IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 278 OF 2021 (DDJ)

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION) AND IN THE MATTER OF THE COMPANIES ACT (2021 REVISION) AND THE PARTNERSHIP ACT (2013 REVISION)
IN THE MATTER OF NEW SILK ROUTE ADVISORS, L.P.

Appearances:	Ewan McQuater QC, Peter Hayden and Ella van der Schans of Mourant Ozannes for limited partners Saxena Holdings LLC and Tagusi Holdings LLC Ben Valentin QC, Harry Shaw and Guy Cowan of Campbells LLP for Gupta Associates LLC, the Petitioner Quentin Cregan and Justin Naidu of Maples and Calder (Cayman) LLP for New Silk Route Advisors, L.P. by its general partner New Silk Route Partners Ltd
Before:	The Hon. Justice David Doyle
Heard:	25 January 2022
Draft Judgment circulated:	7 February 2022
Date Judgment delivered:	10 February 2022

HEADNOTE

Dismissal of application to strike out winding up petition based on exclusion from management and loss of substratum grounds and application for a general stay on ground of abuse of process due to parallel proceedings in New York – imposition of temporary case management stay pending determination of issues in foreign proceedings

JUDGMENT

Introduction

1. On 25 January 2022, I heard submissions in respect of an application to strike out or stay a winding up petition. I reserved judgment. I now deliver my judgment.

2. In this case Gupta Associates LLC (the "Petitioner"), a limited liability company incorporated under the laws of Delaware, is a limited partner holding a 50% interest in New Silk Route Advisors, L.P. (the "Partnership" or "NSRA"). The members of the Petitioner are Anita Gupta as to approximately 70% and the Banyan Family Trust as to approximately 30%. Rajat Gupta ("Mr Gupta") is neither a member of the Petitioner nor a trustee or beneficiary of the Banyan Family Trust.

3. The Partnership is a Cayman Islands exempted limited partnership created on 3 January 2008 and is governed by its Third Amended and Restated Exempted Limited Partnership Agreement dated 30 December 2010 (the "LPA").

4. The Petitioner seeks a winding up order in respect of the Partnership on just and equitable grounds.

5. The general partner of the Partnership is New Silk Route Partners Ltd a Cayman Islands exempted company (the "GP"). The GP's shareholders are stated to be as follows holding the specified percentages of the issued share capital:

   (1) Mr Parag Saxena ("Mr Saxena") 43.5%;

   (2) NSR-H Associates, LLC ("NSR-H") 43.5% (stated to have acquired such interest formally held by Mr Gupta personally);

(3) Mr Mark Schwartz 5%;

(4) Dr Abdul Hafeez Shaikh 4%; and

(5) Mr Victor Menezes 4%.

6. The limited partners of the Partnership were previously Mr Gupta and Mr Saxena personally as to 50% each. On 31 December 2010 the former limited partners assigned their interests to related entities. Since that time the limited partners have been:

(1) the Petitioner 50%;

(2) Saxena Holdings LLC 30% controlled by Mr Saxena; and

(3) Tagusi Holdings LLC 20% controlled by Mr Saxena.

7. Saxena Holdings LLC and Tagusi Holdings LLC applied for orders striking out certain parts of the petition and also a stay of the proceedings.

Summary

8. In this judgment I have declined to strike out the petition on the grounds advanced. I have also declined to grant a general stay of the proceedings on the ground of an abuse of the process of the court. I have however decided to impose a temporary case management stay. I have decided, for reasons which follow, that the future progress of these proceedings in the Cayman Islands should await the determination of issues in proceedings in the United States of America which were commenced in 2020 (a year before the petition in this case was filed).

Appearances

9. Ewan McQuater QC, Peter Hayden and Ella van der Schans of Mourant Ozannes appeared for Saxena Holdings LLC and Tagusi Holdings LLC.

10. Ben Valentin QC, Harry Shaw and Guy Cowan of Campbells LLP appeared for the Petitioner.

11. Quentin Cregan and Justin Naidu of Maples and Calder (Cayman) LLP appeared for New Silk Route Advisors, L.P. by its general partner New Silk Route Partners Ltd.

12. Mr Cregan part way through the hearing on 25 January 2021 produced concise written submissions dated 19 January 2022 which adopted and relied upon the submissions of Saxena Holdings LLC and Tagusi Holdings LLC. The GP on behalf of the Partnership submitted that it was appropriate that the petition be struck out, dismissed, or stayed "for the reasons advanced on behalf of the Saxena/Tagusi parties". A copy of these written submissions had not been provided to me prior to the hearing. To reduce the risk of this situation arising again in the future I remind litigants and attorneys that section B1.4(e) of the Financial Services Division Guide provides that skeleton arguments "must be delivered to the Personal Assistant to the assigned Judge at the same time as the hearing and authorities bundle(s), together with an agreed chronology and dramatis personae, unless one or other or both are clearly unnecessary."

The Petition

13. In the petition it is stated that the Partnership is part of the New Silk Route Group (the "NSR Group"). The Partnership is a registered investment advisor with the United States Securities and Exchange Commission (the "SEC") and provides advisory services to funds within the NSR Group and is also responsible for the regulatory compliance for all NSR Group funds.

14. The 51 page winding up petition dated 23 September 2021 also pleads details of the current state of the Partnership. The Petitioner refers to the hostilities between the limited partners over the last decade and makes detailed reference to a series of lawsuits being issued in the United States of America concerning:

    (1) the attempted removal of Aaron Deuser as a director of the GP by Mr Saxena;

    (2) alleged misfeasance, self-dealing and misappropriation of the Partnership's assets by Mr Saxena; and

    (3) counterclaims against Mr Gupta alleging fraud and dishonesty in connection with an agreement between the parties in 2012.

15. It is stated that there is a breakdown in the relationship between the Petitioner and NSR-H (the "Gupta Parties") and Mr Saxena, Saxena Holdings LLC and Tagusi Holdings LLC (the "Saxena Parties").

16. It is pleaded at paragraph 12 of the petition that it is just and equitable for the Partnership to be wound up and/or dissolved on the grounds that:

(1) there has been a complete and irremediable breakdown in trust and confidence between the Gupta parties and Saxena Parties as limited partners such that it is impossible for each of the limited partners to place any confidence in the other; (the "loss of trust and confidence ground");

(2) the Partnership has lost its substratum as a consequence of the funds to which the Partnership provides management services now being in dissolution pursuant to the terms of their respective LPAs, such that the Partnership can no longer carry on business as an investment manager as intended (the "loss of substratum ground");

(3) the Petitioner has now been completely and unjustifiably excluded from the management of the Partnership contrary to its legitimate expectation that it would continue to fully participate in the management of the Partnership through its nominee on the Board of the GP (the "exclusion from management ground"); and

(4) there are various allegations which have been raised against Saxena and the GP suggesting a lack of probity (including from the NSR Group's former Chief Financial Officer/Chief Compliance Officer and Mr Deuser) which warrant investigation by independent liquidators (the "independent investigation ground").

17. The Petitioner pleads in respect of the formation of the NSR Group in 2006 which was stated to have been founded in 2006 by Mr Gupta and Mr Saxena. The Petitioner refers to the early years of the NSR Group. There is an allegation that Mr Saxena caused the Partnership to be deprived of management fees of approximately US$5 million.

18. There is reference to the SEC filing charges against Mr Gupta for insider trading in late 2010. It is stated that Mr Gupta and Mr Saxena agreed that it would be in the best interests of the NSR

Group for Mr Gupta to resign as a director of the GP and to divest the entirety of his economic interest in the NSR Group to his family members. Mr Gupta resigned as a director of the GP in 2012 and transferred the economic interests to his family thereafter.

19. Crucial to the dispute between Mr Gupta and Mr Saxena is an agreement entered into on Valentine's Day 14 February 2012 between Mr Gupta, NSR-H and Mr Saxena (the "Voting Agreement") which "shall be construed and enforced in accordance with the laws of the State of New York" (paragraph 3.1 of the Voting Agreement under the heading "Governing Law"). It also has at paragraph 3.5 an "Entire Agreement" clause.

20. The Petitioner places great reliance on the Voting Agreement in these proceedings. It is plainly a core part of its case.

21. The Petitioner refers to:

(1) the period from 2012 onward under the heading "The removal of Gupta's nominated directors, and the beginning of the breakdown of trust and confidence";

(2) "2014 – 2015: Tensions worsen as Mr Deuser is immediately marginalized";

(3) "2016: Further disputes and attempted settlements";

(4) "2016: Hostilities worsen as Mr Saxena refuses to accept oversight";

(5) "The Welland Transaction" (some 5 pages);

(6) "2017: The Funds' terms are extended";

(7) "2019: The Rishi Gupta Complaint";

(8) "2019: Mr Saxena continues to avoid oversight and to exclude Mr Deuser from management";

(9) "2019: Expiry of the Funds";

(10) "2020: The ultra vires capital call";

(11) "2020: The New York Complaint and Mr Saxena's counterclaims" (some 4 pages) and at paragraph 85 it is pleaded that: "The allegations, assertions and facts contained within the New York Complaint are hereby expressly adopted by the Petitioner and incorporated herein". At paragraph 86 of the petition it is indicated that Mr Saxena is

defending the New York Complaint and has made counterclaims in relation to the Voting Agreement and the Petitioner's receipt of a US$1.35 million settlement. At paragraph 90 of the petition there is reference to Mr Saxena's New York attorneys notifying the New York Supreme Court, Westchester County on 19 March 2021 that Mr Saxena had begun the process of removing Mr Deuser from the NSR Partners board, pursuant to the terms of the Voting Agreement. At paragraph 91 of the petition there is reference to the Petitioner's New York attorneys writing to the New York Supreme Court in respect of the Voting Agreement. The Petitioner at paragraph 93 in effect says that it is plain from the New York proceedings that there is no trust and confidence between the Saxena Parties and the Gupta Parties;

(12) "2021: Further attempts by Mr Saxena to extend the terms of the Funds notwithstanding their liquidation";

(13) "2021: The removal of Mr Deuser from the board of the GP" again with considerable reliance being placed on the Voting Agreement by the Petitioner. At paragraph 100 the Petitioner pleads that since the Partnership was established it "has had a legitimate expectation that it would continue to participate fully in the management of the Partnership through its nominee on the board of the GP. Mr Deuser's removal as director, and the inability of the Petitioner to re-appoint him or otherwise appoint a replacement, has meant that the Petitioner has now been completely and unjustifiably excluded from the management of the Partnership."

22. Over the last 11 pages of its petition the Petitioner provides a summary and conclusion to its petition. The summary is under the following heads:

(1) breakdown in relationship and loss of trust and confidence (paragraph 113 – 114);

(2) unjustifiable exclusion from management (paragraph 115);

(3) loss of substratum (paragraphs 116 – 118);

(4) oppression (paragraphs 119 – 126); and

(5) the need for an investigation (paragraphs 127 – 129).

23. In its conclusion (paragraph 130) the Petitioner provides a summary of why it contends that it is just and equitable for the Partnership to be wound up and focuses on the following grounds:

(1) there has been a complete and irreversible cessation of trust and confidence and an irreconcilable breakdown in the relationship between the limited partners;

(2) the Partnership has lost its substratum;

(3) the Saxena Parties act as though they are entitled to conduct the Partnership's affairs as they wish with no regard to the views of the Petitioner;

(4) there has been misuse of the Partnership's funds which is oppressive;

(5) the failure to provide information is oppressive, unjust and unlawful;

(6) the actions of the GP and Mr Saxena need independent investigation and the Partnership's assets need to be safe-guarded;

(7) the attempt by Mr Saxena to remove Mr Deuser from the board is motivated by a desire on the part of Mr Saxena and the Saxena Parties to seize control of the Partnership improperly and is oppressive to the Petitioner;

(8) following the removal of Mr Deuser as a director (a) the Petitioner has completely and unjustifiably been excluded from involvement in the Partnership business contrary to the Petitioner's legitimate expectations; and (b) the Partnership's management is either unable to operate or "The Partnership would be continuing in circumstances to which the Petitioner can reasonably say it did not and could not agree"; and

(9) only independent liquidators will be able to achieve an orderly wind-down of the Partnership's affairs and a fair and lawful distribution.

24. The Petitioner at paragraph 14 of the petition describes Mr Gupta as having been "a board member of various high-profile corporations, including Goldman Sachs, American Airlines and

Proctor & Gamble. He was also a top advisor to the Bill and Melinda Gates Foundation and other non-profits, served as Chairman of the Board of the Harvard Business School, was a member of the Foundation Board for the World Economic Forum, and co-founded the Indian School of Business."

Mr Gupta's conviction, sentence and the prohibition from engaging in management

25. The United States District Court, Southern District of New York in a judgment dated 24 October 2012 in a criminal case determined that Mr Gupta had been found guilty by jury of counts 1, 3, 4 and 5 after not guilty pleas. Mr Gupta was found not guilty on counts 2 and 6. Count 1 was described as conspiracy to commit securities fraud and counts 3, 4 and 5 as securities fraud and it was noted that the offences 3, 4 and 5 ended in 2008 and offence 1 ended in January 2009.

26. Mr Gupta was committed to the custody of the United States Bureau of Prisons to be imprisoned for a total of 24 months to run concurrent on counts 1, 3, 4 and 5. It was ordered that Mr Gupta surrender for service of sentence before 2pm on 8 January 2013 and upon release from imprisonment be under supervised release for a period of one year. A fine of US$5,000,000.00 was also imposed to be paid at the rate of 15% of Mr Gupta's gross monthly income beginning with the second month of supervised release.

27. Judge Jed S. Rakoff in the United States District Court Southern District of New York by order dated 17 July 2013 in proceedings between the Securities and Exchange Commission v Rajat K Gupta and Raj Rajarathan stated that:

> "The Court hereby grants the SEC's motion for summary judgment, and imposes a civil penalty of $13,924,665, a permanent injunction prohibiting Gupta's service as an officer or director of a public company, and a permanent injunction prohibiting Gupta's association with brokers, dealers or investment advisors. The Clerk of Court is to enter final judgment."

28. It was common ground between the parties that by this order Mr Gupta was prohibited from being involved in the management of the Partnership, the GP and connected entities.

The Summons

29. The amended summons dated 13 December 2021 of Saxena Holdings LLC and Tagusi Holdings LLC (the "Summons") seeks the following orders:

(1) as to whether the court has any jurisdiction to hear the winding up petition;

(2) that the petition be struck out, dismissed and/or stayed in whole or in part pursuant to Order 18 rule 19 of the Grand Court Rules and/or the Court's inherent jurisdiction on the grounds that:

a. it discloses no reasonable cause of action; and

b. it is an abuse of the process of the court.

(3) in the alternative to (2), the petition be stayed pursuant to the Court's inherent jurisdiction and/or its case management powers.

The evidence

30. Insofar as it is relevant, I have considered the evidence placed before the court and all the documentation in the bundles.

31. Order 18 rule 19(2) of the Grand Court Rules provides that no evidence shall be admissible on an application under subparagraph (1) (a) namely a strike out of a pleading on the ground "it discloses no reasonable cause of action". Even when considering a strike out under subparagraph (1) (d) namely "it is otherwise an abuse of the process of the court", the court needs to take care in its consideration of the admissible evidence before it during a strike out hearing.

32. In my judgment in *AquaPoint L.P.* (FSD; 23 November 2021) at paragraph 10(5) I referred to authority which indicated that the hearing of a strike out application is not the place for resolution of disputed facts. The parties in the case presently before me sensibly acknowledged that to determine the loss of trust and confidence ground would require a trial. The court must normally assume that the facts asserted by the petitioner are true at the strike out hearing stage. If the court, on a review of the material that has properly been put before it, finds that there are

facts in dispute which are or may be material to a determination in the petitioner's favour on the petition, then it must usually let it go to trial. On the other hand, if the facts which must be taken to be true or (where evidence is admissible) are established by evidence which is not disputed, lead the court to the clear view that the petition is bound to fail, then it would be pointless to allow the petition to go to a hearing. A court should be prepared to scrutinize the properly available undisputed evidence supporting the allegations and to strike out the petition if it is obviously unsustainable. In *AquaPoint*, I reiterated the obvious point that it is only if it can clearly be seen that the just and equitable ground for winding up cannot be established that it will be appropriate to strike out the petition. There is clearly a danger in pre-judging the outcome of the hearing of a petition and the court's strike out jurisdiction needs to be exercised carefully. Equally, the court needs to be careful to ensure the winding up procedure is not being improperly used.

Determination

33. I now turn to my determination of the Summons.

Jurisdiction issue

34. In view of the limited time available on 25 January 2022 I was not able to hear full submissions on the jurisdiction issue and it was agreed that it be held in reserve. It is unnecessary to determine it in this judgment.

The two key grounds of the strike out application

35. There is very little flesh on the bones of the Summons. In submissions the two key grounds relied upon by Mr McQuater were (1) exclusion from management and (2) loss of substratum, on the basis that they had no real prospect of success and they (and the allegations which go to support them) should be struck out.

36. Mr Valentin submitted that even if Saxena Holdings LLC and Tagusi Holdings LLC were successful in obtaining a strike out on the exclusion from management ground and on the loss of substratum ground, the Petitioner also alleges that there has been a fundamental breakdown in the relationship between the parties and a loss of trust and confidence (paragraphs 113 – 114 of the petition) and this allegation is not said to be unsustainable. I note also the existence of the independent investigation ground.

Decision on exclusion from management ground

37. In respect of the exclusion from management ground Mr McQuater stresses that the Petitioner is Gupta Associates, LLC and not Mr Gupta or NSR-H, and the injunction granted by Judge Rakoff in the United States District Court prevents Mr Gupta permanently from associating with NSRA or the GP. Mr McQuater submitted that Mr Gupta's interest as a limited partner was assigned to the Petitioner which agreed to be bound by the terms of the LPA (including that NSRA's affairs are to be managed by the GP). Mr Gupta resigned as a director of the GP on 14 February 2012 and Mr Gupta, NSR-H and Mr Parag Saxena entered into the Voting Agreement dated 14 February 2014. Mr McQuater argued forcibly that the only rights acquired by the Petitioner were as a limited partner in NSRA, which conferred no entitlement to participate in its management. Furthermore the Petitioner was not a party to the Voting Agreement. In such circumstances, Mr McQuater submitted that Mr Gupta and the Petitioner could not have any current right or legitimate expectation of participation in the management of the GP (or through the GP, NSRA). Mr McQuater puts it simply and powerfully: The Petitioner plainly has not been excluded from management as it never participated in the management of NSRA nor did it ever have any right to do so.

38. Mr Valentin refers to the Petitioner's allegations that it has been excluded from the management of the Partnership in circumstances where the Petitioner was "guaranteed equal and shared control on the Board of the GP and had a legitimate expectation of being involved in the Partnership's management", and amongst other matters the Petitioner relies on the Voting Agreement. Mr Valentin submitted that exclusion from management and loss of trust and confidence are quintessentially factual issues on which the court could not reasonably conclude at this stage that the petition was bound to fail, having regard to the general principles applicable to strike out applications and the need to determine the facts at trial.

39. Although I can see the strength of Mr McQuater's powerful arguments on the exclusion from management ground I do not have the confidence to conclude that such ground has no real chance of success and as such that the allegations in this respect should be struck out. Much will depend on the evidence and the facts as found after a trial. It is not at this stage plain and obvious that the exclusion from management ground is a complete non-runner.

Decision on loss of substratum ground

40. On the loss of substratum ground Mr McQuater stressed that it is obvious from the facts in this case that NSRA is still actively fulfilling the purpose for which it was established and whether the court applies the standard of impossibility (*In re Suburban Hotel* (1867) LR 2 Ch App 737 at 750) or impracticality (*Belmont Asset Based Lending Limited* 2010 1 CILR 83 at 89; *Re Heriot African Trade Finance Fund Ltd* 2011 (1) CILR 1 and also see *ABC Company (SPC) v J & Company Ltd* [2012] 1 CILR 300 as to the differing approaches in the British Virgin Islands and the Cayman Islands), it plainly remains possible and practical for NSRA to continue to perform the objects for which it was formed.

41. Mr Valentin submitted that the purpose for which the Partnership was formed was to act as investment manager for the funds (which are now in dissolution) and that purpose has now become impossible to pursue. Mr Valentin says that the Petitioner's headline allegations are fully supported by the particulars set out in the petition which, he adds, the court must assume are true for the purpose of the strike out allegation. Again Mr Valentin stresses that the issue as to whether the Partnership has lost its substratum is also quintessentially one which should be determined, on a full review of the evidence, at the final hearing of the petition.

42. On the loss of substratum ground again I can see the strength of Mr McQuater's arguments but again I have not been persuaded that I should conclude that such ground has no real chance of success and as such that the allegation in this respect should be struck out. Again much will depend on the evidence and the facts as found after a trial. Again it is not clear and obvious to me that the loss of substratum ground is a non-runner.

Decision on general stay on abuse ground

43. Mr McQuater submitted that the petition was in any event an abuse of the court's process given that very many of the allegations relied on are already being litigated in proceedings commenced by the Petitioner over 18 months ago in New York. Mr McQuater submitted that two features of the Petitioner's conduct in this regard were abusive: (1) the Petitioner has chosen to bring proceedings concurrently in two jurisdictions raising substantially the same allegations and issues between (in substance) the same parties, thereby oppressively creating a multiplicity of proceedings, a risk of inconsistent judgments, a wholly unnecessary increase and duplication of time and costs and an unnecessary waste of court resources; and (2) the Petitioner is using the winding up procedure for an ulterior or collateral purpose: the petition has been brought to

put pressure on Mr Saxena, NSRA and the GP in relation to the New York dispute and/or is improperly being used to resolve the *inter partes* dispute in the New York proceedings.

44. The parties to the Second Amended Complaint in the Supreme Court of the State of New York County of Westchester Index No. 57453/2020 (the "2020 New York Complaint") are stated to be:

> "GUPTA ASSOCIATES, LLC suing individually and in the right of NEW SILK [ROUTE] ADVISORS, L.P., Plaintiffs, - against – PARAG SAXENA and NEW SILK ROUTE PE-SPV L.P., Defendants"

The Counterclaim Plaintiffs are stated to be: PARAG SAXENA, NEW SILK ROUTE PE-SPV, L.P, NEW SILK ROUTE ADVISORS, L.P. and NEW SILK ROUTE PARTNERS LTD.

And the Counterclaim Defendants: RAJAT GUPTA and GUPTA ASSOCIATES, LLC.

45. Mr McQuater refers to the Petitioner commencing the 2020 New York Complaint on 20 July 2020 and submits that the vast majority of the many allegations made in the petition seeking to support the grounds of the breakdown of trust and confidence, lack of probity, the need for an investigation and exclusion from management are already in issue in those New York proceedings. Mr McQuater says that the parties to the New York Complaint include the Petitioner, NSRA, the GP, Mr Gupta and Mr Saxena. Saxena Holdings LLC and Tagusi Holdings LLC are not parties but it is common ground that they are Mr Saxena's companies and, importantly, they accept that they would be bound by findings in the 2020 New York Complaint proceedings. Mr McQuater justifiably submits that there is a very high degree of duplication between the issues in the petition and the issues in the 2020 New York Complaint.

46. I am not persuaded that the petition is an abuse on the ground of the proceedings in New York or that I should impose a general stay. For reasons which follow there will be little risk of inconsistent judgments and the risk of duplication of time and costs and a waste of court resources should also be much reduced in view of the case management stay which I have been persuaded to grant (as to which see below).

47. Moreover, I am not presently persuaded that there is any direct evidence before me or a sufficient basis to draw a reasonable inference that the Petitioner is using the winding up procedure for an ulterior or collateral purpose and I do not grant a general stay on that ground.

Decision on case management stay

48. I turn now to the law, the submissions and my decision on the application for a temporary case management stay.

49. I can set the relevant law out relatively briefly. Moses J.A. delivering the judgment of the Court of Appeal on 14 September 2018 in *Nanfong International Investments Limited* 2018 (2) CILR 321 applied *Reichhold Norway ASA v Goldman Sachs Intl* [1999] 1 ALL ER (Comm) 40; on appeal [2000] 2 ALL ER 679 and helpfully set out the relevant law. Moses J.A. at paragraph 20 of the judgment in *Nanfong* referred to Moore-Bick J's conclusion at first instance in *Reichhold* that a temporary stay should be granted in order to manage the order in which the proceedings were to be heard:

> "….not only because the existence of concurrent proceedings may give rise to undesirable consequences in the form of inconsistent decisions, but also because the outcome of one set of proceedings may have an important effect on the conduct of the other." (my underlining)

50. Moses J.A at paragraph 21 noted that the English Court of Appeal, in upholding Moore-Bick J's decision, detected no error of law in his identification of the relevant principles. Moses J.A. also referred to Lord Bingham's riposte to counsel's argument that Moore-Bick J's order would open the door to a flood of applications, as follows:

> "…I have no doubt that judges (not least commercial judges) will be alive to these risks. It will very soon become clear that stays are only granted in cases of this kind in rare and compelling circumstances."

51. Moses J.A. at paragraph 22 of the judgment in *Nanfong* accepted that an "applicant may find it easier to establish a compelling reason to stay where there are existing foreign parallel proceedings which, if heard earlier, could be expected to resolve the issues in domestic proceedings, but that is no more than an example of a compelling reason…[Lord Bingham] was making a prediction but he did so for the purposes of underlying the need to find a compelling reason and strong grounds and to encourage caution before granting a stay."

52. In *Nanfong*, as is clear from paragraph 39 of the judgment, the important issue was BIIL's authority to issue the petition (BIIL being a Samoan company) which was due to be "heard shortly at the end of October" (paragraph 41) and:

> "If the proceedings in Cayman are stayed, then the Grand Court will have the benefit of the Samoan court's ruling on the issue of authority in a manner which is likely to be determinative of the issue in the Cayman Islands."

53. Moses J.A. at paragraph 40 of the *Nanfong* judgment found it difficult to foresee any particular disadvantage to BIIL by granting a temporary stay: "It will have to litigate the issues arising out of its purported resolutions in Samoa. A stay may well avoid unnecessary duplication of costs."

54. Moses J.A. at paragraph 41 of the *Nanfong* judgment felt that "those considerations afford compelling and very strong reasons for granting a temporary stay in order to manage the order of proceedings."

55. The Appeal Division of the High Court of the Isle of Man in *Hiranandani v Hirco Plc* 2014 MLR N23 (judgment 26 September 2014) also applied *Reichhold* and *Isis Investments Limited v Oscatello Investments Ltd* [2013] EWHC 7 (Ch) and stated at paragraph 148 that it was "uncontroversial that such authorities set out the principles to be applied when exercising [a case management stay] discretion." The Appeal Division at paragraph 152 noted that "the burden on an applicant who seeks a case management stay is high. This is because a case management stay prevents a claimant from exercising its fundamental right of access to the court in respect of a bona fide claim based on a properly pleaded cause of action." I also remind myself that the right to petition for a just and equitable winding up order is a remedy available as of right provided by statute and such right should not be lightly interfered with.

56. The Supreme Court of the United Kingdom relatively recently applied *Reichhold* in *Unwired Planet International Ltd and another v Huawei Technologies (UK) Co Ltd* [2020] UKSC 37 and at paragraph 99 stated:

> "We therefore turn to case management… A temporary stay may be ordered where there are parallel proceedings in another jurisdiction, raising similar or related issues between the same or related parties, where the earlier resolution of those issues in the foreign proceedings would <u>better serve the interests of justice</u> than by allowing the English proceedings to continue without a temporary stay: see *Reichhold Norway ASA*

v Goldman Sachs International [2000] 1 WLR 173. But this would be justified only in rare or compelling circumstances: see per Lord Bingham MR at pp 185-186, and *Klöckner Holdings GmbH v Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm)." (my underlining)

57. More recently Parker J considered the position of case management stays in *Martin v Circumference Holdings Ltd* in a judgment delivered on 3 May 2021. Parker J at paragraph 57 stated:

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

58. Mr McQuater, in a powerful and persuasive way, submitted that there were strong reasons in this case for granting a case management stay given the significant overlap of issues considered in the petition and the 2020 New York Complaint and the clear benefits that would result from a stay. Mr McQuater stressed, among others, the following points:

(1) the 2020 New York Complaint which was commenced in July 2020 was brought over a year before the petition and is well advanced with the following schedule: (i) 28 February 2022: completion of party dispositions and all fact discovery; (ii) 21 April 2022: completion of expert and all discovery; (iii) 20 May 2022: Dispositive motions;

(2) the New York court has already heard two interim motions in relation to the Voting Agreement in which extensive evidence has been filed and two decisions have been handed down following oral hearings;

(3) the 2020 New York Complaint will determine the key elements of the dispute in a manner that is binding on the relevant parties and in the forum originally and correctly selected by the Petitioner itself. If the Petitioner is ultimately successful in New York, it could then apply to lift the stay of the petition. The Grand Court would then be faced "with a hugely simplified exercise" in determining the petition;

(4) this will avoid a multiplicity of proceedings running concurrently, the risk of inconsistent judgments, duplication of time and costs and a waste of court resources;

(5) if the petition were to proceed in the Grand Court, directions would have to be given leading to a substantial trial of the many contentious issues, including disclosure and witness evidence. There is no reason to think that the petition could be resolved more quickly than the 2020 New York Complaint which has a significant head start and is a proceeding in the Petitioner's own choice of forum;

(6) given the overlap in issues the same documentary and witness evidence would be required in both proceedings with many of the key witnesses based in the United States including Mr Saxena and Mr Gupta;

(7) the New York court is already familiar with the issues (especially around the Voting Agreement) and the parties have legal teams in New York which are already familiar with the issues and have been contesting them for over 18 months; and

(8) in all the circumstances a case management stay will promote the most efficient, fair and cost-effective means of resolving the dispute.

59. Mr Valentin, with his usual clarity, conciseness and courteousness, presented the Petitioner's focused opposition to a temporary case management stay stressing, amongst others, the following points:

(1) there must be strong reasons for granting the stay to further the ends of justice and the benefits which are likely from the stay must clearly outweigh any disadvantage to the Petitioner;

(2) the burden is on the applicant (even in cases where parallel proceedings are already in existence) to demonstrate that "very strong reasons" exist; a stay should only be granted in "rare and compelling circumstances";

(3) all factors must be taken into account but two factors which might militate in favour of a temporary stay are where the concurrent foreign proceedings give rise to the undesirable risk of inconsistent decisions or where the outcome of one set of proceedings may have an important effect on the other;

(4) where there is no basis for concluding that the concurrent foreign proceedings would or might be determinative of proceedings in the Cayman Islands a stay should be refused;

(5) in this case the New York Complaint proceedings (in respect of which no date has been set for the adjudication of dispositive motions due to be filed before 20 May 2022 and no trial date has been set) is simply raised by the Petitioner as "further evidence of the breakdown in the relationship (and in trust and confidence) between the Saxena Parties and the Gupta Parties" and there are no "very strong reasons" or "rare and compelling circumstances" that might justify the imposition of a temporary case management stay of the petition, pending the outcome of the proceedings in New York; and

(6) the resolution of the New York Complaint proceedings will make no difference to the decision which the Grand Court has to make on the petition and nor is there any risk of inconsistent decisions between the Grand Court and the Court in the New York Supreme Court, Westchester County. The fact that there may be an overlap between the factual issues in the two proceedings is insufficient to justify the imposition of a stay.

60. Mr Valentin was right to point out that in *Circumference Holdings* and in *Nanfong* the issues to be decided by the foreign court may have been determinative of the proceedings in the Cayman Islands. In *Circumference Holdings* the issue concerned the standing of the petitioner to issue the petition. In *Nanfong* the issue related to the petitioner's authority to issue the petition to wind up the company. Each case, of course, must be decided on its own facts and circumstances. As can be seen from a review of the authorities the relevant test is not limited to proving that the issue to be determined in the foreign proceedings would be determinative of the proceedings in the Cayman Islands. A stay may be granted if the outcome of the foreign proceedings may have "an important effect" on the proceedings in the Cayman Islands. A stay may be granted where it would "better serve the interests of justice." It is also essential to have regard to the likely benefits and disadvantages of imposing a temporary case management stay.

61. In my judgment the benefits of granting a stay in this case clearly outweigh any disadvantage to the Petitioner. The main disadvantage to the Petitioner will be a delay in the determination of its petition but that appears to have been filed well after the main events complained about

had taken place. The Petitioner in its petition dated 23 September 2021 complains about historical events dating back to at least 2010 following serious charges against Mr Gupta of insider dealing, with the Voting Agreement being entered into on 14 February 2012 and culminating in the New York Complaint dated 20 July 2020 and subsequent continuing conflict between the disputants in America. I accept that the issue with Mr Deuser appears to have culminated in more recent times. I also accept that normally winding up petitions should be heard within a relatively short period of time but there appears to be no pressing urgency in the hearing of the petition in the case presently before the court. Moreover the proceedings in respect of the 2020 New York Complaint are well advanced.

62. The determination of the issues in the 2020 New York Complaint proceedings should significantly assist this court in the fair, just and cost-effective determination of the issues which arise in the petition. It should, in the long run, save the parties' time and costs. Moreover it will also ensure that the best use is made of court time and resources in respect of these proceedings in the Cayman Islands.

63. I note that the Petitioner and Mr Saxena are parties to the 2020 New York Complaint. Moreover, Mr McQuater confirmed that his clients in these proceedings in the Cayman Islands namely Saxena Holdings LLC and Tagusi Holdings LLC agreed to be bound by the findings in the foreign proceedings.

64. I am not seduced by Mr McQuater's slightly exaggerated submission that once the issues are determined in the 2020 New York Complaint proceedings, this court will be faced "with a hugely simplified exercise" in determining the petition. I would delete the word "hugely". As things presently stand, in my judgment, the outcome of the proceedings in New York will, however, have an important effect on these proceedings in the Cayman Islands and will significantly assist this court and better serve the interests of justice.

65. At paragraph 85 of the petition the allegations, assertions and facts contained within the 2020 New York Complaint are expressly adopted by the Petitioner and incorporated into the petition. At paragraph 86 of the petition reference is made in respect of the counterclaim and the Voting Agreement which is governed by the law of the State of New York. It is not sufficient for the Petitioner to attempt to explain away their obvious significance by saying that this is just background and context in respect of the loss of trust and confidence ground and not determinative of it.

66. One only needs to consider Mr McQuater's helpful Appendix 1 to his skeleton argument to appreciate the significant duplication between the issues in the 2020 New York Complaint proceedings including the counterclaim and the issues in the petition. These significant common issues include:

(1) Rishi Gupta's complaint including allegations of misappropriation, misfeasance and violation of Federal securities law;

(2) the Welland Transaction (alleged misappropriation of US$4 million);

(3) unjustified personal and business expenditure on private jets, cars, vacations and personal projects;

(4) depriving NSRA of management fees on initial commitment of US$26 million;

(5) conflict of interests on co-investments;

(6) illegitimate loan to purchase New York apartment;

(7) improper bonus payment of US$2.7 million and failure subsequently to repay US$1.35 million;

(8) unauthorized capital call of US$2 million;

(9) failures to provide information;

(10) Mr Deuser's exclusion;

(11) derivative claims on behalf of NSRA;

(12) sentencing and sanctioning of Mr Gupta by the US authorities;

(13) circumstances of Mr Gupta's withdrawal from the NSR Group, entry into the Voting Agreement governed by New York law and alleged breaches of the Voting Agreement; and

(14) violation of the Federal injunction.

67. I accept that the determinations of the common issues in the 2020 New York Complaint proceedings are unlikely to be determinative of the issue as to whether this court should grant a winding up order on the just and equitable basis but they should significantly assist this court in achieving justice in this case, making best use of limited court time and resources, avoiding unnecessary duplication and reducing the risk of inconsistent findings on common issues.

68. The determinations in the foreign court will, in my judgment, having been living with this case at first instance since September of last year, have "an important effect" (Moses J.A. at paragraph 20 in *Nanfong* quoting Moore-Bick J's conclusion at first instance as upheld by the English Court of Appeal in *Reichhold*) on these proceedings in the Cayman Islands.

69. Moreover, the case management stay enabling the likely earlier resolution of those issues in the foreign proceedings would "better serve the interests of justice" (the Supreme Court of the United Kingdom in *Unwired Planet* at paragraph 99) than by allowing the proceedings in the Cayman Islands to continue without a temporary stay. In my judgment there are good reasons (as specified above) to justify, in the exercise of my discretion at first instance applying the relevant principles and taking into account all relevant factors, a temporary case management stay. I therefore grant a temporary case management stay of these proceedings pending determination of the issues in respect of the 2020 New York Complaint proceedings.

70. I should add that active judicial case management has moved on considerably since 28 June 1999, the date upon which the judgments of the English Court of Appeal were delivered in *Reichhold*. It may be that Lord Bingham's "rare and compelling circumstances" comments in *Reichhold* need to be read in light of the more modern litigation culture in 2022 which requires active judicial case management that was in its infancy in 1999. In any event, Lord Bingham's words must be seen in their proper context, namely a response to a floodgates argument advanced by counsel in 1999. Moreover Lord Bingham's words should not be construed and applied as if they were words in a statute. Lord Bingham, in an address delivered at the Centenary Conference of the Bar on 29 October 1994, commented that "there seems now to be a large measure of agreement that movement towards some system of case management

(however described) is overdue." *Reichhold* was an important development, so much so that it warranted a mention by Sir Bernard Rix (Justice of Appeal Rix in this jurisdiction) in his chapter entitled "Lord Bingham's Contributions to Commercial Law" in *Tom Bingham and the Transformation of the* Law (2009) at page 676.

71. The law and practice in respect of case management stays has been developing since the 1990s. With much more cross-border international litigation in 2022 as compared to 1999 it is inevitable that the circumstances that justify a temporary case management stay in 2022 will not be as rare as the circumstances prevailing in 1999. I stress again that each case, of course, must be decided on its own facts and circumstances. To justify a temporary case management stay there needs to be a good reason. At the very least the determinations in the foreign court must be considered to be likely to have "an important effect" on the proceedings in the Cayman Islands, if not actually determinative of them. Moreover, temporary case management stays may be imposed where imposing such would "better serve the interests of justice". The court has a wide discretion which must be exercised cautiously with regard to the relevant facts and applying the relevant principles outlined in the authorities specified above.

Consequential issues

72. The attorneys should provide, for my approval, a draft order within the next 7 days reflecting the decisions I have made in this judgment.

73. If the same cannot be agreed between the parties I am content to consider any consequential costs issues on the papers without the need for a further oral hearing, with any applications and concise written submissions to be filed and served within 21 days of the delivery of this judgment.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT