In The Supreme Court of Bermuda

CIVIL JURISDICTION
COMMERCIAL COURT
COMPANIES ACT (WINDING UP)
2020: No. 300

BETWEEN:

SPANISH STEPS HOLDINGS LTD.

Petitioner

- and -

POINT INVESTMENTS LTD.

Respondent

Before: **Hon. Chief Justice Hargun**

Representation: **Mr. Keith Robinson of Carey Olsen Bermuda Limited for the Petitioner**

Mr. Mark Diel, Ms. Katie Tornari and Mr. Christopher Snell of Marshall Diel & Myers Limited for the Respondent

Date of Hearing: 29 October 2021 **Date of Judgment: 17 November 2021**

JUDGMENT

Hargun CJ

Introduction

1. At the conclusion of the hearing on 29 October 2021 the Court ordered that Andrew Childe and Richard Lewis of FFP Limited, Cayman Islands and Mathew Clingerman of Krys Global, Bermuda be appointed as Joint Provisional Liquidators ("**JPLs**") of Point Investments, Ltd ("**the Respondent**") and that the powers of JPLs shall not be limited, pursuant to section 170(3) of the Companies Act 1981 ("**the Act**").

2. This Judgment sets out the Court's reasons for the appointment of JPLs and also deals with the Respondent's application seeking, *inter alia*, a validation order pursuant to section 166(1) of the Act.

3. In support of these applications the Petitioner relied upon three affidavits of Kiernan Jane Bell, a former director of the Petitioner, and three affidavits of Peter Goddard, a director of BCT Directors Limited, which is now the sole director of the Petitioner. The Respondent relied upon seven affidavits of James Alexander Fortescue Watlington, a director of the Respondent.

Background

4. The background to these winding up proceedings is helpfully set out in the written submissions prepared by Mr. Robinson on behalf of the Petitioner.

5. The Petitioner is ultimately wholly owned by the trustee of the A. Eugene Brockman Charitable Trust ("**the Trust**"). While the Respondent commenced its existence as a BVI company, it became a Bermuda company on 30 November 2009. The Respondent is thus a corporate investment vehicle for the Petitioner and ultimately the Trust. It continues to

hold at the date hereof extremely valuable assets (in the region of US$1.8 billion) the vast majority of which are represented by investments in Cayman Islands funds.

6. The share structure of the Company is unusual and means that the Petitioner, while holder of all of the economic interest in the Respondent (save for US$100) represented by 4,900,000 common shares of par value US$0.001, has no right to vote its shares. The holder of the single "Manager Share" with par value of US$100 has all of the voting power (bye-law 4(1)).

7. The Trust has been embroiled in extensive litigation in Bermuda and the United Kingdom since 2018. The beneficiaries of the Trust are certain members of the Brockman family, including Robert Brockman, and charity.

8. The trustee of the Trust is BCT Limited ("**BCT**" or "**the Trustee**") which is a controlled subsidiary of Maples FS Limited. BCT was appointed as trustee of the Trust in place of Medlands PCT Limited ("**Medlands**") by Order of the Court of Appeal dated 2 February 2021 with its appointment to take effect on such date and on such terms as Justice Subair Williams was to appoint. Justice Subair Williams, by Order dated 26 March 2021, appointed 1 April 2021 as the date on which BCT would commence its trusteeship of the Trust. While BCT is a Cayman Islands company, it has irrevocably submitted to the jurisdiction of this Court with respect to the administration of the Trust.

9. The Petition was presented on 16 September 2020 at which point in time the shares of the Petitioner were ultimately held by Medlands as trustee of the Trust and the Board of the Petitioner was made up of Medlands' appointees. Medlands had also been appointed by Order of the Supreme Court dated 19 December 2019. Upon BCT's appointment as trustee, the Board of the Petitioner was changed and is now made up of BCT's nominees.

10. Medlands was appointed as trustee in place of St Johns Trust Company Limited ("**SJTC**") which had been in office since 1995. By Order dated 19 December 2019 Subair Williams J declared that SJTC had not been properly appointed as trustee of the Trust and rather had at all material times been a trustee *de son tort*.

11. Prior to 28 September 2018, Mr. Evatt Tamine had been a director of SJTC together with Mr. James Gilbert. Mr. Tamine was also, until 28 September 2018, a director of the Respondent. On that date, Mr Tamine resigned~~,~~ *inter alia* ~~,~~ from these directorships. Mr. Tamine had been a director of SJTC from 2010 until 28 September 2018 and the sole director of SJTC between 2013 and 23 June 2017.

12. While Mr. Tamine had resigned his directorship of SJTC, he had not relinquished control of the shareholding of SJTC that was held via a Nevis company called Cabarita. In events which have been examined in the Judgment of this Court dated 26 March 2020 (2019 No. 447), Mr. Tamine used his ultimate control of SJTC to appoint Mr. James Watlington and Mr. Glenn Ferguson as directors of SJTC. Messrs. Watlington, and Ferguson remain in this position today.

13. The Petitioner and BCT are pursuing proceedings in this Court against Mr. Tamine and his associated company, Tangarra Consultants Limited (2018 No. 300), for the return of approximately US$28 million which it is alleged to have been taken wrongfully by Mr Tamine from the Trust while he had control over SJTC. Mr. Tamine has denied any wrongdoing in this regard.

14. SJTC unsuccessfully appealed the order of 19 December 2019 to the Court of Appeal. It was in these Court of Appeal proceedings in which BCT was appointed as an independent fiduciary to take over the trusteeship. The Court of Appeal has dismissed SJTC's appeal with reasons which are awaited. Mr. Tamine intervened in the Court of Appeal proceedings and supported SJTC's (unsuccessful) appeal.

15. SJTC has filed an application seeking leave to appeal to the Privy Council. Accordingly, the present position is that whilst Mr. Watlington and Mr. Ferguson are continuing with SJTC's proposed appeal (in which Marshall Diel & Myers Limited ("**MDM**") are SJTC's counsel) by which they seek to remove BCT as trustee of the Trust, they also remain the sole directors of the Company and thus control one of the Trust's most valuable assets.

16. Mr. Watlington and Mr. Ferguson also owe their position as directors of the Respondent to Mr. Tamine, mirroring the position with SJTC. The holder of the Manager Share in the

Respondent is another Nevis company, Point Investments LLC ("**PI LLC**"). The shares of PI LLC are held by the Point Purpose Trust the trustee of which the Petitioner understands to be or to be controlled by Mr. Tamine.

17. Mr. Tamine has denied in correspondence that the Manager Share is held ultimately and beneficially for the Trust but does accept that the Respondent is an asset of the Trust. In a memorandum sent by Mr. Tamine, in his capacity as a director of the Respondent, to PwC dated 13 August 2017 Mr. Tamine advised PwC that "*Point Investments Limited … is a closely held investment vehicle for Spanish Steps Holdings Ltd, which in turn is an asset and investment holding vehicle for the A. Eugene Brockman Charitable Trust*."

18. Mr. Tamine is presently a co-operating witness with the United States Department of Justice in respect of the prosecution of one of the beneficiaries of the Trust, Mr. Robert Brockman. It appears that Mr. Tamine has received immunity from prosecution by the United States' authorities.

19. The directors of the Respondent have made it clear in the affidavit evidence filed by Mr. Watlington that they consider that it is their duty to remain in office so that they, rather than the JPLs as officers of the Court, can deal with any claim, which has yet to be brought, but which may be brought by the United States authorities against the Respondent.

The Petition

20. The winding up Petition in this matter was presented by the Petitioner on 16 September 2020. The Court should note that there is an outstanding application filed by the Respondent on 11 August 2021 seeking a declaration that the parties agreed that the Petition will be withdrawn and in the circumstances the Court should either dismiss or alternatively strike out these proceedings on the grounds that they or vexatious and/or an abuse of process. Mr. Watlington in his third affidavit accepts that it would be open to the Petitioner to withdraw this Petition, on the terms agreed *inter partes* in December 2020 and file a fresh Petition making the same allegations.

21. It appears to the Court that it is a pointless exercise to require the Petitioner to withdraw this Petition and to refile a fresh Petition in identical terms. Such a course would be wholly wasteful of the parties' resources and contrary to the Overriding Objective. The Court of course accepts that the Respondent may wish to, if so advised, pursue an application for wasted costs or agreed costs arising out of the alleged agreement to withdraw the Petition.

22. The Court should also mention that there is an outstanding application dated 11 August 2021 seeking leave to amend the Petition. Some of the proposed amendments seek to update the Petition to plead circumstances giving rise to change of control over the Petitioner.

23. Paragraph 19A of the draft Amended Petition pleads that, subsequent to BCT's appointment, it called upon Mr. Tamine (via his ultimate control of the holder of the Manager Share in the Respondent) to transfer the Manager Share to a nominee of BCT's choosing. Mr. Tamine has refused to do so asserting that BCT has no right to demand the transfer of Manager Share and asserting that his role in respect of the Manager Share did not arise as a result of his role as a director of SJTC.

24. Paragraphs 57-59 of the draft Amended Petition plead that by letter dated 12 May 2021 MDM forwarded to the Petitioner's counsel a letter from Mr. Tamine's counsel by which he asked for an indemnity against the Respondent purportedly pursuant to bye-law 99 the Respondents bye-laws. It is in excess of US$10 million and relates to Mr. Tamine's legal fees in respect of the DOJ's investigation, the Bermuda police service investigation, an investigation conducted in Switzerland, and proceedings before the Supreme Court of Bermuda 2018 No. 390 and 2020 No. 37.

25. The Petition alleges that given that Mr. Watlington and Mr. Ferguson were appointed by PI LLC, a company controlled by Mr. Tamine, they owe their office to, and could be removed by, Mr. Tamine procuring the voting of the Manager Share. The Petitioner alleges that Mr. Watlington and Mr. Ferguson thus operate under a disabling and incurable conflict of interest and the Board of the Respondent is thus unable to adjudicate on the claim for an indemnity made by Mr. Tamine.

26. Whilst the application to amend the Petition remains outstanding it is highly unlikely that the Court can properly refuse the Petitioner's application to amend the Petition.

27. In addition to the amendment sought in the draft Amended Petition, the evidence filed in support of the Petition asserts that as a result of steps taken by the current directors of the Respondent:

    (1) The Petitioner has been prevented from withdrawing its investment in the Respondent;

    (2) The Petitioner and the Trustee are unable to access US$3 billion of the Trust's assets, including effectively all of the Trust's liquid assets (more than US$1.4 billion), which are the source of the liquidity required for payment of the Trust's routine operational and legal outgoings and expenses as well as meeting the Trust's charitable commitments;

    (3) The former Trustee was forced to pursue alternative funding to meet the charitable commitments due in Q3 2020 at an additional cost to the Trust of US$5 million to avoid harm to the institutions, students and medical research supported by the Trust, and irreparable damage to the Trusts reputation;

    (4) The Trust has had to reduce the level of charitable commitments, which would have involved making over US$40 million of charitable donations during the period September 2020 to September 2021;

    (5) The Respondent has failed to meet the capital call in respect of at least one of the funds in which it is invested which would have serious consequences for it, and accordingly to the assets of the Petitioner and the Trust.

28. The Petitioner prays that in all the circumstances, it is just and equitable that the Respondent should be wound up. In particular:

(1) The sole purpose of the Respondent is to act as an investment vehicle for the Petitioner and the Petitioner holds all of the economic interest in the Respondent. The Trust owns the Petitioner.

(2) The Trust and the Petitioner desired to terminate the Respondent's role as an investment vehicle for the Petitioner such that the Respondent has no continuing purpose and/or there has been a failure of the Respondent's substratum.

(3) Without proper justification and in breach of their duties to the Respondent, the Board of the Respondent (Mr. Watlington and Mr. Ferguson) have refused to redeem the Common Shares in accordance with the redemptions by, amongst other things, improperly purporting to suspend the Respondent's NAV.

(4) Without proper justification and in breach of their duties to the Respondent, the Board of the Respondent have caused the Petitioner's bank accounts with Bank Mirabaud and Bank of Singapore to be frozen (and thereby caused the Trust to incur additional costs of approximately US$5 million in order to meet certain of its charitable commitments and to reduce the level of the Trusts charitable commitments).

(5) Without proper justification, the Board of the Respondent have caused the Respondent to refuse and/or fail to provide information to the Petitioner relating to the affairs of the Respondent in circumstances where the Petitioner holds effectively all the economic interest in the Respondent.

(6) There is at present no effective management in relation to the affairs of the Respondent and the Petitioner has a justifiable lack of confidence relating to the affairs of the Respondent.

(7) Any winding down of the affairs of the Respondent should be carried out under the control of independent officeholders as officers of the Court.

Jurisdiction to appoint provisional liquidators

29. Legal principles with respect to the appointment of provisional liquidators following the presentation of the winding up petition were recently summarised by the Court in *Raswant v Centaur Ventures Ltd & Ors* [2019] SC (Bda) 55 Com (a contributory's petition) as follows:

> ***"The legal regime for the appointment of provisional liquidators***
>
> 7. *The statutory basis for the appointment of provisional liquidators is to be found in section 170(2) of the Act and rule 23(1) of the Companies (Winding-Up) Rules 1982.*
>
> 8. *Section 170(2) provides that:*
>
> > *"the Court may on the presentation of a winding-up petition or at any time thereafter and before the first appointment of a liquidator appoint a provisional liquidator who may be the Official Receiver or any other fit person"*
>
> 9. *Rule 23(1) of the Companies (Winding-Up) Rules 1982 provides that:*
>
> > *"After the presentation of a petition for the winding-up of a company by the Court, upon the application of a creditor, or a contributory, or of the company, and upon proof by affidavit of sufficient ground for the appointment of a provisional liquidator, the Court, if it thinks fit and upon such terms as in the opinion of the Court shall be just and necessary, may make the appointment."*
>
> 10. *The appointment of provisional liquidators is an exercise of judicial discretion. In exercising that discretion, the courts in Bermuda (Re CTRAK Ltd [1994] Bda LR 37 (Ground CJ); Discover Reinsurance Co*

v PEG Reinsurance Co Ltd [2006] Bda LR 88 (Kawaley J); and BNY AIS Nominees Ltd v Stewarship Credit Arbitrage Fund Ltd [2008] Bda LR 67 (Bell J)), have followed the guidance given in the judgment of Sir Robert Megarry in Re Highfield Commodities Ltd [1984] 3 All ER 884, at 892-893 in following terms:

> *"At the outset let me say that I accept that the court will be slow to appoint a provisional liquidator unless there is at least a good prima facie case for saying that a winding-up order will be made: see Re Mercantile Bank of Australia [1892] 2 Ch 204 at 210, Re North Wales Gunpowder Co [1892] 2 QB 220 at 224. Founding himself on cases such as Re Clifoden Benefit Building Society (1868) LR 3 CH app 462 (where the words 'in general' should be noted) and Re London and Manchester Industrial Association (1875) 1 Ch D 466, counsel for HCL contended that if the company opposed the application for the appointment of a provisional liquidator, no appointment would be made (and any ex parte appointment would be terminated) unless either the company was obviously insolvent or it was otherwise clear that it was bound to be wound up, or else the company's assets were in jeopardy, as seems to have been the case in Re Marseilles Extension Rly and Land Co [1867] WN 68.*
>
> *……..*
>
> *I do not think that the old authorities, properly read, had the effect of laying down any rule that the power to appoint a provisional liquidator is to be restricted in the way for which counsel for HCL contends. No doubt a provisional*

liquidator can properly be appointed if the company is obviously insolvent or the assets are in jeopardy; but I do not think that the cases show that in no other case can a provisional liquidator be appointed over the company's objection. As the judge said, s. 238 is in quite general terms. I can see no hint in it that it is to be restricted to certain categories of cases. The section confers on the court a discretionary power, and that power must obviously be exercised in a proper judicial manner. The exercise of that power may have serious consequences for the company, and so a need for the exercise of the power must overtop those circumstances. In particular, where the winding-up petition is presented because the Secretary of State considers that it is expedient in the public interest that the company should be wound up, the public interest must be given full weight, though it is not to be regarded as being conclusive.

11. *I accept the submission that Highfield Commodities makes clear that the categories of cases in which it would be appropriate to appoint a provisional liquidator are not closed. Indeed this is demonstrated by the practice in this Court of appointing provisional liquidators to facilitate restructuring where the Company is in the "zone of insolvency" (see Discover Reinsurance, per Kawaley J at [18], [19]).”*

Application for the appointment of JPLs

Ability of the Trustee to manage Trust property

30. In his oral submissions Mr. Robinson referred to the fundamental duty of a trustee to gather, control and manage trust property. Mr. Robinson referred to Mr. Tamine’s decision not to

transfer the Management Share to the Trustee of the Trust which results in an entirely unsatisfactory position that the Trust assets are not managed by the Trustee or individuals appointed by the Trustee but by individuals whom the trustees consider "***lack bona fides…have profited very considerably from the personal fees that they have disgorged from [the Respondent] while at the same time committing serious breaches of fiduciary duty***"[1]. In paragraph 41 his first affidavit Mr. Goddard states that the Petitioner considers that "***Mr. Watlington and Mr. Ferguson had breached their fiduciary duties as directors of [the Respondent] and should be personally accountable to [the Respondent] for all of the legal costs incurred in [the Respondent's] opposition to this Petition***."

31. As Mr. Goddard explains in his first affidavit, the renewed pursuit of this Petition by the Petitioner (under its new management) has been necessitated by the conduct of Mr. Tamine, the Respondent, and its directors, Mr. Watlington and Mr. Ferguson. Faced with the concerted resistance by the parties that have no material economic interest in the shares of Respondent, the winding up of the Respondent represents the only legal mechanism by which the Petitioner (on behalf of the Trust) can recover over US$3 billion of assets (according to the financial statements prepared by the Respondent) to which the Petitioner is lawfully entitled as the sole economic shareholder of the Respondent.

32. As noted earlier, Mr. Tamine has acknowledged in his memorandum of 13 August 2017 and to PwC that the Respondent "*is a closely held investment vehicle for Spanish Steps Holdings Ltd, which in turn is an asset and investment holding vehicle for the A. Eugene Brockman Charitable Trust*." In the circumstances it is difficult to understand the sworn evidence of Mr. Watlington when he says in his second affidavit at paragraph 17: "***Ms. Bell in her evidence proceeds on the misconception that*** *we as directors owe duties to [the Petitioner] (which we do not) and that* ***the assets of [the Respondent] are trust assets (which they are not)****."*

[1] Paragraph 6 of the letter from Carey Olsen Bermuda Limited ("**Carey Olsen**"), attorneys for the Petitioner, to Marshall Diel & Myers, attorneys for the Respondent dated 24 September 2021.

33. I accept Mr. Robinson's submission that in order to hold a trustee accountable as a trustee the Court must ensure that the trustee is able to gather, control and manage the trust property. It would be an abdication of this Court's inherent jurisdiction to supervise the administration of trusts to allow a situation to arise and/or continue where the entire corpus of the trust (in excess of US$3 billion) is managed by individuals whom the trustee considers, by sworn evidence before the Court, not to be fit and proper individuals to be in that position.

Opposition to the Petition by the Respondent in these proceedings

34. Bermuda and English authorities dealing with unfair prejudice petitions establish the position that in principle a company should take a neutral position in relation to the relief sought in the petition and should avoid the expenditure of the company's funds in opposition to the petition. I accept Mr. Robinson's submission that the same principles apply to a contributory's petition based upon the just and equitable ground.

35. The position under Bermuda law is made clear in the judgment of Kawaley J (as he then was) in *Westport Trust Co Ltd v Paragon Trust Ltd* [2010] Bda LR 35 at [16]-[18]:

> *"16. The proposition that a company ought not expend its funds save for legitimate corporate purposes was supported as a broad general principle by reference to the principle articulated in Pickering v Stephenson (1872) LR 14 Eq 322 at 340 , "that the governing body of a corporation, that is in fact a trading partnership, cannot, in general, use the fund of the community for any purpose other than those for which they were contributed." However, the narrower principle of the impropriety of a company expending its funds to respond to a section 111 petition was supported by a number of dicta, most robustly the following observations of Harman J in Re a Company No. 004502 of 1988, ex parte Johnson [1991] BCC 234 at 236-237: "**The train of authority being well established, it seems to me quite clear that, if it is shown that directors of a company have been causing the company's money to be spent on financing the company's resistance either to a 'pure' sec. 459 petition or, according to Plowman J in Re A &BC Chewing Gum and myself in***

***Re Hydrosan*, in financing the company's resistance to a member's winding-up petition based on the just and equitable ground, the court should prevent such expenditure. Such expenditure is a misfeasance, there is no excuse for it in law and it is not a question of an arguable case being raised showing that it may be right to permit misfeasances. Misfeasances are not matters that are permitted by the courts and there is no question of an arguable case at all**."

17. Implicit from a reading of the earlier portions of Harman J's judgment is that **the company's participation at its own expense is not justified where it is "a nominal party to the sec 459 petition, but in substance the dispute is between two shareholders"**: per Hoffman J in Re Crossmore Electrical and Civil Engineering Ltd. (1989) 5 BCC 37 at 38. The question of whether or not "in substance the dispute is between two shareholders" clearly turns on the facts of each case, a point which the principal authority relied upon by Mr. Marshall clearly illuminated. The following principles apply to deciding whether a company's participation in the English equivalent of our own section 111 petitions, according to Lindsay J in Re a company (No. 1126 of 1992) [1994] 2 BCLC 146: "Firstly, there may be cases (although it is unlikely nowadays when wide objects clauses are the norm) where a company's active participation in or payment of its own costs in respect of active participation in a s459 petition as to its own affairs is ultra vires in a strict sense. Secondly, leaving aside that possible class, there is no rule that necessarily and in all cases such active participation and such expenditure is improper. Thirdly, that the test of whether such participation and expenditure is proper is whether it is necessary or expedient in the interests of the company as a whole (to borrow from Harman J in ex p Johnson). Fourthly, that in considering that test the court's starting point is a sort of rebuttable distaste for such participation and expenditure, initial scepticism as to its necessity or expediency**. The chorus of disapproval in the cases puts a heavy onus on a company which has actively participated or has so incurred costs to satisfy the court with evidence of the necessity or expedience in the particular case**. What will be necessary to discharge that onus will obviously vary greatly from case to case. Fifthly, if a company seeks approval by the court of

such participation or expenditure in advance then, in the absence of the most compelling circumstances proven by cogent evidence, such advance approval will obviously vary greatly from case to case."

18. Although the fifth point is not applicable to the present case, I find the above statement of principles to be highly persuasive and the fourth point to be of particular relevance to the present case. The starting point is for this Court to be sceptical about the need for the Company's participation."

36. Following the presentation of the Petition to the Court MDM set out the position of the Respondent (as determined by Mr. Watlington and Mr. Ferguson) in a letter to Wakefield Quin, the Petitioner's then attorneys, that the Respondent would be opposing the application to appoint JPLs and would also oppose the winding up petition:

*"**Following discussions with the US Department of Justice (the DOJ), our client has instructed us that they wish to contest both Spanish Steps Holdings Ltd's (SSH's) application for the appointment of Joint Provisional Liquidators (the JPLs) and SSH's Winding Up Petition**…the DOJ has never agreed to, acquiesced or concurred with the proposed liquidation of [the Respondent] and that the **DOJ does in fact object to the liquidation and/or dissipation of assets currently held in the [Respondent's] name**.."*

*"There is no risk at all of [the Respondent] being insolvent so there can be no sensible objection to a Validation Order - which of course is only required because of **your client's misconceived ruse of presenting its Winding Up Petition**."*

37. In paragraph 36 of his first affidavit Mr. Goddard states that in a short 6-week period between 24 September 2020 and 7 November 2020, the Respondent spent a "*staggering*" amount of $261,062.44 in legal costs which the Petitioner considers is a totally unwarranted and constitutes misfeasance on the part of Mr. Watlington and Mr. Ferguson.

38. In paragraph 24 of his first affidavit dated 27 October 2020 Mr. Watlington advises the Court that "*In terms of an estimate of future legal fees,* ***I estimate that they will be approximately $900,000 to the hearing of the Petition. This estimate includes the costs of MDM and Leading Counsel in preparing for the hearing relating to the Petitioner's application to appoint JPLs on the 20 November 2020, preparing replies to the Petition and three affidavits of Kiernan Bell and preparing for the hearing of the Petition in early 2021****, and advising [the Respondent] throughout*."

39. In his fourth affidavit sworn on 23 August 2021 Mr. Watlington advises that of the $2 million transferred to MDM's trust account on 1 February 2021, the sum of $915,439.13 had been paid out in respect of the Respondent's fees and expenses. The schedule provided shows that the sum of $625,588.72 was in respect of the legal fees incurred by MDM, Paul Hastings (US lawyers instructed by the Respondent to "*liaise with*" the DOJ) and English leading counsel. By way of explanation Mr. Watlington advised that the fees paid included "***Defending the Petition and the [Petitioner's] application to appoint JPLs (the JPL Application), in particular working on detailed evidence responding to the Petition and the JPL application… Preparing for Leading Counsel to be called to the Bermuda Bar to appear at the JPL Application…"***

40. In his fifth affidavit dated 10 September 2021 Mr. Watlington states that "***the dispute*** *on the Petition (and the Summons for appointment of JPLs) centres on who ought to be entrusted with control over the underlying assets of [the Respondent] pending the outcome of the DOJ Investigation, rather than any financial issues*." Mr. Watlington does not explain why he considers it appropriate that the Respondent should be involved in that dispute and why the Respondent's funds should be expended by its directors in relation to that "*dispute*".

41. In paragraph 10 of the same affidavit that Mr. Watlington states that; "*in my view, it would be a breach of the duties of the current Board to permit all or a significant proportion of its assets to be paid over to any of its members before the indebtedness to potential creditors were established and quantified.* ***To permit the assets to be disbursed****, whether by way of redemption, dividend or* ***supine acquiescence in*** ***the winding up petition****, would*

leave [the Respondent] and indeed its directors open to a charge of putting assets beyond the reach of creditors or even, potentially, accusations of committing a crime under the Proceeds of Crime legislation…" The highlighted passage shows that Mr. Watlington is under the impression that to allow assets to be administered under a court ordered winding up of the Respondent is in fact a breach of his duty and therefore he must take action to oppose the Petition.

42. In paragraph 21 of his fifth affidavit Mr. Watlington says that he believes that the Respondent's future estimated costs (calculated from 10 September 2021) until the hearing of the Petition will be in the region of **$800,000 to $900,000**. This is apparently on the basis that in addition to engaging MDM and English Counsel to advise the Respondent in relation to the Petition and all the various hearings that will take place prior to the hearing of the Petition, the Respondent wishes to take advice from Paul Hastings in the US who are "*liaising with*" the DOJ.

43. A review of the correspondence and the evidence filed (including the evidence of Mr. Watlington himself) shows that he is completely oblivious of the legal position that in circumstances such as the Petition presented by the Petitioner, the Respondent must maintain a neutral position. The fact that the Respondent has taken such a strong position in opposition to the Petition presented by the Petitioner, presumably upon the instructions of Mr. Watlington and Mr. Ferguson, is a matter of concern to this Court. It is also a matter of concern to this Court that substantial amounts have been paid on account of legal fees in opposing the Petition by the Respondent. As Mr. Tamine acknowledged in his memorandum to PwC, these funds ultimately belong to the Trust.

Duty to the foreign tax authority

44. Section 97(1) of the Act requires that every director of a company in exercising its powers and discharging his duties shall act honestly and in good faith with a view to the best interests of the company and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. These duties are owed to the company not merely as an abstract notion but for the benefit of the shareholders as a general body.

In the case of a solvent company directors' decisions are guided, as a general proposition, by what is in the best interest of the shareholders as a general body.

45. However, Mr. Robinson submits that in this case the directors of the Respondent, Mr. Watlington and Mr. Ferguson, appear to be under the misapprehension that they owe some form of undefined duty to the US tax authorities and the DOJ. Mr. Goddard complains in his first affidavit that Mr. Watlington appears to think he owes a greater duty to the DOJ then he does to the Respondent and its sole economic shareholder, the Petitioner.

46. Soon after their appointments as directors of the Respondent, Mr. Watlington and Mr. Ferguson instructed Paul Hastings to "*liaise with*" the DOJ in relation to the DOJ investigation in relation to the tax liability of one of the beneficiaries of the Trust, Mr. Robert Brockman. In this context it is to be noted that Mr. Tamine is a co-operating witness with the DOJ in respect of the prosecution of and as such has received immunity from prosecution by the US authorities.

47. On 10 July 2020 Paul Hastings sent the following email to Mr. Corey J. Smith, Senior Litigation Counsel, Tax Division, US DOJ, on behalf of the Respondent:

> *"Dear Mr. Smith:*
>
> *As you know, Paul Hastings LLP represents Point Investments, Ltd. ("Point"), which acts through Messrs. James Watlington and Glenn Ferguson, the duly appointed Directors of the company.*
>
> *Point has been working to gather documents and otherwise understand efforts to effect the alienation, redemption, transfer, change in custody over and/or unexplained expenditure of Point's assets.* ***As we have previously advised, at least until this work is completed Point under its current leadership intends only to draw on the company's assets for the payment of reasonable and customary expenses****, including for banking fees, director fees, counsel's fees, and fees*

associated with other professional services such as those incurred by auditors involved in the preparation of financial statements.

We have provided your office with both documentation reflecting the appointment of Messrs. Watlington & Ferguson and relevant Court decisions out of Bermuda. One of Point's banks has asked that we refresh and reaffirm our understanding of the Department of Justice's position as follows:

(1) ***that the Department of Justice is conducting a criminal investigation as to which assets held by or through Point are of central relevance****;*

(2) that the Department of Justice is aware of the appointment of Messrs. Watlington and Ferguson as directors of Point and the decision of the Chief Justice of Bermuda approving the empowerment of these gentlemen as directors of a related entity; and

(3) that the persons and actions of Messrs Watlington and Ferguson form no part of the Department's ongoing criminal investigation"

48. Mr. Smith responds on 13 July 2020 stating *"Matt: This is fine and accurate".*

49. It is not readily apparent why Mr. Watlington and Mr. Ferguson thought it was necessary to voluntarily advise the DOJ that the Respondent did not intend to draw on the Respondent's assets other than for customary expenses given that no formal claim has been asserted by the DOJ against the Respondent. Further, it appears that no analysis has been carried out by Mr. Watlington and Mr. Ferguson as to the enforceability of such a claim against the Respondent in Bermuda. This communication was made to the DOJ on behalf of the Respondent without any discussion with the sole economic shareholder of the Respondent, the Petitioner. Further, it is extraordinary for a company itself to seek confirmation from the DOJ that the DOJ "*is conducting a criminal investigation*" into the company's affairs.

50. In his second affidavit Mr. Watlington sets out his further engagement with the DOJ following the presentation of the current Petition. At paragraph 115 he states:

> *"115.* ***Following the receipt of SSH's Petition and the Application for the appointment of the JPLs on 24 September 2020, [the Respondent] instructed Paul Hastings to make contact with the DOJ to discuss its position as regards the Petition.*** *On 1 October 2020, Paul Hastings was copied into an email from Mr. Smith of the DOJ… that* ***the DOJ had never agreed to, acquiesced or concurred with the proposed liquidation of [the Respondent] and that the DOJ did in fact object to the liquidation and/or dissipation of assets currently held in the [Respondent's] name…***
>
> *116…Further, through Paul Hastings, the Independent Directors* ***[Mr. Watlington and Mr. Ferguson] have advised the prosecution team at the DOJ that, pending resolution of the DOJ's criminal investigation, they will continue to preserve [the Respondent's] assets*** *and only draw on [the Respondent's] assets for the payment of reasonable and customary expenses… The prosecution team at DOJ does not object to this assurance."*

51. Again, Mr. Watlington does not explain why it was thought necessary to obtain the instructions from the DOJ in relation to the present Petition presented by the Petitioner to this Court in circumstances where there was no formal claim against the Respondent. He also does not explain why he thought it was necessary or appropriate to advise the prosecution team at the DOJ that pending resolution of the DOJ's criminal investigation the current directors will continue to preserve the Respondent's assets without any discussion with its sole economic shareholder.

52. In paragraph 119 of the same affidavit Mr. Watlington states that "*The dispute between [the Respondent] and [the Petitioner] is essentially about whether [the Petitioner] ought to have the right to redeem its shares in [the Respondent] and leave the cupboard bare in circumstances where there is a good reason to be concerned that [the Respondent] has a considerable liability to the US authorities*." As noted earlier, this statement by Mr.

Watlington is made in the context where there is no formal claim against the Respondent by any US authority and no proper analysis has been carried out by the Respondent as to whether such a claim would be enforceable against the Respondent in Bermuda. Further, Mr. Watlington does not explain how it can be said that the "*cupboard would be left bare*" in circumstances where the Court appoints its own officers, the JPLs, to wind up the Respondent under the supervision of this Court. As Mr. Robinson rightly submitted any legitimate interest of any creditor of the Respondent recognised under Bermuda law would be fully protected in a Court ordered winding up of the Respondent.

53. In a letter dated 24 September 2021 from Carey Olsen, attorneys for the Petitioner, to MDM, Carey Olsen pointed out that Mr. Watlington and Mr. Ferguson appeared to be under the misapprehension that they have duties to the DOJ. They also pointed out that any tax claim by the DOJ against the Respondent would have to be considered in light of the decision of the House of Lords in *Government of India v Taylor* [1955] AC 491 (taxes due under the laws of a foreign country are unenforceable in English courts and a foreign judgment seeking to recover taxes under foreign law is likewise unenforceable). This Court would expect the directors of the Respondent to have carefully considered this issue before "*liaising with*" the DOJ and before making any representations as to what they intended to do in relation to the assets of the Respondent. In any event this letter clearly required a proper response from the directors of the Respondent.

54. In response to this letter MDM, in their letter of 29 September 2021, stated that the Board of the Respondent is "*well aware that it has no duty to the DOJ, contrary to your insistence - but equally, it can hardly simply ignore a serious and powerful potential creditor which might cripple or even sink [the Respondent]."* There was no direct response to the *Government of India* point raised in the letter from Carey Olsen. This omission was picked up in the further letter from Carey Olsen dated 8 October 2021. In response to that letter MDM stated the directors' position in the following terms:

> "*We are not sure why you are focused on the possibility of enforcement in Bermuda or to the Bermudian courts and the simple rule about foreign tax claims given the nature and place of the claims being made and threatened, and the location of the*

underlying assets. As you are no doubt aware, there are various exceptions and limitations to the rule about foreign claims which you do not address and we have little doubt that the US authorities would be quite prepared to seek enforcement of their claims in places other than Bermuda."

55. As noted at the outset Mr. Watlington has filed seven affidavits in relation to this Petition. There is no evidence relating to what, if any, analysis was carried out by Mr. Watlington and Mr. Ferguson and or their advisors in relation to the enforcement of any claims by the DOJ in Bermuda or in any foreign jurisdiction where assets of the Respondent may be located.

56. Review of the affidavit evidence filed in these proceedings in relation to the interaction on behalf of the directors of the Respondent and the DOJ has left the Court with serious concerns as to whether the directors fully appreciate that their duties are owed solely to the Respondent and not to the DOJ. The directors' decision to start "*liaising with*" the DOJ prior to having conducted any serious review of (i) the potential liability of the Respondent to the DOJ in respect of any tax or other claims; (ii) the enforceability of any tax claims in Bermuda or other jurisdictions where the Respondent's assets may be located, leaves the Court with a real sense of unease. The Court is also perplexed as to why it was thought advisable to make voluntary representations on behalf of the Respondent that the Respondent will not dispose of its assets other than its ordinary fees and expenses. The fact that the interaction between the directors of the Respondent and the DOJ took place without any meaningful discussion with and input of the Respondent's sole economic shareholder, the Petitioner, is equally disturbing. In the circumstances, bearing in mind that the assets of the Respondent are trust assets, the Court is clear that Mr. Watlington and Mr. Ferguson should play no further part in the resolution of any tax or other claims made by the DOJ against the Respondent and any such claims must be resolved by the JPLs under the supervision of this Court.

Mr. Tamine's request for an indemnity under the bye-laws of the Respondent

57. By letter dated 27 April 2021 Canterbury Law Limited made a claim, on behalf of Mr. Tamine, asserting that Mr. Tamine be indemnified by the Respondent under bye-law 99 of the Respondent's bye-laws. The letter enclosed a draft writ of summons claiming costs and expenses in respect of (i) Mr. Tamine's response to the investigation conducted by the DOJ concerning the Trust structure; (ii) Mr. Tamine's response to an investigation conducted by the Bermuda Police Service which arose as a result of the DOJ investigation; (iii) the judicial review proceedings identified in the draft writ; (iv) Mr. Tamine's response to the investigation conducted by the public prosecutor, Switzerland; and (v) Mr. Tamine's defence of the allegations which formed part of civil proceedings against him in Bermuda.

58. Mr. Goddard, in his first affidavit, states that the claim for indemnity is in excess of $10 million. Mr. Goddard expresses concern on behalf of the Petitioner and the Trust that Mr. Tamine has effective control over PI LLC and thus, just as he was able to arrange for the appointment of Mr. Watlington and Mr. Ferguson as directors of the Respondent, it is to be assumed he can arrange for their removal and replacement if he is displeased with the handling of his claim for $10 million against that the Respondent.

59. Having regard to the unease expressed by the Court in relation to (i) the failure by Mr. Watlington and Mr. Ferguson to ensure that the Respondent remained neutral in relation to this Petition; and (ii) their apparent failure to fully appreciate that their duties are solely owed to the Respondent and not to the DOJ, the Court accepts the submission made by Mr. Robinson that it is not appropriate for Mr. Watlington and Mr. Ferguson to deal with the claim for indemnity made by Mr. Tamine. The Court orders that the claim made on behalf of Mr. Tamine for indemnity from the Respondent under its bye-laws must be considered and dealt with by the JPLs under the supervision of this Court.

Dysfunction and lack of trust

60. The Court accepts Mr. Robinson's submission that the relationship between the Respondent and its sole economic shareholder is dysfunctional, as illustrated by the freezing of the Petitioner's account with the Bank of Singapore. The Court has already referred to the Petitioner's complete lack of trust in relation to the conduct of Mr. Watlington and Mr.

Ferguson. The Court has already expressed its view that it is wholly untenable to have a position where the Trust assets (the assets held by the Respondent) are managed by persons in whom the trustee has no trust.

61. The Court notes that the structure providing for the Manager Share in the name of PI LLC (allowing it to appoint directors of SJTC and the Respondent) made commercial sense when SJTC was the trustee of the Trust and the Respondent held the assets of the Trust. It clearly makes no sense when SJTC is no longer the trustee of the Trust for PI LLC (Mr. Tamine) to insist that the directors of the Respondent (which holds the assets of the Trust) must be appointed by PI LLC and against the express wishes of the Trustee.

62. The Court also notes that the Court of Appeal Order dated 2 February 2021 expressly provides that at the hearing before Subair Williams J to determine the terms upon which BCT should become the Trustee no parties other than those provided for in the Order shall have "*standing to appear or present evidence or submissions in relation to the matter*". The Court of Appeal was clearly of the view that SJTC and/or Mr. Tamine should play no further part in the life of the Trust. The suggestion that the assets of the Trust, held by the Respondent, should in perpetuity be managed by directors appointed by Mr. Tamine and contrary to the express wishes of the Trustee is obviously unsustainable and cannot be accepted by this Court.

63. It was for these reasons that at the conclusion of the hearing on 29 October 2021 the Court made an order for the appointment of the JPLs.

Application for validation

64. Now that the JPLs have been appointed by the Court it is appropriate that they should be given an opportunity to consider, on behalf of the Respondent, the scope of any application to validate the payments pursuant to section 166 of the Act. Accordingly, the Court orders that the present application made by the Respondent by amended summons dated 8 September 2021 be adjourned *sine die* with liberty to apply. The application for a restraining order against the Respondent is no longer pursued by the Petitioner.

65. The Court will hear the parties in relation to any application for costs, if required.

Dated this 17th day of November 2021.

_____

NARINDER K HARGUN
CHIEF JUSTICE