IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

Cause Nos FSD 268, 269 and 270 OF 2021 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

AND IN THE MATTER OF PRINCIPAL INVESTING FUND I LIMITED (FSD 268)

AND IN THE MATTER OF LONG VIEW II LIMITED (FSD 269)

AND IN THE MATTER OF GLOBAL FIXED INCOME FUND I LIMITED (FSD 270)

B E T W E E N:

CREDIT SUISSE LONDON NOMINEES LIMITED

Petitioner

- and –

PRINCIPAL INVESTING FUND I LIMITED (FSD 268)
LONG VIEW II LIMITED (FSD 269)
GLOBAL FIXED INCOME FUND I LIMITED (FSD 270)

First Respondents

- and –

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED (FSD 268)
LV II INVESTMENT MANAGEMENT LIMITED (FSD 269)
FLOREAT INVESTMENT MANAGEMENT LIMITED (FSD 270)

Second Respondents

AND

Cause No. FSD 106 of 2024 (IKJ)

B E T W E E N:

CHIA HSING WANG

Plaintiff

- and –

LV II INVESTMENT MANAGEMENT LIMITED

Defendant

IN COURT

Before:	The Hon. Justice Kawaley
Appearances:	Mr James Collins KC and Mr David Lee and Mr David Lewis-Hall of Appleby (Cayman) Limited on behalf of the Petitioner (in FSD 268-270/2021) and the Plaintiff (in FSD 106/2024), respectively Mr Tom Richards KC and Mr Alistair Abbott and Mr Alan Quigley of Forbes Hare for the Second Respondents (in FSD 268-270/2021) and the Defendant (in FSD 106/2024), respectively
Heard:	27-28 June 2024
Date of decision:	2 July 2024
Draft Reasons circulated:	5 July 2024
Reasons delivered:	15 July 2024

Company law-separate legal personality - veil-piercing - whether ultimate beneficial owner of company liable to pay arbitration award granted against company he controlled - principles governing the grant of negative declarations - relevance of pendency of attachment proceedings in Switzerland - forum non conveniens - application to stay enforcement of costs orders - governing principles - Grand Court Act (2015 Revision) sections 11, 11A - Grand Court Rules (2023 Revision) Orders 12 rule 8, 46 rule 11, 47 rule 1

JUDGMENT

Introductory

1. By an Originating Summons dated 2 February 2024 (the "Declarations Summons") in FSD 106/2024, Mr Chia Hsing Wang, the ultimate beneficial owner of Blue Water Limited ("Blue Water") seeks the following declaratory relief against LV II Investment Management Limited ("LV2IM")

   (1) A declaration that Blue Water has separate legal personality to the Plaintiff; and

   (2) A declaration that the Plaintiff is not liable for the obligations of Blue Water under the LCIA Awards – being a Partial Award dated 22 November 2023 and Final Award dated 19 January 2024 (the "LCIA Awards") - granted, *inter alia*, in favour of LV2IM against Blue Water.

2. Only the second declaration was controversial in legal terms. However, by a Summons dated 22 March 2024 (the "Jurisdiction Summons"), LV2IM applied to strike-out the Declarations Summons primarily on jurisdictional grounds.

3. In FSD 268-270/2021 (the "Petition Proceedings"), Floreat Principal Investment Management Limited ("FPIML") (in FSD 268/2021) LV2IM (in FSD 269/2021) and Floreat Investment Management Limited ("FIML") (in FSD 270/2021) sought by their 27 February 2024 Summons (the "Stay Summons") the following relevant relief:

   "*2. An Order pursuant to Order 45, rule 11 of the GCR and/or the Court's inherent jurisdiction staying the execution of paragraph 1 of the Order dated 29 January 2024 made in these proceedings until:*

(i) such time as all awards made in favour of LV II Investment Management Limited ('LV2IM') in the London Court of International Arbitration ('LCIA') arbitration bearing LCIA numbers 215317 and 215318 (the 'LCIA Awards') have been paid in full to LV2IM; or

(ii) in the alternative, until 1 July 2024 (or such other time and date as this Court may deem fit).

3. In the alternative, an Order pursuant to Order 3, rule 5(1) of the GCR, Order 45, rule 6(1) of the GCR and/or the Court's inherent jurisdiction extending or varying the period pursuant to paragraph 1 of the Order dated 29 January 2024 within which the Second Respondent is required to pay the sum of US$5,600,000 on account of the costs that it has been ordered to pay in these proceedings (the 'Interim Payment'), in particular extending or varying the date by which the Interim Payment is to be paid by the Second Respondent until:

(i) such time as the LCIA Awards have been paid in full to LV2IM; or

(ii) *in the alternative, until 1 July 2024 (or such other time and date as this Court may deem fit).*"

4. Directions for the final determination of these three Summonses at a consolidated hearing were ordered by consent on 2 April 2024. Counsel agreed at the outset of the 27 June 2024 hearing that there were really two applications for the Court to determine:

(a) the Plaintiff's application for declaratory relief, which was opposed on jurisdictional grounds; and

(b) the Second Respondents' Stay Summons.

5. Despite the skilful way in which the Declaratory Summons was contested in oral argument, it seemed clear by the end of the hearing that the Plaintiff's application was meritorious. Mr Richards KC advanced the at first blush improbable application to stay this Court's interim payment on account of costs Orders with audacious persuasiveness. He contended the Court's jurisdiction to do justice by looking through the corporate structures was a generous one, while Mr Collins KC insisted the jurisdiction could only be exercised in a miserly manner.

6. At the end of the hearing, I indicated that it would take me longer to decide the Stay Summons than the other two Summonses. However, because a winding-up petition presented by the Petitioner against LV2IM (and petitions against the other Second Respondents to the Petition Proceedings) was due to be heard on 5 July 2024, I indicated I would seek to decide the Stay Summons in advance of that hearing, so the parties knew where they stood. On 2 July 2024 I decided that the respective Summonses should be disposed of as follows:

(a) the Plaintiff's Declarations Summons was granted (substantially in the terms set out in paragraph 25 below) while the Defendant's Jurisdiction Summons was dismissed; and

(b) the Second Respondents' Stay Summons was dismissed.

7. These are the reasons for that decision.

THE DECLARATIONS SUMMONS

Legal principles: negative declarations

8. Section 11 (2) of the Grand Court Act provides that:

> "*...the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not.*"

9. In *Woods v. Thompson* [2016 (2) CILR 1] at paragraphs 85–87, Mangatal J approved the statement of principles applicable to declaratory relief generally articulated by Aikens LJ for the English Court of Appeal in *Rolls-Royce plc v. Unite the Union* [2009] EWCA Civ 387, [2010] 1 WLR 318:

> *"120. I think that the principles in the cases can be summarised as follows.*
>
> *(1) The power of the court to grant declaratory relief is discretionary.*
>
> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue ...*
>
> *(6) ... the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court."*

10. The general applicability of these principles was not disputed. Nor was the need for special care in relation to negative declarations as was primarily sought in the present case. In this regard, Mr Collins KC commended to the Court, again without controversy, the following observations of Cockerill J in *BNP Paribas SA v Trattamento Rifiuti Metropolitani SpA* [2020] EWHC 2436 (Comm) at [78]:

> "*78. Overall I conclude that the interesting argument which I have heard on the authorities has been in danger of over-refining an exercise which is essentially discretionary. The overarching issues relevant to this case which can be taken away from the authorities and which I apply when coming to consider the individual declarations sought are as follows:*
>
> *i) The touchstone is utility; ii) The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose; iii) The prime purpose is to do justice in the particular case. 'Justice' includes justice not only to the claimant, but also to the defendant; iv) The Court must consider whether the grant of declaratory relief is the most effective way of resolving the issues raised. In answering that question, the Court should consider what other options are available to resolve the issue; v) This emphasis on doing justice in the particular case is reflected in the limitations which are generally applied. Thus:*
>
> *a) The court will not entertain purely hypothetical questions. It will not pronounce upon legal situations which may arise, but generally upon those which have arisen.*
>
> *b) There must in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them.*
>
> *c) If the issue in dispute is not based on concrete facts the issue can still be treated as hypothetical. This can be characterised as 'the missing element which makes a case hypothetical'.*
>
> *vi) Factors such as absence of positive evidence of utility and absence of concrete facts to ground the declarations may not be determinative; Zamir and Woolf note that the latter 'can take different forms and can be lacking to differing degrees'. However, where there is such a lack in whole or in part the court will wish to be particularly alert to the dangers of producing something which is not only not utile, but may create confusion.*"

11. The appropriateness of granting declaratory relief was contested primarily on the broad ground that caution was required when a declaration would impact on foreign proceedings and that there was in the circumstances insufficient utility to justify granting the relief sought. However, the authorities which supported this proposition all involved foreign substantive proceedings which were seised of and likely to determine the issue which formed the subject of the declaration sought.

For instance, in *Camilla Cotton-v-Granadex* [1976] 2 Lloyd's Law Rep 10, Lord Wilberforce prefaced his analysis of how the discretion should be exercised by noting (at pages 13-14):

> "*The appellants are Swiss companies, and the assets against which they seek to establish liability are in Switzerland. Switzerland is not only a proper forum but the most convenient forum… So there is at least a prima facie case for saying that the English proceedings may be oppressive in the sense in which that word has to be understood in relation to the Court's inherent jurisdiction…*"

12. I accordingly did not accept that any similar need for caution about interfering with pending foreign proceedings concerned with the same legal and factual issues arose in this case where the only foreign proceedings are interlocutory attachment proceedings. The Defendant's counsel conceded that no case had been cited which supported the need for caution about interfering with foreign non-substantive proceedings. That said, because the Plaintiff proposed to rely upon the declaration in the attachment proceedings, there was nonetheless what I regarded as a minimal precautionary requirement to have regard to the need "*to avoid interfering improperly in foreign proceedings*": *Elinoil Hellenic Petroleum Co. S.A. v. Biotechnika S.R.O.* [2020] EWHC 3592 (Comm) (at paragraph 15, per HHJ Pelling QC).

Legal principles: circumstances in which the corporate veil between a company and its shareholders may be pierced

13. Again, the content of the principles governing veil-piercing were common ground. It was contended in the Plaintiff's Skeleton Argument:

> "*There is no statutory exception that is relevant to the present case. Insofar as the common law exception is concerned, Prest v. Petrodel is also itself the leading authority. In that case, Lord Sumption – following a review of the relevant authorities – summarised the position at [34] and [35]:*
>
> > *'These considerations reflect the broader principle that the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. <u>It is not an abuse to rely on the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary, that is what incorporation is all about.</u> …*

> *I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality. …" (emphasis added).*"

14. Mr Collins KC rightly emphasised that it is only an abuse of the doctrine of separate legal personality to create a company as a means of avoiding an existing liability. There is nothing wrong about establishing a company to avoid personal liability which the company may incur in the future. In *Persad v. Singh* [2017] UKPC 32, Lord Neuberger noted:

> "*20…The fact that CHTL was a 'one man company' is also irrelevant: see Salomon v A Salomon and Co Ltd [1897] AC 22, which famously established the difference between a company and its shareholders. That case also exposes the fallacy of the notion that the court can pierce the veil where the purpose of an individual interposing a company into a transaction was to enable the individual who owned or controlled the company to avoid personal liability. One of the reasons that an individual, either on their own or together with others, will take advantage of limited liability is to avoid personal liability if things go wrong, as Lord Herschell said at pp 43 to 44. If such a factor justified piercing the veil of incorporation, it would make something of a mockery of limited liability both in principle and in practice.*" [Emphasis added]

15. I unreservedly accepted that veil-piercing in the narrow sense of holding a shareholder liable for the debts of a company they control is only generally permissible in the sense described by the UK Supreme Court and the Privy Council in the cases just mentioned. It was common ground that the LCIA Awards sought to recover debts incurred by Blue Water under a contract which was entered into after its incorporation. Absent the Court being invited to apply a radical new theory of veil-piercing, which even the redoubtable Mr Richards KC did not dare to assert, the second and main substantive declaration sought was clearly meritorious in substantive terms.

Legal principles: determining the appropriate forum

16. The Plaintiff's counsel submitted in their Skeleton:

> *"51. LV2IM is a Cayman Islands company, and was therefore served with the Originating Summons in the Declaratory Proceedings as of right. The Court will be familiar with the principles that apply to a jurisdictional challenge in those circumstances:*
>
> *51.1. Where the plaintiff is 'entitled, as of right, to institute proceedings against the [defendant] in the Cayman Islands, the burden of proving "that there is another available forum which is prima facie the appropriate forum for the trial …" is on the [defendant]': Brasil Telecom S.A. v. Opportunity Fund [2008 CILR 2011] (CICA) at [22] per Mottley JA.*
>
> *51.2. The threshold for discharging that burden is a high one: the other forum must be 'clearly or distinctly more appropriate'. Hence,'[i]n respect of an application by a defendant seeking a stay of proceedings commenced as of right the burden resting on the defendant is not just to show that the Cayman Islands is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the Cayman Islands forum': Maples FS Ltd v. B & B Protector Services Ltd [2022 (2) CILR 59] (Grand Ct) at [111] per Doyle J.*
>
> *51.3. That question must be considered with due regard to the fact that, all other things being equal, the plaintiff has invoked a prima facie right to have a claim determined in the Cayman Islands. See KTH Capital Management Ltd v. China One Financial Ltd [2004-05 CILR 213] (Grand Ct) at [33] per Smellie CJ.*
>
> *51.4. In deciding whether that high threshold has been discharged the two-staged test established by The Spiliada is followed (endorsed in Cayman Islands law by the Court of Appeal in Brasil Telecom at [12]): at stage one factors pointing to the putative foreign forum conveniens are considered; and if (and only if) the Court considers that the foreign forum is prima facie clearly more appropriate, matters beyond connecting factors are considered, including in particular whether the plaintiff may show that he will not obtain justice in the foreign forum.*
>
> *51.5. The connecting factors which fall for consideration at stage one are fact-specific, but as a general proposition they encompass both practical and formal or legal matters, as appropriate in the particular circumstances of the claim and case in issue. Again as explained in The Spiliada as cited in Brasil Telecom at [12], 'these will include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law governing the relevant transaction . . . and the places where the parties respectively reside or carry on business'."*

17. Mr Richards KC in oral argument agreed that the *Spiliada* principles applied. However:

(a) he contended that the Plaintiff had an initial evidential burden of establishing sufficient facts to impose the burden on the Defendant of proving that a distinctly more appropriate forum existed; and

(b) argued that it was important to analyse the forum factors having regard to the whole dispute: *Maples FS Ltd*-v-*B & B Protector Services Ltd* [2022 (2) CILR 59] relying on the underlined words in the following paragraph of Doyle J's Judgment:

> "*116 I take full account of the firewall provisions and the Cayman governing law and jurisdiction provision but I have nevertheless reached the conclusion that the English High Court is clearly and distinctly the most appropriate forum in which this case can be suitably tried for the interests of all the parties and for the ends of justice. I am not persuaded that it would be appropriate to attempt to salami slice (to use the phrase used by Mr. Potts) the bare trust claim out of the bigger sausage being dealt with in England. It is best that all the issues between the parties, including the issues in respect of the alleged fraud and the Cayman trust be dealt with in one forum and that forum should be England and Wales taking into account the advanced stage the English proceedings have reached and the knowledge and experience of the English courts in respect of the English proceedings to date.*" [Emphasis added]

18. It is possible to extract from Smellie CJ's reference to "*the plaintiff's prima facie right to bring the action in this jurisdiction*" (*KTH Capital Management Ltd v. China One Financial Ltd* [2004-05 CILR 213] at paragraph 33) a requirement for the Plaintiff to prove facts supporting that *prima facie* legal entitlement. In many cases, establishing the factual basis for the entitlement to sue the defendant within the jurisdiction will be (as here where the Defendant is a Cayman Islands company) straightforward and not capable of reasonable dispute.

19. It is also right to accept that this Court should in assessing which is the appropriate forum generally take into account the fact that there are foreign substantive proceedings involving a wider dispute of which the claim prosecuted in this jurisdiction merely forms a part. As Doyle J found in *Maples FS Ltd.,* the fact that the Cayman Islands claim forms part of a wider dispute which is properly (and substantively) before a foreign court in advanced proceedings will often be a strong pointer towards the appropriateness of the foreign forum.

20. There accordingly appeared to be a huge contextual chasm between the facts of this case and the facts of the cases upon which the Defendant's counsel relied to support the essential hypothesis of the jurisdictional challenge: that Switzerland was clearly and distinctly the most appropriate forum.

Findings: was it appropriate to grant declaratory relief?

21. The uncontroversial factual background out of which the Declarations Summons arises may be adequately described in very concise terms. The Defendant, a Cayman Islands company, obtained the LCIA Awards in an amount of approximately US$55 million from an arbitral tribunal of which former UK Supreme Court Judge Lord Dyson was a member. The LCIA Awards were granted against Blue Water, another Cayman Islands company, based on findings that Blue Water owed the Defendant fees for services it had received. Blue Water is insolvent and is in official liquidation. The Defendant has obtained pre-enforcement attachment orders against the personal assets of the Plaintiff in Switzerland, in anticipation of commencing substantive enforcement proceedings if the interim attachments are not set aside. The Plaintiff seeks the declarations confirming fundamental principles relating to the nature of limited liability and separate corporate personality under Cayman Islands law:

    (a) to support its present attempts to set aside the Swiss attachments; and/or

    (b) to impede the ability of the Defendant to pursue similar steps elsewhere to enforce the LCIA Awards it obtained against Blue Water against the Plaintiff as that company's ultimate beneficial owner.

22. Having regard to the general requirements for granting declaratory relief, I am bound to conclude that:

    (a) there is a real dispute between the Plaintiff (Mr Wang) and the Defendant (LV2IM) as to whether the Defendant is entitled to enforce the LCIA Awards against the Plaintiff's assets;

    (b) each party is clearly directly affected by the dispute; and

    (c) the issue has been argued, as fully as a one-sided issue can be argued, with the Defendant having agreed at the directions stage that the Declarations Summons could be finally determined at the present hearing. It is true that another LCIA Award creditor Floreat Private Limited ("FPL") in respect of claims asserted against another of the Plaintiff's companies has also attached Mr Wang's Swiss assets. The fact that a similar but clearly distinct dispute exists in relation to other parties in my judgment provided no valid basis for declining to grant the declarations sought. At this stage, when there

are no pending substantive enforcement proceedings abroad, there is no tangible risk of inconsistent decisions on the merits. Moreover, Cayman Islands law appears likely to be applied by the Swiss Court if it substantively determines this issue.

23. As regards the special considerations applicable to negative declarations:

(a) there is clearly some practical utility to the declarations sought. The un-contradicted Swiss law expert evidence from Mr Stucki is that the relief sought might assist the Swiss Court in determining the attachment proceedings. That the Swiss Court is not required at that stage to have regard to Cayman Islands law as the law governing liability for the debts owed to the Defendant is beside the point. It is in any event self-evident that the declarations might assist the Plaintiff ward off other similar attachments;

(b) as regards the justice of granting the declarations, rather than leaving the Plaintiff to contest the Swiss attachment proceedings, and any subsequent substantive enforcement proceedings should the attachments be confirmed, three discretionary considerations were dispositive:

(i) it did not lie in the Defendant's mouth to contend that justice favours declining to grant declarations it is unable to contest on their merits. Based on the Cayman Islands legal position which is not (or not seriously) disputed, the Defendant has wrongfully attached the Plaintiff's personal assets which are clearly not available for enforcement of Blue Water's debts as a matter of Cayman Islands law. That Mr Wang is presumed to have the resources to provide additional funding to Blue Water to satisfy the LCIA Awards and is refusing to do so can readily be perceived as unfair in somewhat simplistic 'man in the street' terms, but this is not unfair in any admissible legal sense;

(ii) there was no principled basis for concluding that this Court should be cautious about interfering with pending interlocutory proceedings in Switzerland by substantively determining an issue of Cayman Islands law against a Cayman Islands company. If the roles were reversed, this Court would not view the decision of the Swiss Court to grant declaratory relief against a Swiss company

applying Swiss law as "interfering" with this Court's interlocutory adjudication of an application for a pre-enforcement freezing order, and

(iii) where this Court is asked to determine an issue which is fundamental to the efficacy and integrity of Cayman Islands company law, and no foreign court is already seised of the issue, there is a public interest in this Court deciding an issue where the requirements for granting declaratory relief are otherwise met.

24. As regards the terms of the proposed declarations, Mr Richards KC submitted that:

(a) there was no need for this Court to grant a textbook-like declaration about separate legal personality as the proposition embodied in the first declaration was not contested; and

(b) the second declaration was too broadly drafted.

25. In his reply, Mr Collins KC explained that the first declaration was prompted by issue being joined on the point in the Defendant's evidence. As regards the second declaration, he agreed that it could be made clear that the declaration was being granted as a matter of Cayman Islands law. I accordingly found in the exercise of the Court's discretion that the Plaintiff was entitled to a declaration substantially in the following terms:

> "The Plaintiff is not liable as a matter of Cayman Islands law for the obligations of Blue Water under the LCIA Awards a Partial Award dated 22 November 2023 and Final Award dated 19 January 2024 (the "LCIA Awards") in favour of LV2IM against Blue Water."

THE STAY SUMMONS

Preliminary

26. The Second Respondents' beguiling stay application was presented against the following background. In this case, as in many similar cases, a sub-plot was interwoven into the formal legal narrative. The Petitioner has throughout these proceedings claimed the moral high ground. The

Floreat Respondents seemed keen to use the fact LV2IM had won the LCIA Awards to knock the Petitioner off its moral perch.

27. Mr Richards KC pointed out that the vindication of the fees claim was a clear refutation of the original allegation made in the Petition proceedings that the Floreat Respondents had from the outset intended to defraud Mr Wang. There was no need to remind me that I had encouraged the Petitioner to abandon that allegation. It was almost as if the Second Respondents' principals felt that they had been tried for 'divers acts of villainy' and were now defiantly proclaiming their innocence to the jury: "*We're not villains 'cause Lord Dyson says so.*" The real villain, they appeared to be arguing, was Mr Wang. His refusal to advance money he had to Blue Water to meet the huge sums owed to LV2IM was the primary reason why the Second Respondents were not able to pay the comparatively small costs award. The Petitioner ought not to be permitted to petition to wind-up LV2IM and the other Second Respondents based on their failure to pay these costs. Those Petitions were, as already noted above, listed for hearing on 5 July 2024.

28. As a matter of elementary and substantial justice, putting legal formalities and corporate identities aside, the obligation to pay the costs awards could only properly be stayed, it was contended. This was because the various transactions indirectly entered into by Mr Wang with entities controlled by Mutaz Otaibi, Hussam Otaibi and James Wilcox (the "Floreat Parties") which were the subject of the Petitions and the proceedings which resulted in the LCIA Awards, were all interrelated. It was inherently unjust for Mr Wang to, in effect, place Blue Water into liquidation by refusing to fund its debts while taking legal steps to punish LV2IM for failing to pay the comparatively trifling costs award. In these circumstances, it was urged, it was possible to look past the formal legal boundaries which made set-off unavailable, because the Court's Rules and/or inherent jurisdiction was sufficiently flexible to allow a just result to be achieved. I was, initially, instinctively attracted by this audacious argument.

Governing legal principles

29. GCR Order 45 rule 11 provides as follows:

> "***Matters occurring after judgment: stay of execution, etc. (O.45, r.11)***
>
> *11. Without prejudice to O.47, r.1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the grounds of matters which have occurred since the date of the judgment*

or order, and the Court may by order grant such relief, and on such terms, as it thinks just."

30. The effect of this rule, as Mr Collins KC submitted, is that applications for a stay of a judgment or order must be made when the decision is made. Thereafter, a stay can only be justified based on a material change of circumstances since the judgment or order was made. I also find that Order 47 rule 1, which confers a broader jurisdiction to stay execution by way of writ of *fieri facias*, has no application to the present Stay Summons.

31. There being no post-judgment change of circumstances to rely upon, Mr Richards KC was compelled to invoke the inherent jurisdiction of the Court. He disputed his opponent's contention that this jurisdiction was constrained by the parameters of Order 45 rule 11. Each contention was partly sound. Clearly the Court cannot willy-nilly override its own rules. On the other hand, the inherent jurisdiction itself in this jurisdiction derives from statute, section 11 of the Grand Court Act. The Second Respondents' counsel aptly relied on the Hong Court of Appeal decision in *Credit Lyonnais-v-SK Global Hong Kong Limited*, CACV167/2003, Judgment dated 15 July 2003 (unreported). However, the inherent jurisdiction is not like a blank cheque which the Court can fill out at its whim. As Geoffrey Ma CJ stated:

"2. *I have no doubt that the court retains an inherent jurisdiction, in suitable cases, to make orders staying execution quite apart from those situations expressly permitted under the Rules of the High Court (namely, RHC O.45, r.11, O.47, r.1 and O.59, r.13). By the term 'suitable cases' are meant those situations in which the inherent jurisdiction of the court is required to be exercised so as to avoid injustice, prevent abuse, preserve the dignity of the court or to facilitate the administration of justice. This is, of course, the rationale for the existence of the jurisdiction in the first place. An inherent jurisdiction exists even in respect of matters regulated by statute or rules of court (see Halsbury's Laws of England Vol.37 (4th edition) at paragraph 14), although I accept the point made by Rogers VP that the inherent jurisdiction must not expressly conflict with Rules of Court.*

3. The existence of an inherent jurisdiction to stay execution must not, however, be confused with the exercise of it. The exercise of the discretion whether or not to order a stay of execution must be made in accordance with principle."

32. In the same case, Rogers VP opined as follows:

> "*20. In my view the approach of Chu J was too broad and generous. It may be assumed that the court has inherent jurisdiction over its own processes. That inherent jurisdiction supplements the rules of court, but, of course, cannot conflict with them. In exercising its inherent jurisdiction the court may, for example, stay proceedings which are before it. The court will only stay proceedings if that is necessary in the interests of justice. The power to stay proceedings is not necessarily limited to instances where there is an abuse or a threatened abuse of process. The court regularly stays proceedings in circumstances where it considers that proceedings should be carried on in a foreign court.*
>
> *21. In relation to judgments which have been regularly obtained and in respect of which there is no challenge as to their validity or appeal pending, it may be said that, in broad terms, the court has jurisdiction to stay enforcement of its judgments. It is difficult to imagine circumstances in which that power should be exercised short of there being shown to be some abuse. Whilst it would not be appropriate in a judgment of this nature to try to define all the circumstances in which a court may exercise its power to stay enforcement of a valid judgment, I would for present purposes, say that for that to happen justice must require it and there must indeed be very special circumstances."* [Emphasis added]

33. The suggestion that the inherent jurisdiction "*cannot conflict with*" rules of court is not fully explained. Both Ma CJ and Rogers VP essentially appear to have agreed that the function of the inherent jurisdiction is to supplement the rules of court and, in exceptional cases, to do what is not expressly contemplated by the rules. In my judgment, if it would be an abuse of the process of the Court for a judgment to be executed for reasons that existed but were not raised when the judgment was made, this Court must possess the inherent jurisdiction to stay execution even if no new event has occurred.

34. Order 45 rule 11 may accordingly be understood as prescribing the usual rule which does not exclude the inherent jurisdiction to depart from it in "*very special circumstances*" in the interests of more important legal policy imperatives than the principle that judgments may be enforced. It would only be inconsistent with the rule to use the inherent jurisdiction in a way which undermined the efficacy of Order 45 rule 11 as prescribing the usual (and perhaps almost invariable) practice. In any event, an alternative, parallel jurisdiction to stay proceedings altogether on abuse of process grounds undoubtedly exists.

35. There is a difference between procedural rules of court, which are subject to modification through the inherent jurisdiction to give effect to, *inter alia*, fundamental fair hearing rights and jurisdictional rules (such as the gateways prescribed by Order 11) which cannot be similarly modified. Whatever jurisdiction is being exercised, whether Order 45 rule 11 or the inherent jurisdiction, the focus ought properly to be on whether the right to enforce a judgment in the ordinary way is being seriously misused by the judgment creditor.

36. I also accepted that there is an exceptional jurisdiction to have regard to the parties behind the crossclaims asserted by bodies corporate in the stay context. Mustill J (as he then was) in *Orri-v-Moundreas* [1981] Lexis Citation 1443 observed:

> "*The mere existence of a cross action by the debtor against the judgment creditor will not ordinarily be sufficient to justify a stay: and a fortiori where, as here, the parties to the cross actions are not the same. That there can, however, be cases where the Court will look behind the corporate structure at one or both parties to find the person truly at interest, and then exercise its power to grant a stay, as the justice of their mutual relations may demand, is strikingly demonstrated by Canada Enterprises Corporation v. MacNab Distilleries, (Unreported), a decision of the Court of Appeal which appears to have escaped the notice of reporters and commentators alike, and which Mr. Willmers was enabled to cite through the enterprise of his learned junior, Miss Bucknall.*"

37. That was a case concerning the more flexible jurisdiction to stay a particular form of execution under Order 47 rule 1, as was the *Canada Enterprises Corporation Ltd. & Ors. -v-McNab Distilleries Ltd* [1987] 1 W.L.R. 813 case itself. Special circumstances for looking through the corporate structures were found by Cairns LJ having regard to "*the very wide discretion which is given to the court by Order 47 rule 1 (a)*". The Judge considered the precise nature of the stay jurisdiction did not matter in *Lewis-v-Lamb* [2004] NSWSC 322, where "*both sets of proceedings, insofar as they involve Lewis, Lamb and their associates, are aspects of one war between Lewis and Lamb arising out of the one event of their parting company in a previously successful business operation which was, in various manifestations, carried on both in Australia and in New Zealand*" (at paragraph 8). Mr Richards KC embraced the "one war" analogy, although Hamilton J in that case also took into account the following pertinent factors:

> "*9. However, the considerations in this case go beyond the fact that, whilst there is not a correspondence of parties in the proceedings, success in the proceedings in the Equity*

Division may, as a realistic matter, make available to Lamb from the Lewis side funds with which to meet the New Zealand judgment. It seems to me quite clear from the terms of the settlement deed that one of the matters contemplated by the parties to it in reaching agreement in the terms they did was an anticipation that the proceedings in the Equity Division would be concluded before the New Zealand judgment fell to be enforced. They allowed a period of stay of more than seven months after the agreement and specifically contemplated (while all other applications in relation to the New Zealand judgment were precluded) an application for stay of execution if the proceedings before me had not reached conclusion by 31 March 2004. These appear to me all to be matters relevant to the exercise of the discretion to stay judgment in this case."

38. Although on superficial analysis the New South Wales court adopted a very flexible approach to the stay of execution jurisdiction in taking 'crossclaims', loosely defined, into account, it was doing so in very special circumstances which are far removed from the facts of the present case.

39. In summary I found that this Court has the inherent jurisdiction to grant a stay of execution based on circumstances which pre-dated the entering of judgment, notwithstanding the terms of Order 45 rule 11, but only where such power is needed to prevent some serious form of injustice or to prevent an abuse of the processes of the Court.

Findings: merits of Stay Summons

40. The relevant facts are common ground:

(a) Blue Water, ultimately owned and controlled by Mr Wang, was placed into liquidation because it was unable to pay the US$55 million it owed LV2IM under the LCIA Awards;

(b) the Petitioner, acting by Receivers (appointed on an application by Mr Wang) over shares ultimately owned and controlled by Mr Wang, is a judgment creditor for approximately US$5 million in respect of costs awarded in the present Petition proceedings;

(c) the Petitioner, unless the costs orders are stayed, will seek to wind-up LV2IM (and the other two Second Respondents) on 5 July 2024. The Second Respondents assert that it

would be unjust for this to occur having regard to the fact that (looking through the corporate structures):

(1) Mr Wang is indirectly a far larger debtor of the Floreat parties (LV2IM and FPL) who are net creditors to a substantial extent, and

(2) Mr Wang has the means to cover Blue Water's indebtedness and (implicitly) should not be allowed to avoid doing so while indirectly enforcing his paltry claim against LV2IM.

41. The Second Respondents were essentially advancing a modified version of the veil-piercing argument. Mr Wang's position was, to my mind, a morally unattractive one viewed in this way. But what is the legal position? It potentially runs a coach and horses through separate legal personality and limited liability to introduce into the law the notion that a shareholder has in certain circumstances, absent a positive prior legal obligation, a duty to financially support their company.

42. It was therefore necessary to consider with greater specificity what in both commercial and legal terms had occurred in relation to Blue Water's insolvency. And this analysis had to take into account the fact that that company was now under the control of official liquidators who will be duty bound to recover any assets which were improperly distributed back to Mr Wang in anticipation of the LCIA Awards. It seemed improbable that this sort of misconduct had occurred, because the director of the company is a prominent insolvency practitioner. The only reasonable inference was that LV2IM elected to provide services to Blue Water without requiring any sufficient retainers or security for their substantial fees. This was perhaps because it was assumed that relations with Mr Wang would always be rosy and that they could rely on his goodwill to ensure that Blue Water had sufficient funds to meet its obligations. However, that was a risk LV2IM's principals were, for whatever reasons, willing to assume, seemingly over a period of several years. In contrast, LV2IM's London solicitors have (the evidence shows) obtained security against their client's assets for their substantial fees.

43. Against this background, I revisited my initial, instinctive sympathy for the Second Respondents' complaint that it is simply unfair for Mr Wang to cause the Petitioner to enforce its debt worth 10% of what the insolvent Blue Water owns LV2IM against LV2IM, through winding-up proceedings. The critical question was the following: is it is manifestly legally unfair or abusive for the Petitioner to enforce its costs award against, *inter alia*, LV2IM because the individual for whose ultimate

benefit it is acting has declined to voluntarily advance further capital to another company which he ultimately owns which is substantially indebted to LV2IM and (apparently) another which is substantially indebted to FPL?

44. Legal logic very quickly generated a negative answer to this question. Predictability in this area of the law is sacrosanct. Costs follow the event. Litigation strategies are devised and implemented based on the assumption that costs orders which are made will be enforceable, without regard to the exigencies in unrelated but tenuously connected separate proceedings. I felt bound to conclude that the inherent jurisdiction to stay execution of judgments is not intended to be used by judges to achieve highly subjective, quixotic notions of justice.

45. The Petitioner has pursued the present proceedings with the legitimate expectation that it would recover an appropriate proportion of costs following taxation if it succeeded. It is unclear why the Second Respondents have each seemingly conducted the present proceedings on the basis that they would meet any adverse costs orders out of recoveries made from other companies controlled by Mr Wang, despite having failed to put in place any safeguards for the recovery of those costs. I say that because the Second Respondents did not ultimately seek more time to pay, nor did they offer any form of security for the stay they sought. Justice as it is legally understood favoured the Petitioner's right to enforce its adjudicated costs claims. The Stay Summons was accordingly dismissed.

46. As much of the argument anticipated the imminent hearing of the Petitioner's creditor's winding-up Petitions presented on 26 April 2024 against each of the Second Respondents herein, it followed that those Petitions could now proceed. Although the jurisdiction to adjourn a winding-up petition is far more generous than the power to stay execution of a judgment, any adjournment application to have realistic prospects of success would (I provisionally concluded) probably have to be combined with:

(a) a relatively short period of time to effect payment or some other compromise; and

(b) undertakings in place of a freezing injunction in respect of LV2IM's assets.

Conclusion

47. For the above reasons, the respective Summonses were disposed of as follows:

(a) the Plaintiff's Declarations Summons were granted (substantially in the terms set out in paragraph 25 above) and the Defendant's Jurisdiction Summons was dismissed; and

(b) the Second Respondents' Stay Summons was dismissed.

48. Subject to hearing counsel if required, the Plaintiff/Petitioner is awarded the costs of the present applications to be taxed if not agreed on the standard basis.

THE HONOURABLE JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT