IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 39 OF 2020 (IKJ)

IN THE MATTER OF SECTION 46 OF THE COMPANIES LAW

BETWEEN:

SC GLOBAL VISION FUND SPC

for and on behalf of SCSH PRE-IPO SP V

PLAINTIFF

AND

OASIS BUONO LIMITED

DEFENDANT

IN COURT (VIDEO CONFERENCE AND LIVESTREAMING)

Appearances:

Mr Christopher Young and Ms Fleur O'Driscoll, Forbes Hare, on behalf of SC Global Vision Fund SPC (the "Plaintiff")

Mr James Kennedy, KSG Attorneys at Law, on behalf of the Defendant

Before: The Hon. Justice Kawaley

Heard: 16 June 2020

Date of decision: 16 June 2020

Draft Reasons Circulated: 30 June 2020

Reasons Delivered: 8 July 2020

REASONS FOR DECISION

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Rectification of register-section 46 Companies Law (2020 Revision) – cross-application by defendant for case management stay in favour of arbitration commenced by sole registered shareholder of defendant against plaintiff - whether title shares validly passed under share transfer agreement - whether a substantial question to be referred to arbitration had been shown to exist - allegations of fraud

Introduction and Summary

1. By an Originating Summons dated February 27, 2020, the Plaintiff sought the following substantive relief, namely orders that:

> "*1. Pursuant to section 46 of the Companies Law (2020 Revision) (the '**Law**'), the Register of Members of the Defendant be rectified by striking out the name of Aurora Grand Limited in respect of 50,000 ordinary shares ("**Shares**") held by it and inserting in lieu thereof the name of the Plaintiff, SC Global Vision Fund SPC for and on behalf of SCSH-Pre-IPO SP V, as holder of the Shares pursuant to the duly executed and previously delivered instrument of transfer in respect of the Shares…*"

2. By a Consent Order dated April 1, 2020, directions were given for the Originating Summons and any stay application to be heard together. The Defendant filed a Summons dated April 9, 2020 seeking the following substantive relief, namely orders:

> "*1. Pursuant to the Court's case management powers, staying all further proceedings in the Plaintiff's application for rectification of the Defendant's Register of Members pending:*
>
> *(a) receipt of an arbitration award resolving the dispute concerning legal title to the subject shares as between the Plaintiff and Aurora Grand Limited; or*
>
> (b) *agreement between the Plaintiff and Aurora Grand Limited as to the legal title to the subject shares.*"

3. Although this Summons was formally filed by the Defendant, and Aurora Grand Limited ("Aurora") was not formally joined to the proceedings, the application to stay the Originating Summons was in substance an application made by or on behalf of Aurora. The stay was sought in aid of an arbitration agreement contained in a Share

Transfer Agreement dated June 20, 2019 entered into between the Plaintiff and Aurora (the "STA"). The Plaintiff was the purchaser and Aurora, the vendor in relation to the Defendant's Shares. The dispute was whether or not the Plaintiff was entitled to enforce the STA and be registered as sole shareholder of the Defendant in place of Aurora. And the evidence filed in support of the stay application was expressly given "*on behalf of Aurora and Oasis Buono Limited*".

4. It was common ground that the two applications were reverse sides of the same coin. If the Plaintiff established an entitlement to rectification on a summary basis, the Defendant would have failed to make out a case for a case management stay. If the Defendant established that it was appropriate to grant a case management stay until the determination of the arbitral dispute, the Plaintiff would have failed to make out a case for rectification.

5. The governing legal principles were common ground. The applications turned on an assessment of the documentary evidence. The Defendant's case appeared to me at first blush to do just enough to justify a stay. But after Mr Young clinically dissected it, I was bound to conclude that the case for summarily granting rectification had been made out and that the case for a stay had not. At the end of the hearing I accordingly ordered that:

> "*1. The Defendant's Stay Application is dismissed.*
>
> *2. The Defendant's register of members be rectified forthwith by striking out the name of Aurora Grand Limited in respect of 50,000 ordinary shares (the '**Shares**') held by it, being the entire issued share capital in the Defendant, and inserting in lieu thereof the name of the Plaintiff, SC Global Vision Fund SPC for and on behalf of SCSH-Pre-IPO SP V, as holder of the Shares pursuant to the duly executed and previously delivered instrument of transfer in respect of the Shares with effect from 27 June 2019....*"

6. I now give reasons for that decision.

Governing legal principles

Rectification of the register

7. Section 46 of the Companies Law (2020 Revision) (the "Law") provides as follows:

> "***Remedy for improper entry or omission of entry in register***
> ***46**. If the name of any person is, without sufficient cause, entered in or omitted from the register of members of any company, or if default is made or unnecessary delay takes place in entering on the register the fact of any person having ceased to be a member of the company, the person or member aggrieved or any member of the company or the company itself may, by motion to the Court, apply for an order that the register be rectified; and the*

Court may either refuse such application with or without costs to be paid by the applicant or it may, if satisfied of the justice of the case, make an order for the rectification of the register, and may direct the company to pay all the costs of such motion, application or petition, and any damages the party aggrieved may have sustained. The Court may, in any proceeding under this section, decide any question relating to the title of any person who is a party to such proceeding to have that person's name entered in or omitted from the register, whether such question arises between two or more members or alleged members, or between any members or alleged members and the company, and generally, the Court may, in any such proceeding, decide any question that it may be necessary or expedient to decide for the rectification of the register:

Provided that the Court may direct an issue to be tried, on which any question of law may be raised."

8. An application for rectification of the register is not designed to determine substantive disputes about share ownership. It is designed to correct the register when, in light of a transfer of shares, the register no longer accurately reflects who the legal owner of the shares is. This is established by a case upon which the Defendant's counsel relied, *Nilon Ltd.-v- Royal Westminster Investments* [2015] 3 All ER 372 (PC) where Lord Collins opined as follows:

> "***[51]*** *In the view of the Board, proceedings for rectification can only be brought where the applicant has a right to registration by virtue of a valid transfer of legal title, and not merely a prospective claim against the company dependent on the conversion of an equitable right to a legal title by an order for specific performance of a contract. It follows that Re Hoicrest was wrong as a matter of principle, however sensible it might have been as a matter of case management.*"

9. A case for rectification under section 46 may be legally made out when the applicant can demonstrate that an agreement for the transfer of the disputed shares in its favour has been completed. As McMillan J held in *Cannonball Plus Fund Ltd –v- Dutchess Private Equities Cayman Fund Ltd*, FSD 185 of 2016 (RMJ), Judgment dated June 12, 2018 (unreported):

> "*51. In terms of paragraph 51 of the Nilon decision, Mr. Lowe is in effect saying that in light of the administrator's action a valid transfer of title has already taken place, and that the Plaintiff has not merely a prospective claim against the Defendant on the conversion of an equitable right to a legal title, but a great deal more than a prospective claim: the transfer had been completed.*
>
> *52. In other words, upon the facts of this case the Nilon principle operates to the benefit of the Plaintiff and not to the benefit of the Defendant.*

53. In addition to the logic of Mr. Lowe's submission, which the Court upon the facts accepts to be correct, there are additional factors which serve to satisfy the justice of the case in any event."

10. It was common ground that the pivotal question to be decided in relation to the Plaintiff's application under section 46 of the Law was whether or not, in the words of McMillan J in *Cannonball Plus Fund Ltd*, "*a valid transfer of title has already taken place*".

Case Management Stay

11. The legal basis for the Case Management Stay was explained in the Defendant's Written Submissions as follows:

> "*31. If the Plaintiff had included Aurora as a defendant to this action, this matter would unquestionably be subject to a mandatory stay under section 4 of the FAAEL. That section states that:*
>
> > *If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings of taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.*
>
> *32. In BankAmerica Trust and Banking Corporation (Cayman) Limited v Trans-World Telecom Holdings Limited, 1999 CILR 110, Smellie CJ found that so long as there is a real or genuine dispute shown within the scope of the relevant arbitration clause, the court is obligated to stay the court proceedings in favour of arbitration. The Defendant has demonstrated above that there is such a dispute, but of course is not a party to the STA and thus does not have standing to request a FAAEL stay.*
>
> *33. However, where a non-party to an arbitration agreement requests that court proceedings against it be stayed pending the resolution of an arbitrable dispute, the Court has jurisdiction to grant the stay under its inherent jurisdiction and case management powers. This power was recognized by the English Court of Appeal in Reichhold Norway ASA v Goldman Sachs International [2000] 1 WLR 173. That case has been adopted in the Cayman*

Islands numerous times, including in IG Services Limited v Deloitte and Touche (Cayman) Limited, 2003 CILR Note 2; Ahmad Hamad Algosaibi and Brothers Company v Saad Investments Company Limited, 2010 (2) CILR 289; In re Nanfong International Investments Limited, 2018 (2) CILR 321; and Tianrui (International) Holding Company Limited v China Shanshui Cement Group Limited (Grand Ct, 6 April 2020, unreported). The case law confirms that "rare and compelling circumstances' are required for a case management stay to issue when the proceedings are commenced as of right. However, none of the local cases have yet considered this threshold in the context here, where A's action against C requires determination of an issue that is arbitrable between A and B....

35. Finally, in ACP v Sacyr, Blair J noted the role of the courts in ensuring the fair and efficient disposition of disputes:

> *In circumstances in which an international commercial dispute involves arbitration as well as court proceedings, it makes good commercial sense for the court to have regard, where appropriate, to the orderly resolution of the dispute as a whole, if necessary by granting a temporary stay in favour of arbitration. A coherent system of commercial dispute resolution has to take into account the fact that various different tribunals may be involved, each of which should aim to minimise the risk of inconsistent decisions, and avoid unnecessary duplication and expense."*

12. The legal test for granting a Case Management Stay was not disputed. I accepted Mr Kennedy's submissions in this regard. *In re Nanfong International Investments Limited*, 2018 (2) CILR 321 is a decision of the Cayman Islands Court of Appeal which is binding on this Court. In that case, Moses JA approved the following governing principles:

> *"17 Any stay of the hearing of the petition must therefore be based on principles other than those identified in Spiliada. Those relevant to the grant of a stay on case management grounds are to be found in Reichhold Norway ASA v. Goldman Sachs Intl. (6). In that case, the Court of Appeal approved the principles applied by Moore-Bick, J. who stayed the hearing of an action for negligent misstatement by Goldman Sachs in relation to 2018 (2) CILR 328 the sale of shares in a Norwegian company pending an arbitration in Norway to be brought by Reichhold alleging breach of warranty under the sale agreement. If the arbitration proceedings were successful there would be no need for Reichhold to sue Goldman Sachs, the vendors' advisers.*
>
> *18 Moore-Bick, J. emphasized ([1999] C.L.C. at 492) that before a temporary stay of proceedings properly started in England should be granted there must*

be 'very strong reasons for doing so and the benefits which are likely to result from doing so clearly outweigh any disadvantage to the plaintiff.'

19 Moore-Bick, J. recognized (ibid., at 495) that the grant of a temporary stay was a lesser interference with the plaintiff's rights than a stay granted on grounds of forum non conveniens, which in practice determines whether a plaintiff can proceed at all in the jurisdiction of its choice. There is, he said, a 'very real burden' on the applicant for a case management stay to satisfy the court that the 'ends of justice' would be served by granting a stay, even if no greater than on the grounds of forum non conveniens, but that the factors to be taken into account in a case management decision will differ.

20 Applying those principles, Moore-Bick, J. concluded (ibid., at 491) that a temporary stay should be granted in order to manage the order in which the proceedings were to be heard: '. . . not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other.'

21 The Court of Appeal, in upholding Moore-Bick, J.'s decision, detected no error of law in his identification of the relevant principles. Lord Bingham, C.J. commented on the appellant's argument that Moore-Bick, J.'s order would open the door to a flood of applications, differing in merit, introducing uncertainty and a charter to evasive and manipulative defendants ([2000] 1 W.L.R. at 185). His riposte gave rise to some debate in the instant appeal:

'I for my part recognise fully the risks to which [the appellant's counsel] draws attention, but I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances.'"

13. As noted, it was common ground that if there was an arbitrable dispute about title to the Shares, a stay should properly be granted but if the Court summarily determined that no such dispute existed, the rectification claim would succeed. The legal principles I adopted were thus aligned with those which would have applied had Aurora applied to join the proceedings and sought a mandatory stay under section 4 of the Foreign Arbitral Awards Law (1997 Revision). That section provides:

"4. If any party to an arbitration agreement, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings;

and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

14. The principles which would have applied to such an application were described by the Singapore Court of Appeal (Sundaresh Menon CJ) in *Tomolugen Holdings-v-Silica Investors Ltd* [2015] SGCA 57 (in a passage upon the Defendant's counsel relied) which as follows:

> "*[113]... In our judgment, when the court considers whether any 'matter' is covered by an arbitration clause, it should undertake a practical and commonsense inquiry in relation to any reasonably substantial issue that is not merely peripherally or tangentially connected to the dispute in the court proceedings. The court should not characterise the matter(s) in either an overly broad or an unduly narrow and pedantic manner...*"

15. What I extracted from that passage for the purposes of the present case was that even a mandatory arbitration stay will only be granted if the arbitrable matter is "*reasonably substantial*". This requirement was stated even more clearly in a decision of this Court upon which the Plaintiff relied, *BankAmerica Trust and Banking Corporation (Cayman) Limited-v-Trans-world Telecom Holdings Limited* [1999 CILR 110]. An arbitration stay under section 4 of the 1997 Law was refused on the grounds there was no "*real or genuine dispute*" to be referred to arbitration. Smellie CJ lucidly opined as follows (at page 119):

> "*The governing principle is that the court will not ordinarily intervene to try a dispute which is one provided by the agreement between the parties to be resolved by reference to arbitration. The principle applies a fortiori when the contract provides exclusively for arbitration, as it does in this case.*
>
> *The rationale is straightforward: the parties, when they made their bargain, included as a part of it the provision for arbitration, and so should ordinarily be required to stick to their bargain: see In re Phoenix Timber Co. Ltd.'s Application (6). In that case it was also decided that the mere fact that the dispute is of a nature eminently suitable for trial in court is not a sufficient ground for refusing to give effect to what the parties have agreed. And it follows that the onus is on the party seeking the court's intervention to show the exceptional circumstance why a stay should not be entered in the court proceedings (or restraining any others to be brought) so that the arbitration might proceed on a dispute arising within a valid and subsisting arbitration agreement.*
>
> *Not surprisingly, the rule is that such an exceptional circumstance will arise where a party can show that there is no real or genuine dispute to be referred to arbitration. Indeed, a highly persuasive line of authority to be considered below is to the effect that absent such a real dispute to be referred to*

arbitration, there is no jurisdiction in the court to stay its own proceedings in deference to arbitration." [emphasis added]

Summary of governing principles

16. If Aurora had applied for a mandatory statutory stay, the Plaintiff would have carried the burden of showing that there was no substantial dispute which justified granting the stay. In the circumstances of the present case, therefore;

    (a) the Defendant assumed the burden of demonstrating that there was "*a real dispute to be referred to arbitration*", which dispute would have amounted to compelling circumstances for granting the Case Management Stay; and

    (b) the Plaintiff assumed the ultimate burden of demonstrating that the STA had been completed so that it had a present right to be entered on the Defendant's register pursuant to a final Order of this Court.

Factual findings

The STA and the Escrow Agreement

17. The most important provisions in the STA between the Plaintiff as Purchaser and Aurora as Vendor may be summarised as follows:

    (a) **Section 2 (Closing)**: a "Long Stop Date" was fixed at June 27, 2019 (section 2.1). The Purchaser was required to pay the "Escrow Amount" (equivalent to the Purchase Price) to the Escrow Agent, Oxon Law LLC, a licensed Singaporean legal practice. Section 2.2 critically provided:

        "*(a) Subject to the deposit of the Escrow Amount...if the Escrow Agent has received from the Vendor all the Closing Deliverables (defined below), Closing shall take place within three business days thereafter and the Escrow Agent shall release (i) the Escrow Amount to the Vendor and/or as instructed by the Vendor under such applicable escrow agreement between the Escrow Agent, Vendor and Purchaser ("Escrow Agreement"), in settlement of the Purchase Price in its entirety and (ii) the Closing Deliverables to the Purchaser, at Closing*";

    (b) **Section 2(b)**: defined the "*Closing Deliverables*" as including, *inter alia*, (1) an instrument of transfer in respect of the Shares "*duly executed by the Vendor*", (2) documents evidencing board approval by the Defendant of the transfer of the Shares from the Vendor to the Purchaser;

    (c) **Section 2.3 (Post-Closing Deliverables)**: this clause most pertinently provides:

> *"Subject to release of the Escrow Amount... by the Escrow Agent (or by the Purchaser pursuant to Section 2.4), the Vendor shall procure the Company to, on or before the third business day after Closing, deliver to the Purchaser or its nominee (a) the original of the new share certificate issued to the Purchaser in respect of the Purchase Shares..."*

(d) **Section 7.13 (Governing Law and Dispute Resolution)**: this clause pertinently provides:

> *"(a) This Agreement shall be governed by and construed in accordance with the laws of Singapore.*
>
> [(b)] *Each party irrevocably agrees to submit to the non-exclusive jurisdiction of the courts of Singapore over any claim or matter arising under or in connection with this Agreement.*
>
> *(c) Any dispute, controversy or claim arising out of or in connection with this Agreement, whether in contract, tort, under statute or otherwise, including any question regarding its existence, validity, interpretation, breach or termination (a 'Dispute'), shall if possible be resolved* [through] *amicable negotiation and mutual agreement by the Parties within thirty (30) days of commencement of negotiations. Should the Parties fail to reach an agreement within such period of time, then Dispute shall be submitted to* [the] *International Court of Arbitration of the International Chamber of Commerce and shall be finally settled by binding arbitration under the International Chamber of Commerce Rules..."*

18. The most important provisions of the Escrow Agreement for present purposes may be summarised as follows:

(a) **Clause 1 (Interpretation)**: the Escrow Amount is defined as US$13,625,172. The Escrow Account was specified. Clause 1.1 also critically defined "*Vendor Bank Account*" as meaning "*the Vendor's bank account as described in clause 2.7 or bank accounts nominated and notified by the Vendor to the Escrow Agent*";

(b) **Clause 2.5 (Release of Escrow Amount)**: this clause critically provides as follows:

> *"Subject to Clause 2.4*[1]*, upon the fulfilment of the release of funds in Clause 2.2(b) of the SPA, in the form as set out in Appendix 2 hereto executed by any Authorised Signatory of, and for and on behalf of, the Purchaser, release the Escrow*

[1] This clause permits the purchaser to withdraw from the transaction and seek the return of the Escrow Amount.

Amount less any Permitted Deductions, in the manner and to the persons specified in the Release Notice by way of telegraphic transfer within three (3) Business Days from the date of receipt of the Release Notice.

In the event that No Withdrawal Notice or Release Notice is received by the Escrow Agent by 5 pm on 1 July 2019, the Vendor shall be entitled to issue a written notice ('Vendor Escrow Instruction Notice') in the form as set out in Appendix 3 hereto…";

(c) **Clause 7 (Governing Law and Jurisdiction)**: the Escrow Agreement is governed by Singapore law and the parties submitted to the non-exclusive jurisdiction of the courts of Singapore;

(d) **Appendix 2 (Release Notice)**: the form of notice provided for the Purchaser's director and signatory of the Escrow Agreement, Mr Jacky Chan, to instruct the Escrow Agent to (1) release the Escrow Amount to the Vendor Bank Account, and (2) confirm that clause 2.2(b) of the SPA had been complied with.

19. The two agreements were clearly closely connected and appeared to me to contain unremarkable terms which are probably commonly used in similar transactions. Their intended effect was most importantly as follows:

(a) the Escrow Agent played an administrative middle man role of holding the Escrow Amount/Purchase Price and protecting the interests of each party to the STA by:

(i) only forwarding payment to the Vendor after the Purchaser had confirmed receipt of the Closing Deliverables, and

(ii) only forwarding the Closing Deliverables to the Purchaser after the Purchaser had paid the Purchase Price into the Escrow Account.

(b) the central, commercial function of Closing under the STA was that:

(i) the Vendor would receive the Purchase Price paid to the Vendor Bank Account or any other bank account notified to the Escrow Agent,

(ii) the Purchaser would receive corporate documentation confirming its right to become registered holder of the Shares in consideration of having discharged its duties under the STA by releasing the monies paid into the Escrow Account to the Vendor, and

(iii) actual payment of the Escrow Amount/Purchase Price to the Vendor was the responsibility of the Escrow Agent, acting on

instructions received from an Authorized Signatory of the Vendor.

Did the Purchaser discharge its responsibilities under the STA and the Escrow Agreement?

20. It being agreed that the Purchaser had paid the Purchase Price to the Escrow Agent and instructed the Escrow Agent to release the monies in full to the Vendor, having received the Closing Deliverables, I was bound to find that the Plaintiff had discharged its obligations under the Agreements. The suggestion advanced by the Defendant, that Closing had not in fact occurred because the Plaintiff was contractually obliged under the STA to ensure that Escrow Agent paid the full amount of the Purchase Price to the Vendor Bank Account specified in the STA, was unsustainable.

21. The STA clearly provided that the Purchaser was required to instruct the Escrow Agent to release the full amount to the Vendor, and the Purchaser signed the prescribed Release form instructing the Escrow Agent to release the Purchase Price to the Vendor Bank Account. However, as one might expect, the STA expressly contemplated that the Vendor might authorise the Escrow Agent to pay the monies to the Vendor Bank Account designated in the STA or any other bank accounts thereafter designated. The term "*Vendor Bank Account*" was flexibly defined by Section 1.1 as "*the Vendor's bank account as described in clause 2.7 or bank accounts nominated and notified by the Vendor to the Escrow Agent*".

22. The Defendant did not suggest that the Escrow Agent had not paid the full Purchase Price to a bank account "*nominated and notified by the Vendor to the Escrow Agent*". Its complaint was that there was a shortfall of US$3,303,072, because only US$10,322,100 was paid to it by the Escrow Agent. But carefully scrutinised, Aurora's real complaint was that that lesser payment was all that was paid into the account it initially designated and recorded in Section 2.6 of the Escrow Agreement. It did not actually make the further complaint that the balance of the monies were paid to an account which it had not "nominated and notified", which would also have contractually qualified as a Vendor Bank Account.

23. It makes no commercial sense to suggest, as the Defendant's argument on this issue implied, that the Purchaser was required to police the reliability of the payment instructions the Vendor supplied. Section 2.2(b) of the STA clearly signified that the transaction was consummated when the Purchaser had paid the Purchase Price to the Escrow Agent, the Escrow Agent had supplied the Closing Deliverables provided by the Vendor to the Purchaser and the Escrow Agent had paid the Purchase Price "*to the Vendor and/or as instructed by the Vendor*". The Defendant and/or Aurora placed no evidence before the Court to suggest that this had not occurred or to support any plausible case that the Plaintiff as Purchaser had failed to comply with its contractual obligations under the STA.

The fraud allegation

24. The Defendant's real case was that the Plaintiff had conspired with a dishonest agent of Aurora to divert US$3,303,072 away from Aurora, and in this covert but substantive way had failed to discharge its payment obligations under the STA. There was simply no credible evidence advanced in support of this serious and on its face improbable allegation. It was implicitly conceded that the Escrow Agent had disbursed the monies in accordance with the Vendor's apparent instructions, because the most obvious complaint that the Escrow Agent had failed to follow Aurora's instructions was simply not advanced.

25. Aurora's pursuit of the inherently improbable and speculative supposition that the Plaintiff had formally completed the STA but then conspired to effectively steal back part of the Purchase Price it had paid, unsurprisingly lacked conviction. It allowed months to pass without apparently carrying out forensic investigations to clarify who actually benefitted from the alleged fraud. It was supposedly seeking to compromise the matter with Mr Chan, yet produced no incriminating evidence likely to persuade the Plaintiff to give up their strict legal right to enforce the STA. Then, after the Plaintiff commenced the present proceedings in late February this year, and the hearing was listed, Aurora referred the "dispute" to arbitration on May 13, 2020.

26. The Defendant ultimately relied solely upon the First Affidavit of David Kok Soon Chang, who became Operations Manager of Aurora on January 2, 2019. It advanced no independent basis of its own for refusing to register the Share transfer its own board of directors had already approved. In short, this evidence clearly supports a potential interlocutory finding that Aurora was arguably defrauded by its own employee who admitted defrauding Aurora. But as far as implicating the Plaintiff in this alleged fraud, the Affidavit is notable for its glaring omissions, apparently unfounded suspicions, reckless inaccuracies and surprising speculations. That said, it seemed equally clear that Mr Chang was seeking to assist his employer to remediate a significant financial loss and was doing his best to advance the best possible case for Aurora without misleading the Court on the central factual issues. He was not the logical person to be the evidential flag carrier, but fortuitously required to play a leading role. No personal criticism of the deponent is intended in the critical review of his evidence which follows below.

27. The first glaring omission relates to information relating to who received the 'missing monies' which must either (a) already be available to Aurora, or (b) could have been obtained from the Escrow Agent by legal compulsion had it refused to produce it. The former seems most likely. Firstly, Mr Chang deposed that in or about July, 2019 he discovered that the "*missing US 3,303,072, had been disbursed to various persons and entities without the authority of Aurora*" (paragraph 22). He does not depose that any of the recipients included the Plaintiff or any person linked to the Plaintiff. The only reasonable inference is that there was no obvious connection and that, almost a year later with ample opportunity for investigations to be carried out into potential links between the recipients and the Plaintiff, no connections have been found.

28. The second glaring omission is the lack of any explanation as to why the Escrow Agent has not been sued for breach of contract and/or facilitating the fraud. Closely connected with this is the failure to unambiguously aver that the missing monies were

not sent to accounts notified by Aurora's Authorised signatory and director, Mr Yap. Mr Chang makes the following unimpressively obtuse averment (at paragraph 21):

> "*21. I further confirm that to the best of my knowledge Aurora and Mr Yap did not amend the agreement in any way with respect to the authorized payment instructions to Aurora which I believe would require the signed consent of both the Plaintiff and the Escrow Agent...*"

29. This averment combines an uncontroversial and accurate factual assertion (there was no amendment to the STA and/or Escrow Agreement) with an unsustainable legal argument (the Vendor could not unilaterally designate bank accounts based on the definition of "Vendor Bank Account" in Section 1.1 of the Escrow Agreement). The definition itself permitted various accounts to be designated by the Vendor. The indemnity clause in the Escrow Agreement expressly provides that "*the Escrow Agent shall not be relieved from liability hereunder for its own willful misconduct*" (clause 3.2). It beggars belief that the missing money had in fact been paid by the Escrow Agent to third parties without any apparently valid instructions from the Vendor, Aurora, in circumstances where Aurora was raising not even a whisper of a complaint.

30. The unfounded suspicions deployed in support of the fraud allegation may in part reflect a not uncommon propensity displayed by victims of fraud; a tendency to view even innocent aspects of a transaction as incriminating. It may also reflect the reality that in the absence of the director who led the negotiations for Aurora (who has since retired), Mr Chang has been thrust into a somewhat unfamiliar arena. He candidly admitted that he did not play a leading role in negotiating the Agreements. The suspicions deployed against the Plaintiff's director, Mr Chan, which (with one exception) I found to be on their face lacking in substance included the following:

(a) Mr Chan became involved at a late stage when the substance of the agreement had been negotiated by the Plaintiff's shareholder, and his involvement was in and of itself suspicious. To my mind having regard to the fact that Mr Chan is a director of the Plaintiff, and was authorised to execute the Agreements on the Plaintiff's behalf, it is unremarkable that he should become involved in finalizing the legal documentation. Aurora was in no position to assess the whys and wherefores of Mr Chan's nomination by the Plaintiff;

(b) Mr Chang considered certain proposals made by Mr Chan to be "*highly unusual and pedantic*". One alleged proposal, the nominee director proposal, arguably was unusual, but it is far from clear that this proposal emanated from the Plaintiff's Mr Chan. I consider this further below. Mr Chan's proposed use of an Escrow Agent was said to be suspicious, as was his disputed and unsubstantiated nomination of Oxon LLC. I found nothing unusual about the structure of the Agreements, no support for the idea that Oxon LLC was nominated by the Plaintiff and there was in any event no or no credible suggestion of any fault on Oxon LLC's part;

(c) the high point of Mr Chang's case on suspicion was Mr Chan's allegedly proposing that Aurora appoint a nominee director to handle the 'know your customer' ("KYC") issues post-closing. Mr Chang states that the Aurora team was so suspicious of Mr Chan's negotiating proposals at the time when they were made, that their lead negotiator Mr Tang (who negotiated the commercial bargain including the price with the Plaintiff's shareholder, Shinhan Investment Corporation) was warned that the nominee director proposal "*would expose Aurora to the risk of fraud*" (paragraph 12). These suspicions were so strongly held, moreover, that Mr Tang was instructed to break off the negotiations, an instruction which he circumvented by lobbying a senior executive of Aurora. This resulted in the appointment of Mr Yap as a nominee director to consummate the Agreements on Aurora's behalf. However:

(1) Mr Chang was the Operations Manager, and Mr Tang the Portfolio Manager. The appointment of Mr Yap must have been approved by Aurora's board and by persons constitutionally charged with making commercial risk assessments on such matters;

(2) as pointed out in the Second Chan Affirmation, and confirmed by contemporaneous email correspondence, Aurora was represented in the transaction by lawyer Anil Murthy of Aequitas Law Corporation. Conspiracy theorizing on a fairly large scale is required to think that it is plausible that both Aurora's board and its lawyers were wilfully blind to a contractual proposal which patently exposed the Vendor to a risk of fraud which, it is implied, actually materialised;

(3) the most striking and dispositive omission from Mr Chang's evidence, however, is the absence of any positive assertion that Mr Yap, whose appointment as a nominee director is said to have raised an obvious risk of fraud, played any role in the fraud which actually occurred[2];

(4) the array of suspicions levelled against Mr Chan does not bite at all as far as the Plaintiff is concerned in any event. To my mind it is more plausible to suspect a rogue director of seeking to profit from fraud than to suspect that individual of seeking to obtain a benefit for a company and its shareholder from fraudulent conduct;

[2] Had the Defendant and Aurora been able to rely on the Affidavit of Wanshou Gao, which was not properly admissible because it was purportedly sworn in a language the deponent was not fluent in, the forensic value of his assertion that Mr Yap was implicated and had resigned as a director would have been neutralised by his admission that, far from being a mysterious stranger inveigled into the transaction by Mr Chan, Mr Yap was well known to and had often assisted Aurora before.

(5) however, as Mr Chan himself points out in his Second Affirmation (at paragraph 11), he did not originate the nominee director proposal. There is no documentary support for the suggestion that he did. Moreover the earliest email reference to it which he can find is in an email dated May 6, 2019 from Aurora's lawyers. This email not only seemingly pre-dates his involvement in the transaction. Mr Chan contended (to my mind without much persuasive effect) that the email also suggested that Aurora was the party which initiated the nominee director proposal. I was unable to form any clear view of the merits of these points of detail. What the May 6, 2019 email did in evidential terms was to undermine the weight to be accorded to Mr Chang's assertions that, in effect, Mr Chan persuaded a rogue employee of Aurora's to blindside a senior executive into accepting an obviously improbable contractual arrangement. The proposal was not objected to by Aurora's outside counsel as well.

31. A reckless (or at least careless) inaccuracy was the averment that Mr Chan had "*two prior convictions in Hong Kong for securities-related offences*" (paragraph 11). The evidence (derived from a simple Internet search) in fact showed that Mr Chan had been charged with two regulatory offences (unlicensed dealing) by the Hong Kong Securities and Futures Commission, but was bound over without being convicted. The mud thrown at Mr Chan did not stick to any material extent in the context of the present applications. He was willing to come forward and defend his own integrity and that of the share transfer transaction. The most likely suspects in Aurora's tale of fraud were nowhere to be seen.

32. The fraud allegation itself therefore stood or fell on its own merits. Mr Young firstly sought to land a knock-out blow by submitting that the rectification application was a final hearing and so hearsay was inadmissible. In my judgment Mr Chang's Affidavit was sworn in support a Case Management Stay. This was an interlocutory application within the rectification proceedings commenced by the Plaintiff. It was open to the Defendant and/or Aurora to rely on an Affidavit which was to a pivotal extent based on the deponent's information and belief. The central averment was as follows, after commencing investigations in July 2019 and interviewing Mr Tang about the Purchase Price shortfall:

> "*24. ... Mr Tang acknowledged that the US$3,303,072 was paid out to various intermediaries as 'introduction fees'...*
>
> *25. Under more detailed questioning...Mr Tang verbally admitted to me that he had personally received 'US$500,000 to US$ 600,000' in proceeds. He further stated that I was being 'naïve' and 'bureaucratic', and asserted that 'in private equity deals such as these, everyone in the chain gets paid', including Mr Chan...*

30. In my personal opinion, the facts as I understand them suggest that Mr Chan never had a bona fide interest in the Transaction, and instead, took advantage of Shinhan's interest in the Transaction to orchestrate a string of events through collaboration with various third parties in order to benefit himself, thereby resulting in Aurora suffering a loss of US$3,303,072. Thus it follows that Aurora has been the victim of a fraud perpetrated by the Plaintiff through its agent Mr Chan."

33. Mr Young relied on two powerful forensic points to demonstrate the weakness of the fraud allegation against the Plaintiff. Firstly, and most importantly, he emphasised how curiously worded the reported basis for the claim was. Mr Tang was not quoted as implicating Mr Chan as receiving a share of the spoils at all. The words "*including Mr Chan*" were the deponent's words, not Mr Tang's. This begged the question of precisely what Mr Tang had actually reported to the deponent. Did he assert that he knew that Mr Chan was paid? Did he agree with a suggestion made by the deponent, who in the course of the transaction had been convinced (unjustifiably) of Mr Chan's bad character? The primary basis for Mr Chang's information and belief was tenuous in the extreme, particularly since the source was said to be admittedly dishonest and now incommunicado in North America.

34. The second point relied upon by Mr Young was that all that the deponent advanced was his "*personal opinion*" of Mr Chan's wrongdoing; an opinion from a lay witness is not evidence. That might appear to be merely a technical point, but in my judgment it helped to highlight a point of substance in the present context. The deponent, who was in any event not even a director of Aurora, seemed unable to make a positive assertion that the Plaintiff or Mr Chan had been involved in the alleged fraud. He also studiously avoided stating that his employer, Aurora, believed that it had been defrauded by Mr Chan or the Plaintiff. The only matters expressly advanced as representing Aurora's position were the contractual points based on the premise that the Escrow Agent was only permitted to pay the Escrow amount into the account mentioned in the STA (paragraphs 23-24). Bearing in mind the unreliability of Mr Chang's judgments about Mr Chan in relation to the negotiating process, confidence in Mr Chang's "*personal opinion*" was further undermined by the fact that his assessments of wrongdoing on the part of Mr Chan and the Plaintiff were not even formally endorsed by Aurora whose claim he sought to vindicate.

35. An additional point which further diminished the Defendant's case was the following. As I observed in the course of the hearing, there really was no credible evidence at all to support a substantial matter to be referred to arbitration as against the Plaintiff company, as opposed to against Mr Chan in his personal capacity. Even Mr Chang's personal opinion was internally inconsistent and illogical in asserting that Mr Chan "*took advantage of Shinhan's interest in the Transaction to orchestrate a string of events through collaboration with various third parties in order to benefit himself*" (emphasis added) and also that "*it follows that Aurora has been the victim of a fraud perpetrated by the Plaintiff through its agent Mr Chan.*" If this "opinion" were to be vindicated, it is difficult to see on what basis the Plaintiff could be held to be vicariously liable for the fraud that Aurora's Operations Manager, but not Aurora itself, believes Mr Chan has "orchestrated".

36. The speculative opinion which is expressed is not that Aurora was induced by the fraud of the Plaintiff's agent to enter into the STA, and should therefore be able to avoid the contract. Rather, it is essentially hypothesised that Mr Chan exploited his involvement in the contractual process to benefit himself after the transaction had been formally consummated. That is, on the face of it, inconsistent with the Plaintiff's vicarious liability. While this is a complicated and fact-sensitive area of the law, in *Dubai Aluminium Company Limited v Salaam and Others* [2003] 2 AC 366 at 377E, Lord Nicholls stated:

> *"... Perhaps the best general answer is that the wrongful conduct must be so closely connected with acts the partner or employee was authorised to do that, for the purpose of the liability of the firm or the employer to third parties, the wrongful conduct may fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business or the employee's employment."*

37. I saw no need to reach any concluded view on the vicarious liability issue because the evidence against the Plaintiff's agent was so tenuous. My positive findings were that there was no credible evidence that Mr Chan had any involvement in the diversion of part of the Purchase Price duly paid by the Plaintiff which apparently occurred. More than that, the Defendant and/or Aurora had failed to demonstrate any reasonable prospect of establishing that the Plaintiff was implicated in the alleged fraud.

Summary

38. It followed that I found no exceptional circumstances justifying staying the Plaintiff's rectification proceedings because there was no real or substantial dispute to be referred which was disclosed by the evidence filed on behalf of the Defendant and Aurora. Even if Aurora had applied for a mandatory statutory stay, I would have in any event concluded that there was no substantial or real dispute to be referred to arbitration.

39. I did find that the Plaintiff had proved that it had acquired title to the Shares under the STA and was accordingly entitled to be entered in the Defendant's register of members as their owner.

Conclusion

40. For the above reasons on June 16, 2020, I dismissed the Defendant's stay Summons and granted the Plaintiff's application to rectify the Defendant's register of members under section 46 of the Companies Law (2020 Revision).

GRAND COURT CIV-03 CAYMAN ISLANDS

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT