IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD0059 OF 2023 (AWJ)

IN THE MATTER OF SECTION 46 OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF JUNIPER LIFE SCIENCES LTD

BETWEEN:

RBH HOLDINGS

Plaintiff

AND:

JUNIPER LIFE SCIENCES LTD.

Defendant

IN CHAMBERS

CORAM: **Walters J. (Acting)**

Appearances: **Mr Richard Millett KC instructed by Mr Jonathon Milne and Mr Jordan McErlean of Conyers for the Plaintiff**
Mr Alain Choo Choy KC instructed by Mr Denis Olarou and Ms Kalyani Dixit of Carey Olsen for the Defendant

Present: **Mr Rudianto of the Plaintiff and Mr Shankar of Oon & Bazul LLP via Zoom**

Heard: **19 September 2023**

Draft circulated: **16 October 2023**

Judgment issued: **23 October 2023**

Application for leave to appeal and stay. Principles to apply and whether to grant stay if application refused pending application to Court of Appeal

JUDGMENT

1. This is an application made by the Defendant ("**JLS**" or the "**Company**") for leave to appeal against the order dated 30 June 2023 following my judgment dated 8 June 2023 (the "**Judgment**"). In the Judgment, I gave my reasons for dismissing the application by JLS for an order staying an application made by the Plaintiff ("**RBH**") for an order pursuant to s.46 Companies Act rectifying the share register of JLS (the "**Rectification Proceedings**" and the "**Stay Application**").

2. The nature of the relief sought in the Rectification Proceedings is as follows:

   2.1 A declaration that the written resolution of the board of directors of the Company dated 27 October 2022, exercising the discretion under Article 9.1(c) of the Articles of Association dated 21 December 2021 to redeem the 5,000 ordinary shares held by RBH at the par value of USD 5,000 with effect from 27 October 2022 (the "**Resolution**") constituted an exercise of a power for an improper purpose and is void (or, alternatively, voidable);

   2.2 An order that the Resolution be set aside ab initio;

   2.3 A declaration that RBH has since 27 October 2022 been and continues to be a shareholder of the Company;

   2.4 An order pursuant to section 46 of the Companies Act that the register of the members of the Company shall be rectified forthwith (including re-designating and/or cancelling shares as appropriate) such that it reflects the share register immediately prior to the passing of the Resolution with retroactive effect from 27 October 2022, and in the alternative, with effect from the date of the Court order such that RBH shall be recorded as the holder of 5,000 ordinary shares; and Sylvan Asia Growth Master Fund I Pte Ltd (the "**Sylvan Master Fund**") shall be recorded as the holder of the remaining 45,000 ordinary shares.

3. The stay was sought pursuant to section 4 of the Foreign Arbitral Awards Enforcement Act, or the Overriding Objective, or in the alternative, GCR O.12, r.8 (Forum Non-Conveniens), on the basis that the resolution of the dispute between the parties was subject to contractual terms providing for mediation and arbitration administered by the Singapore International Arbitration Centre.

4. RBH's general position is that the redemption was carried out by JLS as what has been described as a "self-help" remedy in relation to a wider dispute between Mr. Rudianto, the owner of RBH and the ultimate owners of JLS. JLS argues that all issues between the parties are covered by the relevant contractual dispute resolution clauses.

Background

5. In its skeleton argument, JLS summarized the background and issues as follows:

5.1 RBH's position is that the board of the Company had exercised its power under Article 9.1(c) improperly and that the share register of the Company should be rectified, such that RBH is reflected as the holder of 5,000 shares (the "**Article 9.1(c) Dispute**").

5.2 It is the Company's case that the Article 9.1(c) Dispute is intertwined with, and that Article 9.1(c) must be read subject to:

5.2.1 an agreement dated 12 January 2022 between (1) the Sylvan Master Fund, (2) the Company, and (3) RBH, for the issuance and allotment of shares in the Company (the "**Subscription Agreement**";

5.2.2 an employment agreement dated 16 July 2021 between Sylvan Capital Management Pte Ltd ("**SCM**") and Mr. Raymond Rudianto ("**Mr Rudianto**"), who is the 100% shareholder and director of RBH (the "**Employment Agreement**");

5.2.3 an agreement between Mr. Rudianto (and his corporate vehicles), the Sylvan Master Fund, and SCM concluded on or around 10 January 2022, as known and agreed to by the Company, for the shares in the Company to be issued to RBH, and to be held as part of a contemplated Employee Stock Option Plan programme (the "**ESOP Agreement**"); and,

5.2.4 an agreement between Mr. Rudianto (and his corporate vehicles), the Sylvan Master Fund, and SCM concluded on or around 5 August 2022, for the shares held by RBH to be returned to the Company (the "**Share Return Agreement**").

5.3 The Company's position is, it says, at least *prima facie*, supported by, amongst other things, the following salient facts. The Company was incorporated as an investment holding vehicle for the Sylvan Group (which included the Sylvan Master Fund, and SCM), and as part of a private equity venture focused on the healthcare industry ("**Project Juniper**").

5.4 Pursuant to the Employment Agreement, Mr. Rudianto had agreed to be employed as a full-time managing director of SCM, with the aim of achieving a profitable exit for the Sylvan Group from Project Juniper.

5.5 In view of Mr. Rudianto's contemplated employment with SCM, it was agreed, pursuant to the ESOP Agreement, that Mr. Rudianto would be rewarded with certain shares in the Company, as part of an Employee Stock Option Plan (the "**ESOP Shares**"). It is also said that it was agreed that Mr Rudianto (or his corporate vehicles) would hold a portion of these ESOP Shares for the benefit of other incoming employees in the Project Juniper entities. The ESOP Shares (i.e., 5,000 ordinary shares) in the Company were subsequently issued and allotted to RBH (a corporate vehicle for Mr. Rudianto) at par value, pursuant to the Subscription Agreement. The Company contends that the Subscription Agreement gave effect to the ESOP Agreement (and the Employment Agreement), which meant that RBH was able to obtain its shareholding in the Company at a nominal value and at a significant discount (i.e., 0.1% of the consideration which had been paid for the other shares in the Company).

5.6 The Company alleges that Mr. Rudianto ultimately did not fulfil the terms of the Employment Agreement and was never employed by SCM.

5.7 Consequently, it is contended, Mr Rudianto, the Sylvan Group, and SCM entered into the Share Return Agreement, pursuant to which Mr. Rudianto is alleged to have agreed to return (and/or procure RBH to return) the ESOP Shares to the Company.

5.8 It is claimed that Mr. Rudianto did not fulfil the terms of the Share Return Agreement, and RBH did not return the ESOP Shares. As there was no longer any basis for Mr Rudianto (and RBH) to retain the ESOP Shares, it is said that the directors of the Company decided to exercise their power under Article 9.1(c) of the Articles of Association, to repurchase and redeem those shares. The redemption price was fixed by JLS at the same amount which RBH had paid to acquire these 5,000 shares in the first place.

6. There are plainly disputes between the parties in relation to the Subscription Agreement, Employment Agreement, ESOP Agreement and Share Return Agreement. However, the parties differ in the following regard:

6.1 RBH says that the Rectification Proceedings concern the Article 9.1(c) Dispute which is separate and distinct from the disputes arising in relation to the agreements referred to above.

6.2 The Company disagrees. It says that the Article 9.1(c) Dispute cannot be hived off from the other underlying disputes as they all concern the basis upon which the ESOP Shares were allocated to and were to be held by RBH; hence, the resolution of the Article 9.1(c) Dispute – and, specifically, the question whether the Board of the Company properly exercised its power under Article 9.1(c) – necessarily requires determination of the other disputes.

Legal principles on an application for leave to appeal

7. The test on an application for leave to appeal is well established and is set out in *Telesystem International Wireless Inc v CVC/Opportunity Equity Partners LP*[1]:

> *"The general test of whether leave to appeal should be granted is: Does the appeal have a real (i.e. realistic, not fanciful) prospect of success? ..... In exceptional circumstances, leave will be granted even where no such prospect exists if the appeal involves an issue which should be examined by the Court of Appeal in the public interest, e.g. when a public policy issue arises or a binding authority requires reconsideration. The relative significance of the issues and the costs necessary to examine them will be a relevant factor. In an appeal on a point of law (including on the ground that a finding of the lower court is unsupported by evidence), leave should not be granted unless the court considers there is a real prospect that the Court of Appeal will come to a different conclusion that will materially affect the outcome of the case.*
>
> *In appeals on questions of fact, leave will be appropriate if the lower court has drawn an untenable inference from primary facts or should have drawn a materially different inference, and no particular benefit has been received from the courts having seen the witnesses. Leave will nevertheless rarely be given for an appeal based on the judge's evaluation of oral evidence and requiring an examination of the detail of his factual investigation. The court must give its reasons for granting or refusing leave in all factual appeals. Leave will also rarely be granted to appeal on the basis of the courts wrongful exercise its discretion, unless the case raises a point of general principle requiring the opinion of the appellate court.*
>
> ...

[1] [2001 CILR 21].

If the court is unsure whether leave should be granted, it should then refuse leave and allow the Court of Appeal to decide the matter."

8. In *Lhasa Investments Limited and Concorde International Trading S.A. v. International Credit and Investments Company (Overseas) Limited (in liquidation)*[2] the Court of Appeal stated that:

"It should be borne in mind that the Court of Appeal is only entitled to intervene and interfere in limited circumstances with the decision of a judge of first instance based on the exercise of discretion. It must be shown that (a) the trial judge had misdirected himself with regard to the principle in accordance with which is discretion had to be exercised; (b) he had taken into account matters which he ought [not] to have taken into account or failed to take account of matters which he ought to have taken into account; or (c) the decision was plainly wrong. The appellate tribunal should not merely substitute its views for those of the trial judge."

9. JLS argues that leave to appeal should be granted because there is a real prospect that the Court of Appeal will come to a different conclusion that would materially affect the outcome of the case. If leave to appeal is refused, then JLS also seeks an interim stay of the Rectification Proceedings pending the renewal of the application for leave to appeal to the Court of Appeal. It says that there is a serious question to be determined on appeal, and if a stay is not granted, there is a risk that JLS would be wound up and irreparably prejudiced, and the balance of convenience accordingly favours a stay.

FSD 106 of 2023 (AWJ)

10. At this stage it is relevant to note that there are separate proceedings in cause FSD 106 of 2023 (AWJ) (the "**Winding Up Proceedings**") commenced by RBH by the presentation of a winding up petition dated 27 April 2023 (the "**Petition**") seeking an order that JLS be wound up on the just and equitable ground. The basis for the relief sought is essentially the same as that which provides the basis for the Rectification Proceedings. Immediately before hearing this application, I heard an application by JLS in the Winding Up Proceedings for an order striking out the Petition. My judgment on that application will be handed down at the same time as this judgment.

Application for leave to appeal

[2] [1994–95 CILR 293], page 307, lies 20-29.

11. In dismissing the Company's Stay Application, I ruled that the Article 9.1(c) Dispute does not fall within Clause 18 of the Amended Subscription Agreement and that there were therefore no grounds to impose a mandatory stay of these proceedings in favour of arbitration (Judgment at [90]).

12. JLS says that, for the purposes of its application for leave to appeal, it regards my key findings being as set out below.

    12.1 The Article 9.1(c) Dispute raises an issue as to whether the directors of the Company exercised their discretionary powers under Article 9.1(c) in accordance with the *Braganza* principles and pursuant to those principles "[t]*he focus is very much on the decision-making process*" (Judgment at [82]).

    12.2 There seems to be a real and substantial dispute between Mr. Rudianto and SCM about the Employment Agreement and its alleged breach by Mr. Rudianto; and also relevant to that dispute is the alleged ESOP Agreement and Share Return Agreement, which have a bearing on what Mr. Rudianto did or did not agree to do with the shares held by RBH in the Company (Judgment at [83]).

    12.3 The evidence given on the Company's behalf suggested that the alleged ESOP Agreement was between Mr. Jeun (on behalf of SCM and the Sylvan Master Fund) and Mr. Rudianto (acting for himself and any corporate vehicle owned by himself), but the ESOP Agreement and Amended Subscription Agreement (the latter being between the Company, RBH and the Sylvan Master Fund) "*do not appear to be interrelated and interdependent contracts between common parties and the latter certainly has not been drafted in that way*" and the Court was therefore "*not in a position to assume that the Amended Subscription Agreement gave effect to the ESOP Agreement*", as alleged on behalf of the Company (Judgment at [85]).

    12.4 Even if the Amended Subscription Agreement gave effect to the ESOP Agreement, the Article 9.1(c) Dispute is "*entirely separate and distinct from"* the Title Dispute (i.e., the dispute as to the basis upon which the 5,000 ordinary shares were issued to and to be held by RBH) (the "**Title Dispute**"). The Title Dispute "*may have provided the backdrop*" to the Company's decision to repurchase RBH's shares pursuant to Article 9.1(c) (the "**Decision**"), but the Decision was "*liable to scrutiny as a matter of Cayman Islands law in its own right*" (Judgment at [86]).

12.5 It may be necessary to consider as a matter of Cayman Islands law whether the Company (as an investment holding company) and its Board should have got involved at all in a dispute between Mr. Rudianto and SCM. Furthermore, the present case seems to be distinguishable from the facts of *Nilon* because it does not involve a dispute as to whether RBH should be registered as a member of the Company; at the time of the Decision, RBH was already a registered member (Judgment at [86]).

12.6 The subject of these proceedings is the Article 9.1(c) Dispute, namely, whether the Board of the Company should have exercised its Article 9.1(c) discretion at all and whether the exercise of that discretion leading to the Decision "*was honest, rational and in good faith and in the absence of arbitrariness, capriciousness, perversity, and irrationality*"; and that exercise will not involve the Court having to decide any of the substantive issues which might flow from the Employment Agreement, ESOP Agreement, Share Return Agreement or the Amended Subscription Agreement, or having to investigate the actual dispute much further than has already been canvassed in the evidence before the Court, all such issues being "*matters of background only*" (Judgment at [87]).

12.7 As to the proper construction of Clause 18 of the Amended Subscription Agreement, there are clearly rights and obligations set out in the Amended Subscription Agreement that might form the subject matter of a dispute that would stand to be dealt with under Clause 18. However, the Company had chosen to exercise a "*self-help*" remedy under Article 9.1(c) "*to assist SCM with its position vis a vis Mr. Rudianto in the Title Dispute*", which suggested that it did not regard the issue as falling within the terms of Clause 18 (Judgment at [89]).

12.8 In my view, the Article 9.1(c) Dispute is not one that can be treated as falling within Clause 18 because it does not relate to any of the rights and obligations arising under and from the Amended Subscription Agreement (Judgment at [89]).

12.9 I also refused to grant a stay on grounds of Case Management and Forum Non Conveniens because:

12.9.1 I did not regard the Title Dispute as likely to be determinative of the Article 9.1(c) Dispute or vice versa (Judgment at [92]); and

12.9.2 In my view, the outcomes of the Article 9(1)(c) Dispute and the Title Dispute are not interdependent (Judgment at [95]).

Grounds of Appeal

Ground 1: The Judge erred in finding that the alleged ESOP Agreement and Amended Subscription Agreement were not interrelated and interdependent contracts between common parties and that he was not in a position to assume that the Amended Subscription Agreement gave effect to the ESOP Agreement.

13. In making the above finding, JLS argues that I specifically erred in the following respects:

13.1 Issue 1 - I effectively disregarded or gave no weight to the evidence before me, in the form of documents showing the background to the execution of the Subscription Agreement and the witness evidence produced on behalf of the Company (as partly summarised at Judgment [16.5]-[16.10] and [17]-[21]), that indicated that the Subscription Agreement was only executed following the conclusion of the ESOP Agreement, that the percentage shareholdings allocated pursuant to the Subscription Agreement reflected the precise percentage shareholding that it was agreed that RBH would hold pursuant to the ESOP Agreement, and that it was at least arguable therefore (if not probable) that the Subscription Agreement was entered into by way of partial implementation of the ESOP Agreement. It says that one of the important documents that I was referred to which evidenced the implementation of the ESOP Agreement by means of the Subscription Agreement, but which was not referred to in the Judgment, was the 10 January 2022 email sent by the Sylvan Group to Andrew Edgington (a director of the Company) shortly after the conclusion of the ESOP Agreement, requesting the preparation of board resolutions on behalf of the Company to reflect the allocation of the percentage shareholdings agreed for RBH and the Sylvan Master Fund "*via a share subscription agreement*". Had I taken proper account of the evidence before me, I would have concluded that there was at least a reasonably arguable case that the ESOP Agreement and Subscription Agreement were interrelated contracts.

13.2 Issue 2 - In finding that those two agreements were not between "*common parties*", I wrongly ignored or failed to take proper account of the witness evidence before me to the effect that the existence and terms of the ESOP Agreement were contemporaneously known and agreed to by the directors of the Company (Messrs. Chan, Leong and Edgington) – as it had to be since it could only be implemented as regards the allocation of shares in the Company to RBH and the Sylvan Master Fund if the Company agreed to such allocation; hence, the Company was a party to the ESOP Agreement and the parties to the Subscription Agreement (the Company, RBH and the

Sylvan Master Fund) were also parties to the ESOP Agreement. Whilst I recorded the Company's argument in this regard at Judgment [63.1], in my analysis and discussion at [82]-[90] JLS argues that I did not refer to any of the relevant witness evidence supporting the view that the Company was just as much a party to the ESOP Agreement as RBH and the Sylvan Master Fund. It says that I thereby disregarded the evidence of the commonality of parties as between the ESOP Agreement and Subscription Agreement.

13.3 Issue 3 – JLS argues that I appear at Judgment [85] to have proceeded on the assumption that I had to reach a final conclusion on the evidence before me as to whether or not the ESOP Agreement and Subscription Agreement were sufficiently interrelated and/or interdependent, but this assumption was wrong. It says that the case law summarised at Judgment [57] shows that I was only concerned with whether there was a "*real or genuine*" (or "*reasonably substantial*") dispute that fell within the scope of the arbitration clause. As such, in light of the fact that the documentary and witness evidence relied upon by the Company disclosed at least a reasonably arguable case that the two agreements were interrelated and/or interdependent and entered into between common parties, I ought to have assumed for the purposes of the Stay Application that that case was correct and proceeded to construe Clause 18 on the basis of that assumption.

Decision on Ground 1

14. In relation to each of these aspects of Ground 1, my comments are as follows:

14.1 Issue 1 – I did take account of the relevant evidence. Indeed, if paragraphs 16.9 – 19 of my Judgment are considered, they show that I clearly reviewed the evidence from Mr Chan and Mr. Jeun about the discussions and events leading up to the ESOP Agreement. That evidence also included reference to the incorporation of Margie River CS and RBH to hold ESOP shares on behalf of Mr. Rudianto pursuant to the ESOP Agreement. I made further reference to the JLS board resolution dated 12 January 2022 recording the issuing of subscriber shares to RBH and I also referred to the evidence that the Subscription Agreement was entered into the same day and which was superseded by the Amended Subscription Agreement. The fact that I did not specifically refer in those paragraphs to the email of 10 January 2022 (which in my view adds

nothing material to the issues) does not mean that I disregarded the evidence in question[3]. Indeed in paragraph 21 of the Judgment I said:

> *"Mr. Chan claims that fundamentally, the Amended Subscription Agreement was structured based on the ESOP Agreement and given that the Subscription Agreement is inextricably intertwined with the ESOP Agreement, JLS's position is that any dispute relating to the ESOP Agreement and the basis on which RBH held a 10% shareholding in the Company, as recorded in the Subscription Agreement, is a dispute that falls within the scope of Clause 18 of the Subscription Agreement…"*

14.2 Issue 2 – In paragraph 63 of the Judgment I said:

> *"Applying those principles, the Defendant says that the key considerations are as follows:*
>
> *63.1 As explained by Mr. Chan, the ESOP Agreement may have been entered into between Mr. Jeun (acting for Sylvan Group entities, including the Sylvan MF) and Mr. Rudianto (acting for himself and his corporate vehicles, including RBH), but the existence and terms of the ESOP Agreement were contemporaneously known and agreed to by JLS (through at least Mr Chan). The Defendant says that there was therefore agreement as to the terms of the ESOP Agreement between both shareholders (Sylvan MF and RBH) and JLS. This, the Defendant says is hardly surprising because the issue and/or allotment of shares in JLS (and hence the implementation of the ESOP Agreement) would necessarily have had to be agreed to by JLS.*
>
> *63.2 The Subscription Agreement was entered into on 12 January 2022 after instructions were given on 10 January 2022 by an associate of the Sylvan Group to IQ EQ to prepare board resolutions on behalf of JLS to issue shares to Sylvan MF and RBS. The Defendant says that gave effect to the ESOP Agreement."*

I then went on in paragraphs 82 – 85 of the Judgment to say as follows:

> *"82 A great deal of the evidence and submissions touch on the substance of the Article 9.1(c) Dispute and Title Dispute which are not matters currently for consideration by this court.*

[3] I did in fact refer to the email in paragraph 63.2 of the Judgment.

Indeed, the latter may never be a dispute dealt with in this jurisdiction. I have therefore taken care not to trespass into the facts or potential legal arguments too deeply when setting out below my views. It seems to me that the obvious starting point is the application of the two-fold test set out in The Republic of Mozambique. Therefore, the first issue is to identify the matter in respect of which these proceedings have been brought. As I have set out above, the Defendant has argued that a wider approach should be taken to this. It is clear that the Directors exercised their discretionary powers under Article 9.1(c) when taking the Decision. It is common ground that when doing so the Directors had to act within the Braganza Principles. I have set out at some length passages from Braganza to illustrate the approach taken by courts in such circumstances. The focus is very much on the decision-making process.

83 There seems to be a real and substantial dispute between Mr. Rudianto and SCM about the Employment Agreement and the extent to which Mr. Rudianto might have breached its terms. That is the basis upon which SCM's letter JLS dated 27 October 2022 appears to have been written as does the letter from Allen & Gledhill dated 23 November 2022. Also relevant to that dispute is the alleged ESOP Agreement and alleged Share Return Agreement which have a bearing on what Mr Rudianto did or did not agree to do with the shares held by RBH in JLS.

84 As can be seen from the submissions on behalf of the Defendant, its approach has been to seek to show that, in effect, the relationship between JLS, RBH, Mr Rudianto, Sylvan MF and SCM is intertwined by virtue of the Employment Agreement, ESOP Agreement and Amended Subscription Agreement. Intertwined to such an extent that at least the Amended Subscription Agreement gives effect to the ESOP Agreement so that the issue about RBH's retention of shares in JLS and therefore the Decision are caught by Clause 18.

85 The alleged ESOP Agreement appears to essentially be an oral agreement. It is not clear what law might apply to it or whether according to that law it constitutes a valid contract. The evidence given on behalf of the Defendants suggests that it was between Mr Jeun (on behalf of SCM and Sylvan MF) and Mr Rudianto (acting for himself and any corporate vehicle owned by himself. RBH was incorporated on 10 January 2022). Even if I had to do so I would be limited in drawing any conclusions that as a matter of Singapore law, and therefore a matter of fact, the Amended Subscription Agreement which is between JLS,

> *RBH and Sylvan MF gave effect to the ESOP Agreement. As it stands, the Amended Subscription Agreement provides for the subscription by Sylvan MF for shares in JLS. It then goes on as previously mentioned to deal essentially with certain, limited aspects of the relationship between RBH and Sylvan MF as shareholders in JLS, although I do not think that one can go as far as saying that it is a general shareholders' agreement intended to govern all aspects of the relationship between shareholders in JLS, present and future. Furthermore, despite what is alleged, the ESOP Agreement and Amended Subscription Agreement do not appear to be interrelated and interdependent contracts between common parties and the latter certainly has not been drafted in that way. I am not in a position therefore to assume that the Amended Subscription Agreement gave effect to the ESOP Agreement.*
>
> *86 Even if it did, in my view, the Article 9 (1) (c) Dispute is entirely separate and distinct from the Title Dispute. The Title Dispute may have provided the backdrop to the Decision but, in my view, the Decision is liable to scrutiny as a matter of Cayman Islands law in its own right. Indeed, a review of the Decision itself is quite possibly a secondary issue. As some of the authorities reviewed in Nilon suggest, first, it may be necessary to consider as a matter of Cayman Islands law whether JLS (an investment holding company) and the Board should have got involved at all in a dispute between Mr. Rudianto and SCM, They are third parties as far as JLS was concerned and even if they had been shareholders, the same issue arises. This is also a case that also seems to be distinguishable from e.g. Nilon because does not involve a dispute as to whether RBH should be registered as a member of JLS. At the time of the Decision, it was already a registered member and the register of members is conclusive as to that.*

I have set these passages out at some length because I feel that they provide the context for the issues raised by JLS in its application for leave to appeal. In relation to this particular issue, I do not agree with the suggestion by JLS that I made a "finding" in relation to the contracts between the parties. I prefaced that discussion in paragraphs 82 and 85 of my Judgment by clear statements that I was cautious not to engage in the substance of the various disputes between the parties and was limited in my ability to draw any conclusions about those issues.

14.3 Issue 3 – similarly, for the reasons set out above, I was proceeding on the basis that I did not have to (and could not) draw any final conclusions about such issues for the purposes of construing

Clause 18. Indeed, I prefaced paragraph 86 of the Judgment with the words *"[e]ven if [the Amended Subscription Agreement gave affect to the ESOP Agreement] …*".

15. Overall, therefore, I do not agree that any of the arguments made in relation to Ground 1 have a real prospect of success on appeal.

Ground 2: The Judge erred in holding that the Article 9.1(c) Dispute was entirely separate and distinct from the Title Dispute and that the Title Dispute merely provided the backdrop to the Decision but was not relevant to the assessment of the validity of the Decision by reference to *Braganza* and/or *Eclairs* principles.

16. In its skeleton argument JLS argues that the essence of this ground of appeal is best illustrated as follows.

16.1 If, as alleged by the Company, the ESOP Agreement and Share Return Agreement were in fact concluded, so that Mr. Rudianto (for himself and on behalf of RBH), (a) only agreed to receive the 5,000 shares for the purpose of holding them in connection with his contemplated long term employment within the Sylvan Group and the establishment of an ESOP scheme for senior management generally, and (b) subsequently agreed to return the shares to the Company once it had become clear that he might not take up employment as originally agreed, it seems inconceivable that the substance of those agreements would be irrelevant to the propriety and *bona fides* of the exercise of the Company's power to recover the shares pursuant to Article 9.1(c).

16.2 By exercising the Article 9.1(c) power, the Company would have sought to give effect to what RBH had actually agreed should happen to the shares, namely, that they should be returned to or reacquired by the Company. The exercise of the power would merely have been the means by which the parties' pre-existing agreements were implemented. In such a scenario, why, says JLS, would the exercise of the power of repurchase have been improper or in bad faith? (It might fairly, or at least arguably, be contended that it would be absurd to answer this question in the negative, as the Judgment effectively does. How can the Court determine whether the register should be rectified in RBH's favour without considering whether RBH is entitled to retain the shares in the first place?).

16.3 At the very least, it says, the surrounding circumstances and terms of the ESOP and Share Return Agreements as alleged by the Company are arguably (rather than fancifully) relevant to the

propriety and *bona fides* of the exercise of the Article 9.1(c) power. This is all that the Company needs to establish for the purposes of its application for leave to appeal.

17. It contends that for me to assert that the surrounding circumstances and terms of those agreements were merely the backdrop to the Decision also trespassed into the merits of the substantive review of the Decision. At this stage of the proceedings, it says that as rightly acknowledged in the Judgment at [57] and [82], I had to take care not to seek to make a final or summary determination of the substance of the Article 9.1(c) Dispute. Yet, by determining that the surrounding circumstances and terms of the Employment Agreement, ESOP Agreement and Share Return Agreement were mere "*backdrop*" rather than substantially relevant (or even arguably relevant) to the resolution of the Article 9.1(c) Dispute, I had effectively made a final or summary determination of an important aspect of the substance of the Article 9.1(c) Dispute, namely, with regard to how the trial judge would ultimately assess the relevance and weight to be attached to the surrounding circumstances and terms of those agreements when considering whether the Article 9.1(c) power was misused.

Decision on Ground 2

18. Again, I think that it is important to set out the relevant paragraphs of the Judgment to put these issues into their proper context.

> *"86 Even if it did, in my view, the Article 9 (1) (c) Dispute is entirely separate and distinct from the Title Dispute. The Title Dispute may have provided the backdrop to the Decision but, in my view, the Decision is liable to scrutiny as a matter of Cayman Islands law in its own right. Indeed, a review of the Decision itself is quite possibly a secondary issue. As some of the authorities reviewed in Nilon suggest, first, it may be necessary to consider as a matter of Cayman Islands law whether JLS (an investment holding company) and the Board should have got involved at all in a dispute between Mr. Rudianto and SCM, They are third parties as far as JLS was concerned and even if they had been shareholders, the same issue arises. This is also a case that also seems to be distinguishable from e.g. Nilon because does not involve a dispute as to whether RBH should be registered as a member of JLS. At the time of the Decision, it was already a registered member and the register of members is conclusive as to that.*
>
> *87 It seems to me therefore that the matter that is the subject of these proceedings (and about which there is a real or genuine dispute) is the Article 9(1) (c) Dispute; namely, whether the Board should have exercised its Article 9(1) (c) direction at all and, if it was appropriate for it to have done so,*

whether the exercise of that discretion leading to the Decision was honest, rational and in good faith and in the absence of arbitrariness, capriciousness, perversity, and irrationality. Depending on the outcome of that analysis, an order may be made under s.46 of the Act rectifying the register of members of JLS.

88 Despite Mr. Choo Choy's submission to the contrary, I am not of the view that the exercise described above will involve this court having to decide any of the substantive issues which might flow from the Employment Agreement, ESOP Agreement, Share Return Agreement or the Amended Subscription Agreement or investigate the actual dispute much further than has already been canvassed in the evidence before the court. In my view, those are matters of background only."

19. With respect to Mr. Choo Choy, I do not think that my Judgment said or can be interpreted as saying that I made a summary or final determination about what facts may be relevant to the Article 9.1(c) Dispute. The fact is that elements of the Title Dispute did provide the backdrop to the decision of the directors of JLS to redeem RBH's shareholding. This is evidenced by the letter dated 27 October 2022 sent by SCM to JLS and also the wording of the Written Resolution of the board of JLS dated the same day. What I said in the Judgment is that, in my view, there are two separate issues. The first is the Article 9.1(c) Dispute which relates to the corporate action by JLS in redeeming RBH's shares. The second is the Title Dispute itself. The extent to which the elements of the Title Dispute were expressed by the board at the time to be relevant to its decision was set out in its own records. The extent to which the elements of the Title Dispute should be taken into account as part of the Rectification Proceedings will be a matter to be argued when directions are given for trial. My comment in paragraph 88 about what further evidence might be required was simply an observation that the Court already had before it evidence of substantial detail. I am not of the view that anything that I said in the Judgment constrains any arguments in that regard; indeed, I was at pains to point out that I was taking care not to trespass into those matters (paragraph 82 of the Judgment).

20. For the reasons given, I am not of the view that Ground 2 has a real prospect of success.

Ground 3 - The Judge erred in holding that the Article 9.1(c) Dispute could be resolved by the sole application of the *Braganza* Principles and without the benefit of any further evidence.

21. It is argued by JLS that I also erred because I:

21.1 wrongly assumed that the Article 9.1(c) Dispute could be resolved by the sole application of the principles in *Braganza v BP Shipping Ltd* [2008] EWCA Civ 116 (the "***Braganza* Principles**"); and

21.2 wrongly assumed that the issues relating to the Employment Agreement, the ESOP Agreement, the Share Return Agreement, and the Subscription Agreement did not have to be considered and were merely background to the Article 9.1(c) Dispute.

22. It is further argued that I failed to have proper regard to the fact (as recorded at Judgment [70] and [74]-[75]) that RBH's attack on the exercise of the Article 9.1(c) power was not limited to reliance on *Braganza* principles but also relied on the *Eclairs* principles. On this basis, it is said that I should have found that:

22.1 the question of whether the Company's directors had exercised their powers under Article 9.1(c) for a proper purpose would also have to be resolved with reference to the principles set out in *Eclairs* and *Grand View*; and

22.2 accordingly, the Article 9.1(c) Dispute is inextricably linked and intertwined with the issues arising from the Employment Agreement, the ESOP Agreement, the Share Return Agreement, and the Amended Subscription Agreement, such that they cannot be resolved in separate forums.

23. In assessing how the "proper purpose rule" should be applied, it is said that I should have considered the two-step test set out in *Eclairs Group Ltd (Appellant) v JKX Oil & Gas plc* 2015] UKSC 71 ("***Eclairs***") and *Grand View Private Trust Co Ltd v Wong & Ors* [2022] UKPC 47 ("***Grand View***"), as follows.

23.1 First, the range of proper purposes for which the power was conferred would have to be established.

23.2 Second, the actual purpose for which the power was exercised by the directors would have to be identified – before a comparison is done to ascertain if the actual purpose of the decision-maker(s) fell within the range of permissible purposes.

24. It is argued that this two-step test is well-established and has been elaborated on in the recent decision of *TMO Renewables v Yeo* [2021] EWHC 2033.

"…i) first, the application of the purpose test turns on the ascertainment of, and a comparison between, the purpose for which the power was conferred and the purpose for which it was exercised by the directors.

ii) second, this enquiry encompasses both legal issues (construing the power) and factual issues (the actual purpose for which the power was exercised) in the relevant legal and factual context – see Lord Sumption in Eclairs at [31]: "…[t]he purpose of a power conferred by a company's articles is rarely expressed in the instrument itself…But it is usually obvious from its context and effect why a power has been conferred".

iii) third, where powers are exercised for a variety of purposes (only some of which may be improper), the exercise of the power will be tainted if the "substantial or primary" (Howard Smith), or "primary or dominant" purpose (Eclairs in the Supreme Court) was improper.

iv) fourth, the test is necessarily subjective – see Lord Sumption in Eclairs at [15]:

> *"the proper purpose rule is not concerned with the excess of power by doing an act which is beyond the scope of the instrument creating it as a matter of construction or implication. It is concerned with abuse of power, by doing acts which are within its scope but done for an improper reason. It follows that the test is necessarily subjective. 'Where the question is one of abuse of powers' said Viscount Finlay in Hindle v John Cotton Ltd 1919 SLR 625 at 630, 'the state of mind of those who acted, and the motive on which they acted, are all important'."*

v) fifth, the duty is strict in the sense that it does not depend on establishing bad faith (see Lord Sumption in Eclairs at [16] and also Hogg v Cramphorn Ltd [1967] 1 Ch 254)."

25. JLS says that the principles elucidated above were a central feature of RBH's written and oral submissions, and were also addressed on behalf of the Company (see e.g. Transcript Day 1 page 53 onward, and Transcript Day 2 page 66 line 4 onwards).

26. In construing the range of proper purposes for which the Article 9.1(c) power was conferred, JLS argues that the authorities make clear that the following documents are relevant:

26.1 the "*instrument containing the power*" (i.e. the Articles); and

26.2 the "*documents which objectively inform the context of the instrument in question… are admissible, as are substantially contemporaneous documents which are intended to be read with the [instrument]*".

The Employment Agreement, the ESOP Agreement and the Subscription Agreement, are substantially contemporaneous documents and arrangements, which were concluded at the same time that the Articles were entered into. It says that a consideration of these documents and arrangements is accordingly necessary to determine the range of permissible purposes for which the power under Article 9.1(c) can be exercised.

27. JLS says that Article 9.1(c) essentially gives the directors the power to redeem shares in the Company. It would be impossible it says to construe the range of proper purposes for the exercise of that power, without first considering the basis on which such shares were issued/allotted and held, hence the obvious connection between the Article 9.1(c) Dispute and the Title Dispute.

28. It would also be impossible it says to identify the actual purpose for which the power under Article 9.1(c) was exercised by the directors of the Company, without embarking on an enquiry into the state of mind of the said directors and the surrounding circumstances. JLS says that that is self-evident. It is said therefore that I was accordingly wrong to conclude that there would be no need to "*investigate the actual dispute much further than has already been canvassed in the evidence before the court*" (Judgment at [88]).

Decision on Ground 3

29. In paragraph 70 of the Judgment when considering the position of RBH in relation to this issue I said the following:

> *"In its written submissions the Plaintiff spent some time reviewing the basis upon which the Decision might be impugned. For the purposes of the Stay Summons it is not for me to take any decisions about the basis upon which and reasons why that might be the case but the approach to that issue is, in my view, relevant to the question of what matters might fall within the ambit of Clause 18…"*

I summarized RBH's arguments on this point and in footnotes refer to *Eclairs* and *TMO* setting out the same quote which JLS has included in its arguments in this application.

30. In paragraph 71 of the Judgment, I said:

> *"The Plaintiff argues further that although bad faith is not a necessary ingredient in the improper purpose doctrine, Cayman Islands law (as English law) nonetheless requires that a unilateral discretionary power conferred on one party must be exercised honestly, rationally and in good faith and in the absence of arbitrariness, capriciousness, perversity, and irrationality: Socimer International Bank Ltd v Standard Bank London Ltd;[4] Braganza v BP Shipping Ltd. (the "Braganza Principles")[5]. Both Braganza and Socimer have been considered by the Grand Court. It is accepted by Mr Choo Choy that the Braganza Principles do apply to the Article 9(1)(c) Dispute and the Decision which was the exercise of a discretionary power arising under the Articles and I believe that it is important therefore to review what they are in some more detail although, as I have said previously, the court is not presently tasked with reviewing that Decision."*

In his submissions for the purposes of this application, Mr. Choo Choy suggested that his submissions at the Stay Application may have caused some confusion in relation to the *Braganza* issue. From my perspective, as I believe I made clear in the Judgment, I was not taking any decisions or making any findings of fact or law about how the conduct of the directors of JLS might be impugned at the hearing of the Rectification Application. I noted what were in effect the prospective arguments of the parties in that regard as well as what I understood the general position of counsel to be. However, I do not regard that as binding either party into a position for the purposes of the Rectification Application or the directions leading up to that. I have already addressed paragraph 88 of the Judgment and do not repeat what I have said above.

31. For the reasons given, I am of the view that Ground 3 has no prospect of success.

Ground 4: The Judge erred in holding that the Company's decision to repurchase the shares pursuant to Article 9.1(c) as an act of "self-help" precluded any future attempt to arbitrate the dispute under Clause 18 of the Subscription Agreement.

32. In relation to this Ground JLS argues as follows:

32.1 It was wrong for me to characterize the Company's decision to exercise its powers under Article 9.1(c) to redeem RBH's shares as evidence that the Company "*did not regard the issue as one falling within the terms of the agreement and therefore within Clause 18*", or to deem it relevant

[4] [2008] EWCA Civ 116, [2008] 1 LR 558 (CA), at [66].
[5] [2015] UKSC 17 **[AB/12/237]**; [2015] 1 WLR 1661 (SC).

to ask whether the parties to the Subscription Agreement would have expected that (Judgment at [89], especially the 4th and 5th sentences).

32.2 As to the first point, it says that the scope of Clause 18 is an issue of objective construction. It does not matter what the Company thought the clause meant. In any event, however, it is said that the inference of inconsistency drawn by me is misconceived because, on the evidence, the Company acted as it did because it considered that it was entitled to do so and did not have to engage the dispute resolution provisions of Clause 18 - which is different from saying that the dispute resolution mechanism could not be engaged. It is argued that my approach amounts to saying that whenever a party to a dispute has decided to resort to self-help by way of satisfaction of its rights, the question whether it was entitled to do so can never fall within the language of a dispute resolution clause. JLS says that such a proposition is self-evidently – or, at least arguably, for the purposes of a leave application – wrong. (Even RBH did not advance that argument.)

32.3 As to the second point, it is said that the question posed by me is the wrong question. When ascertaining the proper scope of a dispute resolution clause, the precise nature of the actual dispute does not need to have been foreseen at time of contracting. It is said that the relevant question is whether, on the proper objective contextual construction of the dispute resolution clause, the language of the clause is capable of covering the dispute that has in fact occurred (here, the Article 9.1(c) Dispute).

Decision on Ground 4

33. In relation to the first point raised, I think that it was reasonable to draw the inference that despite being a party to the Amended Subscription Agreement the fact that JLS chose to deal with RBH's shares in the way that it did without reference to Clause 18 does suggest that it did not regard the issue as one falling within that clause. Indeed, JLS's own submissions as set out above seem to affirm that. What I did not say in my Judgment was that the dispute resolution process provided by Clause 18 could not have been engaged in relation to the issue that JLS was seeking to resolve through its self-help remedy. I also did not say that whenever a party to a dispute has decided to resort to self-help remedies then the question of whether it was entitled to so do can never fall within the language of a dispute resolution clause. That is not the issue here.

34. In relation to the second point, the approach that I took was consistent with that set out in *Fiona Trust & Holding Corporation v Privalov*[6] which I cited in paragraph 61 of the Judgment. When considering the purpose of Clause 18 its construction is to be influenced by what the parties were likely to have intended that the clause would cover and what its commercial purpose was intended to be. Therefore I do not agree that it was wrong to pose the question that I did about the intention of the parties. Paragraph 89 of the Judgment starts by reciting the wording of Clause 18 and it was in that context that I took the view that the Article 9(1)(c) Dispute was not covered by that wording.

35. For the reasons given, I do not regard Ground 4 as having a real prospect of success.

Ground 5 – The Judge erred in finding that the Article 9.1(c) Dispute did not fall within the scope of Clause 18 of the Subscription Agreement.

36. JLS argues that had I found as I ought to have done that the final determination of the Article 9.1(c) Dispute would or might necessitate consideration of the surrounding circumstances and terms of the other agreements reached (or alleged to have been reached) between the parties, including the Employment Agreement, ESOP Agreement, Subscription Agreement and Share Return Agreement, I would (and should) have concluded that the Article 9.1(c) Dispute fell squarely within the scope of Clause 18 of the Subscription Agreement.

37. It is said that it is common ground between the parties that Clause 18 of the Subscription Agreement should be liberally construed in favour of arbitration (Judgment at [60] and [77]).Where there is a valid arbitration clause, the assumption should be that the parties are likely to have intended any dispute arising out of the relationship into which they have entered to be decided by the same tribunal.

38. Clause 18 of the Subscription Agreement was drafted in broad terms, and states as follows:

> "*… any dispute, controversy or conflict arising from or* ***in relation to this Agreement****, including a dispute on its validity, conclusion, binding effect, breach, amendment, expiration and termination…".*

39. In accordance with the principles set out in *Fiona Trust*, it is argued that I should have taken a holistic view and "*look[ed] at the substance of the dispute, rather than the particular legal vehicle which it was being advanced*". However, it is claimed, I failed to do so. The net result is that the overall dispute between the

[6] [2007] 4 All ER 951.

parties to whether RBH was entitled to retain the shares initially allocated to it has been artificially spliced, with different aspects of the parties' relationship being carved out and subjected to different dispute resolution forums.

40. JLS argues that the Article 9.1(c) Dispute, in as much as it concerns RBH's entitlement to regain the shares initially allocated to it pursuant to the Subscription Agreement, is plainly (or at least arguably for the purposes of the leave application) a dispute that arises "*from or in relation*" to the Subscription Agreement. JLS says that this is correct, or at least arguably correct, on the plain and ordinary meaning (which is a naturally broad meaning) of the words "*arising from or in relation to*"; but this conclusion is further reinforced by consideration of the importance of the overall context in which the dispute as to the ownership of the shares arises, which brings into play the surrounding circumstances in which all of the agreements (or alleged agreements) between the parties were reached.

41. It is said that I was wrong to reason (at Judgment [89], last sentence) that Clause 18 does not apply to the Article 9.1(c) Dispute because that dispute "*is [not] related to any of the rights and obligations arising under and from the Amended Subscription Agreement*". JLS argues that the fallacy in this reasoning is that it assumes that only a dispute about rights and obligations set out in the Amended Subscription Agreement is covered by Clause 18. On its proper construction, however, it says that Clause 18 is not limited to disputes about rights and obligations contained in the agreement itself. It extends to any dispute "*arising from or in relation to*" the agreement. Thus, a dispute as to whether, having regard to all agreements between the parties, RBH is truly entitled to the shares that the Subscription Agreement records RBH as being entitled to is a dispute "*arising from or in relation to*" the Subscription Agreement.

Decision on Ground 5

42. This Ground of appeal touches on some of the earlier Grounds. My analysis in paragraphs 82 to 90 of the Judgment sets out my approach and position in relation to the identification of the matter in respect of which the Rectification Proceedings have been brought (the Article 9.1(c) Dispute). I set out clearly how I have distinguished that from the Title Dispute. I explained my view that the Article 9.1(c) Dispute can be resolved without affecting the outcome of the Title Dispute. Indeed, If RBH is successful with the Rectification Proceedings then it will result in JLS's register of members being returned to its original form showing RBH as a shareholder. Whether RBH's ultimately retains its shares after the Title Dispute is resolved is an entirely separate matter. The reasons that the directors say that they took their decision on 27 October 2022 to redeem RBH's shares touch on issues arising in the Title Dispute but as stated in the

Judgment that does not bring the Article 9(1)(c) Dispute within Clause 18. On that basis, I do not agree that JLS has a real prospect of success in relation to this Ground.

Ground 6 – Even if the Article 9.1(c) Dispute does not fall within Clause 18 of the Subscription Agreement, the Judge should have stayed proceedings on grounds of Case Management and Forum Non Conveniens and application for an interim stay.

43. JLS argues that further and/or in the alternative, there are strong and compelling reasons to grant a case management stay and/or a stay on grounds of Forum Non Conveniens. It says that this would be the case, even if (which it is not accepted) the Court finds that the Article 9.1(c) Dispute does not fall within the scope of Clause 18 of the Subscription Agreement (such that a mandatory stay should be granted). JLS says that I erred in this regard, because I took the view that the Article 9.1(c) Dispute and the Title Dispute were not interdependent (Judgment at [95]). JLS says that this, however, ignores the fact that the Rectification Proceedings are based on the *Eclairs* and *Braganza* principles, the application of which would necessitate a consideration of the basis upon which the 5,000 shares were issued to RBH. It argues that as it says, I rightly observed, the "Title Dispute" is an issue "*that is capable of being dealt with by an arbitral panel or court in Singapore with the benefit of expert evidence*" (Judgment at [95]). Consequently, and if a stay is not granted, there would be a real risk of inconsistent findings, since an arbitral tribunal and the Cayman Court would effectively be asked to rule on the closely connected and overlapping issues (i.e., whether RBH is entitled to the shares).

44. In the alternative, it says the Rectification Proceedings should still be stayed, even if I was right to find that the Article 9.1(c) Dispute and the Title Dispute are not interdependent (which JLS does not accept). The Rectification Proceedings will not finally dispose of the disputes between the parties. The truth it says is that, even if the share register of the Company is rectified (or not), RBH's ultimate interest in the Company would still be subjected to *"mediation arbitration or litigation in Singapore*" (Judgment at [92]). As such, and if the Rectification Proceedings were to proceed, there would be a real risk that the parties and Court would be put to the time and expense of determining a question that is ultimately academic.

45. In relation to an interim stay of the proceedings pending the determination of its appeal, including an application direct to the Court of Appeal for leave to appeal if I dismiss their current application. Mr Choo Choy argues that the Court should consider whether the grounds of appeal are arguable and whether the balance of convenience lies in favour of a stay[7]. He argues that the Grounds of appeal are arguable and do

[7] *The Deputy Registrar of the Cayman Islands Government v Day and Another* [2019 (1) CILR 510].

have a realistic prospect of success. He goes on to argue that the balance of convenience lies in favour of granting a stay for the following reasons:

45.1 if JLS is forced to defend these proceedings on the merits then it will thereby be held to have waived any entitlement to seek arbitration pursuant to Clause 18 of the Amended Subscription Agreement, thereby rending its appeal nugatory;

45.2 if a stay is not granted and the intended appeal were to succeed, there would be a high risk of inconsistent judgments and/or having to deal with an issue in these proceedings that is ultimately academic;

45.3 there is a real risk that if the proceedings are not stayed the Company will be wound up as a result of the Winding Up Proceedings; and,

45.4 conversely, if the proceedings are stayed pending appeal, RBH would not be prejudiced in a manner that could not be compensated in damages pursuant to s.46 of the Act.

46. Mr Millett KC on behalf of RBH takes the position that in order to obtain a stay JLS has to show that there is a real risk of injustice to it and none to RBH[8]. He says that the Court has to balance the alternatives to decide which best accords with the interests of justice[9]. He says that the prospects of success on appeal is a relevant factor[10]. Reference is also made to the recent Court of Appeal's decision in *Maso Capital Investments Limited and Blackwell Partners LLC - Series A v Trina Solar Limited*[11] which cited with approval what was said by Doyle J in *Re Aquapoint LP*[12] in relation to the principles for granting a stay pending an appeal from the Grand Court:

> *"It can be seen from the local Cayman authorities that: (1) an appeal does not operate as a stay; (2) the starting point is that there should be no stay and a successful party at first instance should not be deprived of the fruits of that success; (3) they must be "good cause" or "good reason" for a stay. In some of the English authorities there is reference to "solid grounds"; (4) the court is likely, all other things being equal, to grant a stay where the appeal could otherwise be rendered nugatory or deprived of much of its significance; and (5) in deciding whether or not*

[8] *Hammond Suddards Solicitors v Agrichem International Holdings Ltd* [2001] EWCA Civ 2065.
[9] *Leicester Circuits Ltd v Coates Brothers plc* [2002] EWCA Civ 474.
[10] Ibid at paragraph 13.
[11] CICA (Civil) Appeal No. 009 of 2021, unreported 4 August 2023 at paragraph 48.
[12] Unreported, Grand Court, 5 October 2022.

to impose a stay the court will consider the grounds of appeal, the likelihood of success and the balance of convenience having regard to the interests of the relevant parties. The overriding feature is the interests of justice."

47. Mr. Millett argues that the prejudice to RBH of a stay includes the following:

47.1 Continued uncertainty as to RBH's status as a shareholder in JLS including its locus standi to petition for its winding up[13].

47.2 The risk to RBH's interests as a shareholder by actions taken by JLS earlier this year which involved a substantial re-organisation of the JLS group structure (the "**Re-organisation**") which had led to JLS's wholly owned subsidiary, Juniper Holdings Ltd no longer holding ordinary shares in two valuable subsidiaries. RBH says that those shares appeared to then be held by JTB Holdings, a newly incorporated Cayman Islands entity. RBH took the view that these were very significant transactions which were not validated by a validation order dated 31 July 2023 made in the Winding Up Proceedings for the purposes of section 99 of the Companies Act and providing only for the payment of the parties' legal and other professional fees. JSL has indicated that the Re-organisation has been effectively reversed and offered undertakings to RBH as follows:

"d. That said, and in the interest of addressing any concerns that RBH may have, the Company is prepared to offer the following undertakings in good faith for the duration of the Winding Up Petition.

i. The Company will maintain the existing status quo by not concluding or procuring the conclusion of any transaction which may materially prejudice RBH's alleged rights and/or interest (which are denied) without at least 14 days' written notice to your firm of any such proposed transaction, including any transaction:

1. disposing of any of the Company's substantial assets or procuring the disposal of any substantial assets held by the Company's subsidiaries;

2. causing the Company, or procuring any of the Company's subsidiaries, to take on any new debt of more than US$5 million; and,

3. dealing in any of the shares in the Company.

[13] An issue covered in my contemporaneous judgment in FSD 106 of 2023 (AWJ).

ii. Save that none of the undertakings in (i) above shall prejudice the rights of the Company and/or any of its subsidiaries from conducting their day-to-day business and enter into transactions in the ordinary course of their respective businesses."

47.3 On behalf of RBH, Mr Millett also repeated his concern that JLS's tactic is to obtain the dismissal the Winding Up Proceedings and a stay of these proceedings leaving it with the benefit of its self-help remedy and no obvious desire to progress with alternative dispute resolution. It seems that the discussions about alternative dispute resolution have ground to a halt because counsel for Sylvan Master Fund seek to include the Article 9.1(c) Dispute as part of a "consolidated" mediation. This is a proposal which has been rejected by RBH in favour of ad hoc or "freestanding" mediation with RBH's rights in relation to the Rectification Proceedings reserved. It is not clear how or when that impasse will be resolved.

47.4 It is further argued that there is no substantive basis to any claim of prejudice to JLS if a stay is not granted. RBH says that JLS has not explained the basis for its assertion that its appeal will be rendered nugatory if a stay is not granted. It also says that substantial costs have already been incurred in these proceedings. RBH says that in its letter of 10 April 2023 it invited JLS to agree to reverse the redemption of RBH's shares and put RBH back on the register of members without prejudice to the parties' respective positions in the wider dispute. In addition RBH offered a "drop hands" approach on costs. That offer was rejected but appears from Mr Millett's submissions to remain open.

The Winding Up Proceedings

48. This is an appropriate point at which to interpose more details of the Winding Up Proceedings. In those proceedings there was correspondence between local counsel about undertakings being offered. I have referred to the undertakings above. During the course of oral submissions in the Strike Out Application, I asked Mr. Choo Choy whether those undertakings might be offered in these proceedings. After taking instructions overnight he confirmed when the hearing resumed that in the event that the Petition is struck out his client was prepared to give the same undertakings in these proceedings, for their duration or further order. For ease of reference, the Undertakings are as follows:

"i. The Company will maintain the existing status quo by not concluding or procuring the conclusion of any transaction which may materially prejudice RBH's alleged rights

and/or interest (which are denied) without at least 14 days' written notice to your firm of any such proposed transaction, including any transaction:

1. *disposing of any of the Company's substantial assets or procuring the disposal of any substantial assets held by the Company's subsidiaries;*
2. *causing the Company, or procuring any of the Company's subsidiaries, to take on any new debt of more than US$5 million; and,*
3. *dealing in any of the shares in the Company.*

ii. *Save that none of the undertakings in (i) above shall prejudice the rights of the Company and/or any of its subsidiaries from conducting their day-to-day business and enter into transactions in the ordinary course of their respective businesses."*

During the course of argument in relation to the application for leave to appeal he further clarified that the undertakings would include any dealings by its wholly owned subsidiaries, Juniper Holdings Ltd, J Holdings and JTB Holdings (which holds the interests in Juniper Biologics Ptd Ltd and Juniper Therapeutix Ptd Ltd which were held direct by JLS prior to the Restructuring).

49. After the conclusion of the Strike Out Application and application for leave to appeal, Mr Millett and Conyers had the opportunity to take instructions on the offer made. In a letter from Conyers to the Court dated 21 September 2023 they set out their client's position which in summary is that terms used in the undertaking such as "*materially prejudice*", "*substantial assets*", "*day to day*" or "*ordinary course of business"* are too vague and that it is unclear how they would be enforced. Concerns were also raised about the *bona fides* of JLS in view of the removal of RBH from its register of members, JLS's attempts to delay the Rectification Proceedings, JLS's refusal to engage in ad hoc mediation and the Restructuring.[14]

50. In a letter of reply dated 22 September 2023, Carey Olsen responded by saying that their client does not accept that such terms are ambiguous and suggesting that such terms are often used in orders such as asset freezing injunctions. They went on to say that qualifications of materiality and substantiality are obvious and a practical necessary. They added that to the extent that opinions may differ as to whether transactions meet those thresholds, JLS will have to bear in mind the fact that it has offered undertakings to the court

[14] This position has to be considered in conjunction with the undertakings Conyers themselves requested from Carey Olsen on 14 August 2023 where they use the expressions "*materially prejudice*", "*directly or indirectly*" and "*do any other act which may cause prejudice to RBH*". What was requested was substantially the same as the undertakings requested from Stuarts on 20 December 2022.

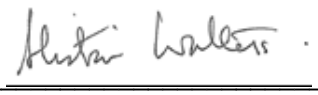
with the exposure of a finding of contempt if the undertakings are breached. On that basis they say that it will have to err on the side of caution.

51. In my judgment in the Winding Up Proceedings, I give my reasons for striking them out. One of the reasons was the offer of undertakings in these proceedings. I regard the undertakings offered reasonable taking into account the respective positions of the parties and they are accepted. This then deals with one of the bases that JLS says that it might be prejudiced by a stay not being granted.

Decision on Ground 6 and interim stay

52. In the Judgment, I have already declined, in the exercise of my discretion, to grant a stay of the Rectification Proceedings. In my view, there is nothing further that has been said on behalf of JLS to suggest that there is a real prospect of success of an appeal against that decision. The Rectification Proceedings can proceed without the Title Dispute having to be resolved by this Court. I am of the view that to the extent that there is prejudice likely to be suffered, it is by RBH. Its rights as a shareholder in JLS have been removed. Events such as the Re-organisation have occurred which may or may not have affected those rights (assuming that they are restored) but it seems to me that the sooner that its status as a shareholder is resolved, so much the better for all parties. The alternative dispute resolution process can then take its course in Singapore although from the evidence it appears that such a process is a long way off starting in any form. There is no confirmation as to when the Court of Appeal might be able to hear an application for leave to appeal against my decision if I do not grant leave. I am not of the view that JLS has pointed to any material prejudice that it might suffer as a result of these proceedings continuing. My view, therefore, taking all factors into consideration including those below, is that Ground 6 has no real prospect of success. Taking into account the Overriding Objective these proceedings should continue and come to trial without delay and I am not willing to grant an interim stay. Mr. Choo Choy did anticipate the refusal of leave to appeal and did offer to undertake to make an application for leave to appeal to the Court of Appeal with expedition, suggesting that would provide further basis for an interim stay. However, there is still the question of resolving directions for trial which counsel touched on in their submissions, but which will need to be revisited in light of this judgment. That will inevitably take a short period of time to resolve. In the meantime, there are unlikely to be any further steps taken in these proceedings other than perhaps an argument over costs giving Mr Choo Choy an opportunity if so instructed to seek leave to appeal from the Court of Appeal and a stay.

53. On the basis of the above, the application for leave to appeal by JLS is dismissed. The parties have 14 days from the date of this judgment to make concise submissions on costs.



The Hon. Mr. Justice Alistair Walters
Judge of the Grand Court (Actg.)