



# Chancery Bar Association's BVI Conference 2023

Welcome

Andrew Twigger KC, Chair of the Association



# An international comparative analysis of hot insolvency topics

Sajid Suleman (No5 Chambers)

&

Hermione Williams (New Square Chambers)



*“Winding up foreign companies: a challenge to international comity”*

**&**

*“Just and equitable winding up around the world”*



*Winding up foreign companies: a challenge to international comity*

*Re Drax Holdings Ltd [2004] 1 W.L.R. 1049* at [24]–  
[25]: Lawrence Collins J:

*“The English court will not wind up a foreign company where it has no legitimate interest to do so, for that would be to exercise an exorbitant jurisdiction contrary to international comity ...”*



## *Winding up foreign companies: a challenge to international comity*

### **JURISDICTION & GROUNDS: section 221(1) and (5) Insolvency Act 1986**

- BVI, section 163 of the BVI Insolvency Act 2003 (as amended, revised edition 2020)

### **FACTORS GOVERNING EXERCISE OF JURISDICTION: 3 CORE REQUIREMENTS:**

- Sufficient connection
- Benefit
- Exercise of jurisdiction.



## *Winding up foreign companies: a challenge to international comity*

### Q: What constitutes sufficient connection?

- *Re a Company No. 00359 of 1987 (1987) 3 B.C.C. 160*
- *Yung Kee Holdings Ltd (CACV 266/2012)*

### Q: How does an applicant prove benefit?

- *Re Buccament Bay Ltd & Harlequin Property (SVG) Ltd [2014] EWHC 4776*
- *Shandong Chenming Paper Holdings Limited v Arjowiggins HKK 2 Limited [2022] HKCFA 11*



## Just and equitable winding up around the world

### HISTORY & JURISDICTION

- Originally introduced by analogy with power to dissolve a partnership.
- Remedy of last resort – other remedies need to be considered.

### SECTION 122 & 125 INSOLVENCY ACT 1986. THREE STAGE TEST.

- Is the applicant entitled to some relief?
- If so, would a winding up be just and equitable if there were no other remedy available?
- If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding up?



## Just and equitable winding up around the world

### BURDEN OF PROOF

- *Asia Pacific Joint Mining Pty Ltd v Allways Resources Holdings Pty Ltd* [2018] QCA 48
- *Lau v Chu* [2020] UKPC 24





## WHEN IS A JUST & EQUITABLE WINDING UP AN APPROPRIATE RESPONSE TO A FALL OUT?





## Just and equitable winding up around the world

### Lord Briggs in *Lau v Chu* identified two situations:

- 1) Functional deadlock: paralysis at board level, company's affairs cannot function.
- 2) Where the company is a corporate quasi-partnership and there is an irretrievable breakdown in trust and confidence between the members



## Just and equitable winding up around the world

### Lau v Chu

- Breakdown in trust and confidence is not enough. Consider why did the breakdown occur?
- Need to show that the circumstances in which the breakdown arose make it just and equitable for company to be wound up.

### Three examples:

- *Re Klimvest plc* [2022] EWHC 596 (Ch)
- *Financial Technology Ventures II (Q) LP v ETFS Capital Limited* [2021] JCA 176
- *Ninotre Investment Ltd v Strong Light Investments Ltd* [2021] HKCFI 3095



## ARBITRATION CLAUSES AND INSOLVENCY PROCEEDINGS

Sajid Suleman  
No5 Chambers, London  
[ssu@no5.com](mailto:ssu@no5.com)



## Arbitration clauses and insolvency proceedings

Should liquidation proceedings be stayed in favour of arbitration proceedings?

Difference of approach in:

- UK
- BVI
- Cayman Islands
- Hong Kong
- Singapore



# Arbitration clauses and insolvency proceedings

## ENGLISH COURTS

*Salford Estates (No 2) v Altomart Ltd (No 2) [2014] EWCA Civ 1575*

- The parties agreed by contract to refer any dispute over debt to arbitration.
- Salford issued winding up petition for unpaid debt.
- Altomart sought to strike out or stay the petition under s9 of the Arbitration Act 1996 for the disputed debt to be referred to arbitration.



## Arbitration clauses and insolvency proceedings

Held:

- s9 of the Arbitration Act is not engaged as winding up petition is not a claim or counterclaim.

However:

- s122(1) of the Insolvency Act of 1986 gives the court discretionary power to wind up a company.
- That discretion has to be exercised consistently with the Arbitration Act.
- Winding up application based on a genuinely disputed debt that is covered by an arbitration agreement will be stayed unless there are exceptional circumstances.



## Arbitration clauses and insolvency proceedings

### BVI

- C-Mobile Services Limited v Huawei Technologies Co. Limited  
BVIHCMAP2014/0017
- Jinpeng Group Limited v Peak Hotels and Resorts Limited  
BVIHCMAP2014/0025 and BVIHCMAP2015/0003

Two recent decisions from 2022:

- Kenworth Industrial Limited v Xin Gang Power Investments Limited  
BVIHC (COM) 2022/0053 & 2022/0065
- Sian Participation Corp. (in liquidation) v Halimeda International Limited  
BVIHCMAP2021/0017





## Arbitration clauses and insolvency proceedings

Jinpeng Group Limited v Peak Hotels and Resorts Limited  
BVIHCMAP2014/0025 and BVIHCMAP2015/0003

*“BVI court’s statutory jurisdiction to wind up a company [is] based on its inability to pay its debts as they fall due unless the debt is disputed on genuine and substantial grounds. This principle is too firmly a part of BVI law to now require a creditor exercising the statutory right belonging to all the creditors of the company to apply to wind up the company, to prove exceptional circumstances to establish his status to apply.”*



## Arbitration clauses and insolvency proceedings

Sian Participation Corp. (in liquidation) v Halimeda International Limited BVIHCMAP2021/0017

- Arbitration point raised too late by the company.

Kenworth Industrial Limited v Xin Gang Power Investments Limited BVIHC (COM) 2022/0053 & 2022/0065

- Issue for arbitration was only one of many in the insolvency proceedings, and therefore it would not be appropriate to stay for arbitration.
- No need for creditors to show exceptional circumstances.



# Arbitration clauses and insolvency proceedings

## Cayman Islands

Re China CVS (Cayman Islands) Holding Corporation (unreported, 23 April 2020) on appeal from Re China CVS (Cayman Islands) Holding Corporation [2019] (1) CILR 266



# Arbitration clauses and insolvency proceedings

## Hong Kong

- Lasmos Limited v Southwest Pacific Bauxite (HK) Limited [2018] HKCFI 426
- Dayang (HK) Marine Shipping Co., Ltd v. Asia Master Logistics Ltd [2020] HKCFI 311; HCCW 14/2019
- Champ Prestige International Limited v China City Construction (International) Co, Limited [2020] HKCFI 355; [2020] HKCLC 371; HCCW 34/2018



# Arbitration clauses and insolvency proceedings

## Singapore

- BDG v BDH [2016] 5 SLR 977
- AnAn Group (Singapore) Pte Ltd v VTB Bank [2020] SGCA 33
- BWG v BWF [2020] SGCA 36



# Gateway (25) – Extraterritorial disclosure orders

Philippe Kuhn  
39 Essex Chambers  
London



## Introduction of new gateways

- Gateway (25) introduced in October 2022
- One of several new gateways in CPR Practice Direction 6B
- Gateway (25) of particular relevance to the BVI



## Hypothesis

- *Carte blanche* for applicants seeking extraterritorial third party disclosure orders?

or

- Shift away from 'gateway' arguments to substance?





## Gateway (25)

### Information orders against non-parties

(25) A claim or application is made for disclosure in order to obtain information—

(a) regarding:

(i) the true identity of a defendant or a potential defendant; and/or

(ii) what has become of the property of a claimant or applicant; and

(b) the claim or application is made for the purpose of proceedings already commenced or which, subject to the content of the information received, are intended to be commenced either by service in England and Wales or pursuant to CPR rule 6.32, 6.33 or 6.36.



## *Scenna v Persons Unknown* [2023] EWHC 799 (Ch)

- Court: English High Court (Chancery Division)
- Judge: James Pickering KC (Deputy High Court Judge)
- D1-D6 – substantive defendants
- D7-D8 – Australian banks
- D9 – Hong Kong bank
- Challenge to *Bankers Trust* orders against Australian banks



## *Scenna v Persons Unknown* [2023] EWHC 799 (Ch)

- *Bankers Trust* order against Australian banks did not satisfy the requirements for such an order against a foreign bank
- Exceptional circumstances test based on previous case law
- On the facts:
  1. Local law concerns in Australia
  2. Ability to obtain equivalent relief in Australia
  3. Lack of urgency (not a “hot pursuit” case)
- Same result based on service out analysis given *serious issue to be tried* and *forum conveniens* requirements



## Doom and gloom?

- *Scenna* confirms that gateway (25) does not offer *carte blanche* to applicants for extraterritorial disclosure orders
- Practical impediment or barrier to such orders removed by gateway (25)
- Cyber-fraud and other “hot pursuit” cases
- Location of documents
- Connection with other reforms (e.g. alternative service)



## Other practical considerations

- Domestication of English disclosure orders in the BVI?
- Parallel applications in different jurisdictions?



# Proprietary Claims

Iain Quirk KC (Essex Court Chambers)



# Proprietary Claims – The Four Key Cases

Iain Quirk KC, Essex Court Chambers

United Mizrahi Bank Ltd v Doherty [1998] 1 WLR 435

Carl Zeiss Stiftung v Herbert Smith (No. 2) [1969] 2 Ch 276

AA v BB [2021] EWHC 1833 - *“solicitors will not be liable unless they know that their client has no defence. It is not enough that they have doubts about their own client’s case.”*

Vneshprombank v Bedzhamov [2022] EWHC 1166

[iquirk@essexcourt.com](mailto:iquirk@essexcourt.com)

+44 20 7147 7357

[www.essexcourt.com/barrister/iain-quirk-kc](http://www.essexcourt.com/barrister/iain-quirk-kc)

# Morning Coffee







# **BVI Business Companies Act – Amendments & Beyond**

Chair: Andrew de Mestre KC (4 Stone Buildings)

Panel:

Daria Gleyze (Three Stone)

Zachary Kell (Radcliffe Chambers)

Lara Kuehl (Selborne Chambers)



# *Prudens Simplicitas*

## The Restoration of Companies in the UK and the BVIs



**Zachary Kell**

Radcliffe  
Chambers



## Today's Talk

- The position in England and Wales (Companies Act 2006, *Fakhry v Pagden* [2020] EWCA Civ 1207).
- The position in the BVIs (BVI Business Companies Act 2004, *Trade Management Ltd v Registrar of Corporate Affairs* [2022]).
- Prudently simple or devilishly complex?



## The Position in England and Wales

- Part XXXI, Ch. 3 of the Companies Act 2006.
- Administrative applications under s.1024 and court applications under s.1029.
- *Fakhry v Pagden* [2020] EWCA Civ 1207 (David Richards L.J.):
  - Minority shareholder applies without notice for restoration.
  - Categories of applicants per s.1029(2).



## The Position in England and Wales

- A procedural argument?
- **Civil Procedure Rules 1998, r.40.9.**
- **Civil Procedure Rules 2000 of the Eastern Caribbean Supreme Court, rr. 42.12(6) and 43.8(1).**



## The Position in the BVIs

- Amendments to the 2004 Act in force from 1 January 2023.
- *Trade Management Ltd v Registrar of Corporate Affairs* (BVIHC (COM) 2021/0219), 2 February 2022 per Jack J.
  - Applicant's standing under s.218(1)(b).
  - Nb. Now amended so a similar provision is at s.218(2)(f) adding the word "other".
  - Application by company secretary.



## The Position in the BVIs

- Company secretary had standing.
- *Paulo Maluf v Registrar of Corporate Affairs* (BVIHCV 2021/0078), 20 October 2021, per Ellis J.
- *Re Test Holdings (Clifton) Ltd* [1970] Ch 285, per Megarry J.
- *Re Wood & Martin (Bricklaying Contractors) Ltd* [1971] 1 WLR 293, per Megarry J.
- *Re Forte's (Manufacturing) Ltd; Stanhope Pension Trust Ltd v Registrar of Companies* [1994] BCC 84, CA.



## The Position in the BVIs

- Discretion exercised under s.218A to restore the company because:
  - The company had valuable assets in Hong Kong.
  - The failure to pay the registration fees was an oversight.
  - The shareholders supported the claimant's application.
- Claimant still ordered to pay Registrar's costs of \$1,500 (applying *Baxendale-Walker v Law Society* [2007] EWCA Civ 233, [2008] 1 WLR 426).





## Conclusion

- A person with an “interest” in having the company restored can apply.
- Possible joinder argument under the relevant procedural rules.
- Broad but principled approach.
- Registrar will exercise vigilance in judging applications.
- Successful claimants should still expect to pay the Registrar’s costs.



# STRIKING OFF AND RESTORATION

Transition to a regime more similar to E&W:

- 7 years between s/o and dissolution → instantaneous dissolution (when s/o notice published in the Gazette)
- zombie companies → fully alive/fully dissolved companies
- companies s/o but not dissolved as of 1 January 2023 → transitional arrangements

*Daria Gleyze*

*Three Stone*



## The (final) demise of Zombie companies?

- Z-cos are companies which were struck off but not dissolved
- Still among us until 30 June 2023 → deadline to return to good standing;
- If restored by court order, a penalty of US\$5,000 in addition to all other US\$\$ due;
- If not, automatic dissolution, agent deemed to have resigned.



## Zombie companies' powers

- Z-cos can:
  - continue to prosecute and defend proceedings commenced before s/o;
  - apply to be restored (for a hefty price, in the £0000s);
  - be Ds/Rs to proceedings commenced after s/o.



## Zombie companies' limitations

- Z-cos cannot:
  - ☠ act “*in any way*” with respect to their affairs (old s 215);
  - ☠ *actually* defend proceedings commenced after s/o;
  - ☠ argue against enforcement commenced after s/o;
  - ☠ make any claim or claim any right;



## Zombie companies' limitations (continued)

- Z-cos cannot:
  - ☠ carry on any business;
  - ☠ deal with their assets in any way;
  - ☠ instruct lawyers (save re restoration and pre-s/o proceedings).



*Al-Otaibi & others v Sloane International Developments 1 Ltd (BVI) & others  
(1-2 August 2022, EWHC)*

- App to set aside service out and for a s 9 stay;
- 4 BVI Z-cos and other UK Ds → 1 BVI co restored by the time of the hearing;
- Cs tried to argue that all steps taken in the litigation in the meantime were ineffective: instructing solicitors, objecting to jurisdiction, evidence, app for stay (2 expert reports!);
- Ct disagreed but unwilling to end proceedings against 3 Z-cos.



## Deeming provisions

- Ss 1028(3) & 1032(3) CA 2006: *“The Registrar/court may give such directions and make such provision as seems just for placing the company and all other persons in the same position (as nearly as may be) as if the company had not been dissolved or struck off the register”*
- 
- S 218A(b) BVI CA *“the court may give such directions or make such orders as it considers necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been dissolved or struck off the Register”*





## ***Tradition Financial Services Ltd v Bilta (UK) Ltd [2023] EWCA Civ 112***

- Not simply a question of putting back the clock to the date of dissolution, but of requiring the court to ask what would have happened thereafter, during the period of dissolution, if dissolution had not occurred;
- But court should not undertake a wide-ranging inquiry into consequences that were merely probable or possible;
- Wide powers, including to direct an extension of the limitation period.





## Arbitrability?

*Bridgehouse (Bradford No.2) Ltd v BAE Systems Plc [2020] EWCA Civ 759*

- Apps for restoration to the Companies Register ☠ **not arbitrable**;
- The application/interpretation of deeming provisions ☑ **arbitrable**;
- Apparently, the deeming provision “*does not affect status and an application for such relief will normally be an essentially private matter, affecting nobody but the company and one or more specific individuals or entities*”.



## Freezing Injunctions – offshore companies beware!

- freezing injunctions technically pointless against Z-cos (does not stop cts from granting them)  more difficult to enforce
- cts very keen to “think outside the box” and freeze assets where no information publicly available or forthcoming 

*Santina Ltd v Rare Art (London) Ltd* [2023] EWHC 807 (Ch): expanded freezing injunctions to apply in support of security for costs orders

 More publicly available info might assist BVI cos.



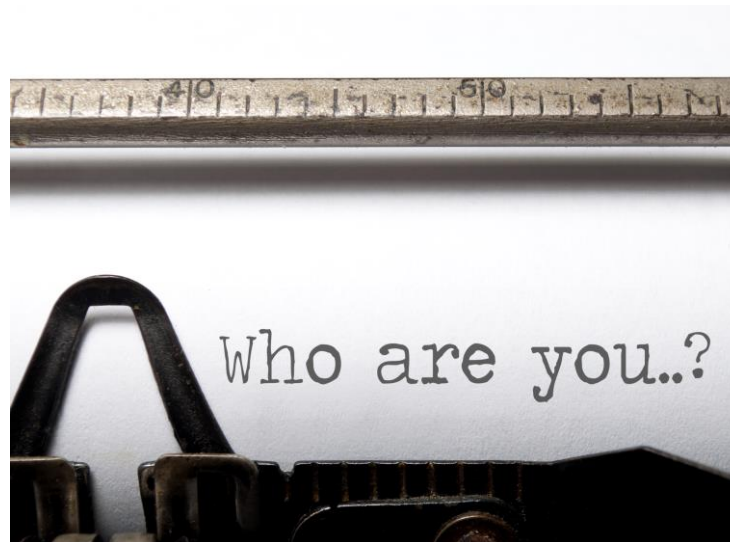
# Transparency versus Privacy

Lara Kuehl  
Selborne Chambers



## Register of Persons with Significant Control

Amended section 230 of BVI Business Companies Act





## History of PSC registers in Europe



- 2013- G8 agreement
- 2015 – 4MLD – “legitimate interest” limitation on public access
- 2016 – UK’s PSC regime
- 2018 – 5MLD – no “legitimate interest” restriction
- UK’s Register of Overseas Entities regime



*WM and Sovim SA v Luxembourg Business Registers (Joined Cases C-37/20 and C-601/20)*





## ECJ Decision



- Amendment to 4MLD permitting general access was invalid
- Serious interference with right to respect for private and family life and protection of personal data (Arts. 7 and 8, European Charter)
- Interference not limited to what is necessary or proportionate





## Legal consequences in the UK?

- Not binding
- But Art. 7 of European Charter same as Art. 8 of ECHR, which is part of UK law through the Human Rights Act 1998
- In theory, may be an infringement of Art. 8 ECHR





## UK Government's response?

- Supplementary memorandum in relation to UK's PSC and ROE regimes
- Considered that both regimes are ECHR compliant
- Intrusion into Art. 8 rights proportionate





## International consensus?



# Lunch





# Changing the terms of trust

Nicholas Le Poidevin KC  
(New Square Chambers)



# Powers of amendment

Example of broad power:

The Trustees may at any time during the Trust Period by deed vary, amend, add to or delete any or all of the provisions of this Settlement including the trusts, powers and discretions and the administrative powers in this Settlement and in the schedules declared and contained

(E.F.&P., vol. 40(3), form no. 48)



# Powers of amendment

Examples of limited powers:

- Restricted to changes ‘not materially prejudicial to the interest of the Bondholders’

*Re SMP Trustees Ltd* [2012] EWHC 772 (Ch)

- On a change of proper law:

... the Trustees shall be at liberty to make such consequential alterations or additions in or to the trusts, powers and provisions of this Settlement as the Trustees may consider necessary or desirable to ensure that the trusts, powers and provisions of this Settlement shall ... be as valid, enforceable and effective as they are under the [original proper law] (E.F.&P., loc. cit.)



# Powers of amendment

- Broad power unlimited in terms
- Discussed in *Grand View Private Trust Co. Ltd v. Wong* [2022] UKPC 47:
  - No absolute rule against altering substratum of trust ([99], [108])
  - Rule is that power must be exercised for proper purpose
  - Necessary to ask whether trust has overall purpose –
    - If so, ‘a strong presumption that a power of amendment is not to be used to alter the purpose of the trust’ ([108]; also [104], [114])
  - Power in *Grand View* could be exercised only for benefit of beneficiaries





# Powers of amendment

How is purpose identified?

- ‘a question of determining objectively the intention of the settlor’ (*Grand View*, at [61])
- to be identified at date of settlement (*ibid.*)
- by reference to terms of settlement and factual matrix ([63]):
  - Terms of settlement
  - Contemporary letter of wishes (but not later ones)
  - Other contemporaneous transactions
- Is there identifiable purpose at all? Query case of ‘Red Cross trust’ ([80], [90]-[92])



## Powers of addition and exclusion

*Grand View* primarily concerned with addition and exclusion of beneficiaries

- Necessary to ask what purpose of power is ([74])
- Power of addition may be used in interests of existing beneficiaries, e.g. ([82])
  - spouses, other dependants, unmarried partners, stepchildren, and other individuals to whom a beneficiary owes a moral duty; also charities or other organisations to which a beneficiary owes a moral obligation
- Possible to have power of addition not in interests of existing beneficiaries but that must be apparent ([81])



# Powers of advancement and appointment

Example of wide power:

... [T]he trustees may at any time or times during the trust period ... pay or apply the whole or any part or parts of the capital of the trust fund to or for the benefit of any one or more of the [beneficiaries] or in writing appoint that the whole or any part or parts of such capital shall be held upon such trusts (either revocable or irrevocable) for the benefit of any one or more of the [beneficiaries] ... and subject to such powers and discretions exercisable by any person or persons ... and generally in such manner as the trustees shall think fit ...

(Form used in *Blausten v. I.R.C.* [1972] Ch. 256 (Eng. C.A.))



# Powers of advancement and appointment

Exercise to reproduce existing trusts with changes:

- *Muir v. I.R.C.* [1966] 1 W.L.R. 1269 (Eng. C.A.) – removal of power to capitalise income
- *Blausten v. I.R.C.*, above – removal of settlor's wife as beneficiary
- *Re New Huerto Trust* (2015) 15 I.T.E.L.R. 447 (E.C. C.A.) – exclusion of settlor as beneficiary

Other uses:

- Inserting protectorship regimes



# Powers of advancement and appointment

Not equivalent to unrestricted power of amendment: must be exercised in interest of some or all of beneficiaries



## Powers of transfer to new trust

### Power of transfer:

- Wide form – at least one beneficiary of transferor trust must be beneficiary of transferee trust
- Narrow form – *all* beneficiaries of transferee trust must be beneficiaries of transferor trust

Usually an extension of power to benefit beneficiaries, so either must be exercised in interests of one or more of beneficiaries of transferor trust



## Court: new administrative powers – common legislation

BVI Trustee Act 1961, s. 59(1):

Where in the management or administration of any property vested in trustees, any ... disposition, or any ... transaction, is in the opinion of the Court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument ... or by law, the Court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for that purpose

Cayman Is. Trusts Act (2021 Revision), s. 63(1)

Both based on English Trustee Act 1925, s. 57



## Court: new administrative powers – common legislation

No need for particular transaction to be in contemplation:

- *Cotterell v. Allendale* [2020] W.T.L.R. 1183

Some recent uses:

- Self-dealing between trusts with common trustee: *Re 1964 E Settlement* (2020) 24 I.T.E.L.R. 41 (Jers. R.C.)
- Altering quorum provisions in trust instrument: *Portcullis Pensions (IOM) Ltd v. Alder*, unrep., 22 December 2022 (I.o.M. H.C.)

May be useful in dispensing with veto:

- *Re Beale* [1932] 2 Ch. 15





# Court: variation of trusts – common legislation

BVI Trustee Act 1961, s. 58:

Where property ... is held on trusts ... under any will, settlement or other disposition, the Court may ... approve on behalf of— (a) any person having ... an interest, whether vested or contingent, under the trusts who by reason of infancy or other incapacity is incapable of assenting; or (b) any person (whether ascertained or not) who may have become entitled ... to an interest under the trusts ...; or (c) any unborn person; or (d) any person in respect of any discretionary interest of his under protective trusts ..., any arrangement ... varying, adding to, revoking or replacing all or any of the trusts ...

Cayman Trusts Act (2021 Revision), s. 72(1)

Both based on English Variation of Trusts Act 1958



# DIY : variation of trusts – BVI legislation

BVI Trustee Act 1961, s. 58A:

Where a trust instrument provides for the appointment of any person ... to approve any arrangement described in section 58(1) on behalf of any of the persons referred to in paragraphs (a) to (d) thereof ... and where such approval is subsequently given ..., such approval shall have the same effect as if the Court had approved such arrangement on behalf of such persons ...:

Provided that no such approval shall be given on behalf of any persons referred to in paragraphs (a) to (c) ... unless, in the opinion ... of the person giving the approval, carrying out and giving effect to such arrangement would not be detrimental to the person or persons on whose behalf it is given

Applies only to trusts created on or after 1 March 2004



## Court: variation of trusts – BVI legislation

BVI Trustee Act 1961, s. 58B(3), (4):

- (3) Where this section applies to any trusts, the Court may ..., if it thinks fit and the condition specified in subsection (4) is satisfied, by order –
  - (a) vary, add to, revoke or replace all or any of the trusts;
  - (b) enlarge, restrict or remove all or any of the powers of the trustee of managing or administering any of the property subject to the trusts or ... any other powers of the trustee; or
  - (c) vary, add to, remove, or replace any or all of the other provisions of the trusts.
- (4) The condition referred to in subsection (3) is that the making of the order is determined by the Court to be expedient in the circumstances then existing, **whether or not the terms of the order may adversely affect any person or purpose**



# Court: variation of trusts – BVI legislation

Requires opt-in – applies only to:

- BVI-law trusts created on or after 9 July 2021 *and* trust instrument says so or
- Foreign-law trusts if proper law changed to BVI law *and* at same time instrument of change says so

Court must consider:

- Settlor's wishes or expectations
- Changes in circumstances since trust created
- Remoteness of interest of any person adversely affected
- No change to interest vested absolutely and indefeasibly in possession



## Court: variation of trusts – Bermuda

Bermuda Trustee Act 1975, s. 47:

- Held to authorise variation of beneficial interests, *GH v. KL* [2010] Bda L.R. 86; *Re ABC Trusts* [2012] SC (Bda) 65 Civ.
- Trustees empowered to make change
- No need for consent of all adult beneficiaries
- Test is expediency for trust, not benefit to all beneficiaries

Sec. 47 now popular; need to change proper law to Bermuda law

Check recognition of order in home jurisdiction



## Crypto and Financial Sanctions: jurisdiction, regulation, and tax

- Where in the world: jurisdiction and governing law for crypto-disputes – *Sophia Hurst, Essex Court Chambers.*
- Russia sanctions: key developments in the offshore context – *Emile Simpson, Pump Court Tax Chambers.*



## Where in the world: jurisdiction and governing law for crypto-disputes

- Why the *forum situs* and *lex situs*?
- Dicey, Morris & Collins on Conflict of Laws 16<sup>th</sup> ed, 23-025:

*“first, the situs is an objective and easily ascertainable connecting factor to which third parties might reasonably look to ascertain questions of title and, secondly, the country of the situs has control over the property and a judgment in conflict with the lex situs will often be ineffective”*



- *Ion Science Ltd v Persons Unknown*
- *AA v Persons Unknown* [2019] EWHC 3556 (Comm)
- *Fetch.ai Ltd v Persons Unknown* [2021] EWHC 2254 (Comm)
- *Tulip Trading Ltd v Bitcoin Association for BSV* [2022] EWHC 667 (Ch) and [2023] EWCA Civ 83
- *LMN v Bitflyer* [2022] EWHC 2954 (Comm)
  
- *Philip Smith v Torque Group Holdings Ltd* BVIHC Com 2021/031
- *Chainswap v Persons Unknown* BVIHC COM 2022/031
  
- *Hurst, De-Crypting Conflict of Laws* (2023) 3 JIBFL 158





## Russia sanctions: key developments in the offshore context

- The UK's Russia sanctions regime's implementation offshore.
- General trends in UK government sanctions policy.
- The trust services prohibition.
- Common asset freeze issues.
- Sanctions litigation.



## The UK's Russia sanctions regime's implementation offshore

- The UK's Russia sanctions regime is housed in the Russia (Sanctions) (EU Exit) Regulations 2019:
  - 17 sets of amending regulations in 2022.
  - Made under the Sanctions and Anti-Money Laundering Act 2018 (“**SAMLA**”).
  - Applied by Order in Council to the Overseas Territories (except Bermuda and Gibraltar).
- In Bermuda, Gibraltar, and the Crown Dependencies (Jersey, Guernsey, Isle of Man), UK sanctions law is given effect through locally enacted legislation – some differences e.g. owned and controlled test in Jersey.
- UK licences do not have effect outside of the UK; co-ordination of licences for payment of legal fees is a key issue in practice.



## General trends in UK government sanctions policy

- The UK has designated ca. 1730 individuals and entities under its Russia sanctions regime.
  - Pace of designations has slowed; new sanctions linked to news cycle (G7 possibly next).
  - No one to date delisted except for obvious errors (wrong name, deceased etc.).
  - The focus of UK government sanctions policy is on counter-evasion and circumvention e.g. sanctions against "enablers".
- Expansive approach to interpretation in official guidance v narrow approach to interpretation of penal statutes:
  - OFSI Enforcement Guidance § 1.14 *"OFSI interprets the prohibitions in sanctions regulations widely, as do courts"*.
  - R v Lane [2018] UKSC 36, at [8]: *"it is a universal principle that if a penal provision is reasonably capable of two interpretations, that interpretation which is most favourable to the accused must be adopted"*.



## The trust services prohibition (TSP)

- Prohibits the provision of trust services “to, or for the benefit of”:
  - **Limb 1:** “Persons connected with Russia” (ordinarily resident in; or located in) – but only arrangements post 16 December 2022.
  - **Limb 2:** Persons designated for purpose of TSP – 21 March 2023 all persons already subject to asset freeze so designated.
  - **Trust services:** (1) the creation of a trust or similar arrangement; (2) the provision of a registered office etc. for a trust or similar arrangement; (3) the operation or management of a trust or similar arrangement, or (4) acting or arranging for another person to act as trustee of a trust or similar arrangement.
- Professional advisors: not “operating or managing the trust”; but beware of “acting or arranging for another person to act as trustee”.
- OFSI (and BVI) General License: 90 days to cease trust services under Limb 2; but if not possible due to the asset freeze, exception at reg. 60ZZB(1)(b) applies.
- Nominee shareholders – see STEP guidance.



## Common asset freeze issues

- Mens rea element - reg. 11:
  - “Knows, or has **reasonable cause to suspect**” that funds or economic resources are owned, held or controlled by a designated person – RCTS requires that a person “would (not might or could)” suspect R v Lane [2017] UKSC 36, at [24].
- Control of entities - reg. 7(4):
  - “it is reasonable, **having regard to all the circumstances, to expect** that P would (if P chose to) be able, in most cases or in significant respects, by whatever means and whether directly or indirectly, to achieve the result that affairs of C are conducted in accordance with P's wishes”.
  - **All the circumstances:** who are the trustees / directors; risk of replacement.
  - **Reasonable to expect:** more than 50% probability.
- Beneficiary requests for information – principles in Schmidt v Rosewood Trustees [2003] 2 AC 709, applied in sanctions context.



## Sanctions Litigation

- Challenges to designations:
  - Stage 1: pre-emptive representations.
  - Stage 2: information request (use of JR to speed up response).
  - Stage 3: ministerial review (FCDO tend to use it as opportunity to strengthen the designation).
  - Stage 4: court review (Part 79; can cross-examine witnesses) – first court review under SAMLA March 2023 - Synesis v FCDO [2023] 541
- Sanctions compliance-related litigation:
  - Focus in 2022 / early 2023 has been on correspondence, and licensing.
  - Going forward, likely to see applications for declaratory relief.
- Commercial litigation involving sanctions issues:
  - Access to justice v effect of asset freeze e.g. NBT v Mints [2023] EWHC 118.
  - Relevance of EU sanctions law – NBT (follows EU law) v Synesis (breaks from it).

# Afternoon tea





# The Duomatic Principle

Alexander Cook KC  
(4 Stone Buildings)





## What is the Duomatic Principle? (1)

- *Re Duomatic Ltd* [1969] 2 Ch. 365.
- Two primary elements:
  - consent of shareholders must be unanimous.
  - consent must be given by the shareholders in full knowledge of the relevant matter: *EIC Services Ltd v Phipps* [2003] 1 WLR 2360.
- Must be some outward manifestation of consent: *Re TulseSense Ltd* [2010] 2 BCLC 525 at [41].



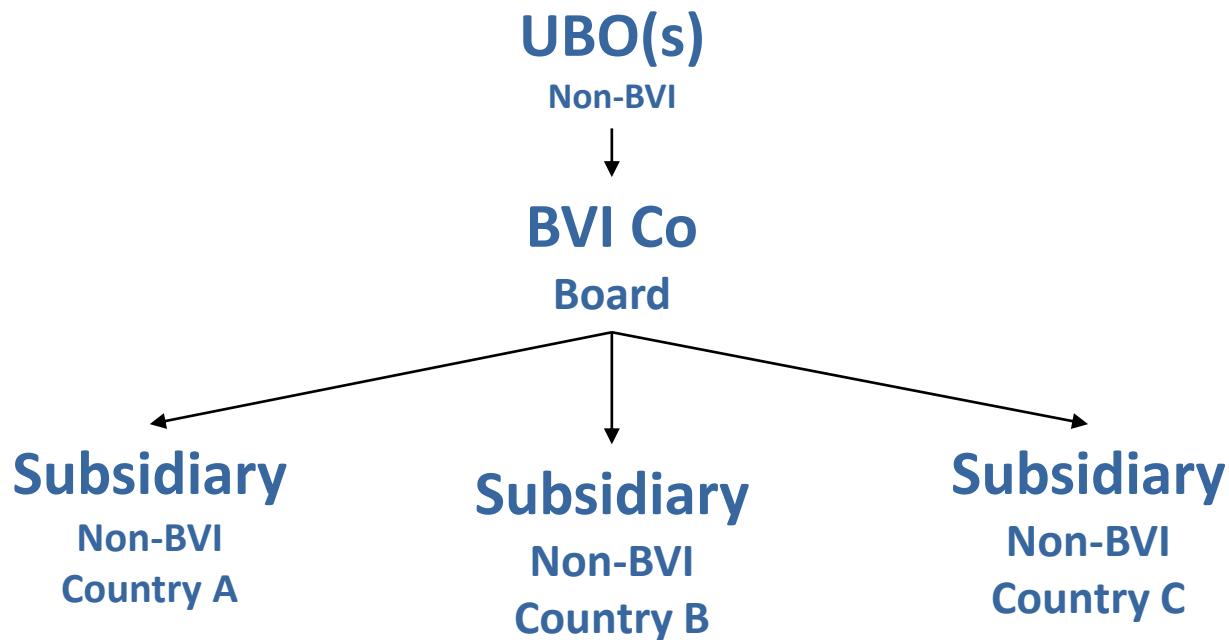
## What is the Duomatic Principle? (2)

- **Capacity**: Not necessarily in their capacity as a shareholder: *Express Engineering Works Ltd* [1920] 1 Ch. 466.
- **Timing of assent**:
  - Generally: Does not matter whether the shareholders give their consent in different ways or at different times: *Parker & Cooper Ltd v Reading* [1926] Ch. 975.
  - Special cases: e.g. share buybacks: *Re R W Peak (Kings Lynn) Ltd* [1998] 1 BCLC 193.



## Relevance to BVI practitioners

- BVI law: *Ciban Management Corpn v Citco (BVI) Ltd* [2021] AC 122.  
Applies to decisions of UBOs.
- Practical level: common scenario:





## Scope of the principle: “CANs”

- UBO: *Ciban, Byers v Chen* [2021] BCC 462 at [70].
- Ostensible authority: *Ciban*.
- Circumvent certain statutory requirements:
  - Substantial property transactions: *Re Torvale Group Ltd* [1999] 2 BCLC 605.
  - Share buybacks: *Kinlan v Crimmin* [2007] 2 BCLC 67.
  - Directors’ service contracts: *Wright v Atlas Wright (Europe) Ltd* [1999] 2 BCLC 301.



## Scope of the principle: “CANs” (cont.)

- Assent inferred from conduct/silence/acquiescence:
  - *Re Bailey Hay & Co Ltd* [1971] 1 WLR 1357
  - *Re Home Treat Ltd* [1991] BCLC 705
  - *Knight v Frost* [1999] 1 BCLC 364
  - *Sharma v Sharma* [2014] BCC 73
  - *Re The Sherlock Holmes International Society Ltd (No 2)* [2017] 2 BCLC 14

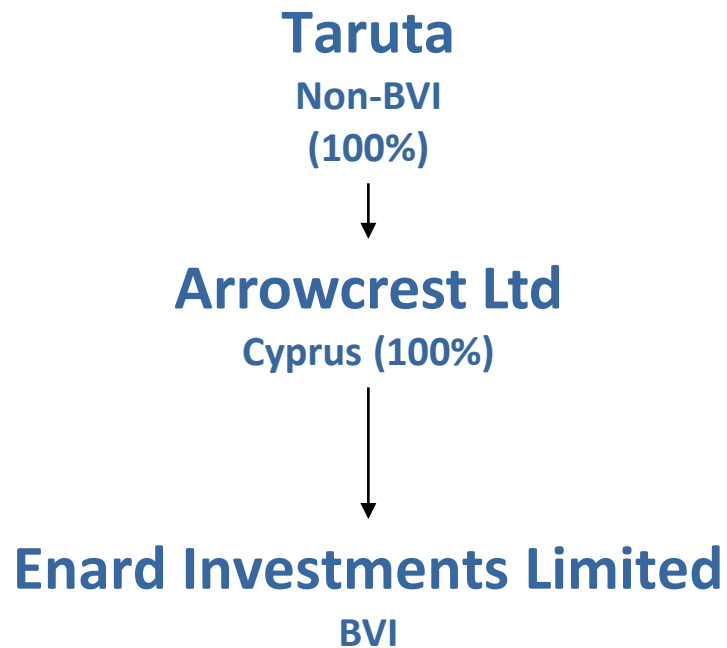


## Scope of the principle: “CAN’Ts”

- Protection of non-shareholders, particularly creditors.
- Distributions: *Bairstow v Queens Moat Houses Plc* [2001] 2 BCLC 531.
- Insolvency or near insolvency:
  - *Secretary of State for Business, Innovation and Skills v Doffman (No 2)* [2011] 2 BCLC 541 at [44]-[45].
  - *Re Finch (UK) Plc (in liquidation)* [2016] 1 BCLC 394.
  - *Ciban*.
- Fraudulent/dishonest or would be *ultra vires* the company:
  - *Re (Stakefield (Midlands) Ltd* [2011] 2 BCLC 541.
  - *Ciban*.



*Arrowcrest Ltd v JSC VTB Bank* BVIHCMAP2021/0043 (delivered 25 January 2023)





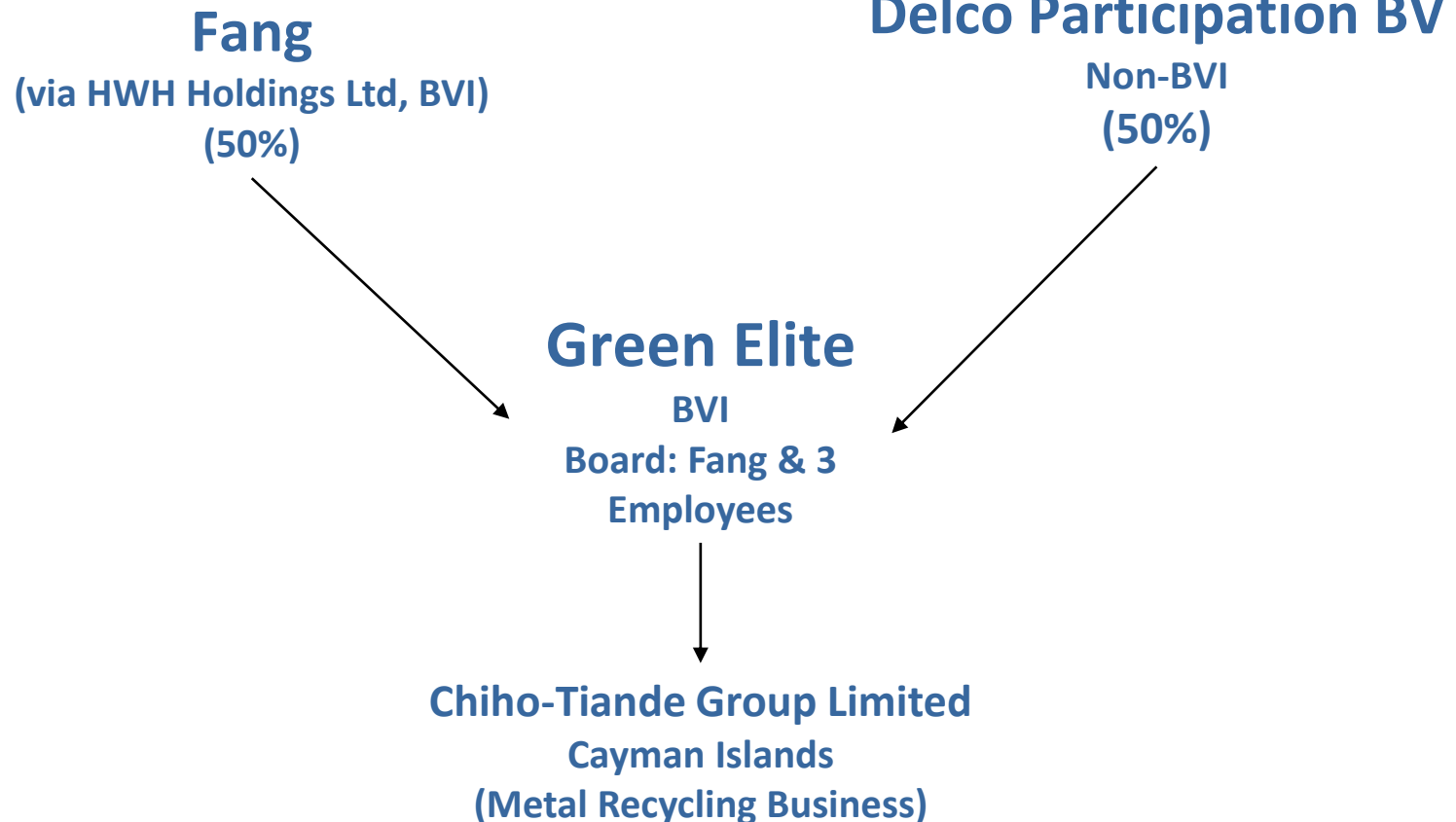
## Comment: *Arrowcrest v VTB*

- Welcome affirmation of separate corporate personality.
- Receiverships and powers.
- Could the Judge have reached the same conclusion by another route?





Fang Ankong v Green Elite BVIHCMAP2022/0013 (delivered 9 January 2023)





## Comment: *Fang Akong v Green Elite*

- Contractual analysis / need for a “legally binding agreement”?
- More straightforward route? Challenging factual findings on appeal.



# COMPOUND PHOTONICS GROUP LIMITED: A DISCUSSION IN “GOOD FAITH”

Ian Clarke K.C.



# COMPOUND PHOTONICS GROUP LIMITED

The relevant facts



## The Terms of the Shareholders' Agreement

“4.2 Each Shareholder undertakes to the other Shareholders and the Company that it will at all times act in good faith in all dealings with the other Shareholders and with the Company in relation to the matters contained in this Agreement.”



Clause 21: obligations on exercise of powers and voting rights

Clause 23: no partnership

Clause 25: entire agreement



## Decision Below

*Unwin v Bond* [2020] EWHC 1768 (Comm)

“229. First, the context in which the good faith obligation was entered into is everything, or at least a great deal. That is hardly surprising, because the extent of the obligation, that is, what prospective acts of a defendant may be subject to a duty of good faith, is a matter of the construction of the contract which contains the obligation.



230. Secondly, once it is established that a prospective act of a defendant is subject to a duty of good faith, the defendant is bound to observe the following minimum standards:

- i) they must act honestly;
- ii) they must be faithful to the parties' agreed common purpose as derived from their agreement;
- iii) they must not use their powers for an ulterior purpose;
- iv) when acting they must deal fairly and openly with the claimant;
- v) they can consider and take into account their own interests but they must also have regard to the claimant's interest.

These minimum standards are not entirely distinct from one another. Rather, they tend to overlap.





The Judge concluded that the expression “good faith” necessarily imported all of the “minimum standards” of good faith identified in *Unwin v Bond* [2020] EWHC 1768 (Comm). These standards included, in addition to a requirement that the investors should act honestly, a requirement of “fidelity to the bargain”, a requirement of “fair and open dealing” and a requirement “to have regard to the interests” of the minority shareholders.



## The Appeal

The investors appeal was principally on the basis that the trial judge interpreted the “good faith” clause in the shareholders agreement far too widely.

It did not impose on them duties of procedural fairness which required them to take into account the interests of the minority shareholders when deciding how to exercise their rights to vote as the majority.



## The Court of Appeal's Analysis

### *The general approach to interpreting express clauses of good faith*

Street v Derbyshire Unemployed Workers' Centre [2004] EWCA Civ 964 at [41]:

*“Shorn of context, the words “in good faith” have a core meaning of honesty. Introduce context, and it calls for further elaboration..... Terms to be found in many statutory and common-law contexts and because they are necessarily conditioned by their context, it is dangerous to apply judicial attempts at definition in one context to that of another.”*

Context is king.....



## The Court of Appeal's Analysis

### *Fidelity to the bargain and the consideration of interests*

“Long live the King....”

CPC Group Ltd v Qatari Diar Real Estate Investment Co. [2010] EWHC 1535  
(Ch)

‘It must be accepted that the party subject to the obligation is not required to subordinate the party’s own interests, so long as pursuit of those interests does not entail unreasonable interference with the enjoyment of a benefit conferred by the express contractual terms so that the enjoyment becomes (or could become), in words used by McHugh and Gummow JJ in Byrne v Australian Airlines Ltd [1995] HCA 24; (1995) 185 CLR 410, “nugatory, worthless or, perhaps, seriously undermined”’



## The Court of Appeal's Analysis

*Fidelity to the bargain and the consideration of interests*

Foreign aid?

Denial of commercial benefit

Limitation by other terms



## The Court of Appeal's Analysis

### *Fidelity to the bargain and the consideration of interests*

Re Coroin [2013] EWCA Civ 781:

“.... the concept of fidelity to the bargain or adherence to the spirit of the agreement could only operate to support the common purpose and aims of the parties as objectively ascertained from the express or implied terms of the contract. .... On any footing, however, the shared aims of the parties must be identified by interpretation of the other terms of the agreement, or by implication of terms according to the usual test outlined in Marks & Spencer plc v BNP Paribas Securities [2016] AC 742.”



## The Court of Appeal's Analysis

### *Is dishonesty or bad faith required for any breach of a good faith clause?*

[241] ....“the authorities do not support the proposition that a contractual duty of good faith can only be breached by conduct that is dishonest according to the explanation of that concept in Royal Brunei and Ivey. Depending on the contractual context, a duty of good faith may be breached by conduct taken in bad faith. This could include conduct which would be regarded as commercially unacceptable to reasonable and honest people, albeit that they would not necessarily regard it as dishonest.”



## The Court of Appeal's Analysis

### *Drawing the threads together...*

- A core requirement that the parties should act honestly towards each other and the Company
- Otherwise the rest is context-driven
- Can (and did) require the parties not to act in bad faith towards each other: prohibits conduct that reasonable and honest people would regard as commercially unacceptable, but not necessarily dishonest





## The Court of Appeal's Analysis

So what? Are we any the better informed?

Health warnings.....



# COMPOUND PHOTONICS GROUP LIMITED: A DISCUSSION IN “GOOD FAITH”

Ian Clarke K.C.



# Chancery Bar Association's BVI Conference 2023

## Address

His Lordship Justice Wallbank

## Conclusion

Michael Gibbon KC, International SC Chair

*COACHES OUTSIDE TO TAKE YOU TO  
THE BRANDYWINE ESTATE FOR A  
CANAPÉ RECEPTION.*