IN THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

CLAIM NO. BVIHC (COM) 140 OF 2015

IN THE MATTER MING YUAN HOLDINGS LIMITED
AND IN THE MATTER OF MING YUAN INVESTMENTS GROUP LIMITED

BETWEEN:

(1) IU CHUNG A.K.A. YAO YONG
(2) YAO YUAN

Claimants

-and-

(1) GREATER ACHIEVE LIMITED
(2) PROVIDENT PACIFIC HOLDINGS LIMITED
(3) TIME HORIZON LIMITED
(4) SHARP COLOUR LIMITED
(5) MING YUAN INVESTMENTS GROUP LIMITED
(6) MING YUAN HOLDINGS LIMITED
(7) CHINABASE HOLDINGS LIMITED
(8) MINGYUAN MEDICARE DEVELOPMENT COMPANY LIMITED

Defendants

Appearances:

John Brisby QC and Robert Nader on behalf of the 1st Defendant

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2016: June 22; 28.

JUDGMENT

Introduction

[1] EDER J [Ag.]: This is an adjourned application by the first defendant ("GA") to strike out the claims made against it in these proceeding under CPR 26.3 and pursuant to the Court's inherent jurisdiction on the grounds that the Statement

of Claim (SOC) does not disclose any reasonable ground for bringing the claim and/or is otherwise an abuse of the process of the Court.

[2] By way of background, the Claimants are two brothers. They are Chinese nationals and according to the SOC live in Hong Kong. Before the events which form the subject of these proceedings, they each had a 50% shareholding in MYHL (the Sixth Defendant), a BVI-incorporated company, which had in turn a wholly owned subsidiary, MYIGL (the Fifth Defendant), another BVI registered company. In turn, according to the Claimants MYIGL had a 22% shareholding in MMD.

[3] Mr Yao was at the time when the proceedings were commenced the chairman and CEO of MMD, and Mr Iu was the legal representative (i.e. had management control) or director of some of, if not all, the subsidiaries of MMD in the PRC.

[4] Mr Iu is an undischarged bankrupt, following a bankruptcy order made against him on 5 August 2015. Shortly before the last hearing, Mr Iu's legal representatives, Harneys, accepted that this meant he was unable to bring these proceedings without the consent of his trustee in bankruptcy or the court in Hong Kong. As appears below, he was given permission to discontinue these proceedings on certain conditions, but those conditions have not yet been fulfilled.

[5] As for Mr Yao, he has substantial unsatisfied judgments against him in the PRC. On 27 November 2015, he was added by the court in the PRC to the official *"List of Dishonest Persons Subject to Enforcement".* The notice given by the PRC court gives the reason for his being added to the list as follows: *"Have the ability to fulfil obligation under effected legal document but refuse to fulfil obligation"*.

[6] The strike-out application initially came before Farara J on 14 and 15 January 2016 together with an application to discharge an injunction previously obtained by the claimants against GA. However, as explained below, there was insufficient court time to deal with GA's strikeout application. Hence it was adjourned to a further hearing ultimately fixed for 22 June 2016. At that hearing, GA were represented by Mr John Brisby QC and Mr Robert Nader who had previously served a skeleton argument in support of the application. The Claimants served no skeleton and were unrepresented.

[7] After hearing oral submissions from Mr Brisby, I informed him of my decision viz. that I would grant the strikeout application and dismiss the claims against GA. These are my reasons for that decision.

The Application

[8] EC CPR 26.3 provides in material part:

> *"Sanctions – striking out the statement of case*
> *(1) In addition to any other power under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court that –*
>
> *a. there has been a failure to comply with a rule, practice direction, order or direction given by the court in the proceedings;*
> *b. the statement of case or the part to be struck out does not disclose any reasonable ground for bringing or defending a claim…."*

[9] As to the proper approach that the Court should take to a strike out application, Mr Brisby drew my attention to the decision of the ECSC Court of Appeal in *Didier v Royal Caribbean Cruises Ltd.* (2016). At [24], Pereira CJ explained that an application under the rule, is decided by the court solely on the parties' pleaded cases before it, with no additional evidence, and all facts pleaded in the statement of case are assumed to be true for this purpose.

Reference was there made to the earlier Court of Appeal decision in *Citco Global Custody NV v Y2K Finance Inc.* (2009), where Edwards JA stated as follows:

> "Striking out under the English CPR, r 3.4(2)(a) which is the equivalent of our CPR 26.3(1)(b), is appropriate in the following instances: where the claim sets out no facts indicating what the claim is about or if it is incoherent and makes no sense, or if the facts it states, even if true, do not disclose a legally recognisable claim against the defendant."

Pereira CJ went on to say that

> "….a strike out application under CPR 26.3(1)(b) would be the appropriate procedure if a party to an action is faced with a statement of case which is plainly just bad in law. In any of the instances mentioned above by Edwards JA, the test whether the statement of case discloses no reasonable ground for bringing the claim, would clearly be satisfied."

[10] Thus, Mr Brisby accepted that he was not entitled to refer to anything beyond the pleaded cases on an application EC CPR 26.3(1)(b). However, he submitted, and I accept, that his application to strike out under the inherent jurisdiction of the Court on the basis of "abuse of process" is not subject to a similar constraint: see *Willis v Earl Howe* [1893] 2 Ch 545; *Remington v Scoles* [1897] 2 Ch 1.

CPR 26.3(1)(b): No reasonable ground

[11] I can deal with the application under CPR 26.3(1)(b) quite shortly.

[12] As appears from the SOC, the claim made against GA relates to the circumstances in which it acquired shares in the Eighth Defendant ("MMD") that were formerly held by the Fifth Defendant ("MYIGL"). MYIGL was a company that was at one time owned by the Claimants, through an intermediate holding company. MYIGL's shares in MMD had been charged to

the Second, Third and Fourth Defendants (the "Lenders"), as security for loans (the "Loans") made by the Lenders to MYIGL. GA acquired the MMD shares when the Lenders exercised their powers of sale. The Claimants contend that the Lenders were not entitled to sell the MMD shares which they held as security, since they claim the Loans had already been repaid. GA is alleged to be liable as a party to a conspiracy to sell the shares unlawfully, or as a knowing recipient or constructive trustee.

[13] All of the Claimants' claims against GA depend on an allegation that the Loans had been repaid as at the date on which the Lenders exercised their security rights. As pleaded, that allegation is the only basis for saying that the sale to GA was unlawful. However, whilst the Claimants assert that the Loans have been repaid, Mr Briby submitted that this is not supported by the facts they plead; and that they do not allege any repayment by the borrower, MYIGL, to the Lenders. Instead they rely on payments said to have been made by parties associated with MYIGL to parties allegedly associated with the Lenders (payments in some cases pre-dating the dates on which the Loans were disbursed). They claim that an agreement was reached to treat the Loans as having been repaid as a result of informal set-off arrangements that would embrace those associates. However, Mr Brisby submitted that they do not say that the Lenders were parties to that agreement: indeed, it is not said to have been agreed by anyone who had the power to bind the Lenders, or to waive their rights to be repaid. Even assuming that everything the Claimants say is true as a matter of fact, I accept Mr Brisby's submissions that, as pleaded, there is no legal basis for saying that the loans have been repaid, and thus, there is no basis for the claim against GA.

[14] In addition, Mr Brisby submitted that there is a further objection to the proprietary claims advanced by the Claimants against GA. These claims are based on an allegation that GA has received assets (the MMD shares) which

ought in law or equity to belong to MYIGL. As submitted by Mr Brisby, any such claim is MYIGL's cause of action, not the Claimants. The Claimants appear to recognise that the cause of action belongs to MYIGL, since the only relief claimed against GA in the prayer is as follows:

> *(1) A declaration that Greater Achieve holds the 815,109,075 shares in MMD as constructive trustee for MYIGL on ground of knowing receipt; and*
>
> *(2) A declaration that Greater Achieve holds all sums received by it in fraud of MYIGL on trust for MYIGL and is liable to account to MYIGL for the same and an order that it pay those sums found to be due on the taking of an account to MYIGL.*

[15] As submitted by Mr Brisby, it is trite law that the only party who can sue in respect of a company's cause of action is the company itself (absent permission for the bringing of a derivative claim). The Claimants have nowhere in the SOC explained the basis upon which they purport to have brought a claim on MYIGL's behalf. The nearest they come is the pleading at paragraphs 11 and 12 that the Claimants are 100% beneficial owners of the entire issued share capital of MYHL, and that MYHL is 100% beneficial owner of the issued share capital of MYIGL. That assertion is disputed – but even if it were right, it would not give the Claimants a right to sue unless they obtained permission for a double derivative action.

[16] Here, the Claimants have neither applied for nor obtained permission to bring a double-derivative claim, and it is now far too late for them to do so. In my judgment, this is a further reason why the SOC should be struck out.

[17] Insofar as the Claimants seek damages for conspiracy against GA, Mr Brisby raised a further discrete point viz. that the only loss said to have been caused

to the Claimants by the conspiracy (so far as it relates to GA) is the loss allegedly suffered by MYIGL on the loss of its shares in MMD: see paragraph 100 of the SOC. However, he submitted that such claims are barred by the rule against reflective loss and therefore irrecoverable: see *Johnson v Gore Wood & Co* [2002] 2 AC 1. On that basis, Mr Brisby submitted that such claims ought to be struck out for that reason. Mr Brisby may be right that such claims are barred and therefore irrecoverable. However, in the event, it is unnecessary to determine this point.

Abuse of Process

[18] Further and in any event, this is, in my judgment, a case where the SOC as against GA should be struck out for abuse of process under the Court's inherent jurisdiction. In summary, this is on the basis that the Claimants are in flagrant breach of a series of orders of this Court and have taken no active steps in pursuit of their supposed claims. This appears from the procedural history set out by Mr Brisby in his skeleton argument which I would summarise as follows.

[19] The current proceedings were issued on 19 November 2015. On 23 November, the Claimants made an *ex parte* application to Farara J for (i) permission to serve out of the jurisdiction on the Eighth Defendant, MMD and (ii) an interim injunction. The injunction was granted. On 11 December 2015, GA applied to discharge the injunction and, on 16 December 2015, by amendment to its application notice applied to strike out the SOC.

[20] Meanwhile, also on 11 December 2015, GA applied for security for costs. That application was granted on 8 January 2016, when the Judge ordered Mr Yao to pay USD150,000 by way of security within 14 days. No order was

made against Mr Iu on account of his bankruptcy. The USD150,000 security has never been paid – and remains outstanding.

[21] The Defendants filed their Defence on 22 December 2015. The Reply was accordingly due on 6 January 2016. The Claimants requested an extension of time for their evidence in reply and an extension of time for their Reply to the Defence until 9 January 2016. On 7 January, Harneys, the Claimants' then legal reresentatives on the record, indicated that they expected to be in a position to serve Mr Yao's evidence by 11 January 2016. In the event, that date passed, but no Reply was served; nor any reply evidence.

[22] On 6 January 2016, following correspondence from the Defendants' legal practitioners, Forbes Hare, concerning the bankruptcy of Mr Iu, Harneys wrote to Forbes Hare to say *"we accept that Mr Iu is unable to bring these proceedings in the BVI without the consent of the Hong Kong Trustee in Bankruptcy and the approval of the Hong Kong Court. We therefore propose to remove Mr Iu as Claimant"*. However, his removal could only be achieved by discontinuance with the leave of the Court.

[23] On 12 January 2016, Harneys wrote to Forbes Hare to state that they had received instructions from the Claimants to discontinue the proceedings against all Defendants. However, the terms of the discontinuance and the discharge of the injunction were not agreed – in particular as regards costs and the ability of the Claimants to revive the proceedings and/or their complaints in a different jurisdiction at a later date.

[24] On 13 January 2016, Harneys wrote to the Court to say that *"the Claimant (for whom we act) anticipates issuing an application this morning… for permission to discharge the injunction, to be released from the undertaking and discontinue the claim. We have suggested a time estimate of 1 hour"* As a

result of that email, the Court assumed that the matter was no longer contentious, reallocated part of the hearing time that had been agreed for the disposal of the various applications, and did not carry out the necessary pre-reading for what the application on 14 and 15 January 2016.

[25] On 14 January 2016, a few minutes before the hearing commenced, there was a *volte face*: the Claimants served a skeleton argument explaining that Mr Yao no longer intended to discontinue the claim, and that he would be opposing the discharge of the injunction.

[26] Accordingly, at the hearing on 14 and 15 January 2016, the Court dealt with (i) an application by Mr Iu to discontinue the proceedings against all Defendants in the light of his bankruptcy; and (ii) GA's application to discharge the injunction. In the light of the email referred to at paragraph [16] above, there was insufficient time to deal with the strike out.Farara J granted Mr Iu permission to discontinue on the terms set out in paragraph 1 of the order. These included (i) a prohibition on him issuing any further claims in the BVI whilst bankrupt; (ii) a prohibition on him issuing further claims in the BVI arising out of the facts pleaded in the SOC without the permission of the Court; and (iii) a requirement that *"Pursuant to CPR 37.6(1) he shall pay the First to Seventh Defendant's costs of the Claim up to the date of discontinuance, such costs to be assessed if not agreed."* These costs have not yet been paid, and accordingly the discontinuance has not yet taken effect.

[27] The Judge also discharged the injunction. In part, the discharge application was based on an argument that the Claimants had failed to raise a "triable issue" as required by the *American Cyanamid* test – an argument closely allied to that arising on this application. As to this he said, *"On this matter, which is the subject of the Strike Out Application, I would go no further than to say that the claim has these serious inherent difficulties as it currently stands"*.

However, the principal ground for discharging the injunction was the Claimants' failure to give full and frank disclosure on the *ex parte* application. His conclusion was as follows:

> "I accept that the non-disclosures were material and they clearly were. Indeed some of them, such as the failure to disclose that the effect of Mr Iu being an undisclosed bankrupt is that he had no authority to bring the claim and to apply for the injunction; that the Second Claimant had failed to pay judgment debts against him of very substantial amounts; that this dispute was already the subject of proceedings in Hong Kong involving the Claimants and some of the Defendants; that the failure to disclose, sorry, the failure to disclose the missing $66 million from one of the companies which the Second Claimant is an executive director, as the true reason for the unresolved matter when addressing this at Paragraphs 40 to 43 of the Second Claimant's Affidavit; the failure to disclose correctly and fully the Bermuda proceedings and why this action was commenced as it related to the failure to call an AGM of the Eighth Defendant and the failure to fully disclose the claim in the Hong Kong proceedings. These are all matters material to the issues the Court had to consider upon the application for the injunction under the principles in the American Cyanamid case.
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> This is really a case of egregious breaches of duty of full and frank disclosure on the part of the Claimants/Applicants. To date the Second Claimant has not offered any explanation or apology for the non-disclosures. The Court is left to conclude that they were deliberate and designed to ensure that the Claimants obtained a most distinct advantage against the Defendants and seemingly to prevent the calling of the AGM of the Eighth Defendant." (Emphasis added)

[28] Paragraphs 4 and 5 of the Order of the Court dated 15 January 2016 provided, in effect, that the Claimants pay the costs of the applications to continue and to discharge the injunction and make an interim payment in the sum of US$67,500. He ordered that the order for security for costs remained in force. However, neither the security nor interim payment has been paid.

[29] Once the injunction had been discharged, the Claimants stopped playing any active part in these proceedings. Harneys came off the record on 10 February 2016. According to an affidavit sworn by James Noble of Harneys (served in the context of a wasted cost application made by the Defendants against that firm), the Claimants owe them *"considerable outstanding fees"*.

[30] The Claimants have not appointed replacement legal practitioners, nor given notice of a change of address for service within the jurisdiction. Thus the Claimants are in breach of CPR 63.4.

[31] The address for service previously given was at Harneys and given that no new address has been notified, GA is still entitled to effect service on the Claimants at the same address pursuant to CPR 3.11 (that rule being unaffected by anything contained in CPR 63.6, the rule under which Harneys came off the record). Accordingly, GA has continued to serve documents on the Claimants at Harneys' address in the BVI. However, although not required by the rules to do so, the Defendants have sent certain documents direct to Mr Yao in order to ensure, so far as possible, that any important developments in the proceedings do in fact come to the attention of the Claimants. Thus, for example, a letter was sent to Mr Yao by registered post on 13 June 2016, referring to the date of this hearing and requesting agreement to the hearing bundle. However, nothing has been heard from the Claimants since the hearing on 14 and 15 January 2016.

[32] On 28 April 2016, Bannister J made an order that *"The claim herein be stayed as against the Second to Seventh Defendants until the Claimants pay the sum of USD 67,500 on account of costs pursuant to the terms of paragraph 5 of the Order of Justice Farara dated 15 January 2016 …"* However, as already noted, that sum remains unpaid.

[33] The Claimants failed to serve any skeleton argument for this hearing on 22 June 2016 – and failed to appear at the hearing. No explanation has been given for these failures.

[34] This brief history of the proceedings plainly demonstrates a series of flagrant breaches of the Court Rules and Orders on the part of the Claimants. Mr Brisby submitted that the obvious inference is that having failed to maintain the injunction and faced with substantial costs orders, the Claimants have decided to abandon these proceedings. That may well be the explanation. In any event, in my judgment and whatever their reasons may be, their conduct as summarised above amounts to an abuse of process which plainly justifies the strike out of the SOC.

[35] Quite apart from all the above, it would appear that Mr Iu has no title to these claims a result of his bankruptcy. All of the matters relied on in the SOC predate his bankruptcy, and accordingly any cause of action which he may have had vested in his trustee in bankruptcy on the making of the bankruptcy order. As already noted, Harneys correctly accepted on 6 January 2016 (whilst they were still acting for him) that Mr Iu was unable to pursue these proceedings without the consent of Mr Iu's trustee in bankruptcy or the leave of the court in Hong Kong – neither of which has been obtained. Mr Iu therefore has no title to the causes of action in respect of which he sues, and the claims made by him should be struck out on that basis as well.

Sir Bernard Eder QC
Commercial Court Judge (Ag)
xxxJune 2016