests of the liquidation. Then the learned author continued (op. cit., at 228-229):*
>
> *'This requirement may be satisfied by proof of some breach of duty or want of efficiency or appearance of partiality or conflict of duty on the part of the liquidator, but it also seems to be enough to show that winding up can be conducted more cheaply or more effectively by some other person. And since the creditors and contributories themselves are usually the best judges of what is in the interests of the liquidation, the court will take account of their wishes in deciding whether a liquidator should be removed, and may direct that meetings be held in order to ascertain their views. But, while their wishes are relevant, they are certainly not decisive, for the seriousness of removing a liquidator requires that consideration of fairness to him should not be left out of account, as might occur if the matter were left simply to the unfettered control of creditors and contributories. Consequently, those who assert that the liquidator should be removed are under a duty to establish at least a prima facie case that this is for the general advantage of the persons interested in the winding up….'*
>
> *In my view the passages quoted from Halsbury's Laws and from McPherson highlight the predominant position of the creditors in the winding up of an insolvent company subject only to the court's duty to protect the reputation of liquidators from those creditors…*
>
> *I accept as good law the propositions of Mr. Hunter that, apart from the liquidator himself, a former liquidator disqualified by reason of ceasing to be a recognized insolvency practitioner, and the Secretary of State or similar body acting under statutory powers, the only persons that can apply to the court for the removal of a liquidator are those persons who will participate, or are likely to participate, in the*

[3] At pages 176,178. Section 107 in its current form appears to have been amended to give effect to the standing limb of this decision.

distribution of the assets of the company, i.e. creditors and contributories." [Emphasis added]

35. Implicit in the removal jurisdiction is the assumption that the application will be made not by way of a freestanding proceeding commenced without the winding-up proceeding in relation to which the official liquidators were appointed, but rather within the winding-up proceedings in question. Consistent with this construction of section 107, the Removal Application was filed within the existing winding-up proceedings in which the JOLs were initially appointed. The standing conferred on creditors and contributories to seek the removal of an official liquidator is quite obviously, in my judgment, not a "right of action" analogous to the right to petition to wind-up a company in vindication of their contractual rights against the Company. Whether or not an official liquidator should be removed requires an assessment not of the merits of the removal applicant's claim against the company, but rather an evaluation of the merits of the complaint that the incumbent liquidator is no longer capable of properly conducting the winding-up as a whole as an independent officer of the Court.

36. Where the removal applicant is the sole stakeholder, there may be considerable practical overlap between the substantive rights and interests of the applicant and the disposition of the removal application, but the principle remains the same. The relevant consideration is whether or not the interests of the liquidation as a whole require a new liquidator. And there should be no grounds for reticence about striking-out a removal application on abuse of process grounds because of anxiety about depriving the applicant of a full adjudication of the merits of its substantive claim. Dismissing an application for the removal of official liquidators summarily on abuse of process grounds does not in any direct sense deprive the applicant of a full adjudication of any personal claim. Rather it involves a summary finding that an application designed to advance the interests of the liquidation as a whole has been pursued in a manner which has had the contrary effect.

Applicable procedural rules

37. The Removal Application was properly made by way of an interlocutory summons. Companies Winding Up Rules 2018 ("CWR") Order 5 rule 6 provides as follows:

"**Application for Removal and Appointment of New Official Liquidator (O. 5, r. 6)**

6. (1) An application by a creditor or contributory for an order that the official liquidator be removed shall be made by summons (referred to in this Rule as a 'removal summons').

(2) A removal summons shall be served upon –

(a) the official liquidator; and

(b) each member of the liquidation committee; or

(c) counsel for the liquidation committee, if an attorney has been appointed by the liquidation committee with authority to act generally; and

(d) such other creditors or contributories as a Court may direct.

(3) A removal summons shall be supported by an affidavit containing all the facts and matters relied upon.

(4) A removal summons must also nominate a qualified insolvency practitioner whom the Court can appoint in succession to the removed liquidator and every person so nominated must swear an affidavit which complies with the requirements of Order 3, rule 4…." [Emphasis added]

38. CWR Order 5 rule 6(3) may have been complied with in a literal or technical sense, but it was not (having regard to the evolution of events after the Removal Application was served) complied with in any substantive way. Coficap only served an Affidavit sworn by an attorney on the JOLs which exhibited a draft of an affidavit which might potentially have been filed and served in support of the Removal Application but which never in fact was sworn or filed. GCR Order 41 applies to winding-up proceedings by virtue of CWR Order 2. Accordingly:

(a) by virtue of GCR Order 41 rule 1(8), an unsworn affidavit fails to comply with the requirement that it be signed and sworn; and

(b) by virtue of GCR Order 41 rule 5(3), the attorney's Affidavit which was sworn could not validly support the client's unsworn averments because an "*affidavit sworn by an attorney shall not be admissible in any cause or matter unless the attorney has direct*

personal knowledge of the facts and matters to which the attorney deposes and does not appear as advocate in the cause or matter".

The merits of the alternative abuse of process ground for dismissing/striking-out the Removal Application

39. As regards AGF, the failure to prosecute the Removal Application was clearly an abuse of process because by the time the Dismissal Application was heard, it was obvious that:

    (a) Coficap had no intention of pursuing its Summons within a reasonable time or at all. This inference may be drawn principally from the fact that (1) no substantive supporting evidence for the Summons was ever filed and/or served and (2) Coficap's initial attorneys after filing the Summons on 19 November 2020 ceased to act in June 2021 and were never replaced;

    (b) the Removal Application remaining on the Court's file and not being duly prosecuted was unfair to the JOLs and contrary to the interests of the liquidation as a whole because it impeded the closure of the liquidation at the tail end of the liquidation process after all intended distributions had been made. Requiring the JOLs to continue to deal with the Removal Application exposed them to the risk of incurring expense for which they might not be remunerated;

    (c) the Removal Application could only be regarded as entirely unmeritorious because no substantive evidence had ever been validly filed in support of it over a period of nearly 2 years and Coficap had previously made unsubstantiated removal threats to the JOLs the dealing with which caused financial prejudice to the liquidation estates;

    (d) Coficap unreasonably declined the JOLs' invitation to withdraw the Removal Application with no order as to costs, and unreasonably required the JOLs to pursue the present application.

40. As regards AEFIT and AGST, the failure to prosecute the Removal Application was an abuse of process because by the time the Dismissal Application was heard, it was clear that:

    (a) Coficap had no intention of pursuing its Summons within a reasonable time or at all. This inference may be drawn principally from the fact that (1) no substantive supporting evidence for the Summons was ever filed and/or served and (2) Coficap's

initial attorneys after filing the Summons on 19 November 2020 ceased to act in June 2021 and were never replaced;

(b) the Removal Application remaining on the Court's file and not being duly prosecuted was unfairly prejudicial to the Trading Companies' stakeholders because it required the JOLs to incur expense dealing with the relevant Summons thereby reducing the sums otherwise available for distribution with no corresponding benefit to the liquidation estates;

(c) the Removal Application could only be regarded as entirely unmeritorious because no substantive evidence had ever been validly filed in support of it over a period of nearly 2 years and Coficap had previously made unsubstantiated removal threats to the JOLs the dealing with which caused financial prejudice to the liquidation estates; and

(d) Coficap unreasonably declined the JOLs' invitation to withdraw the Removal Application with no order as to costs, and unreasonably required the JOLs to pursue the present application.

41. Analysing the position more broadly, the primary function of a winding-up proceeding is generally to wind-up a company's affairs in an expeditious and efficient manner which maximizes the returns to stakeholders. The right conferred on creditors and contributories by section 107 of the Companies Act to apply to remove an official liquidator is designed to facilitate the efficacy of that primary liquidation function. Filing and never properly pursuing an unmeritorious application which only undermines the efficacy of the liquidation process is a particularly egregious misuse of the processes of this Court.

Costs

42. In the JOLs' counsel's Skeleton Argument, the following submissions were advanced in relation to the Summons' prayer for costs to be awarded in relation to the Removal Application (which it sought the dismissal of) on the indemnity basis:

> "*35. Order 62, rule 4(11) of the Grand Court Rules 1995 (Revised Edition) sets out the jurisdiction of the Court to make an order for indemnity costs:*
>
> > *'The Court may make an inter partes order for costs to be taxed on the indemnity basis only if it is satisfied that the paying party has conducted the*

proceedings, or that part of the proceedings to which the order relates, improperly, unreasonably or negligently'. (Emphasis added)

36. In Three Rivers D.C. v Bank of England, Tomlinson J categorised the principles which should guide the Court's determination as to whether a party should pay costs on the indemnity basis, relevantly, as follows:

'(1) The court should have regard to all the circumstances of the case and the discretion to award indemnity costs is extremely wide to Coficap that the JOLs would make an application seeking that the Removal

(2) The critical requirement before an indemnity order can be made in the successful defendant's favour is that there must be some conduct or some circumstance which takes the case out of the norm.

(3) Insofar as the conduct of the unsuccessful claimant is relied on as a ground for ordering indemnity costs, the test is not conduct attracting moral condemnation, which is an a fortiori ground, but rather unreasonableness.

(4) The court can and should have regard to the conduct of an unsuccessful claimant during the proceedings, both before and during the trial, as well as whether it was reasonable for the claimant to raise and pursue particular allegations and the manner in which the claimant pursued its case and its allegations.

(5) Where a claim is speculative, weak, opportunistic or thin, a claimant who chooses to pursue it is taking a high risk and can expect to pay indemnity costs if it fails…' (Emphasis added)

37. Such categorisation was considered and later applied by the Honourable Chief Justice Smellie in the Cayman Islands in the case of Talent Business Invs. Ltd v China Yinmore Sugar Co. Ltd.

38. Here we have a case where the Removal Application has been commenced, yet no steps have been taken by Coficap to prosecute the Removal Application for almost two years. That in and of itself is unreasonable such that it is respectfully submitted, takes this case 'outside of the norm'.

39. Further, the Offer Letter quite reasonably provided Coficap with an opportunity to withdraw the Removal Application (in light of its failure to prosecute the

Removal Application) with no costs consequences. The Offer Letter expressly pointed out to Coficap that the JOLs would make an application seeking that the Removal Application be dismissed for want of prosecution and an order that Coficap pay the JOLs' costs on the indemnity basis. The JOLs gave Coficap 21 days to consider that proposal, but Coficap failed to provide any substantive response within that period or at all.

40. In circumstances where the JOLs have now been forced to incur the costs of making an application to have the Removal Application dismissed for want of prosecution, it is clear that these proceedings have been conducted so unreasonably that this an appropriate case for the making of a costs order on the indemnity basis, and this Honourable Court is invited to do just that."

43. These were compelling submissions. In *Talent Business Investment Ltd.-v- China Yinmore Sugar Co. Ltd.* [2015 (2) CILR 113], Anthony Smellie CJ (after citing GCR Order 62 rule 4(11) summarised the Cayman Islands legal position in relation to awarding costs on the indemnity basis as follows:

"*36 In Ahmad Hamad Algosaibi & Bros. Co. v. Saad Invs. Co. Ltd. (1), the following guidance was given, as summarized in the headnote (2013 (2) CILR at 346–347):*

'In considering awards for indemnity costs, the court's focus should be primarily on the conduct of the losing party, not on the substantive merits of the case. Such an award should be made only in exceptional circumstances, such as where the losing party had behaved improperly, negligently or unreasonably. Advancing a claim which was unlikely to succeed, or which did in fact fail, was not by itself sufficient for the award of indemnity costs; to justify such an award, there should normally be an element in the losing party's conduct which deserved a mark of disapproval. That conduct would need to be unreasonable to a high degree, though may fall short of deserving moral condemnation." [Emphasis supplied.]

37 In Al Sadik v. Investcorp Bank BSC (2), Jones, J., applying the same test, ordered (2012 (2) CILR 33, at para. 14 and paras. 16–17) the plaintiff to pay indemnity costs because he had conducted the proceedings improperly and unreasonably:

> *'14 In my judgment, a proceeding, or some identifiable part of it, can only be said to have been conducted 'improperly' within the meaning of r.4(11) if the court is satisfied, in all the circumstances of the case, that a party has*

invoked the court's jurisdiction illegitimately or abused the process in a way which attracts moral condemnation. A party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly . . .

16 . . . The outcome of litigation frequently turns upon the court's findings of fact and it is not unusual for such findings to depend upon the court's assessment of the credibility and truthfulness of the witnesses. By itself, this outcome does not lead to the conclusion that the losing party had no legitimate case and was abusing the court's process in some way. It can only be said that Mr. Al Sadik is guilty of substantive misconduct to the extent that he advanced a case which he knew to be false.

17 . . . I have come to the conclusion that the conduct of Mr. Al Sadik's case was 'improper and unreasonable' only in one respect. His claim to have the benefit of a guaranteed return was raised after the market crash triggered by the Lehman Brothers bankruptcy and pursued relentlessly to the bitter end, notwithstanding that he knew in his own mind that he had not been given any enforceable guarantee. In this respect, I conclude that Mr. Al Sadik's case was conducted improperly and unreasonably within the meaning of r.4(11)."

38 This decision later received the approval of the Court of Appeal in Asia Pacific Ltd. v. ARC Capital LLC …(2015 (1) CILR 299)…"

'In my view, Jones, J. was correct to take the view, in the Sadik case, that 'a party who asserts a cause of action when he knows that he has no legitimate basis for doing so is acting improperly' within the meaning of O.62, r.4(11). He was correct to draw the distinction between a party who is advancing an honest case—but who fails because the court finds the evidence which he has adduced in support of that case to be incredible or untruthful—and a party who is advancing a case which he knows to be false."

44. Where a proceeding or an application is dismissed or struck-out on abuse of process grounds, there will usually be a reasonable starting assumption that some or all of the successful party's costs will be awarded on the indemnity basis if there is any significant overlap between the abuse of process established and the costs the receiving party has incurred. Where an application ought not to have been made at all, costs of the entire application will logically be taxable on the indemnity basis. In *Re Oakrun Precious Metals*

Fund Limited [2019(1) CILR Note 17], my findings were summarised in the Law Report Note as follows:

> "*(2) Echelon had in general terms standing to seek relief under s.99 of the Companies Law. For costs purposes the critical issue was whether, in all the circumstances, it was reasonable for the validation order to have been sought at all… Echelon would be ordered to pay the petitioner's costs of the application for a validation order on the indemnity basis. The application was an abuse of process.*"

45. In the present case, as Mr Keefe reinforced in oral argument, the JOLs ought not to have been required to deal with the Removal Application at all. There was nothing to displace the strong inference that Coficap never intended to prosecute the Removal Application and had no conviction about its merits. The JOLs initially, and quite reasonably, assumed that because Coficap had instructed attorneys to file and serve the Removal Application, had identified potential alternative liquidators and had drafted a lengthy affidavit which it represented would be sworn in support thereof, that the application was a serious one. The JOLs as a result reasonably instructed their attorneys to file an application for security for costs. When Coficap's attorneys obtained leave to come off the record, the JOLs waited for more than a reasonable period of time for fresh attorneys to be instructed before making an eminently reasonable offer to seek no costs if the Removal Application was promptly withdrawn. The JOLs' attorneys warned that indemnity costs would be sought if they were compelled to seek relief from the Court. When that offer was tacitly rebuffed the JOLs filed and served the Dismissal Application which Coficap ultimately did not oppose.

46. All of these steps on the JOLs' part, in terms of a benefit for the estates, were for nought because in hindsight it is clear that Coficap acted in a manifestly improper and unreasonable way by electing to file and serve the Removal Application at all.

47. The facts of the present case provided a paradigm example of a factual matrix in which the very making of the application, in light of (1) the complete failure to prosecute it in any meaningful way apart from a substantively defective service of it and (2) its apparently complete lack of merit, was an abuse of process. It followed that the JOLs (on behalf of the Companies) were entitled to be awarded their costs to be taxed if not agreed on the indemnity basis.

Summary

48. Coficap's application to remove and replace the JOLs was served on Christmas Eve 2020 and thereafter was neither prosecuted nor substantively supported by any admissible evidence. For the above reasons on 4 October 2022, I dismissed that application on the grounds that it constituted an abuse of process and awarded the JOLs costs to be taxed on the indemnity basis.

THE HON. MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT