



**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**FINANCIAL SERVICES DIVISION**

**CAUSE NO. FSD 273 OF 2024 (IKJ)**

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)**

**AND IN THE MATTER OF INTERNATIONAL AIRFINANCE CORPORATION**

**IN CHAMBERS**

**Before:** The Hon. Justice Kawaley

**Appearances:** Mr. Hector Robinson KC and Mr Adam Barrie of Mourant Ozannes (Cayman) LLP for the Petitioner

Mr Christopher Levers and Ms Victoria King of Ogier for the Respondent

The Company did not appear

**Heard:** 17 September 2024

**Draft Ruling  
Circulated:** 1 October 2024

**Ruling delivered:** 10 October 2024

*Just and equitable winding-up petition-quasi-partnership- deadlock-Summons for Directions-need for active case management-whether petition wrongly placed on public register before Summons for Directions was heard-Companies Winding Up Rules (2023 Consolidation), Order 3 rules 11-12, Order 24 rules 4-6- Grand Court Rules (2023 Revision) Order 63 rule 2*

## RULING ON SUMMONS FOR DIRECTIONS

### Background

1. The Petition herein dated August 30, 2024 (but sealed on 3 September 2024) seeks a winding-up order on the grounds that the Company's business was a quasi-partnership between the Petitioner (Dr Mohammed Idriss Ghodbane) and the Respondent (Mr Moulay Omar El Alaoui El Abdallaoui), and the relationship of trust and confidence in them has irretrievably broken down. Alternatively, an Order is sought requiring one party to purchase the other's shares. The Company's sole business is to serve as investment manager for a Cayman Islands regulated fund, ALIF Segregated Portfolio Company (the "Fund"), which derives its own income from aircraft leasing contracts.
2. By a Summons dated 12 September 2024 ("Validation Summons"), the Petitioner sought an Order validating various payments by the Company in the ordinary course of its business ("Validation Order").

### The need for active case management

3. This type of dispute, a falling out between business partners, typically reflects a tension between commercial logic and the emotional impulses of the human protagonists involved. This was manifest in the barbs which had been thrown in correspondence before the commencement of the present proceedings, and the contentious way in which the Summons for Directions was conducted. By common accord:
  - (a) the alternative 'buyout' relief would seemingly be the only commercially rational way to resolve the proceedings assuming the threshold requirement of a case for winding-up was met; and
  - (b) it would be commercially advantageous for this dispute to be resolved as quickly as possible because of the business implications of the current deadlock.
4. Despite this compellingly sensible consensus, the parties were unable to agree pragmatically a streamlined road map for the present proceedings. In fairness, to counsel, many directions were sensibly agreed. The impasse on a few big-ticket items appeared to me to be at least in part because the protagonists were understandably concerned to preserve the right to vindicate the merits of their respective positions while also preserving the ability to extract a favourable commercial bargain through the application of litigation pressure. Lord Atkin's famous words, expressed in a far loftier

substantive law context, in my judgment apply with equal force in the prosaic context of managing contentious litigation: “*amid the clash of arms, the laws are not silent*”<sup>1</sup>.

5. Whether or not the Overriding Objective in the Preamble to the Grand Court Rules (2023 Revision) (“GCR”) strictly applies to proceedings under the Companies Winding Up Rules (2023 Consolidation) (“CWR”), the guiding principles apply with equal force to contentious winding-up proceedings. Segal J has considered the Overriding Objective in proceedings governed by the CWR: see e.g. *Re China Shanshui Cement Group 2021 (1)* CILR 253 (at paragraph 33 (z)). So has Parker J: see e.g. *Re Performance Insurance Company SPC*, FSD 70/2021 (RPJ), Judgment dated 2 September 2024 (at paragraph 33). Doyle J enjoined counsel to comply with the Overriding Objective in *Re Asia Renewable Energy (Cayman) Ltd.*, FSD 259/2022 (DDJ), Judgment dated 2 May 2024 (unreported) (at paragraph 27). The FSD User’s Guide also implies that the Overriding Objective applies to all proceedings in this Division. As Doyle J stated in another winding-up case, *Re Porton Capital Inc and Re Porton Capital Limited*, FSD 226/2021 (DDJ), Judgment dated 27 January 2022 (unreported):

“30. *The parties and their attorneys also have an obligation to co-operate with each other and with the court in achieving the overriding objective (see B4.3 of the FSD Guide)....*”

6. Accordingly, in considering the most significant contentious issues arising out of the Summons for Directions, and bearing in mind that the parties are agreed that expedition is desirable, I have regard to the following principles which the Court and the parties are required to seek to achieve (GCR, Preamble, paragraph 1.2):

“(a) *ensuring that the substantive law is rendered effective and that it is carried out;*  
(b) *ensuring that the normal advancement of the proceeding is facilitated rather than delayed;*

(c) *saving expense;*

(d) *dealing with the cause or matter in ways which are proportionate*

(i) *to the amount of money involved;*  
(ii) *to the importance of the case; and*  
(iii) *to the complexity of the issues;*

(e) *allotting to it an appropriate share of the Court’s resources, while taking into account the need to allot resources to other proceedings.”*

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<sup>1</sup> *Liversidge-v-Anderson* [1942] AC 206 at 244.

**The contentious issues**

7. The most contentious issues were, in my judgment, the following:
- (a) whether the Petitioner needed to prove his pleaded contentious allegations of misconduct on the Respondent's part to establish that, by reason of a deadlock, and irretrievable breakdown in trust and confidence had occurred. If a "full trial" was required, this would require discovery, pleadings and potentially justify a two-stage approach with valuation being addressed in the second stage (see issue (d) below);
  - (b) whether the proceedings should be stayed for 4 weeks to allow the parties to attempt to reach agreement on the value of the Company's shares;
  - (c) whether the Respondent should be permitted to reserve the right to apply to strike-out the Petition;
  - (d) whether directions should be given for expert valuation evidence at the same time as the directions on the merits of the Petition, or after the threshold merits issue had been determined;
  - (e) whether there should be discovery;
  - (f) whether the Petition was wrongly placed on the public register and, if so, whether it should now be removed; and
  - (g) whether remuneration and other benefits payable to the directors/shareholders should be excluded from the proposed Validation Order.
8. Issues (a) to (e) are all intertwined. Issue (f) raised a nice point of practice in relation to the filing of contributories' petitions.

**The Petition**

9. The Petition avers, uncontroversially, that the Petitioner and the Respondent each hold 50% of the shares in the Company and each serve as one of the two directors in the Company. Controversially, it is averred that the Respondent's management shortcomings have caused a functional deadlock. Notably, no allegations of dishonesty are made. In effect, the central thrust of the complaints is that the Respondent has failed to play the role to be expected of him as a quasi-partner resulting in a

lack of appropriate management structures and systems which exposes the Company (and the Petitioner as a director) to potential liabilities. The key conclusory pleas in the Petition are the following:

*“12. The matters outlined above have resulted in an irretrievable breakdown in trust and confidence between the Petitioner and Mr Alaoui such that the Petitioner no longer has a desire to continue in a quasi-partnership with Mr Alaoui.*

*13. The Petitioner consequently seeks a just and equitable winding up order in respect of the Company on the following grounds:*

- (a) there exists a state of functional deadlock in the management of the Company; and*
- (b) the company is a quasi-partnership and there has been an irretrievable breakdown in trust and confidence between the Petitioner and Mr Alaoui as quasi-partners.*

*14. In the alternative to a winding up order, and on the grounds set out above, the Petitioner humbly requests that the Court exercises its jurisdiction to make the following orders pursuant to section 95(3) of the Companies Act:*

- (a) an order requiring Mr Alaoui to sell his 50% shareholding in the Company to the Petitioner; or alternatively,*
- (b) an order requiring Mr Alaoui to purchase the Petitioner's 50% shareholding in the Company.”*

### **The Petitioner’s evidence**

10. The Petitioner’s First Affidavit verified the Petition and explained the background to the pleaded current deadlock, said to be traceable back to 2019 and 2020. A broad complaint is that, in effect, the Petitioner has been doing all the heavy lifting while the Respondent has played a largely passive role. No reference was made to the Company’s Articles at the hearing, but on a superficial analysis there appears to be no contractual mechanism for breaking a deadlock at shareholder or Board level when there are only two shareholders and two directors.
11. Mr Robinson KC referred to one email exchange on 7 July 2024 which he contended demonstrated that the existence of a deadlock was not in dispute. The Respondent wrote to the Petitioner in the following terms:

*“When we created our company, as partners we agreed that main decisions will be taken in a collegial manner between two partners....*

*We have reached a deadlock situation when a partner is refusing to meet his partner (or even take his phone calls) to devote enough time to find solutions to the current situation.*

*It is urgent and imperative to ask for an Alif board meeting to expose in all transparency the current situation and to inform all the investors of the existing deadlock...”*

12. Within the hour, the Petitioner responded:

*“...Could you please understand that I am not interested or motivated or even looking to work with you anymore? It’s over!! We have totally different business cultures and ethics and we simply cannot agree on anything.*

*I have already started informing the board members of my decision!”*

13. Mr Levers, in straw-clutching fashion, attempted to characterise the Respondent’s positive assertion in his 7 July 2024 email that a deadlock existed at the Company level as merely an unfortunate choice of words. However, the combination of (1) that correspondence on 7 July 2024, (2) combative correspondence between Mourant, the Respondent and Maples (former attorneys for the Respondent) between 22 July 2024 (a letter before action from Mourant to the Respondent) and 6 August 2024 and (3) the presentation of the Petition on 30 August 2024 strongly suggests the following. In the context of a two-party company, the Court potentially ought to be able to summarily determine:

- (a) the existence a corporate deadlock; and/or
- (b) an irretrievable breakdown in trust and confidence between the two quasi-partners.

**Governing legal principles: deadlock and breakdown of trust and confidence between two quasi-partners**

14. As I have not been addressed on the law, the views I express are necessarily only provisional at the present stage. However, the general principles ought not to be capable of serious controversy. The leading authority on just and equitable winding-up of quasi-partnerships on the deadlock/irretrievable breakdown of trust and confidence grounds appears to be *Chu-v-Lau* [2020] UKPC 24. In that British Virgin Islands case, Lord Briggs (at paragraph 5) set out Justice Roger Kaye QC’s key findings (following a six-day trial), which were restored by the Privy Council:

*“I have no hesitation in finding that OSL (and thereby PBM) is in a completely hopeless state of irretrievable deadlock at board and shareholder level. Having seen and heard the two of them in the witness box and having regard to the evidence as a whole I can see absolutely no real prospect of Mr Lau and Mr Chu ever getting on together again in the future. They are hardly on speaking terms (save perhaps with a grimace). It is a true irretrievable breakdown. All trust and confidence between them has gone.”*

15. Four important legal principles were established by the Privy Council in that case. Firstly, that where there is a functional deadlock, that is a sufficient basis for a winding-up order in and of itself. Secondly, in a quasi-partnership, an irretrievable breakdown of trust and confidence may be

sufficient to justify a winding-up even if there is no functional deadlock. Lord Briggs opined as follows:

*“17. The important potential distinction between the two types of breakdown case is this. If there is a complete functional deadlock, then a winding-up may be ordered regardless whether the company is a corporate quasi-partnership. But if the company is of that type, then a breakdown of trust and confidence may justify a winding-up even where there may not be a complete functional deadlock. In the former case winding-up is a remedy for paralysis. In the latter it is the response of equity to a state of affairs between individuals who agreed to work together on the basis of mutual trust and confidence where that trust and confidence has completely gone. But of course both may exist together, and a complete breakdown in trust and confidence may well be the cause of functional deadlock, in a two party quasi-partnership like the present.”*

16. Thirdly, in a two-party quasi-partnership, a broad assessment is required into whether the partners can be expected to continue to work together. According to Lord Briggs:

*“25...What matters is the relationship between the quasi-partners, and the extent to which the necessary basis of trust and confidence has evaporated. For this purpose, no aspect of their business relationship is likely to be irrelevant...”*

17. In amplification of this point, at paragraph 39 (a) Lord Briggs found:

*“There is no rule that a just and equitable application for winding-up must be justified solely by reference to the position as at the date of the filing of the application.”*

18. Fourthly, an additional well-established principle was confirmed by the Privy Council:

*“64. Just and equitable winding-up is a statutory remedy, albeit of an essentially equitable nature. The clean hands doctrine finds appropriate expression in this context by the requirement, expressed in the Ebrahimi case, that the applicant should not have been the sole cause of the breakdown in trust and confidence or of the deadlock: see para 19 above. The Board sees no reason to disturb that well-known, long standing analysis from the highest authority...”*

19. In summary, the following legal principles do not appear likely to be capable of reasonable dispute as a matter of Cayman Islands law:

- (a) a functional deadlock and/or an irretrievable breakdown in trust and confidence are each freestanding winding-up grounds in the context of a quasi-partnership;
- (b) an adjudication of whether a breakdown of trust and confidence has occurred may consider both pre-petition and post-petition events; and

- (c) who is to blame for any breakdown or deadlock which is proved to have occurred is legally irrelevant, save in what I regard as the truly exceptional case where a respondent can establish that the petitioner was solely to blame.

**Issue 1: does the Petitioner need to establish the merits of his complaints about the Respondent's alleged creation of a deadlock so that a "full trial" is required?**

20. My strong provisional view is that proof of the validity of the complaints the Petitioner relies on to seek a just and equitable winding-up is not an essential requirement of establishing that either a functional deadlock exists or that the relationship of trust and confidence which is essential to the proper functioning of this particular quasi-partnership has irretrievably broken down. The Respondent admitted on 7 July 2024 that there was a deadlock sufficiently serious that the quasi-partners had a duty to notify the board of the Fund which the Company managed of the deadlock. He proposed a solution which the Petitioner contended was misconceived because he did not want to work with the Respondent any longer. Absent some contractual mandatory obligation to refer all disputes to arbitration or mediation, the portrait of breakdown presented by incontrovertible documentary evidence does not seem to require casting either protagonist as the villain of the piece.
21. In a very different just and equitable winding-up petition context, at the beginning of a trial scheduled for six weeks, I encouraged the petitioner not to pursue controversial allegations which were not essential to the petition's success. At the costs stage in *Re Principal Investing Fund et al*, FSD 268-270/2021 (IKJ), Judgement dated 28 July 2023 (unreported), I observed:

*"52. The first category of 'claims' are the two which were set out in paragraph 10 (b) and (d) of the Petitions, the contention that the investment vehicles had been set up from the outset with a view to defrauding the Petitioner and the quasi-partnership point. It is unarguably clear that these were not analogous to separate claims or causes of action but were simply discrete allegations which were relied upon in support of the overall plea that it was just and equitable that the Funds be wound-up. As the Petitioner's counsel submitted, these pleas were deleted as a result of encouragement I gave to narrow the issues to minimize the disruption caused by the need to deal with confidentiality and privilege concerns, encouragement alluded to in paragraph 5 of my 16 April 2023 Ruling on the Petitioner's Confidentiality Summons.*

*53. The abandonment of these allegations or specific complaints did not in any way signify that they lacked merit. My encouragement to the Petitioner to concentrate its attack on grounds which focussed on less egregious forms of lack of probity was not based on any assessment that these claims were of dubious merit. I merely signified that it seemed likely that if the Court was able to accept that grounds for winding-up were made out which did not require findings of deliberate misconduct, the need to make findings of a more serious nature might not arise..."*



22. In that case, winding-up orders were ultimately made on an unopposed basis. In the present case, which is far simpler, I am inclined to encourage the Petitioner to narrow the issues at the initial directions stage by applying for leave to amend the Petition by adding a plea along the following lines:

“12A. Further and/or alternatively, the failure of the Petitioner and Mr Alaoui to resolve their differences concerning the management of the Company has resulted in a deadlock and/or an irretrievable breakdown of trust and confidence between them.”

23. I consider it would be overly active case management for me to amend the Petition of the Court’s own motion under GCR Order 20 rule 8 at this stage, without having foreshadowed this point in any way with counsel. However, my provisional view is that such a plea would be sustainable and would potentially support a finding that the Company was liable to be wound-up without any formal adjudication of the merits of the presently pleaded management deficiency allegations made by the Petitioner against the Respondent. Attention would focus on whether or not, in all the circumstances, an irretrievable break down in trust and confidence has occurred.

24. In these circumstances, I accordingly am satisfied (subject to the qualification explained below) that there is no sensible basis for a two-staged approach to deciding whether or not the Company is liable to be wound-up and, if so, what value a buyout should be based on. A “full trial” of the merits of the winding-up grounds presently pleaded is not required based on my provisional findings as to the applicable law. Although it appeared to be common ground that the Respondent should be permitted to file a Defence, and I grant leave for a Defence to be filed within the period proposed by the Petitioner, bare denials will in my judgment suffice.

25. This finding is subject to the following qualification. Either party may apply by letter within 21 days of the date of delivery of the present Ruling, for a direction that a full trial on the merits of the Petitioner’s complaints is indeed legally required because:

- (a) a deadlock does not constitute a sufficient legal basis for a just and equitable winding-up; and/or
- (b) an irretrievable breakdown of trust and confidence in a two-party quasi-partnership can only legally be made out by proving the merits of allegations of misconduct; since proof of an irretrievable breakdown absent fault is insufficient.

**Issue 2: should there be a stay?**

26. I summarily reject the Respondent's application for pre-trial directions to be stayed for 4 weeks to allow the parties to explore a settlement on the value of the shares. Absent agreement, there is no credible basis for believing that anything meaningful is likely to be achieved through such a standstill in all the circumstances of the present case.

**Issue 3: should directions be given for the Respondent reserving the right to apply to strike-out the Petition?**

27. As I indicated, in the course of argument, the Respondent has general liberty to apply to strike-out at any stage although it is well settled that such applications must be made at the earliest possible stage. I decline to make any directions in this regard.
28. Mr Levers suggested the basis for the strike-out would be that the Petition has been presented for a collateral purpose. My present view is that the Court will not likely be recording any findings on the merits of the Petitioner's complaints, in effect because it will be found that an irretrievable breakdown has occurred regardless of who is primarily to blame. In circumstances where it is all but formally agreed that a deadlock exists and the parties should be exploring a buyout solution, it is unclear what such an application (assuming a collateral purpose was established) would achieve other than establishing that an irretrievable breakdown in trust and confidence has occurred by reason of the Petitioner's misconduct instead of the Respondent's.

**Issue 4: directions for factual and expert evidence**

29. I accept the Respondent's submission that composite directions should be given at this stage in relation to both factual and expert valuation evidence. As regards the timetable for filing factual evidence, the competing positions were:
- (a) Petitioner: 2 weeks; and
  - (b) Respondent: 4 weeks.
30. I direct that the Respondent shall file its evidence in response to the Petition within 21 days of the date of delivery of this Ruling. The Petitioner's reply evidence, if any, shall be filed within 14 days thereafter.

31. As I indicated during the hearing, I reject the Petitioner's contention that the Court should give specific directions as to how the experts should approach their task. On reflection, it is easy to see why the Petitioner would be somewhat diffident about grappling with valuation now. If he is buying, his commercial interests favour a low price. From open correspondence, it appears that the Petitioner's opening offer envisages he would be the buyer. A joint expert would potentially facilitate a just result, whoever the buyer or seller may be. On reflection, this would also have the effect of depriving the parties of the ability to engage in a more adversarial horse-trading style negotiating process. However, an expert could be instructed to opine as to an appropriate range of values rather than a single figure.
32. Absent agreement, I am aware of no precedent for a Court compelling commercial litigants to appoint a joint expert. The Respondent proposed the following directions which I approve (subject to any modifications which may be agreed in light of matters which may only become apparent after the parties have had a chance to consider the present Ruling):
- (a) no later than 5 weeks after responsive factual evidence is served, expert reports should be served; and
  - (b) supplementary reports (if any) should be served two weeks thereafter.

**Issue 5: should there be discovery?**

33. As regards discovery, I reject the Respondent's application for general discovery on proportionality grounds. In this quasi-partnership context, as Mr Robinson KC rightly submitted, there is no basis for assuming that either party has materially relevant documents of which the other is unaware. I direct instead that each party shall disclose the documents on which they rely within 21 days of the time fixed for the Petitioner to file his reply evidence. As I indicated during the hearing, applications for specific discovery may still be made, if required.

**Issue 6: should the Petition be removed from the public register?**

34. Mr Levers submitted that publication of the Petition had a "*potentially significant prejudicial effect on the Company which is a corporate investment Manager of a profitable CIMA regulated investment fund*" (Respondent's Skeleton Argument, paragraph 21). Accordingly, the Petitioner ought to have taken steps to prevent the Petition being placed on the public register, or the Court should direct its removal from the file applying the jurisdiction exercised by Creswell J in *Re X Limited* 2012 (1) CILR 407.

35. Mr Robinson KC clearly demonstrated that it was not incumbent on the Petitioner to ensure that the Petition was not placed on the public register in the circumstances of this case. The Petitioner applied his mind to the importance of preserving confidentiality and applied to have his Affidavits sealed. CWR Order 3 provides materially as follows:

***“Presentation and Service of a Contributory’s Petition (O. 3, r. 11)***

*11. (1) Upon the presentation of a contributory’s petition, the petitioner must at the same time issue a summons for directions in respect of the matters contained in Rule 12.*

*(2) Prior to presenting a contributory’s petition and issuing the summons for directions in respect of it, the petitioner’s attorney must apply in writing (by letter or e-mail) to the Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.*

*(3) Every contributory’s petition and the summons for directions relating to it shall be served immediately after having been presented/issued upon –*

*(a) the company, by delivering it to the company’s registered office; and*

*(b) every member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without the leave of the Court.*

***Summons for Directions (O. 3, r. 12)***

*12. (1) Upon hearing the summons for directions, the Court shall give such directions as it thinks appropriate in respect of the followings matters –*

*(a) whether or not the company is properly able to participate in the proceeding or should be treated merely as the subject-matter of the proceeding;*

*(b) whether the proceeding should be treated as a proceeding against the company or as an inter partes proceeding between one or more members of the company as petitioners and the other member or members of the company as respondents;*

*(c) service of the petition upon persons other than the company (as may be appropriate having regard to the directions give under paragraphs (a) and (b) of this Rule);*

*(c) whether, and if so by what means, the petition is to be advertised...”*

36. CWR Order 3 rules 11-12 do not contemplate a decision being made about placing the petition on the file at all. CWR Order 24 rule 4, however, provides as follows:

*“(1) A Court file shall be established in respect of each winding up proceeding in accordance with GCR Order 63, rule 2.”*

37. GCR Order 63 provides, so far as is material:

*“2 (1) The Clerk of the Court shall create a Court file in respect of every proceeding immediately prior to sealing the originating process by which such proceeding is commenced. For the purpose of rules 2 and 3 of this Order an ‘originating process’ includes an application pursuant to Order 53, rule 3...*

*3...(4) The Court may order that the Court file relating to any proceeding or any specific document therein be closed and not open to inspection by any party or other person except with the prior leave of the Court...”*

38. It is accordingly possible for a petitioner presenting a contributory’s petition to apply at the outset for an order sealing the file or, alternatively, directing that the petition as filed should not be placed on the public file, and that an anonymised version of the petition should be entered in the register instead.
39. Practice Direction No: 4 of 2017 (Filing of Winding Up Petitions) (the “PD”) expressly addresses the issue of when winding-up petitions should be placed on the public file, which it refers to as the “Register”. Paragraph 1 of the PD provides:

***“Creditor's Petition***

- (a) In keeping with CWR Rule 5, prior to presenting a creditor's petition, the petitioner's attorney must apply in writing (by letter or email) to the FSD Registrar to have the proceeding assigned to a Judge and to fix a hearing date.*
- (b) A creditor's petition shall not be filed or entered upon the Register of Writs and Actions (the ‘Register’) unless and until the proceeding has been assigned to a Judge and a hearing date has been fixed and endorsed on the petition or stated in a notice of hearing filed simultaneously with the petition.*
- (c) Where the Judge has made an order restricting the filing or otherwise the publication of the petition, the petition may not be entered on the Register other than in keeping with the terms of the order or subsequent order.”*

40. The PD implies that either the petitioner may apply for an order, or the assigned Judge may make of an order of the Court’s own motion, restricting the placing of the creditor’s petition on the public file.

41. Paragraph 2 of the PD provides as follows:

***“Contributory's Petition***

- (a) Upon presentation of a contributory's petition, the petitioner must at the same time issue a summons for directions in respect of the matters contained in CWR Rule 12, which will include directions as to whether or not the petition is to be advertised.*
- (b) Prior to presenting a contributory's petition and issuing the summons for directions in respect of it, the petitioner's attorney must apply in writing (by letter or by email) to the FSD Registrar to have the proceeding assigned to a Judge and to fix a date for hearing the summons for directions.*
- (c) Unless and until the Judge has fixed a date for hearing the summons for directions or otherwise directs, the petition shall not be entered upon the Register.”*

42. As Mr Robinson KC pointed out, a different approach applies to creditor's petitions and contributory's petitions. However, contrary to the initial impression I formed at the hearing, it is a distinction without a difference. The PD also implies in the case of a contributory's petition that either the petitioner may apply for an order, or the assigned Judge may make an order of the Court's own motion, restricting the placing of the petition on the public file. Merely the administrative stage at which this occurs is different; prior to listing the petition in the first instance, and prior to listing the summons for directions in the second instance.

43. However, there is nothing in the scheme of either this Court's rules or the PD which suggests that the default position should be secrecy, and that until a Summons for Directions in relation to a contributory's petition is actually heard, the Judge should in every case direct that the Petition should not be entered on the Register or public file. It would neutralise the open justice principle altogether were this to be the correct legal and practical position. The position is in this respect surely the same as regards a creditor's petition as well. There are two reasons why this must be so.

44. Firstly, and most importantly, the open justice principle has constitutional as well as common law foundations. As Mr Robinson KC aptly observed in the course of argument, the direction of travel in the Cayman Islands has been towards enhancing rather than diminishing transparency. Judicial notice can be taken of that fact. However, it is also helpful to remind oneself of what those principles are and how they operate in practice. In arguably the leading local authority on open justice, *In re Sphinx Group* 2017 (1) CILR 178, Smellie CJ (as he then was) opined as follows:

*“It is recognized, however, that the principle of open justice is not unlimited. Rather, open justice forms part of the overriding principle that justice must be done. As such, at common law, the general rule as to publicity must yield to this overriding principle and limitations can be placed upon the access to information by the public.*

12 *But these limitations are not left to the individual discretion of the judge based simply on what is convenient or desirable in the circumstances. Limitations can only be placed on the principle where the interests of justice so require. The court is therefore required to balance the general rule as to publicity against any requirements for confidentiality or privacy in the interests of justice that may arise in a particular case...*

45. Ramsay-Hale J (as she then was) applied *In re Sphinx Group* in refusing an Order 24 rule 6 sealing application in *In the Matter of Virginia Solution SPC Ltd*, FSD 5/2020 (MRHJ), Judgment dated 23 August 2022 (unreported) (at paragraph 52). The sealing application was firmly rejected, on the grounds that “*the interests of justice do not require a sealing order to be made in the present case*” (at paragraph 54). The same broad approach was followed less than a year later in *Re Silicon Valley (Cayman Islands Branch)*, FSD No. 163 of 2023 (DDJ), Judgment dated 29 June 2023 (unreported). Doyle J, after a fulsome *ex tempore* recitation on open justice principles, pivotally held:

“44.... *There is no necessity which would permit an exception to the fundamental principle of open justice. The court is dealing with a winding up petition. It deals with winding up petitions in open court. The identity of petitioners in winding up petitions should be publicly known. For these reasons I dismiss the application for the sealing order.*”

46. These overarching open justice principles in the winding-up context apply in two main spheres. Most commonly, because the rules expressly provide for this and because confidential information will typically be contained in affidavits rather than in petitions, the Court is required to consider whether the file or documents on it should be sealed. CWR Order 24 rule 6 provides:

“(1) *The Court may direct that the whole or part of any report, order, affidavit or other document, except the petition, winding up order or supervision order, which has been filed or is required to be filed pursuant to these Rules, shall be sealed and kept confidential for a specific period or until the happening of a specified event, on the grounds that —*

(a) *the information in question is of a confidential nature and will not come into the public domain unless and until the document containing such information is filed in Court; and*

(b) *the publication or immediate publication of the information contained in the document will harm the economic interests of the creditors or contributories of the company...*  
[Emphasis added]

47. The Rules explicitly exempt the petition from the scope of a sealing order, so the only way a petition can be shielded from the glare of publicity is if it is not placed (in non-anonymised form at least) on the public file, pursuant to an express judicial order to that effect. This was the jurisdiction Mr Levers contended ought to have been exercised in this case. Indeed, he was unable to point to any decided case in which this Court had made an anonymity order at the outset of a winding-up case.

My own researches reveal only exceptional instances where this Court has restrained publication of the fact that a winding-up petition has been filed, falling into two categories of case:

- (a) cases where publication of the fact that a petition has been filed would risk defeating urgent interim relief the petitioner seeks; and
- (b) cases where the respondent obtains an order restraining publication of the fact that a petition has been filed on the grounds that presentation of the petition was an abuse of the process of the Court so that it is liable to be struck-out.

48. As for the first category of case, I granted a Confidentiality Order in aid of an application made without notice to appoint joint provisional liquidators in *Re Atom Holdings*, FSD 54/2023 (IKJ), Judgment dated 18 May 2023 (unreported). In providing reasons for appointing provisional liquidators, I noted in passing (at paragraph 1):

*“...A separate Confidentiality Order was sought based on the need to enable immediate asset and record conservation steps to be taken in relation to the Company’s management, the management of which was said to have, effectively, left the corporate ship adrift....”*

49. The Respondent’s counsel relied on *In re X Limited* 2012 (1) CILR 407 in support of his client’s application to remove the Petition from the public file. But this case indirectly illustrates the unsurprising proposition that a petition which ought not to have been presented ought to be placed on, or remain on, the public file. In a passage upon which Mr Robinson KC relied in opposing the removal application, Cresswell J ordered the removal of the petition from the file for the following main reasons:

*“15 The circumstances of the present case are somewhat different. It is true that in the present case the petition is already in the public domain on the Internet. But in circumstances where the petitioners lacked any standing to issue the petition in the first place and where, following the dismissal by consent, the email of early 2012 asking for an irrevocable undertaking that the petitioners, their servants, agents or employees would not advertise or otherwise publicise the petition was simply ignored, it is in my opinion appropriate to make the first order sought...”*

50. Since the hearing of the Summons for Directions in this case, a more recent and direct illustration of the jurisdiction to direct a petition not to be placed on the public file on the basis that presentation or prosecution of the petition should be restrained has been published. In *X-v-Y*, FSD 375 / 2023 (IKJ), Judgment dated 1 February 2024<sup>2</sup>, an *ex parte* order had been granted some six weeks earlier in the following terms:

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<sup>2</sup> Released for publication on 27 September 2024.



“1. The Defendant, Y, be restrained from taking any steps in further prosecution of the Petition which the Defendant is understood to have filed in respect of the Plaintiff company (the ‘Petition’).

2. The Petition shall not be placed on the Court’s public register until further Order of this Court.”

51. The injunction was sought on the grounds that the plaintiff was entitled to a mandatory stay in favour of pending arbitration proceedings, alternatively the debt was *bona fide* disputed on substantial grounds. Following an *inter partes* hearing, paragraph 1 was discharged. However, paragraph 2 was continued “until further Order of this Court made in [the] Winding-Up Proceedings”. This was because:

“11. ...On balance, I accept there is a sufficient risk of damage to the Plaintiff from publication of the Petition to continue the restraint on publication I imposed on 14 December 2023, leaving the matter to be reviewed afresh by the assigned Judge in the Winding-Up Proceedings.”

52. The latter case also illustrates the second reason why it is misconceived to suggest that either a petitioner or the assigned Judge ought, as a matter of standard practice, to ensure that a contributory’s petition is not placed on the public file until after the hearing of the summons for directions. Where a respondent considers that the very presentation of a petition is an abuse of process, it will usually be possible for a respondent acting with reasonable diligence to seek an undertaking from the petitioner or to apply to this Court for appropriate injunctive relief. Save where a petitioner is seeking *ex parte* relief which would be defeated by giving notice to the respondent, the company or shareholder respondent will almost invariably be given advance notice that a petition is likely to be presented. What transpired in the present case was the following:

- (a) on 22 July 2024 Mourant wrote to the Respondent warning that a just and equitable winding-up petition would be presented if the Petitioner’s buy or sell offer was not accepted within four days;
- (b) on 25 July 2024, Maples complained that the response time was too short and that presentation of a petition in these circumstances “*would be improper*”. Mourant on the same date agreed to wait for a further 10 days;
- (c) on 4 August 2024, Maples indicated that the respondent would need at least 45 days from the date of the Fund’s Board meeting to respond to the Petitioner’s proposal;
- (d) on 6 August 2024, Mourant notified Maples that the Petitioner intended to present a winding-up petition on grounds that had been canvassed in earlier correspondence;

(e) the Petition dated 30 August 2024 was presented on or about 2 September 2024, over three weeks later, because Maples were seemingly given notice of the Petition on that date. The Respondent personally was notified by email on 9 September 2024.

53. No suggestion that the presentation of a petition would be an abuse of process which ought to be restrained was raised between the 22 July 2024 letter before action and the 2 September 2024 presentation of the Petition, which was sealed the following day. It appears that the changing of the Respondent's legal guard effectively occurred on 11 September 2024 when Ogier were instructed. They entered the 'race' with Usain Bolt-like speed. The following day, Ogier's first letter complained, *inter alia*, that the Petition had "quite wrongly" been publicised. By the hearing of the Summons for Directions, the Respondent's recently instructed new attorneys were not able to articulate a coherent abuse of process case for striking out.
54. Against the above legal and factual background, the application which was made through submissions for the Petition to be removed from the file was very weak indeed. The pivotal submissions were the following:

*"25...there appear to have been no attempts made by the Petitioner to seal the Petition itself or keep it off the public register of originating processes pending the Court's determination of the Summons.*

*26 In failing to make reference to the need to similarly keep the petition from the public file (at least until the hearing of the summons for directions) the Petitioner has abrogated judicial discretion to consider the matter and subjected the Company's business to the potential negative consequences of the purported dispute being made public.*

*27 It is unclear why the Petitioner failed to take steps to keep this dispute private, particularly given that he recognised the need to seal the affidavit verifying its details. Publicity is consistent with the Petitioner's approach of bringing the letter before action to the attention of third parties and causes substantial pressure upon the Respondent. No justification has been provided by the Petitioner as to why the letter before action, containing allegations similar to the Petition, was provided to the board of the Fund.*

*28 In the interim, although the Genie appears to be out of the bottle, the Respondent seeks to prevent any ongoing issues and seeks as part of the directions order, an order that the Petition removed from the public register until further order. In Ogier's second letter confirmation was sought that the Petition would not be further publicised. No response has been received to that request as at the time of this argument but it is not anticipated that the Petitioner would oppose the request given or this application, which is within the Court's jurisdiction (see *In the matter of X Limited [2012 (1) CILR 407]* (copy enclosed)). Should the Court require further evidence of the prejudice caused by the Petition this can be provided on an urgent basis but it is submitted if that is required, then a temporary order may be made, hopefully by the consent of the parties."*

55. I find that there is no presently discernible legal basis for the Petitioner to seek an Order directing that the Petition not be placed on the public file in circumstances where the Respondent himself

had never suggested that this should happen. Before Ogier were instructed, the parties had already agreed that the Fund's Board should be informed of the dispute. There was no inconsistency between sealing the Petitioner's Affirmations and not seeking to keep the Petition private. *In re X Limited* admittedly supports the principle that if the Court has already determined that a petition was improperly presented, it can be removed from the file. The Respondent's application where no abuse of process argument has yet been positively asserted is, on this basis, clearly premature. The presumption in favour of open justice cannot be displaced on a whim.

### The Validation Order

56. The only dispute turned on whether the Validation Order should include the following words:

*"...except for the payment of any dividends, salaries or personal loans to the directors, Mohammed Idriss Ghodbane and Moulay Omar El Alaoui El Abdallaoui"*.

57. Such a provision would most clearly be relevant in relation to a just and equitable petition which raises serious allegations of misconduct and a realistic prospect of proceedings being brought against the directors for e.g. breach of fiduciary duty, or misappropriation of company assets. The fact that the Respondent suggests that such a carve-out is not required implicitly acknowledges, in my judgment, that the Petitioner's complaints do not rise to this level of seriousness.

58. The principled objection Mr Levers advanced was that all payments in the ordinary course of business ought to be made. However, Mr Robinson KC justified the carve-out by reference to the fact that what was really embraced was distributions of profits in relation to a company with low liquidity levels. Both submissions were partially valid.

59. In my judgment, there is a distinction to be made between the payment of standard director's fees earned by reference to attending meetings, for instance, and loans and distributions. I would modify the carve-out wording to read substantially as follows:

*"except for the payment of any dividends <sup>^^^</sup> or personal loans to <sup>^^^</sup> Mohammed Idriss Ghodbane and Moulay Omar El Alaoui El Abdallaoui in their capacity as directors and/or shareholders."*

**Summary**

60. In summary, I resolve the disputed issues reserved at the conclusion of the hearing of the Summons for Directions as follows:

- (a) my provisional finding is that a full adjudication of the merits of the Petitioner's complaint is not in law required. Any controversy can hopefully be resolved on the papers as a preliminary issue in early course;
- (b) the Respondent's stay application is refused;
- (c) no directions are given in relation to any strike-out application the Respondent may wish to make;
- (d) leave to adduce expert value evidence, essentially on the terms proposed by the Respondent, is granted;
- (e) each party should produce the documents upon which he proposes to rely. No general discovery is required;
- (f) the Respondent's application to remove the Petition from the public file is refused; and
- (g) the carve-out wording for the Validation Order proposed by the Petitioner is approved, save for permitting director's fees to be paid in the usual course of business.

61. I will hear counsel on any matters arising from the present Ruling, the terms of the Order and costs. The usual Order would be costs in the Petition, and I see no obvious reason to depart from that.



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**THE HONOURABLE JUSTICE IAN RC KAWALEY**  
**JUDGE OF THE GRAND COURT**