[2014] SC (Bda) 66 Civ (27 August 2014)

In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 197

BETWEEN:

(1) GOLD SEAL HOLDING LIMITED

(2) FIVE STAR INVESTMENTS LIMITED

(3) OUNG SHIH HUA (also known as James Oung)

(4) HUANG WEIZONG MARTIN

(5) KWOK WAI CHI

Plaintiffs

-and-

(1) PALADIN LIMITED

(2) CHEN TE KUANG (also known as Mike Chen)

(3) LAW FONG

Defendants

REASONS FOR DECISION

(in Chambers)

Date of Ruling: July 30, 2014

Date of Reasons: August 27, 2014

Mr. Jan Woloniecki, ASW Law Limited and Mr. Kai Musson, Cox Hallett Wilkinson Limited, for the 2nd Plaintiff ("Five Star") and the 3rd Palintiff ("James Oung")

Mr. Peter Sanderson, Wakefield Quin Limited, for the 2nd Defendant

Introductory

1. Paladin is a Bermudian company listed on the Hong Kong Stock Exchange which is ultimately owned by various members of the Oung family. The present proceedings were commenced by the controllers of the 1st Defendant ("Paladin") to challenge the implementation and validity of an April 29, 2014 Placing Agreement and resolution effectively transferring control over Paladin to the 2nd and 3rd Defendants, and purportedly approved by Paladin's Board of Directors on May 19, 2014.

2. On May 21, 2014, Hellman J granted an Ex Parte Injunction restraining the implementation by Paladin of the said Placing Agreement. Following an inter partes hearing on May 29, 2014, he discharged that injunction on the grounds that, *inter alia*, there was no serious issue to be tried and that damages would have been an adequate remedy. On June 13, 2014, the Plaintiffs filed a Statement of Claim in which an additional complaint emerged. The Board were alleged to have failed to convene a special general meeting requisitioned by the 1st and 2nd Plaintiffs under section 74 of the Companies Act 1981 ("the SGM"), who accordingly themselves convened the SGM for June 16, 2014. The Defence filed on June 26, 2014 countered that the Board itself had duly convened a special general meeting and that the June 16, 2014 SGM had not been validly convened. The purpose of the SGM was in practical terms for the controllers of Paladin to reassert control of the composition of the Board.

3. The scene then moved to Hong Kong. An urgent application was heard before Harris J in the High Court of Hong Kong Special Administrative Region Court of First Instance ("the Hong Kong Court") on June 16, 2014. The 2nd Defendant herein sought an injunction restraining the June 16 SGM. Harris J was not impressed that the application was being made in Hong Kong when the present proceedings were already on foot in Bermuda. Concurring with the views he believed Hellman J had expressed at the May 29, 2014 hearing, he encouraged the Hong Kong defendants who were before that Court to accept that the August 1, 2014 SGM convened by the Company should proceed and that the June 16 meeting should be aborted. Upon the 1st Plaintiff in these proceedings ("Gold Seal") undertaking to adjourn the June 16, 2014 SGM, the Hong Kong Court made no order on the injunction application. As Harris J put it, addressing Gold Seal's counsel Mr. Chan in the course of argument:

> "*Just listen. On 1 August you get the resolution you want and then you get all upset. Well, it's not going to happen. The only people who are going to get upset is the plaintiff* [the 2nd Defendant herein] *who has been telling me that he thinks the meeting has been validly convened. So on the face of it, there's no interesting party who is going to challenge the validity of the resolution. The only issue would appear to be timing …*"

4. Having procured an adjournment of the June 16, 2014 SGM from the Hong Kong Court on the premise that the August 1, 2014 meeting would proceed, the 2nd Defendant, on the last working day in Bermuda before the SGM was due to take place on August 1, 2014 (and the day Hellman J left Bermuda on overseas leave), sought an urgent injunction restraining Paladin and any person served with the proposed Order:

> "*…from holding the SGM due to be held on the 1 August 2014, and…from putting to its shareholders at any meeting any resolutions, or otherwise passing or putting into effect any resolutions , which have the effect, directly or indirectly, of altering the Board composition of the Respondent.*"

5. Perhaps unsurprisingly, I refused this application on July 30, 2014. I now give reasons for this decision.

Factual basis of application

6. The 2nd Affirmation of the 2nd Defendant was sworn in support of the injunction application. The Affirmation states that Five Star holds approximately 54% of Paladin's shares, while the deponent holds 0.5% of its shares. It then proceeds to make a convoluted complaint about steps said to have been recently (on or about July 18, 2014) taken by Mr. Andrew Oung to acquire a controlling interest in Five Star. The essence of the complaint was that under BVI law, Andrew Oung's power to control Five Star (directly) and Paladin (indirectly) was derived from an invalidly created power of attorney dated April 1, 2011 granted by the 1st Defendant's mother to her sister.

7. It is deposed in paragraph 8(i): "*the validity of this power of attorney is in dispute and is the subject of proceedings in the BVI.*" However, it becomes apparent from paragraph 9, that no such proceedings have yet been commenced in the BVI to challenge the validity of the power of attorney granted over three years ago. The following claims "*will be imminently initiated in the BVI*":

"*i. a claim to appoint myself as mental health receiver over the affairs of my mother…*

ii. with regards to the estate of my grandmother…I have applied for both a grant of letters of administration and an ad colligenda bona grant of letters of administration.

iii. I am seeking an injunction enjoining the 2nd Plaintiff herein from dissipating its assets, changing its shareholding, and voting its shares in Paladin (this is necessary only until the time that I can resolve to remove the rogue directors of the 2nd Plaintiff)."

8. If the proposed BVI proceedings were successful, it was further deposed, it would give the 2nd Defendant control of Five Star on behalf of his mother and grandmother. No explanation was offered as to the precise basis upon which the 2011 power of attorney is to be challenged, or why the grounds for impugning it are only now being legally pursued. This was a complaint which in substance implicitly invited the Court to pierce multiple corporate veils in support of a claim designed to resolve a dispute relating to the control of a BVI company, which is itself merely a shareholder of a company, Paladin, which <u>is</u> subject to the jurisdiction of this Court.

9. Although the 2nd Defendant further deposed as follows, there was no or no tangible connection between the "imminent" BVI complaints, and the stated motivations for seeking Bermudian injunctive relief:

"*11. The concurrent injunction is sought for the following reasons:*

i. *Mr. Andrew Oung is intervening with the board of Paladin and is seeking to remove me and the 3rd Defendant as directors;*

ii. *Mr. Andrew is seeking to dissipate shares in Paladin to himself;*

iii. *There is a long history of sinister behaviour on Mr. Andrew Oung's behalf…*

18….Appointment of the New Board which will act in accordance with Mr. Andrew Oung's instructions will further facilitate his plans to dissipate assets to himself…"

10. Mr. Woloniecki sought to strike at the underbelly of the invalid power of attorney claim by reference to two pieces of correspondence. Firstly, in letter dated June 17, 2014 from the 2nd Defendant's Hong Kong solicitors Tanner De Witt, it was

suggested that the 2nd Defendant was instructed by Andrew Oung to guide his mother's hand when she executed the power of attorney. Baker & McKenzie advised that they initially received instructions to prepare the power of attorney from Andrew Oung, but their attorney who attended for the execution:

(a) knew the 2nd Defendant's mother well;

(b) confirmed her instructions in the absence of family members immediately prior to execution; and

(c) confirmed from a doctor that the 2nd Defendant's mother's mental capacity had not been affected by the first stroke (the second stroke occurred after April 1, 2011).

11. This correspondence both demonstrated that (a) the 2nd Defendant had been trawling around for grounds for challenging the power of attorney as early as June 17, 2014, and (b) that over three years after the instrument's execution, no clearly arguable grounds for challenging it had yet been identified. Further, June 17 was the day after the June 16 SGM had been adjourned, with the 2nd Defendant's counsel representing to the Hong Kong Court that the 2nd Defendant[1] considered the August 1, 2014 SGM to have been validly convened and that the meeting would occur as scheduled.

The submissions of counsel

12. Mr. Sanderson was unable to offer any satisfactory explanation as to why this Court, rather than the BVI Court, should be the first port of call for injunctive relief in aid of a BVI cause of action. The latest "sinister" transaction the 2nd Defendant discovered involving Andrew Oung and Paladin shares also involved a BVI company and came to his notice on July 25, 2014. This was seven days before the SGM, a wider window for fully preparing and being heard on an application which primarily concerned the exercise of share rights in relation to a BVI company than was available in Bermuda where July 31 and August 1 were public holidays. The matters complained of in 2nd Chen, to the extent that they had any coherence at all, appeared more closely connected with a remedy against Five Star than a remedy against Paladin.

13. However, in advance of the hearing, through the Registrar, I requested counsel for the 2nd Defendant to be prepared to meet the jurisdictional point that BVI was the appropriate forum to seek initial injunctive relief. Mr. Sanderson submitted orally that the main cause of action in Bermuda which the injunction was intended to support was an unfair prejudice petition. This was clearly a 'last-gasp' submission. The Affirmation sworn in support of the present application did not even hint at the strained contention that the machinations complained of in relation to who controlled Five Star meant that proceeding with the SGM would constitute managing the affairs

[1] The Hong Kong Petitioner.

of Paladin in an unfairly prejudicial manner. The only submission which Mr. Sanderson made good was the proposition that a British minority shareholder could base an oppression petition on future as well as existing or past events: *In re X Ltd.* (2001) Times, 5 June.

14. This is clearly the position under section 459(1) of the UK Companies Act 1985. Neuberger J (as he then was) declined to grant an injunction restraining the holding of an extraordinary general meeting at which the applicant was due to be removed as a director, but "*his Lordship said that had he been satisfied that there was a real prospect of A succeeding under section 459 he would have held that there was jurisdiction to grant the interlocutory relief sought in relation to the extraordinary general meeting*." Mr. Woloniecki submitted that under Bermudian law prospective prejudice could not be relied upon in an unfair prejudice petition under section 111 of the Companies Act 1981.

15. Authorities placed before the Court illustrated the sort of scenarios which could support an arguable unfair prejudice claim. The petitioner was held to have an arguable claim where he sought to challenge the legality of rights issue in *Re a Company* [1985] BCLC 80. In *Re Kenyon Swansea* [1987] BCLC 514, the petitioner, who had run the company for nearly 20 years, was seeking to enforce an option agreement which would have given him control of the company and which the company was seeking to avoid by removing him from the board. And in *Re a company (No 00314 of 1989), ex parte Estate Acquisition and Development Ltd et al* [1991] BCLC 154, the petitioner was held to have arguable complaints in relation to attempts to alter the company's constitution, proposals to remove her as a director and refusals to provide her with information related to an offer to purchase her shares.

16. Mr. Woloniecki argued that none of the complaints set out in the 2nd Defendant's 2nd Affirmation about the control of Five Star had anything to do with Paladin. More substantively, however, he submitted that the Court's jurisdiction to grant interim injunctive relief should not be exercised where an application had yet to be made in the most appropriate forum for seeking such relief. He referred to two decisions of the Judicial Committee of the Privy Council which support the broad principle that courts should be willing to grant Mareva injunctions in support of foreign causes of action to meet what justice requires in the circumstances of a particular case: *Mercedes Benz A.G.-v-Leiduck* [1996] 1 A.C. 284; *Walsh-v-Deloitte & Touche Inc.*[2001] UKPC 58. He also referred to this Court's decision to discharge an interim injunction in aid of foreign proceedings in circumstances where a corresponding application had been made to and refused by the foreign court: *ERG Resources-v-Nabors Global Holdings II Ltd.* [2012] Bda LR 30.

Findings: governing legal principles

17. No controversy turned on the well-recognised principles governing the grant of interlocutory injunctions. It is helpful nevertheless to remember what those principles are. Ground CJ, in the context of an application for interim relief in support of a minority shareholder oppression petition, described the principles in this way in *Sino –JP Fund Co Ltd-v-Pacific Electric Cable and Wire Co Ltd* [2006]Bda LR 51:

> "22. *That leaves the question of the injunctions, which I consider I can still entertain, notwithstanding the stay, because that is a temporary and not a permanent measure. For the reasons given above, I cannot at this stage begin to form a view about which side is in the right in all of this. I have already necessarily decided, when I gave leave to serve out, that the Petition raises triable issues, and there is no reason to change that view. I have therefore, applying the approach set out in American Cyanamid v Ethicon Ltd. [1975] AC 396 (as refined in subsequent cases), next to consider whether the Petitioner will suffer serious prejudice or irreparable harm which cannot adequately be compensated in damages if the injunctions are not granted. If there is doubt as to the adequacy of damages, I then go on to consider the balance of convenience.*"

18. The issue of which jurisdiction is the appropriate forum for seeking interim relief in support of a foreign substantive action only arises at the third limb of the interim injunction analysis, after the serious issue to be tried and irreparable harm hurdles have been overcome. But the jurisdictional disconnect between the relief sought and the forum selected in the present case was so striking that these principles, addressed in argument, deserve to be fully addressed.

19. In *Mercedes Benz A.G.-v-Leiduck* [1996] 1 A.C. 284, Lord Nicholls (dissenting) affirmed the jurisdiction to grant Mareva injunctions in terms of giving interim relief in respect of a prospective foreign judgments which will be recognised and enforced by the local court. In *Walsh-v-Deloitte & Touche Inc.*[2001] UKPC 58, the Judicial Committee refused to discharge a Mareva injunction made in Bahamian proceedings in circumstances where the plaintiff explicitly intended to pursue the substantive claims in Ontario where no such relief had been sought. In that case, there was a clear, practical and rational basis for seeking injunctive relief in the Bahamas which was not being sought in Ontario where the main action would be pursued. As Lord Hoffman opined:

> "22.*Their Lordships do not consider that any objection in principle can be made to the exercise of the jurisdiction in this way. It is commonplace that the most convenient forum may not be the place*

where it is desirable to obtain Mareva relief, either because the defendant resides there and is amenable to the enforcement jurisdiction of the local court, or because the assets are there and notice can be served upon persons (such as banks) who have them under control. As long ago as 1983, in the early days of the English Mareva jurisdiction, Vinelott J. granted an order in aid of proceedings in Ireland: see House of Spring Gardens Ltd v Waite [1984] FSR 277 and more recently in Crédit Suisse Fides Trust SA v Cuoghi [1998] QB 818 the Court of Appeal made a similar order in aid of proceedings in Switzerland. Their Lordships consider that such international judicial co-operation should be encouraged."

20. In the present case, the only substantive causes of action explicitly supported by evidence lie against a company, Five Star, which is resident in the BVI, and relate to matters (the status of its shareholding and the proposed exercise of its corporate power through voting its shares in Paladin at the SGM) which are primarily governed by BVI law[2]. It was not contended by the 2nd Defendant that the BVI Court was not competent to grant injunctive relief in support of any arguable claim that the exercise of Five Star's power to vote its shares in Paladin ought properly to be restrained pending a determination of the dispute as to who was entitled to control Five Star.

21. Accordingly, BVI appeared to be both the most appropriate forum for the substantive action concerning the control of a BVI company <u>and</u> the most suitable venue for seeking the specific type of interim relief sought instead from this Court.

22. In *ERG Resources-v-Nabors Global Holdings II Ltd.* [2012] Bda LR 30, an injunction was discharged in circumstances where the substantive cause of action was in Texas and the Texas Court had declined to grant equivalent relief, albeit apparently applying a more onerous test. I did so for the following reasons:

> "27.*Applying the above legal principles to the facts of the present case, I find that although there is a serious issue to be tried in relation to ERG's claim and the balance of convenience traditionally defined would justify continuing the Injunction in support of a claim being substantively tried in this Court, the Injunction should be discharged for the following reasons:*
>
> *(a)ERG has sought to obtain similar interim relief from the Texas Court and has been refused;*

[2] It was unclear what law governs the impugned power of attorney although it was said that the challenge to its validity would be made in BVI.

> *(b)the comments made by the Texas Court in adjudicating the TRO application on March 20, 2012 do* not *indicate that interim relief was refused on jurisdictional grounds even though the foreign court would otherwise have been minded to grant such relief;*
>
> *(c)the Texas Court (Judge Kirkland) was invited by Nabors on March 23, 2012 to restrain ERG from enforcing the Injunction, but declined to do so to enable this Court to adjudicate the present application. This was the second occasion on which the Texas Court considered the interim relief question and gave no indication that it would welcome the assistance of any other court more competent to give the interim relief ERG sought;*
>
> *(d)it would be wrong in principle for this Court, applying a lower threshold test, to grant interim relief in support of a claim being substantively adjudicated by the Texas Court in circumstances where there is no evidence that the relevant foreign court would construe such relief as judicial assistance and/or cooperation…*"

23. In that case, I referred to an Eastern Caribbean Court of Appeal (BVI) case where the facts were more similar to those in the present case in the sense that interim relief was being sought from a satellite court without having first sought it from the primary litigation court: *Yukos CIS Investments Ltd. et al-v- Yukos Hydrocarbons Investments Ltd. et al,* HCVAP 2010/028, Judgment dated September 11, 2011[3]. An interim injunction was sought in that case against BVI companies in circumstances where no similar relief had been sought in Dutch proceedings where the dispute over the ultimate ownership of the BVI entities would be determined. As in the present case, if the applicant succeeded in the foreign court, it would not obtain a money judgment but the right to indirectly control the local companies. In *Yukos CIS Investments Ltd*., I stated:

> "*[138] ... The judicial discretion to exercise this statutory power* [to grant injunctive relief][4] *is not completely unfettered; the scope of the jurisdictional competence to exercise the statutory discretion is delineated by common law rules governing the circumstances in which such interim relief may be granted.*
>
> *[139] Establishing justice and convenience will ordinarily require, at a minimum, proof of a good arguable case that the applicant will obtain a judgment which will be enforceable (whether by registration,*

[3] A majority decision in which, sitting as an Acting Justice of Appeal, I delivered the leading judgment for the majority.

[4] In Bermuda, the Supreme Court Act 1905, section 19(c).

recognition or otherwise) by the local court against the local defendant. Although ordinarily an interlocutory injunction is sought in support of a substantive claim before the court to which the relevant application is made, in the present context this requirement had to be met by reference to (a) the substantive claim before the foreign court, and (b) the prospect that the applicant will obtain a foreign judgment which will entitle him to execute a money judgment against, or control pursuant to a proprietary judgment, the local assets sought to be frozen. In the present case the reasons why the jurisdictional (in the broader sense) requirements were not met for exercising the discretion to grant injunctive relief may be summarised as follows. The jurisdiction to grant an interim freezing order is not ordinarily exercised unless it is necessary to do so in aid of either relief the claimant is likely to obtain from the local court or from a competent foreign court. The relief the appellants are likely to obtain from the Netherlands court will neither entitle them to enforce a money judgment against the respondents' assets nor establish a proprietary claim in respect of any of such assets. The relief sought will entitle them to control Stichting FPH and only indirectly the shares of the BVI respondents; this is presumably why a pre-trial attachment was granted by the Dutch court on 7th July 2010, in respect of the FPH shares.

[140] In some cross-border cases it may well be irrelevant that equivalent interim injunctive relief has not also been sought in the primary litigation court; for instance a local judgment may be in prospect in respect of a claim which cannot be asserted in the foreign proceedings. In the present case, having struck-out the rectification of the register claim, the judge was correct to hold that the failure of the appellants to seek equivalent interim injunctive relief in the Dutch proceedings against the persons who presently control the BVI respondents was a further discretionary factor which mitigated against granting the relief sought. This omission created the distinct impression that far from being asked to assist the Dutch Court, the BVI Commercial Court was being invited to grant relief which would in practical terms impact on legal actors who were before the Dutch and not the BVI Court. Moreover, the BVI Court was being asked to grant such relief, purportedly in aid of the Netherlands proceedings (or a judgment which might be obtained from the foreign court), in circumstances in which it was unclear that the Netherlands court itself would grant similar relief." [emphasis added]

24. Accordingly, assuming the only claim in the present case to be considered was the proposed BVI proceedings against Five Star which were said to be designed to establish that the present controllers of Five Star were not entitled to indirectly control Paladin, I found that the 2nd Defendant had to meet the following requirements for the grant of interim relief in Bermuda:

(a) establish the existence of a good arguable case in BVI;

(b) demonstrate a risk that he would suffer damage which only an interim injunction could adequately prevent; and/or

(c) demonstrate that justice and convenience (the balance of convenience) favoured granting the injunctive relief, having particular regard to the fact that no application had been made to the BVI Court which, by the 2nd Defendant's own account, was the most convenient forum for the substantive claim the injunction was sought in support of.

25. As regards the belatedly raised notion of the injunction being support of a Bermudian minority shareholder petition which had yet to be drafted, let alone filed, no jurisdictional issues would arise if, and only if, an arguable case was made out of unfair prejudice based on acts occurring in Bermuda and/or governed by Bermuda law.

Findings: exercise of discretion to grant or refuse interim injunctive relief

Injunction in support of BVI claim to change control of Five Star

26. The application for an injunction to restrain the holding of the August 1, 2014 SGM was only supported by evidence relating to a proposed BVI action which would, if successful, result in the 2nd Defendant on behalf of his mother and grandmother's estate, gaining control over Five Star and indirect control over Paladin. A fleeting reference was made to Andrew Oung's "*plans to dissipate assets to himself*" through his proposed Board nominees.

27. The 2nd Defendant's "imminent" claim in BVI, as described in his 2nd Affirmation, did not disclose a good arguable case. It appeared to be a very poorly disguised device for postponing the SGM and putting off the "evil day" when the 2nd Defendant would be removed as Chief Executive Officer of Paladin's Board. The central plank in the claim was the proposition that an April 1, 2011 power of attorney, the execution of which the 2nd Defendant himself had participated in, was invalid. It was difficult to believe that if such a claim was a serious one, it would be advanced in such a cack-handed fashion, three years later and with the first legal filing being made in a jurisdiction other than the forum where the substantive claim was due to be prosecuted.

28. The apparent genuineness of the claim was further undermined by the fact that the 2nd Defendant had only recently, the previous month before the Hong Kong Court, explicitly contended that the August 1, 2014 SGM was validly convened and would go ahead. The implicit contention that genuine concerns about invalidity of the April 1, 2011 power of attorney only surfaced after the June 16, 2014 hearing before the Hong Kong Court seemed inherently improbable. Indeed, paragraphs 5 and 8 of the 2nd Affirmation, gave the misleading impression that the BVI proceedings to challenge the validity of the power of attorney had been commenced before the recent attempts to gain control of Five Star to which reference is also made.

29. I found no credible evidence of irreparable harm flowing solely from a decision to allow the SGM to proceed. The suggestion that the directors likely to be elected would not only all be 'straw men', but would also act in breach of their duties to the company (Paladin) appeared to me to be little more than wild speculation, at best. Paladin is not a small private company but a listed company subject to regulation by the Hong Kong Stock Exchange. On the other hand, it was perhaps more arguable from a Five Star perspective, that if there was a serious issue to be tried as to who was truly entitled to control the BVI company, an 'imposter' ought to be restrained from making any significant commercial decisions which might irredeemably harm the true shareholders.

30. Although the injunctive relief was primarily sought against Paladin, it was indirectly sought against Five Star as well. So if I had found that there was a good arguable case on the merits of the BVI claim, I would have gone on to consider where the balance of convenience lies. The status quo on July 30, 2014 was that Five Star had the right to control the composition of Paladin's Board and the 2nd Defendant's proposed BVI case had no direct impact on the voting rights to be exercised at the SGM. From a Paladin perspective, it was wholly irrelevant who controlled Five Star. Depriving the shareholders of the right to vote at the SGM would amount to altering rather than preserving the status quo. The pivotal question would then be the extent to which an injunction should be granted primarily to support the BVI claim in respect of the exercise by Five Star of its voting rights pending resolution of the dispute as to whom was entitled to control Five Star.

31. In circumstances where it was clear that the BVI Court was the most appropriate forum in which to seek both interim and final relief in connection with a dispute over who should control a BVI company, this jurisdictional 'disconnect' made it ultimately clear that the application for interim relief from this Court could only properly be refused.

<u>Injunction in support of Bermudian minority shareholder oppression petition</u>

32. Section 111 of the Companies Act 1981 provides as follows:

> "*(1) Any member of a company who complains that the affairs of the company <u>are being conducted or have been conducted</u> in a manner oppressive or prejudicial to the interests of some part of the members, including himself, or where a report has been made to the Minister under section 110, the Registrar on behalf of the Minister, may make an application to the Court by petition for an order under this section.*" [emphasis added]

33. This statutory wording is clearly narrower than that in section 459 of the Companies Act 1985 (UK), which permits petitions to be presented "*on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or some part of its members (including himself) or that any actual <u>or proposed act</u> or omission of the company*

(including an act or omission on its behalf) is or would be so prejudicial" [emphasis added]. In many factual scenarios the difference between prejudicial acts which are in train and have yet to reach fruition, and prejudicial acts which have happened or are happening, will perhaps be wholly academic. The Bermudian law position nevertheless is that an unfair prejudice petitioner can only complain of corporate conduct which has occurred or is in the process of unfolding, as Mr. Woloniecki submitted.

34. The idea that the matters complained of constituted grounds for the presentation by the 2nd Defendant of a petition under section 111 of the Companies Act 1981 against Paladin was so improbable, that it was only conjured up by his legal advisers when the Court queried the 2nd Defendant's ability to rely on his BVI claims. No evidence was filed which explicitly supported an unfair prejudice claim; the matters complained of essentially related to who was entitled to control Five Star, a shareholder of Paladin. The bare assertion was made that Andrew Oung proposed, through procuring the appointment to Paladin's Board of his nominee directors, "*to dissipate assets to himself*". This speculative allegation did not come close to supporting a finding that the convening and/or holding of the SGM which would change the Paladin Board composition constituted unfair prejudice, liberally construed.

35. The 2nd Defendant's case was that the Board which he chaired had itself properly convened the SGM in response to a requisition it regarded as valid. This situation was the mirror image of the situation in *Re Kenyon Swansea* [1987] BCLC 514, where the complaint was that the meeting sought to be restrained had been convened by the company for improper purposes. The 2nd Defendant's real complaint was not about anything the Company itself had done or was doing as at the date of the injunction application. The complaints were, in effect, that (a) Five Star had in the course of July 2014 become controlled by a "sinister" person indirectly using an invalid power of attorney, and (b) if Five Star was permitted to vote at the SGM, directors would be appointed who would after their appointment become surrogates of Andrew Oung and act in breach their duties to act in the best interests of the Company.

36. I found that the evidence before the Court did not disclose an arguable, let alone a good arguable, case of past or present unfair prejudice on the part of Paladin in connection with its convening and proceeding with the holding of the SGM. Further and in any event, the main ground of the application was a complaint about who should be entitled to <u>indirectly</u> control Paladin, a company listed on a leading stock exchange. No doubt was being cast on Five Star's right to vote at the SGM. There was no credible evidence of a risk of irreparable harm being suffered by the 2nd Defendant if the meeting went ahead; merely a conspiracy theory as to what might happen under Paladin's new Board. Even if this theory was well-founded, any petition at this juncture would have been premature.

37. Moreover, the grant of injunctive relief would be more likely to alter than to preserve the status quo as the SGM would merely be a vehicle through which existing share rights would be given expression. The position was otherwise in *Re a company* [1985] BCLC 80, upon which Mr. Sanderson relied, where a rights issue was due to be approved and Harman J observed:

> "*There might be circumstances where change was essential, but if possible the existing position should be preserved. In my judgment, that is a factor which in these matters arises under contributories petitions is particularly powerful and has more than the normal 'Cyanamid' (American Cyanamid Co. v Ethicon Ltd [1975] 1All ER 504, [1975] AC 396) force in favor of preserving the status quo, since it is the very nature of this matter that the status quo must affect the remedy which may be available.*"

38. This approach was adopted by Ground CJ in *Sino –JP Fund Co Ltd-v-Pacific Electric Cable and Wire Co Ltd* [2006] Bda LR 51, a local case which illustrates the circumstances in which interim relief can be sought in support of an unfair prejudice petition, despite the fact that the underlying dispute requires resolution abroad. In this case the dispute centred on a share purchase agreement in a Bermuda company, and had direct implications for the management of that local company. Hong Kong was the most appropriate forum for the dispute about the parties' contractual rights to be adjudicated. The petition was found to make out a good arguable case for unfair prejudice. An injunction was sought from this Court, and granted, *inter alia* preventing any changes in the company's board. Ground CJ held:

> "24*. In respect of class (i) I can well see that if Sino-JP loses its board representation it may suffer irreparable harm, which cannot adequately be compensated in damages. However, I think it also likely that, should it turn out that Sino-JP no longer had a right to that representation, PEWC may suffer damage which cannot be compensated under the usual undertaking. In such a case I have to go to consider the balance of convenience. In that regard it seems to me that, pending the resolution of this dispute and in particular whether the 9.2(A) rights survived the exercise of the option, I should preserve the status quo in respect of the directorships. I appreciate that that is going to continue the rift in the Board, and that there are therefore factors of convenience which militate against it, but I think that the balance still comes down in favour of the status quo.*"

39. In the present case there was a yawning chasm separating the BVI shareholder dispute involving Five Star and its shareholders and the way in which the affairs of Paladin were being conducted. The unfair prejudice ground for seeking to restrain the holding of the SGM was simply hopeless and no need to consider irreparable harm and/or the balance of convenience arose. The application for injunctive relief based on this alternative ground also failed.

Conclusion

40. For the above reasons, the 2nd Defendant's July 30, 2014 application for an injunction restraining the holding of the SGM convened by Paladin for August 1, 2014 was refused.

Dated this 27th day of August, 2014 ______________________________

IAN R.C. KAWALEY CJ