



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: 299 OF 2021 (DDJ)

BETWEEN:

**IN THE MATTER OF THE COMPANIES ACT (2021 REVISION) (AS AMENDED)
AND IN THE MATTER OF ORIENT TM PARENT LIMITED**

BETWEEN:

- (1) JOY UNION HOLDINGS LIMITED**
- (2) CHARMING CHINA LIMITED**

PETITIONERS

AND

ORIENT TM PARENT LIMITED

RESPONDENT

Appearances:

Spencer Vickers, Tonicia Williams and Sean-Anna Thompson of
Conyers, Dill & Pearman LLP on behalf of the Petitioners

Tom Lowe QC, Moesha Ramsay-Howell and Jessica Williams of
Harneys on behalf of Orient TM Ruibo Limited

Jennifer Colegate and Annalisa Shibli of Collas Crill on behalf of
the Respondent

Before:

The Hon. Justice David Doyle



Heard: 27 July 2022

**Ex Tempore
Judgment Delivered:** 27 July 2022

**Draft transcript of
Ex Tempore Judgment
Circulated:** 8 August 2022

**Transcript of Ex Tempore
Judgment Approved:** 12 August 2022

HEADNOTE

Ex parte short notice applications to appoint joint provisional liquidators or to grant injunctive relief - dismissed with costs awarded against the Petitioners on an indemnity basis

JUDGMENT

1. By letter dated 21 July 2022 Conyers, acting for Joy Union Holdings Limited and Charming China Limited (the “Petitioners”), indicated to the listing officer that they had “been instructed by the Petitioners to make applications on an *ex parte* urgent basis” and requested a hearing the week commencing 25 July 2022. No skeleton argument or draft orders accompanied the letter. There was an application for the appointment of joint provisional liquidators (“JPLs”) and there was an application for substituted service.



2. My PA emailed Conyers on 22 July 2022, indicating that I had directed that the matter be set down for 11am on Wednesday 27 July 2022 and that skeleton arguments and draft orders should be filed before 2pm on Monday 25 July 2022.
3. Skeleton arguments and draft orders were filed on Monday afternoon and I have had an opportunity of considering them prior to this hearing which has, at short notice, been fitted into a busy court calendar. I have also considered the hearing bundle and the oral submissions put before the court today by Mr. Spencer Vickers the attorney appearing on behalf of the Petitioners together with Tonicia Williams and Sean-Anna Thompson. Mr. Tom Lowe QC, Jessica Williams and Moesha Ramsay-Howell of Harneys have, at short notice (10am yesterday), today entered an appearance on behalf of Orient TM Ruibo Limited and Jennifer Colegate and Annalisa Shibli of Collas Crill have appeared for Orient TM Parent Limited (the “Company”). Mr. Lowe and Ms. Colegate complain about the very short notice in this case and submit, in effect, that the court should not proceed today to hear the application for the appointment of joint provisional liquidators or injunctive relief. In short they say there is no real urgency in this case.
4. By way of background I record that I have considered the winding up petition dated 15 October 2021 and the various percentages of the shareholders of the Company.
5. There is reference to the Going Private Transaction and various agreements defined as the “Cooperation Agreements”.
6. The Petitioners say that since entering into the Cooperation Agreements, the Orient Shareholders have repeatedly and continually acted in breach of their obligations and against the legitimate expectations of Mr. Wang and Mr. Cheng whom the Petitioners describe in their petition as the Founder Shareholders.
7. The Petitioners specify the alleged breaches and wrongdoing under the following headings:



- (1) Continuing failure to pay the cash subscription for shares in the Company;
 - (2) Failure to enter into a shareholders' agreement in respect of the Company;
 - (3) Failure to carry out the restructuring;
 - (4) Total exclusion of the Founder Shareholders from management and control of the Company and the Taomee Group;
 - (5) Unauthorised and unlawful use of subsidiary's seals and Mr Zeng's personal seals;
 - (6) Shanghai Shengyu's acquisition of a 32.1543% interest in Dongzheng Ruibo; and
 - (7) Unauthorised transfers of cash between subsidiaries of the Company.
8. Paragraphs 66 – 68 of the petition under the heading “Conclusion” read as follows:

“Conclusion

66. The Orient Shareholders have repeatedly and continually acted in breach of their obligations, and engaged in a pattern of wrongdoing. This has resulted in the breaches to the legitimate expectations of, and prejudice to, the Founder Shareholders.
67. The Orient Shareholders were introduced as investors in the Company, but the majority of the cash investment committed has not been received. Despite this, contrary to legally binding agreements and against the Founder Shareholders' legitimate expectations, the Orient Shareholders have gained majority control of the Company and have failed to enter into a shareholders' agreement protecting the rights of the Founder Shareholders as minority shareholders. The Orient Shareholders have abused this majority control of the Company by failing to carry out the legally agreed restructuring to remove the Offshore Holding Structure and VIE Structure. As a result, the Founder Shareholders have not received the 51% majority shareholding and control of the board of directors of the Taomee PRC



Companies to which they are entitled. If the Restructuring had been carried out, the Orient Shareholders' majority control of the Company would be irrelevant to control of the Taomee Group. Instead, the Founder Shareholders have been completely excluded from the management and decision-making of the Taomee Group. The Orient Shareholders have used their complete control of the Taomee Group to engage in wrongdoing involving the making of unauthorised transfers of funds from the Taomee Group to Orient Securities Group entities or their affiliates.

68. Therefore, in all the circumstances, we are advised and verily believe that it is just and reasonable for the Company to be wound up on the just and equitable ground pursuant to section 92(3) of the Companies Act.”
9. There is reference in the recent evidence and skeleton argument to an Arbitral Award being made on 6 July 2022 pursuant to an arbitration in the People’s Republic of China (“PRC”). It is stated that the arbitration was between Wang Haibing (“Mr Wang”) and Cheng Yunpeng (“Mr. Cheng”) (the “Founder Shareholders”) and Shanghai Shengran Information Technology defined in the skeleton argument as the “WFOE”.
10. At paragraph 14 of the skeleton argument it is stressed that “neither the Petitioners, nor the Company, were parties to this arbitration.”
11. I note the principle of the separate existence of corporate entities from their directors and shareholders and simply further note that Mr. Wang (who provided the evidence to support the Petitioners’ applications) describes himself as the sole member and director of the First Petitioner and Mr. Cheng is described as the sole member and director of the Second Petitioner. They are, in Mr. Lowe’s words, “the privies of the Petitioners”.



12. It would appear that the Arbitral Award provides that the Founder Shareholders shall transfer the shares they hold in the VIE (the “Founder Shareholders’ VIE Shares”) to Dongzheng Ruibo by 21 July 2022.
13. The Petitioners understand that an enforcement award could be obtained from the PRC court within 10 days of any application and such application could be made at any time from 21 July 2022.
14. The Petitioners in their skeleton argument say that the Arbitral Award, if enforced by a PRC court, may undermine the VIE structure and therefore put the economic value of the Company at risk by risking a dissipation of the Company’s assets (including the indirect rights it holds in the VIE through the WFOE and the Control Contracts).
15. The Petitioners say that they reasonably infer that the Company intends to take steps to change the group structure that sits beneath the Company and that such steps will likely be detrimental to the Company’s economic value.
16. I note also the document at WHB-1-1-1 entitled “Illustrative Structure Chart of Taomee Group” and the submissions of Mr. Vickers and his helpful explanations in that respect.
17. The Petitioners at paragraph 36 of their skeleton argument, refer to the evidence and state that they are concerned to prevent the transfer of the Founder Shareholders’ VIE Shares to Dongzheng Ruibo and the potential dismantling of the VIE Structure, and dissipation of the Company’s assets through the loss of control of the business operations of the Taomee Group held under the VIE. Accordingly, the Petitioners consider it necessary to have independent court-appointed insolvency practitioners in place to immediately take steps to prevent the transfer of the Founder Shareholders’ VIE Shares, to preserve the VIE Structure and to investigate matters and to take control of the Company to ensure that no other steps are taken to dissipate the Company’s assets.



18. At first glance it appears that the Petitioners are trying to circumvent or at least neutralise the impact of the Arbitral Award.
19. In his third affirmation, at paragraph 30, Mr. Wang says that together with Mr. Cheng, the sole member and director of the Second Petitioner, consideration is being given as to whether and how to resist the Arbitral Award “but arbitration awards in the PRC are final and generally there are limited grounds on which to challenge arbitration awards.”
20. On the face of it some would say that the Petitioners are, through these *ex parte* proceedings in the Cayman Islands, trying to challenge the enforcement of the Arbitral Award through the back door. As things presently stand there is no one here, with proper notice, to raise arguments against the Petitioners.
21. Mr. Wang (or at least those who drafted his Third Affirmation) is wise enough to recognise this obvious potential line of attack at paragraph 53c of his Third Affirmation when he states:

“The Company (and/or the Intended Respondents) may claim that I and/or Mr. Cheng are simply (in effect) attempting to appeal the Arbitral Award in the Cayman Court ...”
22. Mr. Wang denies that this is the case.
23. I also have a level of additional discomfort because I have not been addressed on the position where there is an *ex parte* application for the appointment of JPLs and such appointment may prevent the enforcement of an Arbitral Award from another jurisdiction.
24. I confess I have difficulties in understanding how the legitimate enforcement of a genuine and valid Arbitral Award could provide proper grounds for the appointment of JPLs or the granting of an injunction. I keep a mind open to persuasion in respect of those issues.



25. The foundation of the Petitioners' concerns appear to be the enforcement of the Arbitral Award. If that is the case then it may be that they must attempt to challenge the Arbitral Award through the front door of the Chinese Courts and not through the back door of the Cayman Courts.
26. The applications dated 21 July 2022 appear to have been prompted by the issuing of the Arbitral Award on 6 July 2022.
27. In their evidence, the Petitioners do not say when the Arbitral Award was brought to their attention. I think it is a safe inference that such award came to their attention on or shortly after 6 July 2022 (some 21 days ago).
28. The Petitioners gave short notice yesterday to certain interested parties of today's hearing. In practical effect that was tantamount to no notice at all.
29. There has been no satisfactory explanation as to why the Petitioners did not provide notice last week when the application for the appointment of JPLs was lodged. I am reminded of the words of Lord Hoffmann in *National Commercial Bank Jamaica Limited v Olint Corp. Limited* [2009] UKPC 16 (quoted at paragraph 19 of my judgment in *Cathay Capital Holdings III, L.P. v Osiris International Cayman Limited* (FSD 245 of 2021 (DDJ); Unreported 30 August 2021)) that "Any notice is better than none." In the circumstances of this case, I cannot understand why notice was not given last Thursday when the papers were lodged. Certainly notice of the hearing date and time which was communicated to the Petitioners' attorneys on Friday should have been provided to the interested parties well before 10am yesterday. I note the 13 hour time difference between the Cayman Islands and the PRC. I wish to discourage tactical games and late notice. Mr. Vickers was unable to explain why the Petitioners did not give notice last Thursday.



30. I have considered the evidence and arguments presented in respect of the application to appoint JPLs or grant injunctive relief.
31. Mr. Wang in his Third Affirmation dated 21 July 2022 refers to some of the background and the recent developments in the PRC Arbitration. Churning out the statutory language he says at paragraph 34 that “there is a risk of mismanagement of the Company, a dissipation of assets of the Company, and a risk of oppression of minority shareholders’ interests”. At paragraph 31 he says that “the Petitioners have considered it necessary to take steps to protect the assets of the Company by way of this application to appoint joint provisional liquidators to the Company.”
32. He says at paragraph 44 that the application to appoint joint provisional liquidators to the Company is being made on an *ex parte* basis given the need for urgency.
33. Weeks have passed since the Arbitral Award was made. I do not consider that there is any genuine urgency and in any event do not think it appropriate to proceed without proper notice.
34. Moreover, although I keep a mind open to persuasion, based on what I have read and heard to date I am not convinced that it would be appropriate to appoint provisional liquidators.
35. I think Mr. Wang wisely recognises this where at paragraph 42 he refers to alternative relief of “an injunction to prevent the assets of the Company, to the extent possible, pending the hearing of the Winding Up Petition.” I do not think he refers to it in his evidence but a draft status quo injunction has also recently been filed.
36. Again I have concluded that it is not appropriate for the court to deal with the applications for injunctions without proper notice. This is not one of those rare and exceptional cases when the court should proceed on an *ex parte* short notice basis. The law in this respect is well-known (see for examples *Cathay Capital Holdings III L.P v Osiris International*



Cayman Limited (FSD 245 of 2021 (DDJ) Unreported judgment 30 August 2021) and *Seahawk China Dynamic Fund* (FSD 23 of 2022 (DDJ) Unreported judgment 10 February 2022). I am surprised that the Petitioners have sought, in the particular circumstances of this case, to attempt to persuade the court to proceed *ex parte* without notice or at least on very short, totally inadequate notice on the basis of alleged urgency, in respect of “recent” developments namely the Arbitral Award which was made as long ago as 6 July 2022.

37. Notice can be given without formal service. The difficulties with the Hague Service Convention do not excuse the Petitioners from endeavouring to give Dongzheng Ruibo notice and serving those within the jurisdiction formally.
38. On reading the papers over the weekend I was left with the initial impression that the Petitioners, if there was any genuine urgency, should have acted earlier and it may be that they were trying inappropriately to bounce the court into granting unjustifiable relief and to ambush other interested parties without giving a proper opportunity for them to be heard.
39. The Petitioners should carefully consider, on advice, whether they wish to proceed with their requests for provisional liquidators to be appointed or alternatively injunctive relief, even on proper notice to all interested parties. Certainly I am of the firm view that such relief should not be granted, in the circumstances of this case, on an *ex parte* very short notice basis and frankly I have reservations as to whether it could properly be granted on a proper with notice basis but keep my mind open to persuasion. In any event, the Petitioners should carefully consider their position before proceeding further.
40. I therefore decline to appoint JPLs or to grant injunctive relief, today on a very short notice basis.
41. I leave the Petitioners to consider their position further and if they still want to proceed with their applications then they should give proper notice to all interested parties and the Petitioners and interested parties should apply for a hearing date in the usual way. If the



Petitioners decide to proceed then they should liaise with all interested parties and provide the court with draft directions for a substantive on proper notice hearing, such directions to be agreed if possible and if not then separate competing versions to be filed for my consideration in due course. They should include the opportunity to exchange evidence and skeleton arguments and an *inter partes* hearing.

After hearing applications and submissions in respect of costs the following judgment was delivered on costs

42. Applications are made on behalf of Orient TM Parent Limited and Orient TM Ruibo Limited for indemnity costs orders against the Petitioners.
43. Under Order 62 rule 4(1) of the GCR the court can make an order for costs to be taxed on the indemnity basis if it is satisfied that the paying party has conducted the proceedings, or that part of the proceedings to which the order relates improperly, unreasonably or negligently.
44. The authorities show that there must usually be some factor that takes the case “out of the norm” (or what should be the reasonable norm). The unreasonableness normally has to be to a “high degree”. I note *AHAB v SAAD* 2012 (2) CILR 1 at paragraphs 9 – 12 and *Woods Furniture & Design (IVL) v Gary James* (CICA (Civil Appeal) 1 of 2020, Unreported judgment 30 July 2020).
45. I note under Order 24 rule 8(4) of the CWR that the court shall make orders for costs in accordance with the general rules specified in Order 24 rule 8(1) – (3), unless it is satisfied that there are exceptional and special circumstances which justify making some other order or no order for costs.

46. I note all that is said in support of the applications. I also note the submissions put forward by Mr. Vickers in opposition to such applications, after I gave him a short adjournment to consider the position.
47. Mr. Vickers says in effect that the conduct in this case was not so unreasonable that it brings us within the territory of indemnity costs. Mr. Vickers explains the background, the present position and why the petitioners acted as they did and as I say, I note all that Mr. Vickers says on behalf of the Petitioners.
48. I am satisfied in the circumstances of this case that the failure to give interested parties notice last week was unreasonable to a “high degree” and outside what should be the reasonable norm. Moreover, I want to discourage tactical games and proceeding with lack of notice where such is not justified. Without proper notice applications for the appointment of JPLs should be truly exceptional and only be made if solid grounds exist to proceed without proper notice. No such grounds existed in this case and that should have been plain to the Petitioners from the outset. They were wrong to proceed in the way they did and much time including court hearing and preparation time has been wasted. I therefore make an Order for costs against the Petitioners on an indemnity joint and several basis in favour of Orient TM Ruibo Limited and the Company. I ask that the attorneys produce a draft of the order as soon as they reasonably can and certainly within the next 7 days.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT