IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 56 OF 2021 (RPJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

IN THE MATTER OF CIRCUMFERENCE HOLDING LTD

NICHOLAS JAMES MARTIN

PETITIONER

CIRCUMFERENCE HOLDINGS LTD

RESPONDENT

IN CHAMBERS

Appearances:	**Mark Russell and Rupert Wheeler of KSG Attorneys at Law on behalf of the Petitioner** **Sarah Dobbyn and Tetrina Rivers of Sinclairs on behalf of the Company**
Before:	**The Hon. Justice Parker**
Heard:	**8 April 2021**
Draft Judgment Circulated:	**26 April 2021**
Judgment Delivered:	**3 May 2021**

HEADNOTE

Winding up proceedings-just and equitable-adequate alternative remedy-foreign proceedings in England and Luxembourg-strike out-abuse-stay-jurisdiction.

Introduction

1. The Petitioner, Mr. Martin, presents a Petition dated 5 March 2021 on the basis that the court should wind the Company up on the just and equitable ground.

2. He became a shareholder of the Company in January 2019, holding approximately 11.8% of the Company's shares, following the acquisition by the Circumference Group of Coficom Trust Sarl ("Coficom") an accountancy firm in Luxembourg, founded by Mr Martin and of which he was the sole shareholder and managing director.

3. The acquisition of Coficom was made on the terms of a Share Purchase Agreement (the "**SPA**") dated 15 October 2018 pursuant to which the Circumference Group acquired the entire share capital of Coficom in consideration for cash and shares in the Company [1]. The SPA is governed by English law and the High Court of England and Wales has jurisdiction to determine disputes under it.[2]

4. There is a significant ongoing dispute between the parties as to whether the Petitioner remains a shareholder of the Company which, in accordance with the choice of law and express choice of jurisdiction clause in the SPA, is currently being litigated before the High Court of England and Wales (Business List Ch.Div.) ("the English Proceedings").

Company strike out application

5. Ms Sarah Dobbyn appearing for the Company submits that it has well substantiated claims of fraud and fraudulent misrepresentation against the Petitioner which entitled the Company and two of its subsidiaries (who are also Plaintiffs in the English Proceedings) to serve a notice of rescission of the SPA on the Petitioner on 20 March 2020.

6. In the English Proceedings the Company seeks a declaration that the SPA has been validly rescinded, and alternatively, an order for rescission. Ms Dobbyn submits that if the Company prevails that would mean that Mr. Martin is not (and never has been) a shareholder in the Company and therefore would have no standing to issue a Petition, since the SPA would be void *ab initio* and the shares issued to him would be cancelled and all cash paid to him would be returned[3].

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[1] *Turner 1, §14, pages 15 to 63 of Exhibit NM-1*
[2] *Turner 1,§ 14 RHB tab 2 and page 39 of NM-1 .*

[3] *Turner 1 §15.*

7. As set out in paragraph 29 in the Petition there are also criminal actions ongoing against the Company's indirect Luxembourg subsidiaries: Coficom and Circumference FS (Luxembourg) S.A ("CFSL") as well as Circumference Group employees in Luxembourg.

8. These matters, commenced as a form of private prosecution by persons or entities which the Company asserts are owned, controlled, affiliated or otherwise connected with the Petitioner[4] ("The Luxembourg Claimants") are all currently pending before the Luxembourg Court ("The Luxembourg Actions"). None of the parties to the Luxembourg Actions are parties to these winding up proceedings and the Court does not have jurisdiction over them.

9. Ms Dobbyn submits that this Court is not the appropriate forum to determine matters which are founded on allegations of criminal offences under Luxembourg law nor allegations of regulatory breaches under Luxembourg law by the Company's indirect subsidiaries as alleged in paragraph 35 of the Petition, not least since it has no jurisdiction over any of the parties concerned.

10. Coficom, the main defendant in the Luxembourg Actions is in liquidation and not under the management or control of the Company. Since 29 July 2020 it has been under the complete control of its independent liquidator Triple Line Advisory Sàrl ("Triple Line"), and the managing director of that entity, Mr Pfeiffer. All of the criminal claims in the Luxembourg Actions are against Coficom, over which the management of the Company it is said by Ms Dobbyn cannot exercise any control.

11. She submits that the predicament in which the Company's indirect subsidiaries in Luxembourg (Coficom and CFSL) now find themselves in, as to both the Luxembourg Actions as well as the alleged regulatory breaches, have been directly caused by the Petitioner's own misconduct or fraud and his pursuit of vexatious litigation and regulatory complaints against Coficom and CFSL in Luxembourg.

12. She submits that it is an egregious abuse of process of the Petitioner to seek to rely on the consequences of his own wrongdoing as grounds for his supposed loss of confidence in the Company's management in bringing this Petition.

13. The application for a strike out is put forward on the grounds that:

[4] *Turner 1, §33*

(i) The Petitioner has an adequate alternative remedy and is being unreasonable in not accepting or pursuing the same; and

(ii) The Petition has not been brought *bona fide* for the purpose of obtaining the relief sought but for an improper and collateral purpose.

14. Ms Dobbyn submits that the Petitioner's allegations relating to the management of the Company's indirect subsidiaries in Luxembourg will be fully considered and determined in both the English Proceedings and the Luxembourg Actions. He will not have to have to wait long for such relief: The Luxembourg Actions are listed to be heard together on 28 June 2021 (although this may not be the final hearing). Coficom, CFSL and the other named respondents facing these claims are preparing to defend all claims at the hearing and CFSL and others involved believe the claims will be dismissed in due course[5].

15. The trial timetable in the High Court in England provides for disclosure to have been completed by 23 April 2021, witness statements to be exchanged on 25 June 2021, expert reports to be exchanged on 1 October 2021 and the trial to commence in February 2022. The Company and its subsidiaries are actively engaged in this process on a daily basis.[6]

16. She submits that the obvious available alternative remedies for the Petitioner can be seen without a full and extensive examination of the disputed facts being litigated in the English Proceedings and the Luxembourg Actions. Accordingly, she submits that Mr Martin is not able to persuade the court that it would be just and equitable to wind the company up and the Petition should not be allowed to proceed.

17. She invites the Court to strike out, or alternatively dismiss the Petition on the basis of an adequate alternative remedy which it is unreasonable for him not to accept or pursue.

18. As to improper or collateral purpose, the Court should not permit winding up proceedings which are brought only (i) to facilitate the Petitioner's ulterior personal objectives which are not *bona fide* and (ii) in an unmeritorious attempt to undermine or interdict litigation for fraud/fraudulent misrepresentation being brought against him in the English Proceedings or the Luxembourg subsidiaries' defences in the Luxembourg Actions[7]**.** She submits that by his

[5] *Turner 1 §43*
[6] *Turner 1 §16*
[7] *Turner 1, §24 ,Turner 2 §5*

actions in bringing the Petition the Petitioner seeks to harm the reputation of the Company and Mr Turner and abuses the process of the court[8].

Company stay application

19. If the Court is not minded to strike out the Petition as an abuse of process, then, as a much less satisfactory alternative from the Company's point of view, Ms Dobbyn submits that the petition proceedings should be stayed pending the final resolution of the English Proceedings and the Luxembourg Actions.

Petitioner's case

20. The Petitioner resists the strike out application and seeks an order under section 92 (e) of the Companies Act (2021 Revision) that the company be wound up on the just and equitable basis.

21. In summary, the Petitioner claimed in the Petition that he has been subjected to unfairly prejudicial and oppressive conduct based on (i) alleged failure to provide him with financial and operational information; (ii) alleged failure to pay any dividends to him since December 2019 (iii) failure to give notice or invite the Petitioner to the 2020 AGM.[9] These matters are largely no longer at issue.

22. The thrust of the Petition is that he has justifiably lost trust and confidence in the conduct and management of the affairs of the Company and its subsidiaries due to (a) the Luxembourg Actions against the Company's indirect subsidiaries; (b) regulatory breaches committed by the Company's indirect subsidiaries in Luxembourg; both on the bases that the Company's management exercises "*significant and substantial practical control and oversight*" of its indirect subsidiaries in Luxembourg [10]. He submits that the conduct of the affairs of a subsidiary over which it has control is a proper basis of complaint against a parent.[11]

23. It was fairly accepted at the hearing by Mr Russell, appearing for the Petitioner, that the Petitioner no longer relies on items (i), (ii) and (iii) which have been, or are being, dealt with satisfactorily. The main parts of the unfair prejudice case therefore fall away.

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[8] *Turner 1 §§27,32,58 and 59.*

[9] *Petition§§ 2 and 35*

[10] *Petition§§ 2,27- 41*

[11] *Familymart CICA 23 April 2020 unreported § 60*

24. However, the loss of trust and confidence case and the basis for that case is maintained for a winding up order on the just and equitable basis. He claims that entities in the Circumference Group have engaged in conduct that is the subject of the various criminal complaints and proceedings in Luxembourg and have breached and continue to be in breach of regulatory laws and rules applicable to them in Luxembourg. Management responsibility for these factual matters are vigorously denied by the Company.

25. He alleges that Circumference Management [12] exercises significant and substantial practical control and oversight over the management and affairs of the entire Circumference Group and it permitted or acquiesced in the conduct underlying the Luxembourg Actions and the regulatory breaches and has failed to take any appropriate steps to rectify or deal with them. Again these matters are denied and contested by the Company and the allegations as to any lack of probity are rejected.

26. The Petitioner goes on to argue that the regulatory breaches and the conduct underlying them will likely have serious adverse financial and reputational impacts on the Company and the Circumference Group as a whole and demonstrate a lack of probity in the conduct of the management of the affairs of the company. The Petitioner alleges that this requires an independent investigation by Liquidators appointed by the court to determine how the group ought to manage and respond to the criminal and regulatory issues in the best interests of the Company and its shareholders.

27. Mr Russell submits that this has led the Petitioner to lose trust and confidence, reasonably, justifiably and irretrievably, in the conduct and management of the affairs of the Company.

28. Mr Russell puts his case on the footing that the relief sought by the Petitioner under section 92 (e) of the Companies Act is *not* to determine whether Circumference Group *has* committed criminal acts in Luxembourg, nor is it to determine any issue that is before the High Court in the English action.

29. Rather the court is being asked to determine whether the matters raised in the Petition sufficiently give rise to the Petitioner's loss of trust and confidence in the conduct of the

[12] *as defined in the Petition at §8*

Company's management and affairs, such that it would be just and equitable to make a winding up order.

30. The Luxembourg court will ultimately determine whether the conduct set out in the Luxembourg Actions constitutes criminal offences under Luxembourg law and the applicable regulators will decide whether to take regulatory action. Similarly the English High Court will determine the matters in dispute in those proceedings.

31. As to the availability of alternative remedies in the processes of continuing in the High Court and in Luxembourg, Mr Russell submits that none of those proceedings will change the control of the management of the Company which a winding up order would produce with the appointment of liquidators, or provide an independent oversight of the Company and an investigation into its affairs in order to protect him as a contributory.

32. Nor will they address the concerns about ongoing detrimental management. They will not preserve the value of the business operations of the Company or the Circumference Group. That he submits is the Petitioner's main objective.

33. Mr Russell accepted that there may well be an overlap regarding factual matters but the Luxembourg criminal proceedings do not concern the Company and can have no impact on the Petitioner's concerns about it. The English High Court proceedings will not produce the remedies the Petitioner seeks in these winding up proceedings.

34. If the court is not minded to accept his submissions, in the alternative Mr Russell argues that the court should stay the Petition rather than strike it out as a result of taking into account and balancing the relative prejudice that the Petitioner and the Company are likely to suffer from each possible outcome.

35. The Petitioner, he submits, has a greater possibility of suffering serious prejudice if the Petition is struck out, while the only prejudice the Company will suffer if the Petition is stayed is that it will remain on file pending resolution of the English action. That prejudice can be managed by making validation orders under section 99 of the Companies Act, which the Petitioner does not object to.

The law

The nature of winding up proceedings

36. The winding up procedure is generally intended to be used in clear cases.It is not for the resolution of disputed debts or other contentious disputes that should properly be resolved by writ actions or other litigation processes[13]. In addition, in relation to any petition brought on the just and equitable ground, it must self-evidently be just and equitable to obtain the relief sought.

37. The well-known statement of Lord Wilberforce in the House of Lords case of *Ebrahimi v. Westbourne Galleries Ltd*[14]. stated at page 379:

> ***"The foundation of it all lies in the words 'just and equitable'*** *and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which the shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the Company is large or small. The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it.* ***It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*****"** (my emphasis)

38. Further if any action is not brought *bona fide* for the purpose of obtaining the relief sought but for some ulterior or collateral purpose it will, *ex hypothesi,* not be just and equitable. It may be struck out as an abuse of the process of Court: *Lonrho PLC and Others –v- Fayed and Others (no 5) 1 W.L.R 1993, 1489 at page 1502 D-E*. Bringing a petition simply to exert pressure on the Company will also be an abuse of process[15].

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[13] *In re Strategic Turnaround 2008 CILR 447 §§ 17-18 Vos JA*

[14] *[1973] A.C. 360*

[15] *RCB – v- Thai Asia Fund* [1996]CILR 9 and *Camulos [2010]1 CILR 303* and *CVC Opportunity [2002] UKPC 16*

Strike out

Jurisdiction

39. The jurisdiction of the Court to strike out a petition as an abuse of process is well established. It is derived from both GCR Order 18 rule 19 of the Grand Court Rules (GCR) and by the recognised power of the Court to prevent the abuse of its process.

40. The position was examined in *RCB –v- Thai Asia Fund Ltd*[16]. where Smellie J, (as he then was) considered the Court's jurisdiction in the context of applications to strike out winding up petitions generally and in light of the doubt cast on the applicability of the Court's jurisdiction under GCR Order 18 rule 19 by GCR Order 1 r, 2 which provides that the GCR are not applicable to proceedings under Part V of the Companies Act.

41. At line 17 the Judge held the following:-

> "*Within its inherent jurisdiction and for the purpose of protecting its own process from abuse, the court has the power to stay (see Reichel v McGrath), or to dismiss before the hearing, actions which it holds to be frivolous, vexatious or otherwise an abuse of process: See the Metropolitan Bank v Pooley and generally the Supreme Court Practice 195 para. 18/19/36, at 346.*
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> *The inherent powers given at common law are in no way diminished but instead expanded by the rules of court made under the Grand Court Law. As it affects the present matter and as a purely technical point, the expanded jurisdiction may be significant to the complaint of no proper cause of action which is one ground of the summons for striking out.*
>
> *It may be that the summons could not succeed on that ground alone without invoking the Grand Court Rules. Lest there be any doubt on that issue, I should make it clear that I consider the complaints raised in the summons to be entirely substantiated and to have justified striking out and dismissal of the petition either on the basis of the powers given by O.18. r.19 or by the inherent jurisdiction of the court*".

Adequate alternative remedy

42. In considering whether to strike out a contributory's petition to wind up on the just and equitable ground the Court is required to address:

(i) Whether there is an alternative remedy available to the petitioner; and

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[16] *[1996] CILR 9*

(ii) Whether the petitioner is acting unreasonably in not pursuing that alternative remedy.[17]

Chadwick JA, in delivering the Judgment of the Court of Appeal in *Camulos* stated in relation to the questions set out above

> "*If a court is satisfied that both these questions should be answered in the affirmative, then it can be expected to take the view that the presentation of the petition is an abuse of its process or, alternatively that the petition is bound to fail because it would not, in those circumstances be "just & equitable" that the Company should be wound up".*

43. The Petitioner needs to show that the winding up procedure provides the only sufficient remedy to deal with the wrong about which he complains and that there is no adequate alternative available to him.

44. If there is an adequate or sufficient alternative remedy available to him he should not use the winding up procedure, as the mere presentation of a petition, however unreasonable the demands made in it, can cause real damage to a company.[18]

45. Moreover the winding up procedure, because of the serious impact involved for a company, must not be used to exert commercial pressure or to derive some other illegitimate or tactical benefit.

46. It follows that where the procedure is improperly being used to resolve an *inter partes* dispute, it is abusive and the petition is liable to be struck out[19]. Because of this it is incumbent on the court to ensure that winding up proceedings are not brought for an improper purpose[20].

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[17] *Tianrui International Holding Company Limited [2019] 1 CILR 481 CICA; Charles Forte Invs. Ltd [1964] Ch 240; CVC/ Opportunity Equity Partners Ltd [2002] CILR 77; Camulos Partners Offshore Limited [2010] 1 CILR 303.*

[18] *CVC ibid Lord Millett § 57*
[19] *Camulos ibid at § 60*
[20] *CVC Opportunity[2002] UKPC 16 per Lord Millett § 57*

Loss of confidence

47. The Petitioner claims that entities in the Circumference Group have engaged in conduct that is the subject of the various criminal complaints and proceedings in Luxembourg and have breached and continue to be in breach of regulatory laws and rules applicable to them in Luxembourg. This has led to what Mr Russell submits is a justifiable loss of confidence which requires the Company to be wound up[21].

48. However, loss of confidence by the Petitioner himself is not enough. In this case it is obvious, that the Petitioner would have no subjective trust and confidence in the management of the Company which is suing him for fraud.

49. In this regard in *RCB –v- Thai Asia Fund Ltd*[22]. Smellie J observed:

> "*To my mind, all that the petitioners are able to point to is their alleged subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company. The authorities are clear that is not enough".*

50. While the Court takes a broad approach in determining what could amount to an objectively justifiable loss of trust and confidence by a shareholder in the Company's management, it is clear that what would amount to a grievance about the internal affairs of a Company (or indeed a group) will not be enough.

51. In *Re Kitson & Co. Ltd*[23]*:* Lord Greene, M.R said:

> *"It is to be remembered that the winding up procedure does not exist for the purpose of keeping boards of directors in order……it seems to me that the winding up procedure ought not be to used for regulating the internal affairs of the company. If directors are misbehaving themselves, there lies a remedy to the shareholders to stop it, and it would be quite wrong to my mind that the partnership between shareholders, so to speak, should be dissolved merely because the persons carrying on the business on behalf of the company, namely the directors, are misbehaving themselves. It is for the shareholders to stop them. They can get rid of the directors. They can restrain them by means of an injunction if they are doing anything improper, and, therefore, I do not think it*

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[21] *Martin 1 §§31-41*
[22] *[1996] CILR 9*
[23] [*1946] 1 All E.R. at 441*

is putting it too high to say that in the ordinary way of things winding up is not the proper procedure for dealing with that type of situation.[24]

52. It is also important to recognise that a strike out application is not suitable for the resolution of factual issues and so for the court to examine and finally determine whether there was in fact a justifiable loss of trust or lack of confidence in the conduct and management of the Company's affairs in the circumstances of this case would require a trial.

53. At this stage the Petitioner has to show an objectively sustainable case which is likely to result in a winding up order. Lack of probity is a well-established basis for a just and equitable winding up as long as it is supported by facts which are not properly contested or contestable.[25]

Stay

54. Whilst Cayman Islands legislation does not include a specific power for the Courts to impose a case management stay, the Courts can order a case management stay on the basis of their inherent jurisdiction and case management powers. [26]

55. This is also consistent with the overriding objective which maintains that in exercising its discretion, the Court's primary role is:

> *"to secure the just, most expeditious and least expensive determination of every cause or matter on its merits" (Preamble to the GCR, paragraph 2.2).*
> *The obligation on the Court is not just to consider the cost consequences but indeed expressly to strive to achieve "the least expensive determination of every cause…".*

General Principles for Granting a Stay

56. The principles on which the Court will grant a case management stay were restated in the Cayman Court of Appeal decision *In the Matter of Nanfong International Investments Ltd* [27].

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[24] *cited with approval by the Court of Appeal in Tianrui ibid at§ 35.*

[25] *Familymart CICA 23 April 2020* §30

[26] *preamble to the GCR and the FSD Guide sections A and B ,also Re Nanfong International Investments Ltd, §42 ibid.*

[27] *2018 (2), CILR 321*

57. There must be strong reasons for granting the stay to further the ends of justice, and the benefits which are likely to result from the stay must clearly outweigh any disadvantage to the Petitioner.

58. In this case it is noteworthy that the Petitioner accepts, in the alternative to making a winding up order, that such a stay should be granted until the conclusion of the English Proceedings in the alternative to dismissing or striking out the Petition. The effect of that of course would be that the Petition would remain in place until the outcome of the English Proceedings.

Decision

Adequate alternative remedy

59. There is clearly a danger in pre judging the outcome of the hearing of the Petition and the court's strike out jurisdiction needs to be exercised carefully. Equally the court needs to be careful to ensure that the winding up procedure is not being improperly used.

60. I have reached the clear view at this stage that the Petitioner has available alternative remedies, which does not require a detailed examination of the contested facts in the English proceedings and the Luxembourg Actions. The matters which arise to be contested from the written materials before the court in those proceedings make it apparent that the Petitioner will not be able to persuade the court that it would be just and equitable to wind the Company up.[28]

61. When the Company issued its notice of rescission and commenced the English Proceedings in March 2020, the Petitioner's response was to contest the matter in accordance with the exclusive jurisdiction clause in the SPA, which he has done. The proceedings have been underway for over a year. That is the overarching dispute between the parties which is due to be determined by the High Court in England in February 2022.

62. The case will involve allegations and counter allegations relating to the conduct of the Petitioner before the sale of Coficom and of the management in place since the sale. The Petitioner's allegations concerning the serious mismanagement of the Luxembourg subsidiaries and criminal and regulatory breaches are in play in those proceedings as well as in the Luxembourg Actions[29]. The Petitioner is accused of fraud against former clients and the Company in the

[28] *Tianrui ibid § 29*
[29] *§§ 6 and 29 of the amended defence*

English Proceedings. The case is likely to determine whether the Petitioner remains a shareholder.

63. The Luxembourg matters have been raised with regulators in that jurisdiction and are the subject of inquiry there.

64. The Petitioner has in my view a sufficient alternative route to establish his case in those proceedings and he does not present this Petition on the just and equitable ground reasonably or properly as a result. The breadth of the enquiry into the dealings between the parties and the alleged misconduct are plain and obvious from the written materials before the court in the relevant actions. In my view the just and equitable ground cannot be made out in this case.

65. In the light of the matters covered in the English Proceedings and the Luxembourg Actions it seems to me clear that there is no proper basis for allowing the Petition to remain and in my discretion it falls to be struck out.

Loss of trust and confidence

66. The Petitioner's main claim is that the knowledge or acquiescence of Circumference Management in the conduct underlying the Luxembourg Actions and the regulatory breaches, together with its response to such matters, has led to his irretrievable loss of trust and confidence in the management of the affairs of the Company.

67. As to this alleged loss of trust and confidence, I am not satisfied that the Petitioner has established a sustainable case which would be likely to result in a just and equitable winding up order. The Petitioner's case alleges a lack of probity and serious mismanagement, rather than on the breakdown of a relationship.

68. This is a significant hurdle to overcome in winding up proceedings when the facts which underpin his allegations are under investigation and heavily contested in existing litigation and regulatory proceedings elsewhere.

69. The Company disputes that it is responsible for the allegations of permitting or acquiescing in (or ratifying) the conduct complained of. From the material available to the court this seems to me to give rise to a substantial dispute with a reasonable prospect of success. It will be resolved

in due course in the English Proceedings and the Luxembourg Actions with benefit of the facts having been properly investigated and determined in accordance with the relevant processes.

70. Coficom, the main defendant in the Luxembourg Actions is in liquidation and not under the management or control of the Company. All of the criminal claims in the Luxembourg Actions are against Coficom amongst others. The Company it seems to me, whilst obviously not deciding the point, has at least an arguable case with reasonable prospects of success that these are matters over which the management of the Company cannot exercise any control.

71. The court cannot resolve in winding up proceedings the Company's case that it is the Petitioner who is responsible for not only bringing the litigation and regulatory complaints against Coficom and CFSL in Luxembourg, but also the very conduct which has given rise to the issues relating to the indirect subsidiaries in Luxembourg (Coficom and CFSL).

72. The Petitioner has not shown that his allegations in the Petition sufficiently give rise to a justifiable loss of trust and confidence in the management of the Company judged to the requisite objective standard in these circumstances.

73. The remedy he seeks as a shareholder in these winding up proceedings, an investigation into the affairs of the company and a change in control of the management in favour of independent Liquidators pursuant to a winding up order, is therefore not one that he is entitled to.

Improper or collateral purpose

74. Moreover it appears to me that the Petitioner's purpose in bringing these winding up proceedings is clearly intimately connected to the English Proceedings and the Luxembourg Actions. The Company asserts that the purpose of the Petition is to prevent the Company's case from proceeding in England and to put the Company under pressure to settle.[30]

75. Having given this careful consideration I am persuaded that the Petitioner brought these proceedings for an improper or collateral purpose to obtain a benefit in the other actions. The appointment of liquidators would clearly have an effect on the future of the English Proceedings as far as the Company is concerned.

[30] *Turner 1 §12*

76. I note that the Petitioner states on oath that he wishes to obtain a remedy in the winding up proceedings to obtain his objective of protecting his interest in the Company[31]. It is of course debateable whether an order winding up the Company would achieve that stated objective and the consequences for the Company and the remaining shareholders would be likely to be severe. I have been persuaded that the proceedings have been brought for tactical reasons in litigation outside the winding up proceedings, and are therefore an abuse of process.

77. For the reasons set out above he cannot succeed in the winding up application and the Petition, which is an abuse of process will be struck out.

78. The Petitioner is not left without effective remedies which lie elsewhere.

Stay

79. For completeness I should state that if the court had not decided to strike out the Petition it would in its discretion have stayed the Petition until the conclusion of the English Proceedings and the Luxembourg Actions.

80. The Petitioner should pay the Company's costs. Counsel for the Petitioner has conceded that the Company is entitled to have its costs taxed on an indemnity basis if they cannot be agreed.

THE HON. JUSTICE PARKER
JUDGE OF THE GRAND COURT

[31] §42 of Martin 1