IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 255 OF 2021 (RPJ)

BETWEEN:

JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND
(IN OFFICIAL LIQUIDATION)

PLAINTIFF

-and-

(1) XIONG HUI
(2) ZHANG JIAN
(3) POWERFUL WARRIOR LIMITED
(4) SHI KAIYI
(5) HU JING
(6) YANG DONGMEI
(7) OURGAME INTERNATIONAL HOLDINGS LIMITED

DEFENDANTS

AND IN THE MATTER BETWEEN:

FSD CAUSE NO. 258 OF 2021 (RPJ)

JIAN YING OURGAME HIGH GROWTH INVESTMENT FUND
(IN OFFICIAL LIQUIDATION)

PLAINTIFF

-and-

(1) POWERFUL WARRIOR LIMITED
(2) SHI KAIYI
(3) HU JING
(4) YANG DONGMEI

DEFENDANTS

Appearances:	Mr. Matthew Goucke, Ms. Harriet Ter-Berg and Mr. Adrian Fourie of Walkers (Cayman) LLP on behalf of the Plaintiff Mr. Alex Potts KC, Mr. Erik Bodden and Dr. Alecia Johns of Conyers Dill & Pearman LLP on behalf of the Third Defendant in FSD 255 of 2021 and the First Defendant in FSD 258 OF 2021
Before:	The Hon. Justice Parker
Heard:	7 & 8 November 2022
Date of Decision:	8 November 2022
Draft Judgment Circulated:	12 December 2022
Judgment Delivered:	21 December 2022

HEADNOTE

Application to set aside service of proceedings out of the jurisdiction - GCR Order 11 rule 1(1) - serious issue to be tried - whether Cayman Islands clearly the appropriate forum - GCR Order 12 rule 8 -sections 3, 4 , 9 and 27 Arbitration Act 2012 - Section 4 Foreign Arbitral Awards Enforcement Act 1997 - threshold issue - existence of agreement to arbitrate - whether Court should determine threshold issue - approach to determining threshold issue on written evidence without a trial and cross examination.

Introduction

The claim

1. The claim that is the subject of these proceedings is, in summary, a claim for recovery 132 million shares which the Joint Official Liquidators of the Plaintiff (the "JOLs") contend were wrongfully

transferred away from the Plaintiff (the "Fund") by its former directors (the First Defendant in FSD 255 of 2021, Xiong Hui, and the Second Defendant in FSD 255 of 2021, Zhang Jian) in breach of their fiduciary duties arising under Cayman Islands law, in what are alleged to be highly suspicious circumstances.

2. The claim alleges that these shares were wrongfully received and transferred by Powerful Warrior Limited ("PWL") (a BVI company) in breach of trust and then wrongfully received by certain of the other Defendants from PWL and therefore held on trust by them for the Fund.

3. The JOLs were granted permission by this Court to serve PWL and the other defendants (who are in the People's Republic of China (the "PRC")) out of the jurisdiction.

4. PWL now applies in the two related proceedings, the "Writ Proceedings" and the "Receivership Proceedings", for the Court's *ex parte* Orders dated 2 September 2021 to be set aside, varied, or discharged, with consequential relief. PWL is the Third Defendant in the Writ Proceedings and the First Defendant in the Receivership Proceedings.

5. In his judgment following the *ex parte* hearing, Doyle J said:[1]

    a. "*I am satisfied that the Plaintiff has a good arguable case on one or more of the Order 11, rule 1(1) grounds*";

    b. "[T]*hat there are serious issues to be tried* […] *even as things presently stand*"; and

    c. "*In my judgment, the Cayman Islands is clearly the appropriate forum*".

6. PWL challenges the jurisdiction of the Court pursuant to GCR Order 12, rule 8 and/or section 9 of the Arbitration Act 2012 and/or section 4 of the Foreign Arbitral Awards Enforcement Act 1997 on the grounds that:

[1] Judgment for Service Out, dated 2 September 2021, §§ 5 to 7.

a. The claims asserted by the Plaintiff against PWL in the Writ Proceedings and the Receivership Proceedings fall within the scope of a valid and binding arbitration agreement concluded between the Plaintiff and PWL, as contained in section 3.7 of a written Share Purchase Agreement dated as of 31 March 2021 (the "Jian Ying SPA").

b. Alternatively, the most appropriate forum for the disputes between the Plaintiff and PWL is an arbitration in Hong Kong administered by the Hong Kong International Arbitration Centre ("HKIAC"), subject to supervisory review by the High Court of Hong Kong, having regard to the Arbitration Agreement, the choice of Hong Kong law as the applicable governing law, and the other connecting factors pointing clearly in favour of Hong Kong.

PWL submissions in summary

7. Alex Potts KC appeared for PWL.

8. He argued that PWL's answer to the claim was that the shares were not given wrongfully to PWL but were transferred pursuant to an SPA (the Jian Ying SPA) which contained a valid and effective arbitration clause. PWL was under no obligation as a foreign defendant challenging the jurisdiction to set out the details of its case on the merits.

9. He submitted that there was clearly an arbitration agreement in existence, or arguably in existence, between the Plaintiff and PWL[2]. A hard copy wet ink original of the Jian Yang SPA had been made available for inspection and had been inspected by representatives for the JOLs. The document had been exhibited to an affirmation from Mr Zhang Shaopeng dated 11 January 2022 (Mr Zhang). There had been no application to cross examine him, nor is there any independent expert evidence put before the court to support any allegation or assertion or suspicion of forgery.

[2] Zhang 1 §§ 15, 20-23 and 'ZS1' pp 21-29.

10. He submitted that it was strongly arguable that the arbitration agreement was valid and in existence, but if there was a genuine dispute as to the existence of the arbitration agreement that should be determined by the arbitration tribunal having regard to sections 4(5), 4(6) and 4(7) of the Arbitration Act 2012, as well as section 27(1) of the Arbitration Act 2012.

11. He also argued that the claims asserted by the Plaintiff against PWL fall within the scope of the arbitration agreement.

12. The arbitration agreement is contained at section 3.7 of the Jian Ying SPA, and provides (in the English version) as follows:

> **"Section 3.7 Governing Law; Disputes Resolution.** *THIS AGREEMENT SHALL BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH THE LAWS OF HONG KONG. Any dispute, controversy, difference or claim arising out of or relating to this Agreement, including the existence, validity, interpretation, performance, breach or termination thereof or any dispute regarding non-contractual obligations arising out of or relating to it shall be referred to and finally resolved by arbitration administered by the Hong Kong International Arbitration Centre (HKIAC) under the HKIAC Administered Arbitration Rules in force when the Notice of Arbitration is submitted. The number of arbitrators shall be one. The arbitration proceedings shall be conducted in Chinese (Mandarin)."*

13. Mr Potts KC, in relying on Mr Zhang's affirmation, pointed the Court to the following passages of Mr Zhang's affirmation:

(i) At § 4:

> *"As an initial point, I make clear that at all material times my primary residence was in the People's Republic of China ("PRC"). My first, and native, language is Chinese, but I do read, speak and understand conversational English to some extent. In my daily life, I write and speak almost exclusively in Chinese,*

particularly with respect to most of my daily business dealings. Without waiving legal professional privilege, this Affirmation (which has been written in English) has been prepared on my instructions, with the assistance of PWL's Cayman Islands attorneys, Conyers Dill & Pearman LLP ("Conyers"), but without the use of formal translation or interpretation services (having regard to the time pressure under which this particular First Affirmation needs to be prepared, having regard to the deadline by which PWL's Summons needs to be filed and served)."

(ii) At §§ 14 and 15:

"Although I am not a Cayman Islands lawyer, it seems apparent from paragraphs 26 and 27 of the Amended Statement of Claim that the subject matter of the Plaintiff's claims in the Writ Proceedings relates to the transfer of certain shares in Ourgame International Holdings Limited ("Ourgame Holdings") from the Plaintiff to PWL ("the Share Transfer")."

"Although it is not referred to by the Plaintiff in the Amended Statement of Claim, the Share Transfer was made pursuant to the terms of a written Share Purchase Agreement dated as of 31 March 2021 ("Jian Ying SPA"). The Jian Ying SPA is now shown to me at pages 21 to 29 of ZS-1."

(iii) At § 18:

"... PWL denies the allegations that have been made against it, and, subject and without prejudice to the outcome of PWL's jurisdictional challenge, PWL intends to contest the Plaintiff's claims in the appropriate forum for doing so, whether by way of defence or counterclaim. For the present purposes, however, PWL does not consider it necessary to seek to persuade the Court, through the medium of this First Affirmation, that there is no serious issue in dispute between the parties (while fully reserving its right to do so.)"

(iv) At § 20:

> *"....section 3.7 of the Jian Ying SPA between the Plaintiff and PWL contains an arbitration clause ("the Arbitration Agreement") which expressly requires that any claims (broadly defined) which the Plaintiff might wish to make against PWL shall be determined by way of a Hong Kong arbitration to be administered by the Hong Kong International Arbitration Centre…"*

(v) At §§ 21-24:

> *"Neither PWL nor I have any reason to believe the Arbitration Agreement is null and void, inoperative, or incapable of being performed, under applicable law."*
>
> *"As far as PWL, and I personally, are aware, the Arbitration Agreement was, and remains, contractually binding on (and enforceable against) the Plaintiff, having been signed by Zhang Jian in his capacity as a Director of the Plaintiff.".*
>
> *"PWL and I had no reason to believe, or to know, that Zhang Jiang was not duly authorized to enter into the Arbitration Agreement on behalf of the Plaintiff at the time that he did so (if that is what is now alleged by the Plaintiff)."*
>
> *"[I]n any event, the most appropriate forum for any dispute between the Plaintiff and PWL is an arbitration in Hong Kong administered by the Hong Kong International Arbitration Centre (subject to supervisory review by the High Court of Hong Kong), having regard to the Arbitration Agreement and the following additional facts and matters…"*

Mr Zhang's evidence then lists the governing law, the language clause, the assertion that there is very little nexus with the Cayman Islands in terms of negotiations, the fact that while Ourgame is

a Cayman company its shares were listed on the Hong Kong Stock Exchange and other connecting factors pointing in favour of the PRC.

(vi) Finally, at § 26:

> *"PWL may wish to assert claims or counterclaims of its own against the Plaintiff, which it would ordinarily have pursued in an arbitration in Hong Kong given the terms of the Arbitration Agreement. If PWL is successful with the jurisdictional challenges contained in the Summons, I can confirm that PWL's intention is to commence arbitration proceedings in Hong Kong pursuant to the terms of the Jian Ying SPA, subject to resolution of any potential issues associated with the automatic stay of legal proceedings under Cayman Islands law, as a result the Plaintiff having been ordered to be wound up."*

14. Mr Potts KC submitted in general that arbitration agreements should be given a wide interpretation on the assumption that the parties intended that all disputes arising out of their relationship should be referred to arbitration.[3]

15. Mr Potts KC further submitted that, whatever legal theories the Plaintiff might seek to rely upon in support of its pleaded claims, whether in the Writ Proceedings or the Receivership Proceedings, the Plaintiff in substance seeks to reverse, or avoid, the Share Transfer of 31 March 2021, being a Share Transfer that (a) took place pursuant to the terms of the Jian Ying SPA between the Plaintiff and PWL, or (b) at the very least, was related to the Jian Ying SPA.

16. He argued that the arbitration agreement is separable and distinct; it binds the Plaintiff (notwithstanding the fact that the Plaintiff has subsequently been placed by the Court into solvent liquidation); and it is broad enough to cover any and all disputes relating to the Jian Ying SPA (and the Share Transfer), including disputes as to its existence, validity, and non-contractual obligations relating to it.

[3] *Fiona Trust v Privalov* [2007] Bus LR 1719 and *Lombard v GATX* [2012] EWHC 1067.

17. He argued that it would be quite impossible for the Court to be satisfied that the arbitration agreement is "null and void" or "inoperative", whether on the basis of the admissible evidence before the Court, or as a matter of law.

18. In the alternative, he submitted that the Cayman Islands were not clearly the most appropriate forum for resolution of these matters and that arbitration in Hong Kong was.

The JOLs' submissions

19. Matthew Goucke appeared for the JOLs. He emphasised, by reference to the chronology his team had prepared (which was not agreed by PWL), that there has been a pattern of deceit and conspiracy at the heart of this case. I record in passing that the Court is obviously not in a position, on these applications, to make any finding in this regard and does not do so.

20. Nevertheless, he argued that it is notable that there is still no substantive defence alluded to in inter attorney correspondence, PWL's submissions, or evidence. The arbitration clause relied upon is contained within a document identified for the first time in Zhang 1[4] which arrived late in the day. It purports to represent a sale and purchase agreement entered into by a former director (the Second Defendant in FSD 255 of 2021, Zhang Jian) on behalf of the Fund and PWL for the sale of the shares on 31 March 2021.

21. Mr Goucke emphasised that it was surprising that PWL had not identified or sought to enforce this arbitration clause long before now and had not identified this document before these applications were brought.

22. His principal submission was that the JOLs do not accept that the Jian Ying SPA is genuine and have put forward evidence to challenge its authenticity. By contrast PWL has not put forward any evidence on authenticity or even the barest details regarding the circumstances in which it was

[4] An unsworn version was first served on the Plaintiff on 9 December 2021. A sworn version was provided on 11 January 2022.

entered into. As a result, PWL has failed to show on the balance of probabilities that the Jian Ying SPA is genuine.

23. He submitted that if the Court considers that it is necessary to determine whether the Jian Ying SPA was entered into as alleged it may give directions for a further hearing to determine that question and if it does so should also determine the Fund's alternative case that the Jian Ying SPA, if genuine, would in any event be void due to the circumstances in which it was entered into.

Essential factual background

24. The JOLs were initially appointed as Joint Provisional Liquidators (JPLs) of the Fund by Segal J on 2 July 2021 upon application by a shareholder of the Fund, under ss. 92(c) and 92(e) of the Companies Act. The application was opposed by the Fund, acting at the time by the First and Second Defendants in FSD 255 of 2021 (two former directors of the Fund)[5].

25. The sole purpose of the Fund was to hold shares in the Seventh Defendant in FSD 255 of 2021 (Ourgame). There are understood to be various connections between Ourgame, the Fund's former directors and a substantial number of Ourgame's other shareholders.

26. On 20 December 2019 the Fund and an entity known as Choi Shun Investment Limited ("Choi Shun") entered into a sale and purchase agreement which was signed by Mr Li Yang Yang (Mr Li), who was the controlling shareholder of Choi Shun , to obtain all of the Fund's shares in Ourgame for a total consideration of HK$126m at an average price of HK$0.568 per share. Mr Li is now also the CEO and Chairman of Ourgame.[6]

27. Prior to the March Transfer (see below), the Fund's shares in Ourgame represented 18.6% of Ourgame's ordinary shares. The Fund and two other independent shareholders, together held approximately 56.48% of the ordinary shares of Ourgame.

[5] Segal J judgment delivered on 11 August 2021.
[6] Mr Li signed off on the Board resolutions and minutes concerning the March and July 2021 transfers.

28. The effect of the March Transfer was that the Fund's holding in Ourgame was reduced by 12.3% to 6.3% of the ordinary shares, and as a result, the independent shareholders lost their ability to block ordinary resolutions of Ourgame.

The March Transfer

29. On 19 July 2021, (following their appointment) the JPLs discovered the existence of the instrument of transfer in relation to the shares which provided that, on or around 31 March 2021, the Directors had purportedly caused the Fund to transfer the shares to an unknown recipient (the March Transfer). Prior to that time the JPLs believed that the Fund still held the shares. The JPLs subsequently discovered that PWL was the recipient under the March Transfer.

30. Mr Goucke submitted that the March Transfer was entered into either at a significant undervalue (HK $39.7 million) or for no consideration at all, and no consideration has ever been received by the Fund. The wider circumstances, he suggested, surrounding the March Transfer are also highly suspect:

a. the March Transfer was entered into against the backdrop of the liquidation proceedings and the provisional liquidation application brought by a shareholder when there was a very real probability that the JPLs would be appointed and the Fund would enter liquidation (as it did);

b. the March Transfer was entered into by the Second Defendant in FSD 255 of 2021 (Zhang Jian) two days after his appointment as a director (by the Class C shareholders) and shortly after the Fund's investment manager was fired without apparent justification;

c. The First Defendant in 255 of 2021 (Xiong Hui) allegedly provided a false declaration that the certificates for the shares (132 million shares in Ourgame) had been lost or accidently destroyed in order to obtain the issuance of new share certificates prior to

and ostensibly for the purpose of the March Transfer;[7]

d. the March Transfer was carried out surreptitiously and secretively and was not recorded in the Fund's books and records;[8]

e. neither the Directors nor PWL have provided any explanation in relation to the March Transfer despite extensive correspondence from the JPLs;

f. the March Transfer does not appear to be supported by contemporaneous ancillary documentary records (such as authorising minutes);

g. the March Transfer was concealed from the Court in the provisional liquidation application;[9]

h. the March Transfer was concealed from the market;[10]

i. after the shares had been transferred away from the Fund (in order to remove the blocking power), a few days after the appointment of the JPLs, an EGM was requisitioned to pass a resolution to grant the Ourgame Board of Directors the power to issue and allot further shares that, if exercised, would have the effect of further diluting the Fund's interests; and

j. Ourgame withheld the identity of PWL (as the initial transferee) in response to urgent requests from the then JPLs to clarify the position.

[7] Kennedy 5 §§ 34-45.
[8] Kennedy 9 § 80(a).
[9] Affirmation 3 of D1 resisting the appointment of the JPLs.
[10] Kennedy 3 at §§86 and 87.

31. Accordingly, the JPLs applied for and obtained an injunction from Segal J on 27 July 2021 to prevent the shares from being voted until resolution of the question as to who was entitled to the shares.

The July transfer

32. After the injunction was granted, on 30 July 2021, it transpired that the shares had in fact been transferred again, from PWL to the Fourth to Sixth Defendants in FSD 255 of 2021 (Shi Kaiyi, Hu Jing, and Yang Dongmei), three individuals resident in the PRC (the July Transfer).

33. The July Transfer had taken place on 2 July 2021 (the day that the JPLs were appointed). The fact of the July Transfer was withheld/concealed from the JPLs and the Court by Ourgame.

The proceedings

34. The JPLs subsequently issued the Writ which contained claims against the Defendants in respect of the shares. At the same time, given various concerns that had emerged since the injunction hearing, the JPLs issued the Receivership Summons and obtained further relief in the form of an order appointing independent receivers over the shares pending determination of the dispute. With that relief in place, the injunction granted by Segal J was subsequently discharged by consent.

35. The JPLs/ JOLs have, since 28 July 2021 made repeated requests in correspondence to be provided with information regarding the shares and the two transfers. PWL has ignored these requests.

36. Instead, on 9 December 2021, PWL produced the Jian Ying SPA for the first time in its evidence contesting this Court's jurisdiction.

37. The JOLs' case is that the Defendants, including PWL, have acted in concert to arrange for the transfer of the shares away from the Fund and then to obstruct attempts by the JOLs to recover them. The attempt by PWL to introduce the Jian Ying SPA and to challenge the jurisdiction of the Court, whilst simultaneously refusing to provide any meaningful information to the JOLs, appears to be another step in this process.

Evidence in support of the Jian Ying SPA

38. Mr Goucke submitted that:

a. the three paragraphs in Zhang 1 that address the creation of the Jian Ying SPA are extremely vague. Mr Zhang does not confirm that he signed the Jian Ying SPA, nor does he provide any detail as to how, when or why it was entered into, or indeed whether he witnessed it being signed by a director of the Fund;[11]

b. the metadata of the Conyers PDF (the electronic copy of the Jian Ying SPA that was provided to Conyers by PWL and subsequently produced to Walkers) which recorded the date of creation of that electronic version of the Jian Ying SPA has been cleansed;[12]

c. whilst PWL has provided an 'original' copy of the Jian Ying SPA, it does not establish when the agreement was signed;[13] and

d. In contrast, the JOLs have adduced extensive evidence to address the authenticity of the Jian Ying SPA which, both separately and taken as a whole, strongly suggest that the Jian Ying SPA is not genuine.

The inauthenticity of the document

39. In summary Mr Goucke's submissions on the inauthenticity of the document were:

a. despite their appointment as JPLs on 2 July 2021, the JOLs had no knowledge of the existence of the Jian Ying SPA and it was not contained in or referred to anywhere in the books and records of the Fund;[14]

[11] Zhang 1 § 21-23.
[12] Kennedy 10 §§19-22.
[13] Kennedy 10 §§23-24.
[14] Kennedy 9 § 80(a).

b. the Jian Ying SPA was not referred to in any of the evidence put forward on behalf of the Fund in response to the application to appoint the JPLs;

c. the Jian Ying SPA is directly in contravention of the SPA for sale of the Fund's entire shareholding to Choi Shun entered into on 20 December 2019;

d. The First Defendant in FSD 255 of 2021 (Xiong Hui) expressly asserted in his (unsworn) affirmation dated 7 May 2021 (well after the Jian Ying SPA was purportedly entered into) that: "*Choi Shun is the only party that has been identified as a purchaser for the significant shareholding in Ourgame*";[15]

e. the emails between the First Defendant and Li YangYang (in his capacity as director of Choi Shun) in relation to the sale of the Fund's shares in Ourgame to Choi Shun in May 2021 are entirely inconsistent with the suggestion that the Fund's shares had already been transferred to PWL;[16]

f. The First Defendant denied the existence of the Jian Ying SPA subsequently in correspondence

> "*According to my best memory, I was not aware of any information in connection with any transaction involving the Fund and* [PWL], *including that I was not aware of the share JPL*[s] *mentioned had been or would be transferred. That was why I was thinking that the SPA between Fund and Choi Shun Investment Limited should be performed.*"[17]

g. PWL did not draw the JOLs' attention to the Jian Ying SPA until 5 months after the JOLs first requested to be provided with a copy of any agreements relating to the

[15] Affirmation 3 of D1 resisting JPLs appointment §§ 10-13.
[16] Kennedy 5 §§ 50-54.
[17] Email from D1 to JPLs.

transfers of the shares,[18] and PWL has not adequately addressed the delay. On PWL's own case it received the core materials in respect of the dispute on 2 September 2021[19], but did not provide or make reference to the Jian Ying SPA for over 3 months until 9 December 2021.

h. Conspicuously, despite being the signatory to the Jian Ying SPA on behalf of PWL, nowhere in Zhang 1 does Mr Zhang confirm that he signed the Jian Ying SPA, or when; nor does he provide any explanation of the circumstances in which the Jian Ying SPA was entered into.[20]

40. On its face, s 1.1(b)(ii) of the Jian Ying SPA required the Fund and PWL to enter into and duly execute an Instrument of Transfer with respect to the shares still held by the Fund on 30 September 2021 for the purpose of transferring the shares to PWL. Despite this, and despite the fact that PWL was aware of the JOLs' appointment and their contact details, PWL made no attempt to contact the JOLs and to raise its alleged entitlement under the Jian Ying SPA. Similarly, PWL did not make payment under section 1.2 of the Jian Ying SPA 5 business days after 30 September 2021 (or at all).

41. The terms of the Jian Ying SPA are clearly not in the interests of the Fund:

a. The Purchase Price (as defined, HK $0.3 per share) has been demonstrated to be a significant undervalue in respect of the shares as at 31 March 2021;[21] and

b. Further, on the face of the terms of the Jian Ying SPA, payment was not due until over 5 months after the Jian Ying SPA was entered into (31 March 2021), despite the fact that (i) the Fund was obliged to transfer certain shares to PWL on 31 March 2021, and (ii) clause 2.1 of the Jian Ying SPA purported to require the Fund to entrust its voting

[18] Kennedy 9 § 80(b).
[19] Zhang 1 § 7, and Kennedy 9 § 45 (d).
[20] Zhang 1 §§ 21-23.
[21] Kennedy 4 § 13. Sale consideration of HK $0.3 per share represented a 51% discount to the closing price of HK $0.59 per share as at 31 March 2021.

rights in respect of the remaining shares held by the Fund to a person designated by PWL from 31 March 2021. No explanation has been given as to the rationale behind this delayed payment.

42. Furthermore:

a. The terms of the Jian Ying SPA are also entirely inconsistent with the Instrument of Transfer produced by Ourgame which unequivocally states that the Fund had been paid HK$39,739,309.80 by PWL in consideration for the Shares when they were transferred on 31 March 2021;

b. No one contacted the JOLs (then as JPLs) after their appointment on 2 July 2021 and before the EGM scheduled for 28 July 2012 to provide directions regarding how the voting rights in the shares should have been exercised (which PWL would purportedly be entitled to do under the Jian Ying SPA);

c. The signature pages to the Jian Ying SPA are separate pages (both from the rest of the document and from each other) and are undated. In contrast to the remainder of the document, there is no Chinese translation on these pages;[22]

d. The JOLs requested further evidence/information to substantiate PWL's claim that the Fund was a party to the Jian Ying SPA. PWL flatly refused to respond to any of these questions;

e. The JOLs also requested any materials that might corroborate PWL's position that the Jian Ying SPA was genuine. Save for providing the cleansed Conyers PDF and allowing inspection of the alleged 'original' agreement, PWL flatly refused to respond to any of the JOLs' queries; and

[22] Kennedy 10 § 23-24.

f. This is all against the background to the JOLs case of alleged deceit and conspiracy in connection with the March Transfer and the July Transfer for which it has returned to Court and obtained the orders referred to above from Segal J and Doyle J.

Decision

Threshold question and approach

43. The threshold question which arises on PWL's applications is whether there is an arbitration agreement in existence between the parties.

44. I have decided that the right course is to determine this matter on the evidence submitted, rather than issue directions for a hearing as to whether the arbitration agreement exists and whether it is valid and covers the Plaintiff's claims. There is an advantage in the Court making a 'clean' determination (if it can) on whether there was an agreement to arbitrate made without having to have a trial on contested issues of fact (which may go deep into to the merits of the Plaintiff's claim) and without further delay and expense. Permission to serve out was given by Doyle J well over a year ago.

45. The Court has jurisdiction to rule on a question relating to the existence of an arbitration agreement or its scope.[23] It does not seem to me to be an appropriate course to refer a dispute about whether or not an arbitration agreement exists to a tribunal in Hong Kong. That might be an appropriate course if the Court was satisfied that there was an agreement to arbitrate in place and only a dispute about the ambit or scope of it. I also note the reasoning at *§81 of AES Ust-Kamenogorsk* per Rix LJ commenting on the approach of the Court to an application to stay proceedings under section 9 of the English 1996 Act, both in international and domestic cases, where it would examine the issue

[23] *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2011] EWCA Civ 647 at §§ 78 to 81. *Al Naimi v Islamic Press* [2000] 1 Lloyd's Rep 522 and *Albon v Naza (no 4)* [2008]1 Lloyds Rep 1.

of whether there ever was an agreement to arbitrate referencing the Saville Report on the draft Arbitration bill in 1994:

> *"This analysis, in my respectful opinion, usefully underscores the wider picture about the autonomy of the parties and the jurisdiction of arbitrators with power to investigate their own jurisdiction: namely that, sooner or later, the question of substantive jurisdiction is likely to come before the court. Where parties differ as to a matter as fundamental as whether they have agreed any contract, or any contract containing an arbitration clause, it is most unlikely that one or other of them will rest content with a decision of arbitrators as to either their jurisdiction or as to the parties' rights. For one or other party is saying that there is simply no agreement that arbitrators can resolve their disputes. In such circumstances, the issue of jurisdiction is likely to come before the courts sooner or later, and when it does, it will have to be decided by the court from first principles and in light of facts which, whatever the investigation by the arbitrators, are yet to be determined on the evidence by the court."*

46. The Court also can determine a jurisdiction challenge based on a dispute as to the existence of a binding arbitration agreement, either way, on the evidence before the Court. See *Dicey* at 16-076 in the context of the mandatory stay provisions under the English Arbitration Act:

> "*There is a general principle of the law of international arbitration that the arbitral tribunal has the power to determine its own jurisdiction. This is known as the principle of Kompetenz-Kompetenz or compétence-compétence. But the principle does not require that the tribunal has the exclusive power to determine its jurisdiction, nor that the court may not determine whether the tribunal has jurisdiction before the tribunal has ruled on its jurisdiction. Where there is an application to stay proceedings under s.9 of the 1996 Act, both in international and domestic cases, the court may examine the issue of whether there ever was an agreement to arbitrate. If an application for a stay is resisted on the basis that no arbitration agreement exists, the court may determine (1) to decide on the evidence before the court that such an agreement does exist in which case (if the disputes fall within*

> *the terms of that agreement) a stay must be granted; (2) to stay the proceedings on the basis that it will be left to the arbitrators to determine their own jurisdiction pursuant to s.30 of the 1996 Act; (3) not to decide the issue but to make directions for an issue to be tried as to whether an arbitration agreement exists; (4) to decide that no arbitration agreement exists and to dismiss the application to stay.*"

47. When a party challenges the jurisdiction of the Court by reference to a valid and binding arbitration agreement made between the parties it has the evidential burden of showing the Court that such an agreement exists on the balance of probabilities[24].

48. There is an analogy with a party which challenges the exercise of jurisdiction by pointing to an agreement providing for the jurisdiction of the courts of a foreign country:

> "[W]*here an English court is called on to exercise jurisdiction in circumstances in which the material jurisdictional facts are not agreed, the party who wishes to invoke the jurisdiction will be required to have the better of the argument that the facts which support its invocation of the jurisdiction are satisfied. It is likely that the same principle applies in mirror image when a party challenges the exercise of jurisdiction by pointing to an agreement providing for the jurisdiction of the courts of a foreign country. If the court is required to decide who, on the material before it, has the better of the argument on the facts and matters relevant to the existence and exercise of jurisdiction, the question of who has the burden of proof will be the ordinary one, that the party who seeks to establish a fact bears the burden of establishing it.*"[25]

49. Similarly, a party who seeks a stay of litigation on the grounds of an arbitration agreement bears the burden of proving that the arbitration agreement was in fact entered into. The Court must be satisfied that a valid arbitration agreement exists. See: *Associated British Ports v Tata Steel UK* [2017] 1 CLC 826 at § 20:

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[24] *Phipson on Evidence 20th Edition* § 6-0006.
[25] Dicey 12-114; see also *Konkola Copper Mines plc & Anor v Coromin Ltd* [2006] 1 CLC 1 at §§. 94 – 95.

> "*It is not enough for* [the party seeking a stay] *to show merely an arguable case that he is party to a concluded arbitration agreement.* ***Unless the court is satisfied that that is so,*** *there is no jurisdiction under the section to stay proceedings. The court must therefore determine the dispute if it affects the question whether the defendant comes within section 9(1)*."(emphasis added)

50. Mr Potts KC submitted that the Court has to take the arbitration agreement at face value because it is statutorily required to deem it to be effective and that is not denied, credibly or robustly, by the JOLs.[26] Mr Potts KC submitted that a positive case had to be made by the JOLs and it is not enough for them to put PWL to proof or to raise suspicions.

51. He also relied on some commentary in David Joseph KC's book (Jurisdiction and Arbitration Agreements and their Enforcement (3rd Edition)) for the proposition that it was wrong for the Court to need to be 'virtually certain' that an agreement to arbitrate was in place and all that was required was an 'arguable case'. The Court has the evidence of Mr Zhang and the Jian Ying SPA exhibited to it. It has not been tested, Mr Potts KC argued, whether an agreement to arbitrate exists or is arguably in existence. As a consequence, unless the JOLs can show it is null and void, inoperable or incapable of being performed it should apply.

52. I do not accept Mr Potts KC's submissions. In my view the Arbitration Act 2012 does not apply as its principal provisions deal with Cayman-seated arbitrations (see section 3 (1)). If I am wrong about that the assertion that the arbitration agreement exists, it has clearly been denied by the JOLs within the meaning of section 4(4) which as a result does not assist PWL even were the Act to apply. Section 4(4) provides:

> "*Where in any arbitral or legal proceedings, a party asserts the existence of an arbitration agreement in a pleading, statement of case or any other document in circumstances* ***in which the assertion calls for a reply and the assertion is not denied, there shall be***

[26] Sections 3, 4 and 9 Arbitration Act 2012 and section 4 FAAEA.

deemed to be an effective arbitration agreement as between the parties to the proceedings" (emphasis added).

53. As to the approach of the Court, the correct test in my view is whether PWL has satisfied the Court on the balance of probabilities that an agreement to arbitrate was made.

54. The question as to whether there is evidence of an agreement to arbitrate between the parties is obviously the critical precondition to deciding these applications. Both parties have had ample opportunity to prepare and provide evidence on the issue.

No arbitration agreement has been established on the evidence

55. On the available evidence I have come to the clear view that an arbitration agreement was not made. The JOLs have put forward evidence which PWL has not answered regarding the authenticity of the Jian Ying SPA and the arguments as to contemporaneous material negating its existence have not been responded to[27]. I accept Mr Goucke's numerous submissions on the contention that the Jian Ying SPA is not genuine which I have set out above.

56. PWL has not satisfied this Court that the agreement was made on the balance of probabilities or that there is good evidence that it was. There is no evidence of the negotiations which led to the agreement. Although the signature pages appear to have been signed in wet ink, I accept as is said by Mr Kennedy that it is not possible to say when and where execution took place. Mr Kennedy also says the paper used for the signature page of Zhang Jian appears to be a different type of paper from the other pages of the document produced and appears to have been taken from a different paper stock. It is not possible to identify when it was created or by whom.[28] PWL have adduced no supporting evidence to corroborate it.

[27] See correspondence since July 2021 from the JPLs, JOLs, and Kennedy affidavits 3, 4, 5, 6, 9, and 10.
[28] Kennedy 10 §§ 24-26.

57. The Court is not prepared in the circumstance to accept the Zhang affirmation and the document exhibited at face value in order to be satisfied that an agreement to arbitrate was made without more. It is simply not credible on its face against the contemporaneous materials and unanswered critical questions[29].

58. Some of those questions can be read in Walkers letter of 29 April 2022 to Conyers. As a minimum it seems to the Court that a commercial decision to enter into the Jian Ying SPA by the Fund in breach of the Choi Shun SPA on inferior terms requires an explanation with good evidence to support it. None has been proferred.

59. I would add that in the circumstances of this case it will not do for PWL to say the Court cannot fairly reach a view on this threshold issue because a witness has not been cross-examined and the evidence properly tested and the matter must therefore go off to arbitrators in Hong Kong to determine the question of whether an agreement to arbitrate was made.

60. The evidence and circumstances surrounding the March Transfer are sufficiently compelling and the points Mr Goucke has rehearsed challenging the authenticity of the SPA so cogent that this cries out for evidence or explanation from PWL. In the absence of any engagement with these matters by PWL, I have formed the clear view that it is manifestly incredible that the Jian Ying SPA is genuine.

61. The Court does not shut its eyes to the context, namely that the jurisdictional challenge has been enabled by a document produced in December 2021 (five months after service of proceedings on

[29]In *BTU Power Management Company v Hayat 2011* (1) CILR 315 at § 17, Chadwick, P., Forte and Mottley, JJ.A. held:

> "*Put simply, if an applicant establishes by evidence, however weak, that there is a case to answer, then the court may infer, from the failure or refusal to answer that case, that there is no answer to it*."

PWL) which conveniently supports the case to set aside service, without any sufficient explanation or good evidence concerning its provenance and likely authenticity.

JOLs' alternative case and Arbitration Act 2012 and Foreign Arbitral Awards Enforcement Act 1997

62. Having so found, it is unnecessary to consider the JOLs' alternative cases that the SPA would be void and /or the disputes do not fall within the arbitration agreement, assuming it had been made.

63. In addition, no arbitration agreement having been established in this case, the Arbitration Act 2012 and the Foreign Arbitral Award Enforcement Act 1997 have no application. Even if an arbitration agreement had been established to the satisfaction of the Court, the 2012 Act would not apply as by section 3(1) its principal provisions only apply where the seat of the arbitration is in Cayman.[30]

64. As to whether the 1997 Act would apply (if an arbitration agreement had been established to the satisfaction of the Court), for PWL to obtain a stay of proceedings, there would need to be an assessment at trial of whether the arbitration agreement covered the disputes, and whether it was null and void, inoperative or incapable of being performed for the reasons argued by Mr Goucke.

Cayman Islands clearly the appropriate forum

65. PWL put forward in Zhang 1 at §18:

> "*As to* [serious issue to be tried], *PWL denies the allegations that have been made against it, and, subject and without prejudice to the outcome of PWLs jurisdictional challenge, PWL intends to contest the Plaintiff's claims in the appropriate forum for doing so, whether by way of defence or counterclaim. For present purposes, however, PWL does not consider it necessary to seek to persuade the Court, through the medium of this First*

[30] **From the preamble it is clear that this is a Law intended to modernise the conduct of arbitration proceedings in the Cayman Islands.**

Affirmation, that there is no serious issue in dispute between the parties (while fully reserving its right to do so."

66. It is clear that the JOLs have established a serious issue to be tried in this case – as both Segal J[31] and Doyle J[32] have held. Although the merits have not yet been engaged with by PWL there is clearly a serious issue to be tried with a real prospect of success in both law and fact concerning the allegedly wrongful transfer of the shares. There is also a good arguable case that the case falls within one or more of the classes of case set out at GCR Order 11 r, 1(1).

67. As Doyle J found at § 6 of his judgment following the *ex parte* hearing, at the heart of the dispute is the claim by the Fund, which at that time was in provisional liquidation and which is now in official liquidation in the Cayman Islands, against the Directors in respect of their duties as directors of a Cayman Islands company. Its sole purpose is to hold shares in Ourgame which are the subject matter of the dispute. Those shares, being shares in a Cayman Islands company, are also located in this jurisdiction.

68. Once the existence of the arbitration agreement has been decided, as it has, against PWL there are few countervailing connecting factors to Hong Kong. Mr Zhang says:[33]

a. "*it would be necessary for there to be Hong Kong legal advice and expert evidence on issues of Hong Kong law*";

b. "*all of the factual witnesses and any expert witnesses, on Hong Kong law, would be based in the PRC or Hong Kong*";

c. "[*a*]*ll of the witnesses would likely speak Chinese almost exclusively*"; and

d. PWL "*may wish to assert claims or counterclaims against* [the Fund]".

[31] Judgment and Order of Justice Segal in the Injunction Proceedings, dated 27 July 2021.
[32] § 4-5 of Judgment of Justice Doyle allowing for service out of jurisdiction, dated 21 September 2021.
[33] At § 25.

69. These contentions do not in my view displace Cayman as the most appropriate forum to resolve this dispute.

70. I am of the view that on the available evidence the Cayman Islands are clearly the appropriate forum for resolution of the Plaintiff's claims.

Conclusion

71. PWL's applications are dismissed:

a. PWL should file and serve a Defence within 28 days.

b. My provisional view is that PWL should pay the JOLs' costs of these applications including those thrown away for the hearing before Doyle J when he recused himself. However, PWL should have an opportunity to address the Court on costs if it disagrees with this and wishes to do so.

c. If there is a dispute as to costs, and as to the basis of taxation, the parties are invited to file written submissions of no more than 5 pages in length within 21 days and I will determine the matter on the papers.

THE HON. MR JUSTICE RAJ PARKER
JUDGE OF THE GRAND COURT