IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 108 OF 2022 (IKJ)

IN THE MATTER OF SECTION 92 OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF GLOBAL CORD BLOOD CORPORATION

Appearances:

Mr David Chivers KC and Ms Joanne Verbiesen and Mr Jamie McGee and Mr Jonathan Stroud of Bedell Cristin, on behalf of Blue Ocean Structure Investment Company Limited (the "Petitioner")

Mr Thomas Raphael KC of counsel and Ms Ilona Groark of Kobre & Kim for ("GMSCL"), the Applicant

Ms Gemma Lardner and Mr Corey Byrne of Ogier for the Litigation Steering Committee of the Company

Before: The Hon. Justice Kawaley

Heard: In Chambers

Date of hearing: 14 March 2023

Draft Judgment circulated: 21 March 2023

Judgment Delivered: 31 March 2023

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HEADNOTE

Just and equitable winding-up petition-standing of stranger to company to join or intervene in winding-up proceedings to enforce its contractual rights against third parties- Companies Act (2023 Revision) sections 92-95

RULING ON STANDING

Background

1. As a source of unusual factual and legal conundrums, the present proceedings are like the archetypical 'gift that keeps on giving'. The main background events thus far can conveniently be summarised as follows:

   (a) the Company was incorporated in the Cayman Islands in 2009. It is managed primarily from Hong Kong but is listed on the New York Stock Exchange ("NYSE"). Its business focus is lifesaving medical technology, the storage of umbilical cord blood stem cells, mainly in Mainland China where it is said to be the largest such service provider;

   (b) the Petitioner is 100% owned by a special purpose vehicle, Nanjing Ying Peng HuiKang Medical Investment Partnership (Limited Partnership) ("Ying Peng") to hold a 65.4 % stake in the Company which was sold by Golden Meditech Holdings Limited ("GMHL") and Golden Meditech Stem Cells (BVI) Company Limited ("GM BVI") to Ying Peng in 2018;

   (c) after 2018, the Company continued to be controlled by Mr Kam Yuen, the founder of GMHL which by then held a minority shareholding interest in the Company;

   (d) on 5 May 2022 the Petitioner presented the Petition which formally sought a just and equitable winding-up but which primarily sought to prevent the consummation of the "Cellenkos Transaction" which was said to have been improperly approved by the Company's Board without shareholder approval in circumstances where the main beneficiaries of the transaction were related parties being entities linked to Mr Kam and the Company's management;

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(e) the Petitioner supported by other minority shareholders, purportedly convened an extraordinary general meeting for 16 June 2022 at which it was sought to, *inter alia*, replace the directors who had approved the Cellenkos Transaction and terminate the Cellenkos Transaction (the "EGM Resolutions");

(f) on 12 May 2022, Richards J granted the Petitioner's *ex parte* application for an injunction restraining the Company from implementing the closing of the Cellenkos Transaction or the issuing of new shares;

(g) on 23 May 2022, GM BVI filed a Schedule 13D SEC filing in New York asserting that it held a charge over the Petitioner's shares. The validity of the share charge is the subject of proceedings commenced by the Petitioner itself in the British Virgin Islands ("BVI"), the trial of which was vacated;

(h) on 15 June 2022, I declined to grant an injunction restraining the holding of the EGM on the Company's 14 June 2022 *ex parte* on notice Summons. I granted the Company's alternative head of relief, restraining implementation of any resolutions passed at the meeting until an *inter partes* hearing;

(i) on 16 June 2022 the EGM purportedly passed the EGM Resolutions reconstituting the Board and potentially creating a majority opposed to the Cellenkos Transaction;

(j) on 29 July 2022, following an *inter partes* hearing on 13-14 July 2022, I refused the Company's application for a Validation Order permitting completion of the Cellenkos Transaction. The validity of the EGM Resolutions turned in large part on whether the new shares purportedly issued through Phase 1 of the Cellenkos Transaction on 4 May 2022 at a time when the Company had no statutorily compliant share register. The way in which evidence about this change to the share register was belatedly disclosed was perturbing, and I declined to grant the Company's application for a declaration that the EGM was invalidly convened;

(k) on 22 August 2022, the Petitioner applied by Summons to appoint provisional liquidators. The Company was given notice of the hearing but elected not appear to

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challenge the Petitioner's application and the hearing proceeded on an *ex parte* on notice basis;

(l) on 22 September 2022, I appointed Margot MacInnis and John Royle of Grant Thornton Specialist Services (Cayman) Limited and Chow Tsz Nga Georgia of Grant Thornton Recovery & Reorganisation Limited as Joint Provisional Liquidators of the Company (the "JPLs"). In a Judgment delivered on the same date[1], I found that credible evidence had been adduced by the Petitioner to the effect that evidence adduced by the Company through its Chief Financial Officer (an executive director and principal deponent) in the form of a bank statement showing the sale proceeds for the Cellenkos Transaction being deposited into one of its bank accounts had been materially false;

(m) in the 22 September 2022 Judgment I also found that the Petitioner "*has a seriously arguable case-and at this stage it is almost an irresistible case- for setting aside the Order that I made…on the grounds of fraud*". This was because the Company's evidence that it had paid US$664 million on 29 April 2022 and supposedly issued the new shares on 4 May 2022 as consideration for Phase 1 of the Cellenkos Transaction was pivotal to my decision to continue my 15 June 2022 injunction restraining implementation of the EGM Resolutions. This evidence and the lack of any rebuttal from the Company constituted grounds for serious concern about the risk of mismanagement in the Company's affairs;

(n) on 9 December 2022 the Petitioner filed a Summons seeking to set aside the Orders granted on 29 July 2022 with the obvious intention of implementing the EGM Resolutions which was sought to be listed for hearing in mid-February 2023.

2. It was against this background that by a Summons dated 18 January 2023 (the "GM Summons") GMSCL applied, *inter alia*, for the Petition to be struck-out or stayed:

> "*under the Court's inherent jurisdiction and/or injunctive jurisdiction/power and/or pursuant to section 54 of the Arbitration Law 2012, in particular because the Petition is*

[1] The transcript of the Judgment circulated on 28 September 2022 mistakenly described this later date as the delivery date, a clerical error which was recently corrected under the slip rule.

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an abuse of the Grand Court's process and/or breach of contractual obligations of those controlling the Petitioner…"

3. This application was on its face a surprising one which at first blush appeared to be, as the Petitioner complained, an attempt by the 'Kam camp' to make a desperate last-ditch attempt to prevent the EGM Resolutions being deployed to change control of the Company's Board. There was a battle in correspondence in relation to the priority in which the Petitioner's and GMSCL's Summonses should be heard. Whilst the Petitioner contended it was obvious that GMSCL lacked standing to intervene in the present proceedings to enforce contractual rights against third parties, it made no sense to proceed with the Petition while an application to strike-out or stay was waiting in the wings. Therefore, on 1 February 2023 I directed that the GMSCL standing issue should be determined first. Only if a sufficient case was made for GMSCL's application to be heard at all would the Court further delay the hearing of the Petitioner's application to set aside the Orders that I granted on 29 July 2022 on the grounds of fraud. Directions were also given in relation to a related application about the standing of the Company's Litigation Steering Committee to appear in opposition to the Petition. However, this was disposed of by consent by the end of the 14 March 2023 hearing.

4. By the end of the hearing, it was clear that GMSCL was not entitled to be formally joined as a party and it appeared to me that Mr Raphael KC was primarily placing reliance upon the Court's flexible inherent jurisdiction to hear an interested party. Mr Chivers KC submitted that I should decline to consider this Court's injunctive jurisdiction in the absence of any formal application for injunctive relief being moved before the Court. The application for injunctive relief was part of the substantive relief sought in the GM Summons and was supported by the offer of an undertaking. I see no justification for deferring for separate consideration GMSCL's standing to seek the injunctive relief it presently seeks in these proceedings. In my judgment, GMSCL's standing to seek injunctive relief is in the circumstances of the present case in a practical sense, as opposed to in an abstract conceptual sense, indistinguishable from the main standing questions in relation to joinder and intervention.

5. GMSCL's counsel managed to diminish the strength of my initially strong provisional view that his client's case on standing was so obviously lacking in merit that it could be summarily rejected. Unusual applications often contain hidden merits. Being mindful of the adage 'discretion is the better part of valour', I somewhat reluctantly decided to reserve judgment. However, after carefully

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considering the merits of an unusual application in relation to which there was, unsurprisingly, no factually similar illustrative authority, I am ultimately satisfied that GMSCL's application must indeed be firmly rejected for reasons that can be stated with comparative brevity.

GMSCL's factual case on standing

6. GMSCL's proposed intervention is based on its rights as a creditor of Sanpower Group Co., Ltd. ("Sanpower Group"). In essence, the owners of a minority interest in Ying Peng, the 100% owner of the Petitioner, are said to be substantially indebted to GMSCL. On 30 June 2018, a few months after the Petitioner acquired its stake in the Company, Sanpower Group as Creditor and "Sanpower Nanjing", "Yingpeng Assets Management" and "Mr Yuan" as Guarantors entered into a Debt Confirmation and Repayment Agreement (the "June 2018 Agreement") with their Creditor according to which they agreed that they would procure that, *inter alia*, all share rights in relation to the Company would be exercised by Ying Peng in accordance with the directions of GMSCL. The most significant clause upon which reliance was placed was the following:

> "*4.3 Before all the principal debts (including the payables) have been paid off, the debtor and all the guarantors promise and guarantee to the creditor that the debtor and all the guarantors will exercise all the powers and rights to ensure that the directors of global Cord Blood Corporation (hereinafter referred to as 'CO") appointed by Yingpeng Huikang will not (i) put forward any motion or proposal at the Board of Directors of CO; (ii) not vote against or abstain from voting on the matters considered by the Board of Directors of CO, except for the proposal or the vote against or abstain from voting based on the opinions or instructions of creditors.*
> *The debtor and all the guarantors promise and guarantee to the creditor that the debtor and all the guarantors will exercise all the powers and rights to ensure that Yingpeng Huikang will exercise any shareholder rights related to CO according to the creditor's instructions from time to time, including but not limited to voting rights, options and other shareholder's powers or rights, before all the principal debts (including the payables) have been fully paid off.*" [Emphasis added]

7. Ying Peng is the limited partnership which was formed to hold the 65.4% stake in the Company acquired in January 2018 through its 100% ownership of the Petitioner (through two intermediate entities, one of which is "Blue Ocean BVI")). It is owned by the Sanpower Group and ultimately

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controlled by Mr Yuan. The Petitioner placed the limited partnership agreement before the Court and Mr Chivers KC referred to various provisions, including the obligation on the part of the General Partners under clause 9.5.2(2) "*to seek the best interests for the Partnership in good faith*". Of course, I was invited to consider English translations documents executed in Chinese and governed by Chinese law. In evaluating the implications of these documents for the standing of GMSCL to strike-out or stay a Cayman Islands just and equitable winding-up petition, I consider that I am entitled to infer from the familiar elements of these documents what the core commercial objects of the June 2018 Agreement are. I also consider that I can take judicial notice of the fact that the PRC law generally recognises comparable, if not stricter, standards of commercial morality to the standards of the common law world.

8. These contractual obligations were said to have been breached because GMSCL did not wish the Petitioner to present or pursue the present Petition and it has refused to withdraw it. It sought to intervene in the present proceedings to prevent the Petitioner from acting in breach of the contractual obligations owed to GMSCL by the Petitioner's indirect owners. The Petitioner was in these circumstances said to be abusing the processes of this Court. GMSCL's evidence in support of its application may be summarised as follows:

(a) the First and Second Affirmations of Timothy De Swardt dated 19 January 2023 and 21 February 2023, respectively, were made by a principal of Kobre & Kim BVI. He explains the background to the GM Summons and its legal basis and offers an undertaking on behalf of GMSCL in support of the application for an injunction restraining the convening of any extraordinary general meeting of the Company or implementation of the EGM Resolutions. The Second Affirmation explains that GM BVI's case in the BVI Proceedings is that the Petitioner holds its shares in the Company on bare trust for GM BVI because, *inter alia*, the full consideration for those shares was never paid;

(b) the First and Second Affirmations of Ma Xiaohu dated 30 January 2023 and 20 February 2023, respectively. The affiant is one of the GMSCL lawyers with carriage of the China International Economic and Trade Arbitration Commission ("CIETAC") arbitration proceedings commenced against the Debtor and Guarantors under the June 2018 Agreement. He explains the viability of the breach of contract claim which has been referred by GMSCL to arbitration;

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(c) the First Affirmation of Jiang Jianzhong dated 20 February 2023 was made by GMSCL's Chairman and legal representative. He confirms his belief in GMSCL's right to enforce the June 2018 Agreement which he states was to "*maintain control over important matters regarding the GCBC Shares pending the full payment under the GCBC SPA*" (paragraph 18); and

(d) the Expert Opinion of Dong Chungang dated 28 February 2023. He most significantly avers: "*Hence, judging by the wording of the June 2018 Agreement, and taking into account the parties' intent, I am of the view that the CIETAC tribunal will find a contractual basis to issue an award ordering the respondents in the CIETAC Arbitration to 'procure and ensure' that Blue Ocean BVI cease, withdraw or terminate the Petition Proceedings as requested by GMSCL*" (paragraph 64).

9. None of this evidence remotely suggested that GMSCL was intervening to advance the interests of the majority of the Company's shareholders. The alleged impropriety of the proceedings was based entirely on the central allegation that the Petitioner was, indirectly, acting in breach of the contractual control rights owed by strangers to the Company to GMSCL, also a stranger to the Company. There was no or no discernible complaint of substantive commercial prejudice flowing from the alleged breaches of the control mechanisms. Even more ambitious was the assertion that the present proceedings should be stayed pending the determination of the CIETAC arbitration proceedings which GMSCL has commenced under the said agreement. I summarily reject the argument that the Court's powers to grant interim relief in support of arbitration proceedings under section 54 of the Arbitration Act (2012 Revision) provide a potentially valid basis for this Court staying the present proceedings in circumstances where the Petitioner is not a party to the relevant arbitration agreement.

10. Mr Raphael KC submitted that the Court should not evaluate the merits of the relief sought when determining the standing issue. I accept this submission insofar as the analysis is a purely legal one, namely is GMSCL entitled to be joined as a party to the Petition? However, when considering whether the Court should exercise its inherent jurisdiction to allow GMSCL to intervene, the Court cannot possibly make a rational decision without to some extent assessing the merits of the proposed intervention. That said, in carrying out this assessment, I will assume that GMSCL is correct in complaining that its contractual rights have been infringed as it contends and, on that

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basis do not express any view on the Petitioner's responsive evidence on those merits. The following broad issues arise from the respective arguments:

(a) who has standing to be joined as a party in relation to a contributory's just and equitable winding-up petition in the broadest terms;

(b) whether a party with standing in the broad sense must further demonstrate sufficient interest to seek relief in relation to a claim derived from a statute;

(c) whether the Applicant had sufficient interest to be granted discretionary permission to intervene in the exercise of the Court's inherent jurisdiction.

Findings: Standing for joinder in relation to a contributory's joint and equitable winding-up petition (broad test)

11. I am bound to accept the Petitioner's submission that only contributories have standing to be formally joined as parties to a just and equitable winding-up petition presented by a contributory. Mr Chivers KC made good this submission by reference to both statutory and judicial authority. Firstly, section 92 provides:

> "*A company may be wound up by the Court if —*
>
> …
>
> *(e) the Court is of opinion that it is just and equitable that the company should be wound up.*"

12. Section 95(3) then provides:

> "*(3) If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the Court shall have jurisdiction to make the following orders, as an alternative to a winding-up order, namely —*
>
> *(a) an order regulating the conduct of the company's affairs in the future;*
>
> *(b) an order requiring the company to refrain from doing or continuing an act complained of by the petitioner or to do an act which the petitioner has complained it has omitted to do;*

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(c) an order authorising civil proceedings to be brought in the name and on behalf of the company by the petitioner on such terms as the Court may direct; or
(d) an order providing for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, a reduction of the company's capital accordingly."

13. These provisions, read with even a superficial understanding of what such petitions in practice invariably entail, clearly imply that a just and equitable winding-up petition concerns the relations between contributories and the company whose shares they hold. The same inference arises from the Companies Winding Up Rules 2018 ("CWR") and the provisions relating to directions (CWR Order 3 rule 12) and costs for such petitions (CWR Order 24 rule 8). The assumption that the only potential parties to a contributory's petition are other contributories is more than implicit in judicial decisions such as *Hannoun-v- R Limited and Banque Syz Company Limited* [2009 CILR 124] (Henderson J at paragraph 7), and *Re China Shanshui Cement Group Limited* , FSD 161/2018 (NSJ), Judgment dated 27 January 2021 (unreported) (Segal J at paragraph 16, citing Vinlott J in *Re a Company (No 007281 of 1986)* [1987] BCLC 593 at 598-599, and at paragraph 33 (n)). These cases also merit further consideration in relation to the narrower appropriate party standing issue.

14. There is a reason why the broad joinder provisions applicable to general civil litigation found in Order 15 of the Grand Court Rules were deliberately not incorporated into the CWR. It can only be because winding-up proceedings are fundamentally different to civil proceedings generally (as opposed to e.g. bankruptcy proceedings or probate proceedings) in that who the potential parties are is more clearly and narrowly defined and legally understood. Creditors are potential parties to a creditor's petition and contributories to a contributory's petition; this is implicit in both the Act and the CWR.

15. Brief mention may be made of section 95(2) of the Companies Act which provides that a contributory will lack standing if it has entered into a contract not to present a petition. In the absence of an express contracting out of the right of access to the Court, an implied contract will not easily be inferred. Here it is common ground that no qualifying contract exists, so the justification for the Court <u>declining</u> to permit third party contractual rights to deprive a petitioner of standing is far stronger. Persons wishing to impose contractual restraints on the ability of shareholders of Cayman Islands companies to present winding-up petitions should do so directly and expressly. Mr Chivers KC was entirely correct to highlight the strong legal policy imperatives

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against depriving contributories of access to the statutory just and equitable winding-up remedy. In *Re China CVS (Cayman Islands) Holding Corporation* [2020 (2) CILR 201] at 246, Moses JA opined as follows:

> "*129.There seems to me a further difficulty which inhibits the implication of an agreement not to present a petition. In the SHA, the parties could have expressly chosen to agree not to present a petition against the company. But they did not do so, despite s.95(2) of the Law. By failing to do so, they must be understood to have acknowledged the court's exclusive jurisdiction to determine whether the facts justify winding up the company on just and equitable grounds…*"

16. In my judgment GMSCL as a stranger to the Company cannot be formally joined as a party to the present proceedings. It is neither an actual nor putative contributory of the Company. The Petitioner's counsel also aptly relied upon Foster J's following general observations in *Re Freerider* [2010 (1) CILR 286] as regards how far the Court's inherent jurisdiction can depart from the applicable statutory scheme:

> "*12. The upshot of this guidance, as I understand it, is that the court's inherent power may be exercised to supplement the Companies Winding Up Rules but only in a way that is not inconsistent with their overall scheme. If my understanding is correct, the question in this case is therefore whether an inherent power to order the petitioner to give security for costs would or would not be inconsistent with the overall scheme of the Companies Winding Up Rules.*"

Findings: Appropriate party for joinder in relation to a contributory's joint and equitable winding-up petition (sufficient interest test)

17. It was made clear by reference to various authorities that even a contributory does not have an automatic right to be joined as party to a contributory's petition even though basic jurisdictional standing to order joinder exists. One reason is the distinctive character of winding-up proceedings, a point already mentioned which merits repetition. In *Hannoun-v- R Limited and Banque Syz Company Limited* [2009 CILR 124], Henderson J opined as follows:

> "*7. The equitable jurisdiction to wind up a company presents different and broader concerns than the sorts of claims which the beneficiaries wished to advance in the line of*

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authority canvassed by Lord Templeman. For obvious reasons, the mere existence of winding-up proceedings may have a substantial detrimental effect on the business of a company. When a winding-up order is requested, the court is obliged to have regard to the interests of all of the creditors (if the company is insolvent) or all of the contributories (if the company is solvent). A winding-up order is discretionary. If, for some reason, the petitioner can no longer maintain the action, the court is at liberty to substitute the name of another creditor or contributory as petitioner. These considerations serve to illustrate the distinct nature of winding-up proceedings which, although brought in the name of a single petitioner, are really being advanced in the interest of the creditors or contributories as a whole." [Emphasis added]

18. This principle makes it necessary to view the "*sufficient interest*" requirement not by reference to the narrow or idiosyncratic interests of an individual creditor or contributory seeking joinder, but by reference to the wider interests of the stakeholders as a whole. In *Re China Shanshui Cement Group Limited*, FSD 161/2018 (NSJ), Judgment dated 27 January 2021 (unreported), to which GMSCL's counsel referred, Segal J observed (at paragraph 33 (n)):

> "*….But even if the petition is to be treated as a proceeding against the company, the Court may still make an order for the joinder of the shareholders as respondents where the circumstances justify joinder. CWR O.3, r. 12(1)(k) gives the Court a broad discretion…In such a case, the Court will have to consider whether joinder is justified …Joinder (as additional respondents) would be justified where alternative relief including an order that shareholders purchase the petitioner's shares is sought so as to ensure that such shareholders were bound by the Court's order. It may also be justified where the petitioner claims that shareholders are implicated in the misconduct alleged in the petition ….*"

19. These observations illustrate that even where a party has standing to be joined to just and equitable winding-up proceedings in the broad sense, the Court still has to decide whether their joinder is appropriate or justified depending on the nature of the proceedings and the role the additional party may potentially play in them. In a passage to which both counsel referred, Lord Millett explained why in relation to statutory claims parties with *prima facie* standing to seek relief also had to show sufficient interest to be permitted to do so in the Cayman Islands case of *Deloitte and Touche-v-Johnson* [1999] 1 W.L.R 1605 at 1611 B-C:

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"*In their Lordships' opinion two different kinds of case must be distinguished when considering the question of a party's standing to make an application to the court. The first occurs when the court is asked to exercise a power conferred on it by statute. In such a case the court must examine the statute to see whether it identifies the category of person who may make the application. This goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it. The second is more general. Where the court is asked to exercise a statutory power or its inherent jurisdiction, it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint. Orders made by the court are coercive. Every order of the court affects the freedom of action of the party against whom it is made and sometimes (as in the present case) of other parties as well. It is, therefore, incumbent on the court to consider not only whether it has jurisdiction to make the order but whether the applicant is a proper person to invoke the jurisdiction.*" [Emphasis added]

20. Mr Raphael KC suggested that this passage supported his client's case for intervention under the Court's inherent jurisdiction. In my judgment this passage both explicitly undermines the case for formal joinder and also materially circumscribes the inherent jurisdiction to permit intervention. The Privy Council essentially held:

(a) where a party is seeking statutory relief, the Court only has jurisdiction to grant relief where the applicant is qualified to seek relief pursuant to the relevant statute;

(b) even where the party is qualified to seek relief, they must demonstrate that they have sufficient interest to do so; and

(c) where the Court is exercising its inherent jurisdiction to grant relief, judicial restraint must equally be exercised by ensuring that the applicant has sufficient interest to seek relief. This means that there must be a minimum degree of synergy between the nature of the relief sought and the identity of the applicant for relief.

21. Properly analysed, GMSCL's application to be permitted to intervene to strike-out or stay the Petition is an application which can only appropriately be made by a party with standing to be joined to the proceeding which was commenced under the Companies Act and seeks statutory relief. The proposition that an entity which is neither a contributory nor even in a direct contractual

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relationship with the Petitioner or the Company could possess the standing to strike-out or stay the present Petition is indeed, as I suggested in the course of argument, a "heretical" one.

22. In relation to a just and equitable winding-up petition, only a respondent to the petition can have standing to strike-out or stay it and the statutory scheme clearly prescribes that the company and other contributories are the only parties with standing to be joined. It may well be that if in such proceedings the Court is required to adjudicate issues of law and fact which directly engage third party rights (e.g. where findings of misconduct on the part of directors are likely to be made), the relevant third parties can be joined applying the joinder principles applicable in ordinary civil litigation by analogy. But this is not such a case by any account. I accordingly find that GMSCL lacks standing to seek the relief sought in its Summons and no need to consider whether it has sufficient interest properly arises.

Findings: The Court's inherent jurisdiction to allow a party with "sufficient interest" to be heard

23. The need to consider the Court's inherent jurisdiction to entertain the GMSCL Summons only arises if I am wrong in my primary finding that the fact that GMSCL is not a contributory is dispositive of the standing issue. I accept that the Court's inherent jurisdiction is broad and flexible, and indeed exercised that jurisdiction to permit GMSCL to advance its case on the standing issue. But a 'broad and flexible' jurisdiction does not mean unlimited and unconstrained by either relevant legal principles and/or common sense. It does not mean that any intervenor can be heard without regard to the extent (if any) of their ability to potentially facilitate the just disposition of the relevant proceedings. No authority was cited which fairly supported GMSCL's intervention to strike-out. Cases relied upon were clearly distinguishable because either:

(a) the parties seeking to intervene in ordinary civil litigation clearly did have directly cognizable interests in the litigation: e.g. *Gurtner-v-Circuit* [1968] 2 Q.B. 587 (the Motor Insurance Board were liable to pay any damages awarded to the plaintiff);

(b) joinder in proceedings which started as matrimonial proceedings was necessary (in the absence of express joinder rules) to enable the Court to determine a single broad dispute in one proceeding rather than in a multiplicity of proceedings: e.g. *Rodriguez-v-Ebanks* [2014 (1) CILR 264] (Smellie CJ at paragraphs 66, 71-72); or

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(c) a flexible joinder power similar to that in ordinary civil litigation existed and could appropriately be exercised: e.g. *Caldero Trading Limited -v- Beppler & Jacobson Limited et al* [2012] EWHC 1609 (Ch) where the joinder power was deployed in favour of parties who "*have every interest in resisting the finding which is being sought, which will affect them…it is plainly important that they be bound by the result*" (Floyd J at paragraph 42).

24. The case for intervention advanced by GMSCL was ultimately one which could only be acceded to in a '*Through the Looking Glass*' world. The present Petition was presented by a party accepted by the Company to be a registered shareholder and is supported by several independent shareholders who acquired their shares on the NYSE. Its purported aim is to ensure that the legitimate expectations of shareholders as to how the Company would be managed are protected. The JPLs were appointed to protect the interests of the shareholders as a whole after a risk of serious mismanagement emerged. GMSCL's remote interest in the Company can only be understood to be, on its own case, as (a) being based on its interest as a creditor of one of the Petitioner's indirect owners and (b) consisting of an interest in ensuring that the Petitioner exercises its share rights in relation to the Company in a way which enhances rather than diminishes the value of the investment. There is no discernible suggestion that the present proceedings are being prosecuted in a way which are inconsistent with its legitimate commercial interests of ensuring that its debt is repaid through value extracted from the Petitioner's investment in the Company.

25. Mr Raphael KC submitted, in answer to my query as to what GMSCL's motivations in intervening were, that its contractual rights to indirectly dictate how the Petitioner exercises its share rights in the Company are so absolute and abstract in their content that they can be exercised at GMSCL's whim, even against its own commercial interests. However, it does not take much reflection to conclude that the suggestion that GMSCL's only interest is in enforcing its control rights in a purely abstract sense is an entirely unrealistic one. GMSCL is a commercial entity and commercial entities almost invariably act according to easily identifiable commercial motivations, no matter how ill-judged particular actions may be. And the most reliable indicator as to what the most plausible commercial motivations are is the impact of a particular litigation strategy on the litigation battlefield. Can it possibly be entirely coincidental that the transaction the present Petition seeks to invalidate is said to be prejudicial to the Company's shareholders as a whole is impugned on the grounds that it is unfairly preferential to affiliates of GMSCL? Without of course having to decide this point, loyalty to corporate allies is the most straightforward and commercially rational

explanation as to why GMSCL seems so keen to scuttle the present proceedings. Putting motivations to one side, the difficulty with the very substance of the proposed intervention (which explicitly disregards any concern for the financial viability of the Company) is that this sits uneasily with the notion that GMSCL's intervention is justifiable by reference to its rights under the June 2018 Agreement. That Agreement, as characterised by GMSCL, is premised on the implicit notion that the Debtor and Guarantors are obliged to follow GMSCL's instructions. This obligation cannot, as its counsel implied, be sensibly understood as designed in the interests of conferring control for control's sake. Rather such a contractual provision can only sensibly be understood as designed to ensure that the investment is sufficiently well managed that funds will ultimately flow up to the Debtor to enable it to settle the indebtedness. The Agreement does not appear to contemplate that if GMSCL considers that its repayment rights have been trampled on, it can improperly extract its 'pound of flesh' via an entirely different route, namely by assisting its allies to claw back value from the Company in what the Petitioner contends is a legally impermissible manner.

26. Even if GMSCL's proposed intervention is motivated solely by a desire to vindicate the sanctity of strict adherence to contractual rights, this would still provide a compelling basis for the conclusion that it should not be permitted to intervene in the present proceedings. GMSCL is unabashedly not seeking to intervene to advance the interests the Company's shareholders at all by seeking to throw a spanner into the works of the present proceedings and to legally restrain the Petitioner's attempts to use its significant shareholding to restore probity to the Company's management by seeking to, *inter alia*, (a) change the Board and (b) set aside an Order which I have expressed the provisional view was obtained by fraud. The overt goal of the present proceedings is to preserve the Company's value and the Petitioner's investment in it. It is difficult to see how the proceedings are in real world commercial terms inconsistent with the rights of the Creditor under the June 2018 Agreement. GMSCL ultimately lacks sufficient interest to intervene in the present proceedings because:

(a) it has not demonstrated that it is even remotely motivated by a desire to intervene to promote the interests of the Company's shareholders; and

(b) it has not demonstrated in any event that the Petitioner's ongoing prosecution of the Petition is contrary to any legitimate commercial and legal rights it enjoys under the June 2018 Agreement[2].

[2] In a 30 March 2023 Kobre & Kim letter commenting on the draft Judgment, the surprising point was made that this paragraph is based on a point not raised by the Petitioner. A central thesis explicitly advanced by the Petitioner was

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27. It follows that, even assuming, as appears to me to be the case, that the Court's jurisdiction to grant discretionary injunctive relief is broader than the jurisdiction to permit participation in the present proceedings, as Mr Raphael KC[3] persuasively argued, it is plain and obvious that GMSCL is not entitled in these circumstances to obtain injunctive relief of a nature which would effectively permit it by another legal route to improperly intervene in the present proceedings in purported reliance on third party contractual rights.

Conclusion

28. For the above reasons I find that that GMSCL lacks standing to intervene in the present proceedings with a view to seeking the relief set out in the GM Summons, or any similar relief. Subject to hearing counsel if required on the terms of the Order to be drawn up to give effect to this Ruling, my provisional view is that:

(a) the GM Summons should be dismissed; and

(b) the Petitioner's costs of the GM Summons should be paid by GMSCL to be taxed if not agreed on the indemnity basis.

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THE HONOURABLE MR IAN RC KAWALEY
JUDGE OF THE GRAND COURT

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that just and equitable winding-up proceedings are uniquely designed to address shareholder concerns and that GMSCL was not seeking to vindicate shareholder interests in relation to the Company. This portion of the Judgment is an extrapolation from a combination of oral argument and points advanced in the Petitioner's Skeleton Argument and summarized at paragraph 31.

[3] In oral argument, Mr Raphael KC pointed out that injunction applicants no longer had to possess a cause of action. In GMSCL's Skeleton Argument it was submitted that the "*test for standing is even simpler for injunctions*". Kobre & Kim sought clarification as to whether this paragraph of the Judgment should be construed as a decision on the injunction application. The injunction application was not formally or fully argued, so the remarks made in this regard should properly be understood as reflecting my strong provisional view that any pursuit of a separate injunction application would potentially be liable to be summarily refused on abuse of process grounds.

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