

IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 256 OF 2017 (IKJ)

IN THE MATTER OF THE COMPANIES LAW (2016 REVISION)
AND IN THE MATTER OF NANFONG INTERNATIONAL INVESTMENTS LIMITED



EX TEMPORE RULING OF 20 APRIL 2018 (BASED ON NOTE AGREED BY COUNSEL)

- 1.1 The present proceedings began when Business Investment Intelligence Limited ("**BIIL**") presented a petition to wind up Nanfong on 28 November 2017 (the "**Petition**") on grounds that it would be just and equitable to do so as there was a corporate deadlock due to a management deadlock following the breakdown of the relationship of Mr Ng and Mr Wu.
- 1.2 Oriental as minority shareholder issued a summons dated 16 February 2018. This summons sought an order that the proceedings be stayed pending the determination of proceedings in Samoa or by further order of the Court. The summons was supported by an affidavit of Mr Ng explaining the basis of the stay application. The affidavit provided that:
 - (a) As a matter of Samoan law BIIL was not authorised to file the Petition;
 - (b) The question of who has the ability to control and act on behalf of BIIL was currently the subject of litigation before the Samoan Court; and
 - (c) The Samoan Court needed to resolve the dispute in Samoa before the Petition could proceed.
- 1.3 The issue has been before the Supreme Court in winding up proceedings in Samoa. In these proceedings Mr Ng has sought declarations that:
 - (a) The appointment of Mr Yeung was invalid;
 - (b) Any issue of shares by BIIL to Auch Holdings was also invalid; and

(c) The filing of the Petition for the winding up of the Company by BILL was invalid.

1.4 The relief that was being sought in the Samoan Court was the basis for the stay.

1.5 The crucial question in relation to this stay application is the legal test to be applied. Written submissions by both parties agreed that applying the traditional *forum non conveniens* test, the applicant should demonstrate that Samoa is the more appropriate forum for the determination of the standing issue. This is distinct from the application of those principles in determining whether a case should be determined by a local or foreign court, in what has been characterised as a case management stay application.

1.6 In the context where the court has to consider non-substantive issues, a high standard is imposed to have the issue determined by the foreign court. Support for that conclusion can be found in the Court of Appeal decision in *Ahmad Hamad Algosaibi and Brother Company v Saad Investments Company Limited and Forty Three Others* [2010 (2) CILR 289]. In that case Chadwick P at paragraph 117 said,

"I am very conscious that the decision to impose a temporary case management stay was a decision taken by the Chief Justice in the exercise of his discretion, and that an appellate court should not interfere unless satisfied that that exercise of discretion was flawed for one or other of the reasons mentioned by Lord Bingham in Reichhold Norway (3). But, in my view, it is impossible to avoid the conclusion that, in exercising his discretion in this case, the Chief Justice erred in failing to address the question—posed by Moore-Bick, J. and endorsed by the Court of Appeal in Reichhold Norway—whether the benefits which were likely to result from imposing a temporary stay so clearly outweighed any disadvantage to the plaintiff that this was one of those cases in which 'rare and compelling circumstances' provided the 'very strong reasons' that justified doing so."

1.7 Mr Green QC sought to persuade me that this test did not apply because there was a *lis alibi pendens*, which I accept can constitute very strong reasons for granting a stay. I find that the umbrella test where proceedings are brought in Cayman as of right and for a case management stay is that very strong reasons have to be made out.

1.8 Another case which supports this conclusion is *CIGNA Worldwide v ACE Ltd* [2012 (1) CILR 55]. Here, Cresswell J reiterated the principles stated by Chadwick P. It is noteworthy that this case involved cross-border cooperation in an insolvency type situation. It is well recognised that that particular area of law concerning recognition of office holders is an area where the courts have frequently had to decide issues of appropriate forum. That is different to the present case. Here, there is the question of the standing of the petitioner that is a discrete issue which overlaps with issues in foreign proceedings.

1.9 I accept that it is possible for the Samoan court to decide these issues, but it is equally possible for this Court to decide them.



- 1.10 It is accepted that some issues will have to be litigated before the Samoan Court. However, it is not a compelling enough reason that the issue could be determined conveniently by the Samoan Court.
- 1.11 The Samoan legal system is not too different from our own. From perusing the judgment delivered by the Chief Justice of Samoa, Samoa is a common law jurisdiction that operates in a manner similar to our own.
- 1.12 The burden for a stay application is a very high one. While there are factors capable of supporting a fair determination by the Samoan Court, they fall short of the very strong reasons that must be made out.
- 1.13 The application for the stay has been refused.

Leave to Appeal

- 1.14 The proper approach in determining whether leave to appeal should be granted is to consider whether an appeal is arguable. Having reserved judgment, though for a short time, and having had considerable difficulties with coming to this judgment, I conclude that leave to appeal should be granted.



THE HON. JUSTICE IAN KAWALEY
JUDGE OF THE GRAND COURT



(Note agreed between Ritch & Conolly and Harneys per email correspondence 6 July 2018)