IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE No. 7 OF 2024 (DDJ)

BETWEEN:

SEAHAWK CHINA DYNAMIC FUND

PLAINTIFF

AND

(1) GOLD DRAGON WORLDWIDE ASSET MANAGEMENT LIMITED

(2) LAU CHUN SHUN

DEFENDANTS

Before:	The Hon. Justice David Doyle
Appearances:	Tom Smith KC and Alan Quigley of Forbes Hare for the Plaintiff
Heard:	30 January 2024
Ex Tempore Judgment delivered:	30 January 2024
Draft transcript of Ex Tempore Judgment circulated:	31 January 2024
Transcript of Ex Tempore Judgment approved:	2 February 2024

HEADNOTE

Determination of application for permission to serve documents out of the jurisdiction

EX TEMPORE JUDGMENT

Introduction

1. I record that I have considered the hearing bundle, the plaintiff's skeleton argument dated 26 January 2024, the initial authorities bundle and the supplemental authorities bundle filed this morning and Mr Tom Smith's very helpful oral submissions put before the court this afternoon.

The *ex parte* summons for leave to serve out

2. By *ex parte* summons dated 15 January 2024, the Plaintiff (the "Cayman Fund") seeks leave to serve the defendants out of the jurisdiction in Hong Kong.

The parties and the claims

3. The First Defendant ("Gold Dragon") is stated to be the Plaintiff's former investment manager and the Second Defendant ("Mr Lau") a former director of the Plaintiff. The Plaintiff's claims are for breaches of contract by the First Defendant, breaches of duties by the First Defendant owed to the Plaintiff, inducement by the Second Defendant of the First Defendant's breach of contract and the Second Defendant's breach of his duties as a director of the Plaintiff. Damages and/or equitable compensation are sought.

4. The Plaintiff is an open-ended investment fund incorporated as an exempted limited company under the laws of the Cayman Islands on 21 August 2017. The First Defendant is a company that is incorporated under the laws of Hong Kong and has its registered office at an address in Queen's Road Central, in Hong Kong.

5. The Second Defendant appears to have his permanent residential address in Hong Kong and is a Hong Kong passport holder.

The evidence

6. I have considered the evidence before the court.

7. Mr Smith has helpfully and fairly brought the court's attention to a letter from Claritas Legal Limited ("Claritas") from an address in the Cayman Islands dated 18 January 2024 and they indicate that they are not instructed to accept service of the claim on behalf of Mr Lau, the Second Defendant, and they say for the avoidance of doubt that they do not act for Gold Dragon, the First Defendant, and they add, and I quote:

> "Whilst we have not been provided with a copy of the Statement of Claim and are therefore unaware of the basis of the Claim, we are not at all convinced that the Cayman Islands is the appropriate forum to try the claim in circumstances where both Gold Dragon and Mr Lau are based in Hong Kong, which is also where most, if not all, the other witnesses will be based, including those for the Fund, such as Mr Liang."

Claritas reserve their client's rights, including the right to challenge the jurisdiction of the Grand Court and I have considered that letter carefully.

8. Mr Smith also helpfully referred the court to the provisions in the Investment Management Agreement between the Plaintiff and the First Defendant, dated 11 August 2021 (the "Investment Management Agreement"). Under the heading "Governing law and jurisdiction" the following appears:

> "20.8 This agreement is governed by the law of the Cayman Islands.
>
> 20.9 The parties submit to the non-exclusive jurisdiction of the courts of the Cayman Islands and the courts of appeal from them to determine any dispute arising out of or in connection with this agreement. The parties agree not to object to the exercise of jurisdiction of those courts on any basis."

9. At the risk of stating the obvious, the Second Defendant is not a party to the Investment Management Agreement but, of course, the First Defendant is.

The draft statement of claim

10. Mr Smith also helpfully took the court through the draft statement of claim, which starts at page 757 of the hearing bundle. At page 800 of the hearing bundle, there is a heading "I: The Cayman Fund's Causes of Action" and such are outlined. First, breaches of contract by Gold Dragon, from page 800 onwards; page 806: Inducement by Mr Lau of Gold Dragon's breaches of contract; page 811: Breaches of duties by Gold Dragon; page 812: Breaches of directors' duties by Mr Lau, Mr Lau having been a director of the Plaintiff. I have considered the draft statement of claim. I take into account that the claims are, in the main, governed by the law of the Cayman Islands, although Hong Kong law will apply to some of the claims (for example the double-actionability requirement may apply to the inducement claim which would mean that Hong Kong law would also need to be considered).

Determination

11. Having considered the evidence, the submissions and the relevant law, I have concluded at this *ex parte* stage that:

(1) there is in relation to each defendant a serious issue to be tried on the merits;

(2) there is a good arguable case that the claims fall within one or more of the jurisdictional gateways, namely (c) the necessary or proper party gateway, which also includes a party duly served out of the jurisdiction as an anchor defendant, (d) the contract gateway, (f) the tort gateway and (ff) the company gateway. The claims for breach of contract against the First Defendant fall within gateway (d). The claims for inducement of the breaches of contract, those claims against the Second Defendant, fall within gateway (c), or alternatively (f). The claims against the First Defendant for breach of duties in so far as they rely on implied contractual duties fall within (d), and in so far as they rely on tortuous, fiduciary and agency duties they fall within (f). The claims against the Second Defendant of breach of duty as director of the Plaintiff fall within the (ff) company gateway;

(3) in all the circumstances the Cayman Islands is clearly the appropriate forum for the trial of the dispute and the court exercises its discretion to permit service of the proceedings out of

the jurisdiction. It appears to the court that the case is a proper one for service out of the jurisdiction.

12. I have regard to the Hong Kong connecting factors which are raised by the Plaintiff and I also raised various Hong Kong connecting factors with Mr Smith during our exchanges this afternoon. I have full regard to the Hong Kong connecting factors and do not ignore them, but the connections with the Cayman Islands tip the scales firmly in favour of the Cayman Islands. In particular, I have regard to the Investment Management Agreement and the Cayman proper law and jurisdiction clauses and the waiver of jurisdictional objections, which are of course strong Cayman connecting factors. I also note the useful summary provided by Mrs Justice Gloster, as she then was, at paragraph 7 of the authority brought to my attention by Mr Smith, namely *Antec International Limited v Biosafety USA Inc* [2006] EWHC 47 (Comm). At paragraph 7, the relevant legal principles are outlined and I have full regard to them. Paragraph 7 reads as follows:

> "7. In coming to my conclusion, I applied the following legal principles that can be derived from the authorities:
>
> i) The fact that the parties have freely negotiated a contract providing for the non-exclusive jurisdiction of the English courts and English law, creates a strong prima facie case that the English jurisdiction is the correct one. In such circumstances it is appropriate to approach the matter as though the claimant has founded jurisdiction here as of right, even though the clause is non-exclusive; see e.g. per Hobhouse J in *S & W Berisford Plc v New Hampshire Insurance Co.* [1990] 1 Lloyd's Rep. 454, at 463; per Waller J in *British Aerospace Plc v Dee Howard Co* [1993] 1 Lloyd's Rep. 368; per Moore-Bick J in *Mercury Communications Ltd v Communication Telesystems International* [1999] 2 AER 33 at page 41.
>
> ii) Although, in the exercise of its discretion, the court is entitled to have regard to all the circumstances of the case, the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule; see e.g. *British Aerospace Plc supra* ; *Mercury Communications supra at* page 41; per Aikens J in *Marubeni Hong Kong & South China Ltd v Mongolian Government* [2002] 2 AER (Comm) 873 at 891(b) – (f); per Lawrence Collins J in *Bas Capital Funding Corporation*

and others v Medfinco Ltd and Others [2004] 1 Lloyd's Rep. 652, at paragraphs 192-195; per Gross J in *Import Export Metro Ltd v Compania Sud Americana de Vapores SA* [2003] 1 Lloyd's Rep. 405.

iii) Such overwhelming or very strong reasons do not include factors of convenience that were foreseeable at the time that the contract was entered into (save in exceptional circumstances involving the interests of justice); and it is not appropriate to embark upon a standard *Spiliada* balancing exercise. The defendant has to point to some factor which it could not have foreseen at the time the contract was concluded. Even if there is an unforeseeable factor or a party can point to some other reason which, in the interests of justice, points to another forum, this does not automatically lead to the conclusion that the court should exercise its discretion to release a party from its contractual bargain; see cases cited *supra.* In particular, the fact that the defendant has, or is about, to institute proceedings in another jurisdiction, not contemplated by the non-exclusive jurisdiction clause, is not a strong or compelling reason to relieve a party from his bargain, notwithstanding the undesirability of parallel proceedings. Otherwise a party to a non-exclusive jurisdiction clause could avoid its agreement at will by commencing proceedings in another jurisdiction; see cases cited *supra* and *The El Amria* [1981] 2 Lloyd's Rep. 119; *Breams Trustees Ltd v Upstream Downstream Simulation Services* [2004] EWHC 211 (Ch) per Patten J at paragraphs 27 and 28."

13. At 12-106 to 12-108 of *Dicey, Morris and Collins on The Conflict of Laws*, Sixteenth Edition, the learned authors refer at footnotes 426 and 433 to *Antec International* and at 12-109 add (footnotes omitted):

> "The fact that a court was contractually chosen by the parties will be taken as clear evidence that it is an available forum, and that, in principle at least, it is not open in principle (although this is not a fixed and invariable rule) to either party to object to the exercise of its jurisdiction at least on grounds which should have been foreseeable when the agreement was made, for example that there will be inconvenience as a result of witnesses and documents being in another country, or there may be inconsistent findings as a result of concurrent proceedings, or the chosen forum has no rule that costs follow the event …"

14. At 12-105 the learned authors stated (footnotes omitted):

> "… After the development of the *forum conveniens* principles in *Spiliada Maritime Corp v Cansulex Ltd*, there was a tendency to approach the application of jurisdiction clauses (particularly non-exclusive jurisdiction clauses) through the *Spiliada* lens, but the modern approach requires some modification to those principles to ensure that appropriate effect is given to jurisdiction clauses. In particular, questions of the convenience or appropriateness have been said to be of negligible importance when a party seeks to enforce an exclusive jurisdiction clause."

15. I should also record that I take into account the so-called "*Cambridgeshire factor*" i.e. the fact that the court and the parties' lawyers are also familiar with the case and it may already be considered a Cayman case (*AHAB v SAAD* 2010 [2] CILR 289 Chadwick P at paragraphs 77-80). I heard a winding up petition in respect of the Cayman Fund presented in FSD 23 of 2022 (DDJ) from 21-29 June and on 29 July 2022, delivering a judgment on 9 August 2022 dismissing the petition. Mr Lau, the Petitioner, was represented by Appleby (Cayman) Ltd and Mr Liang was represented by Mr Smith and Harney Westwood & Riegels.

16. Moreover on 12 December 2023 I ordered an inquiry in FSD 23 of 2022 (DDJ) in respect of Mr Lau's undertaking to compensate the Cayman Fund for any loss or damage suffered by it as a result of the appointment of joint provisional liquidators and which Mr Lau is liable to compensate it for. I made directions in respect of pleadings with a case management hearing to be fixed for the first available date after 1 May 2024. I dismissed Mr Liang's application for an inquiry. At the hearing on 22 November 2023 Robert Levy KC appeared for Mr Liang, Clare Stanley KC, Kate Pearson and Alexia Adda of Claritas for Mr Lau and Alistair Abbott and Alan Quigley of Forbes Hare for the Cayman Fund. All sides appear to continue to be "lawyered up" in respect of this continuing dispute. It is desirable that all continuing proceedings in respect of the Cayman Fund which raise related and/or similar factual matters be dealt with in the Cayman Islands. This will be the most efficient way for the parties to resolve the disputes between them. This would also avoid the undesirable possibility of conflicting judgments in the Cayman Islands and in Hong Kong.

17. At paragraph 37 of the Plaintiff's skeleton argument, Mr Smith, relying on *Cairnwood Global Technology Fund Ltd* 2007 CILR 193, submitted that it was "well established as a matter of Cayman

public policy and law that it is in principle particularly desirable that the courts of the Cayman Islands determine issues such as the duties and responsibilities of directors of Cayman companies." I drew the attorney's attention to *Brasil Telecom S.A. v Opportunity Fund* 2008 CILR 211 (CICA) and confirm that I considered paragraph 37 in the light of *Brasil Telecom* and place no reliance on pure, abstract "public policy" issues.

18. I steer away from any pure, abstract "public policy" arguments but I do note that (ff) expressly refers to duties of directors of Cayman companies and Mr Lau, the Second Defendant, was a director of the Plaintiff, a Cayman company.

19. In my judgment Cayman is clearly the appropriate forum.

20. Accordingly, for the brief reasons stated in this judgment, I am content to make an order in terms of the draft provided to the court prior to the hearing this afternoon and that is the order I make.

The Order

21. The following order was made:

> "1. Pursuant to Order 11, rule 1(1)(d) and (f) of the Grand Court Rules, the Plaintiff is granted leave to serve the First Defendant, Golden Dragon Worldwide Asset Management Limited, out of the jurisdiction at Unit 3914, 39/F, Cosco Tower, 183 Queen's Road Central, Hong Kong or wherever it may be found in Hong Kong with the Writ and the Statement of Claim, this Order, the Service Out Summons, the First Affidavit of Alan Quigley together with the exhibit thereto and the First Affidavit of Hao Liang together with the exhibit thereto, with such service to be effected by way of personal service or in such manner as is compliant with the requirements of the laws applicable in Hong Kong.
>
> 2. Pursuant to Order 11, rule 1(1)(c), (f) and (ff) of the Grand Court Rules, the Plaintiff is granted leave to serve the Second Defendant, Mr Lau Chun Shun, out of the jurisdiction at Flat A, 16/F, Tower 6, Mayfair by the SEA II, No. 21 Fo Shun Road, Pak Shek Kok, Tai Po, New Territories, Hong Kong or wherever he may be found in Hong Kong with the Writ and the Statement of Claim, this Order, the

Service Out Summons, the First Affidavit of Alan Quigley together with the exhibit thereto and the First Affidavit of Hao Liang together with the exhibit thereto, with such service to be effected by way of personal service or in such manner as is compliant with the requirements of the laws applicable in Hong Kong.

3. The Defendants upon being served must acknowledge service within 28 days after the service of the Writ on them.

4. The costs of and occasioned by the Service Out Summons shall be costs in the cause."

Postscript

22. In my judgment delivered yesterday 29 January 2024 in *Taiping Trustees Limited v Valley Stone Industry Fund Ltd* (FSD 323 of 2022 (DDJ), unreported judgment) I also dealt with jurisdictional issues involving the Cayman Islands and Hong Kong. At paragraph 15 I stressed that:

> "Each case depends to a large extent on its context, facts and circumstances. At the end of the day the court is involved in a balancing exercise in weighing up the various connecting factors and identifying the appropriate forum."

23. In *Taiping* I included a section dealing with the law on public policy in the context of jurisdictional issues at pages 19-24 and my determination of the "public policy" arguments can be found at pages 33-36. I applied *Brasil Telecom S.A. v Opportunity Fund* 2008 CILR 211 (CICA). At paragraph 86 I stated:

> "86. As Cayman law presently stands I must follow the observations in *Brasil Telecom* (which in turn followed English law) on the issue of public policy in jurisdiction cases. It may be in the future that the Court of Appeal and the Judicial Committee of the Privy Council may revisit this point and reflect on whether it suits offshore jurisdictions to take a different approach to onshore jurisdictions on public policy issues in this area of the law. The reputations of offshore jurisdictions such as the

Cayman Islands are vital to their continued existence and their jurisprudence is best developed by local offshore judges."

24. Although *Taiping* is relatively hot off the judicial press I am already regretting the inelegant way I expressed the second half of the last sentence of paragraph 86. The message I was trying to communicate was that, in my humble opinion, Cayman jurisprudence in respect of exempted limited partnerships and whether local public policy concerns should be taken into account in the future would be best developed by local Cayman courts at first instance where appropriate (subject to binding authority) and thereafter by the Court of Appeal of the Cayman Islands through "local offshore eyes" rather than by foreign Hong Kong courts on the basis of expert evidence on the laws of the Cayman Islands. It is in that clarified way that my judicial ramblings as a mere puisne first instance judge in the Cayman Islands should be read.

25. I should also make it crystal clear that I recognise that *Brasil Telecom* is binding upon me and I accordingly followed it in *Taiping* and also in the case presently before the court. I await any further guidance from the Court of Appeal of the Cayman Islands on these local public policy concerns in due course.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT