In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
(Companies (Winding Up))
2023 No: 126 to 131

IN THE MATTER OF ARGO GROUP INTERNATIONAL HOLDINGS INC. (FORMERLY ARGO GROUP INTERNATIONAL HOLDINGS LTD.)

AND IN THE MATTER OF A MERGER AGREEMENT BETWEEN ARGO GROUP INTERNATIONAL HOLDINGS LTD., BROOKFIELD REINSURANCE LTD., AND BNRE BERMUDA MERGER SUB LTD.

AND IN THE MATTER OF SECTION 106 OF THE COMPANIES ACT 1981:

BETWEEN

CORBIN ERISA OPPORTUNITY FUND LTD
CORBIN OPPORTUNITY FUND LP
FOURWORLD EVENT OPPORTUNITIES LP
FOURWORLD GLOBAL OPPORTUNITIES FUND LTD
FOURWORLD SPECIAL OPPORTUNITIES FUND LLC
FW DEEP VALUE OPPORTUNITIES FUND I LLC

Plaintiffs

And

ARGO GROUP INTERNATIONAL HOLDINGS, INC. (FORMERLY ARGO GROUP INTERNATIONAL HOLDINGS, LTD.)

Defendant

RULING

Dates of Hearing: Thursday 18 July 2024
Date of Judgment: Tuesday 03 December 2024

Plaintiff: Mr. Delroy Duncan KC / Mr. Ryan Hawthorne (Trott & Duncan Limited)
Defendant: Mr. Matthew Mason / Mr. Filip Nygren (ASW Law Limited)

Whether to grant a stay on case management grounds / Application for a stay pending unrelated proceedings of similar legal issues / Distinguishing cases involving separate sets of proceedings where the parties and factual and legal issues are substantially the same

RULING of Shade Subair Williams J

Introduction

1. This is the Defendant's application for a stay of these proceedings which were commenced by six separate originating summonses, all of which were filed on 19 April 2023.

2. The Plaintiffs' claim is brought under section 106(6) of the Companies Act 1981 ("CA 1981"). They seek declaratory and mandatory relief in pursuit of an Order sanctioning an appraisal of the fair value of their common shares in the Defendant ("Argo") following a merger (the "merger") between Argo and Brookfield Reinsurance Limited ("Brookfield"). Each of the Plaintiffs acquired these shares subsequent to Argo's issuance of a notice to its shareholders that a special general meeting would be held to approve the merger. The Plaintiffs voted against the resolution for approval of the merger. In that sense, the Plaintiffs have been termed "short-term shareholders". In this Ruling I also refer to the Plaintiffs as the "Dissenters" of the "Dissenting Shareholders".

3. The Defendant's stay application is made on a summons dated 25 January 2024 and is prayed in the following terms:

   "*That these proceedings be stayed pending judgment of the Judicial Committee of the Privy Council in the matter captioned "in the matter of Jardine Strategic Holdings Limited Case No: Civ/2022/14-31….*"

4. The summons is supported by affidavit evidence from Mr. Michael Tiliakos, the General Counsel and Secretary of Argo. The Plaintiffs filed affidavit evidence from Mr. Christopher Jaeger, a senior analyst at FourWorld Capital Management LLC.

5. The Defendant's position is that the originating summonses should be stayed pending the Privy Council's decision on appeal from *Jardine Strategic Holdings Limited* [2023] CA (Bda) 7 Civ (where the Court of Appeal upheld the decision of Hargun CJ on a strike out application on the issue of the short-term shareholders' standing in the context of an amalgamation). The company in *Jardine Strategic Holdings Limited* also filed an appeal from a second decision of the Court of Appeal on the issue of Jardine's dissenting shareholders' discovery entitlements. This will also be argued before the Judicial Board together with strike-out appeal. The underlying legal issues in this case and in *Jardine Strategic Holdings Limited* revolve around the issue of fair share value. The Defendant's application for a stay is grounded on an assertion that the Privy Council will resolve these shared legal issues and in so doing, it will have a dispositive effect on these unrelated proceedings.

6. Having heard oral arguments from Counsel for both sides, I reserved my ruling which I now provide together with these reasons.

Summary of the Background Facts

7. Argo, having formerly been incorporated in Bermuda, now operates as a Delaware incorporated company, effective 30 November 2023. Argo, through its regulated subsidiaries, is in the business of underwriting commercial specialty products in the US property and casualty market. Prior to the merger, its common shares were listed on the New York Stock Exchange (the "NYSE"). Those shares were delisted from the NYSE on 15 November 2023.

8. Brookfield is a Bermuda exempted insurance and reinsurance company. It has subsidiaries in the United States, Canada, Bermuda and in the Cayman Islands. Brookfield's shares, comprising Class A exchangeable shares and Class A-1 exchangeable non-voting shares are listed on the NYSE and the Toronto Stock Exchange.

9. Brookfield is the sole shareholder of its subsidiary BNRE Merger Sub Limited ("BNRE Merger Sub"), which is also a Bermuda exempted company. On 8 February 2023 Argo, Brookfield and BNRE Merger Sub entered into an Agreement and Plan of Merger (the "Merger Agreement") which provided for (i) BNRE Merger Sub merging with and into Argo, the surviving company and (ii) Argo surviving the merger as a wholly owned subsidiary of Brookfield. The Merger Agreement was publicly announced on the same day as its formation.

10. The immediate effect of the merger resulted in each of Argo's issued and outstanding common shares being converted into certificates entitling the respective shareholder to receive US$30.00 per share (without interest and minus any required withholding tax) as consideration for the merger. The conversion meant that any such issued and outstanding common shares would be cancelled and delisted from the NYSE so that they would no longer exist.

11. The merger was to be put to a vote at a special general meeting to be held on 19 April 2023 (the "SGM"). Argos' common shareholders were put on notice of the SGM on 20 March 2023. Notice of the SGM, as issued by Argos' Board of Directors (the "Board"), also signaled that for the purpose of section 106(2) of the CA 1981 the US$30.00 sum had been determined to be the fair value of each of the unissued common shares.

12. After the issuance of the Board's notice of the SGM, on or about 6 April 2023, the Plaintiffs acquired their common shares of Argo, rendering themselves term short-term shareholders. Just short of two weeks thereafter, the merger resolution was approved at the SGM on 19 April 2023 by the requisite majority of the common shareholders. The Plaintiffs dissented from the majority of the shareholders on the passing of the merger resolution.

13. The Plaintiffs, comprising the full number of the short-term shareholders, commenced these proceedings on 19 April 2023. By agreement between the parties, the matter was stayed pending the completion of the merger which occurred on16 November 2023.

The Jardine Proceedings

14. Similar to the present case, the Jardine proceedings were commenced by short-term shareholders filing 18 separate originating summonses. Those plaintiff shareholders dissented on the passing of a resolution to approve an amalgamation agreement entered into by Jardine Strategic Holdings Limited ("Jardine") on 17 March 2021.

15. Jardine sought to strike out those proceedings on the grounds that short-term shareholders had no standing to seek a fair value appraisal under section 106(6) of the CA 1981. The alternative basis for Jardine's strike-out application was that in seeking a fair share value appraisal, it amounted to an abuse of the Court's process. Jardine failed on this strike-out application. In the judgment of Hargun CJ (as he then was) in *In the matter of Jardine Strategic Holdings Ltd* [2022] SC (Bda) 27 Com (20 April 2022) ("*Jardine SC*"), the Court held that the "character and motivations" of dissenting shareholders "as well as the timing and amount of their investments" did not factor as a relevant consideration to their standing or the Court's duty to carry out an objective assessment of the fair value of the shares.

16. Hargun CJ's decision was affirmed by the Bermuda Court of Appeal. Subsequently, Jardine obtained leave to appeal to the Privy Council.

Analysis and Discussion

17. The Defendant's stay application is made on case management grounds. It requires this Court to assess all of the relevant facts and circumstances before applying the law. In my examination of the relevant facts and circumstances, I am to carry out a balancing exercise between the benefits and prejudices which would be occasioned by an order of stay. This exercise engages the competing perspectives of both sides.

THE RELEVANT FACTS AND CIRCUMSTANCES

Whether the risk of prejudice to the Plaintiffs is removed by their receipt of payment of the merger consideration

18. Mr. Mason submitted that the Plaintiffs would not be prejudiced by a stay of these proceedings because they have already been paid the merger consideration totaling US$165,063,600.00 (in aggregate sum) representing the US$30.00 per common share value. To that extent, Mr. Mason pointed this Court to the legal position (post *Shanda Games Ltd v Maso Capital Investments Ltd and others* [2020] UKPC 2) in various other jurisdictions where it has been held that the deal price is the best indicator of fair value in appraisal proceedings.

19. Advancing a prediction that the Bermuda law position will shift towards a reliance on the deal price in determining the fair share value, Mr. Mason recited a portion of a speech publicly made by Lady Arden, Justice of the Supreme Court of the United Kingdom (and the Privy Council) in the 9th Annual P.R.I.M.E. Financial Conference on 3 February 2020. Fair to say, Lady Arden's remarks were expressly neutral in her acknowledgment of the difficulties in determining the fair value of shares without reference to the merger price.

20. Mr. Mason, while devoted to his legal prognosis, submitted that it is unlikely that the Plaintiffs will ever receive more than what they were already paid, no matter how the Privy Council decides the Jardine appeal on the issue of standing. He directed the Court's attention to the evidence under Mr. Tiliakos' second affidavit where the issue of the merger consideration is further addressed. Mr. Tiliakos raised the example of a financial services business which could not be valued using an income-based model without encountering real difficulties, citing the

Cayman Islands Grand Court's decision in *FGL Holdings* FSD 184 of 2020 (RPJ) (unreported, Parker J, 20 September 2022)[1].

21. In the *FGL Holdings* case before Parker J, the Grand Court was asked to determine the fair value of the shares held by FGL shareholders who voted against the buyer's ("FNF") acquisition of FGL. The Court favoured FGL's expert opinion evidence which was given by Professor Kenneth Lehn whose view was that the fair value of each dissenting share in that case should be based on market data about the share price, cross-checked to comparable companies' data in addition to other 'observable' factors.

22. Professor Lehn addressed four methods of fair share valuation in *FGL Holdings*:

    (i) The market trading price
    (ii) The transaction price
    (iii) A comparable companies' analysis
    (iv) A discounted cash flow ("DCF") analysis (used under the income based model)

23. On Professor Lehn's conclusions, the best estimate of fair value entailed a combined use of the market trading price, the transaction price and the comparable companies' analysis, rejecting only the suitability of the DCF analysis.

24. Professor Lehn opined that FGL's publicly listed shares (on the NYSE) had been traded in an efficient, well-informed market, both before and after the merger announcement. His evidence was that the most reliable indicator of fair value is the "Adjusted Unaffected Market Price", meaning the removal of the value which was ascribed to the shares in anticipation of a merger. He championed a valuation based on the actual relationship between the changes in the price of an FGL ordinary share and the changes in the value of market and industry indices.

25. Professor Lehn said that the transaction price reflected an upper bound on the fair value of an FGL ordinary share because the shareholders' vote at the Extraordinary General Meeting implied that it exceeded the shareholders' assessment of the fair value of an FGL ordinary share. Professor Lehn said this was also because the transaction prices reflect a sharing of the expected gains from the transaction, including anticipated synergies that are not included in the determination of fair value. On this expert opinion evidence, the fair value of the dissenters' shares was even less than the transaction price because the transaction price incorporated the buyer's premium for its expected gains deriving from FGL's complementary annuity and life insurance business into FNF's existing insurance business.

[1]It appears that he Costs Ruling was inadvertently provided in lieu of Parker J's ruling on the fair share value application.

26. That being the case, it is undeniably clear from Parker J's reasoned judgment of 149 pages that *FGL Holdings* does not stand as authority for any generically favoured approach. The facts and circumstances of each case must be carefully assessed before any determination of the most reliable or appropriate approach in the exercise of share valuations in the context of a merger. For example, a trial judge considering the suitability of reliance on the market trading price may need to consider questions or issues relating to the fullness of company information in the public domain or evidence of undervalued shares. As Parker J accepted on the agreed evidence in *FGL Holdings*, fair market value is generally marked by the "*highest price expressed in terms of money or money's worth at which the asset would change hands in a transaction between a willing buyer and a willing seller acting at arm's length in an open and unrestricted market where neither are under any compulsion to buy or sell and both have knowledge of the facts*." These factors can only be assessed against fact specific evidence.

27. Citing Segal J in the case of *Trina* (Unreported 23 September 2020), Parker J agreed, as a matter of Cayman law, that the law is not prescriptive as to which method (combined or not) is to be used. He aligned with Segal J's caution that whichever calculation is used, it must be "*undistorted by the limitations and flaws of particular valuation methodologies*…". This was said to be the consistent view of the Court in previous Grand Court decisions such as *Qunar* [2019] (1) CILR 611 per Parker J and *Nord Anglia Education, Inc* (Unreported 17 March 2020) per Kawaley J. At paragraph 257 of the *FGL Holdings* judgment Parker J said:

    "*It follows that fair value is not necessarily the same as the transaction price or the market price* [footnote omitted]. *Where the court finds that market indicators are unreliable, as in the case of an inefficient market for the particular shares in question, then other valuation methodologies may prove to be a more suitable way of assessing the fair value. The court strives to find a methodology or a blended methodology which produces a result which is the best assessment of fair value in all the circumstances of the case*."

28. Recognizing that Delaware case law may be of particular assistance for issues new to Cayman law, Parker J embraced the persuasive effect of Delaware jurisprudence noting the volume of appraisal proceedings litigated over the course of many years under a statutory framework similar to that of the Cayman Islands. The similarity between these two statutory regimes was also carefully observed and outlined by Segal J at first instance and ultimately by Lady Arden in the Privy Council's judgment in *Shanda Games Ltd*. Notwithstanding the parallels, the differences between these legislative structures did not escape the scrutiny of judicial examination. Parker J also cautioned that Delaware law is not Cayman law, meaning where a conflict arises, Delaware law cannot be preferred over Cayman law.

29. Although noting a shift in Delaware case law towards the objectivity of market-based evidence being relied on as the best indicator of fair share value as opposed to the more subjective DCF

valuations, Parker J also quoted Segal J in *Trina* who described the utility of a DCF valuation as follows [paragraph 250]:

"*The assessment of the true or proper monetary worth of the share can be done in appropriate cases by assuming an immediate sale and certain conditions within which the sale is assumed to take place. This will often be the most reliable method of capturing the full monetary worth of the share. But the financial worth of a share can also be assessed (absent a statutory direction to the contrary) on the assumption that the shareholder retains that share and obtains the financial benefits of so doing. This is what the Dissenting Shareholders have in mind when they refer to intrinsic value (establishing a monetary value for the shareholder's bundle of rights by reference to the financial benefits flowing from the right to participate in profits and obtain distributions in a winding up). In both cases a DCF valuation of the company can be of assistance and relied on. The DCF valuation generates a value for the shares by starting with a valuation of the company's cashflows, which cashflows (and assets) represent the financial benefits in which shareholders may ultimately participate, allocating that value to shareholders proportionately and then making suitable adjustments to reflect the different holdings, rights and obligations of individual shareholders (in order to base the valuation on the shareholder's particular entitlement). In the case where there is a valuation based on an assumed sale, the DCF valuation may be relevant insofar as it represents or supports a calculation of what a purchaser is likely to offer and pay for the shares. In a case where there is a valuation based on an assumed retention, the DCF valuation is relevant insofar as it represents or supports a calculation of what the shareholder is likely to receive over time by way of dividends and distributions in a winding up. This approach is supported by the comments of Martin JA in Shanda*[2]…"

30. Mr. Mason referred me to cases decided by the Delaware Chancery Court and the appellate level decisions of the Supreme Court of Delaware in favour of the transaction price measure. Although emphasis was given to the Cayman Islands and the State of Delaware cases, Mr. Mason's global spin through the caselaw did not omit cases from Canada's Ontario Superior Court of Justice and Canada's Court of Appeal of Yukon.

31. This traveled portrait of the law was put on display only to persuade me that it is a near certainty that this Court will later find that the Plaintiffs are entitled to no more than the merger consideration as the law in these various jurisdictions favour the transaction price approach. Under Mr. Tiliako's second affidavit, he provided a detailed report of the merger in a proxy statement dated 20 March 2023 to the Defendant's shareholders. Mr. Mason drew the Court's particular attention to the background of the merger which was prompted by requests from shareholders for a review of potential strategic alternatives by Argo's Board. Mr. Mason outlined various portions of the proxy statement to demonstrate the competitive and arm's

[2] *Shanda Games* (Unreported 25 April 2017) Segal J

length nature of the bidding process for potential and appropriate vendors. This evidence was relied on by the Defendant to entice the Court to find that the Defendant's underlying case is a strong one. I was also asked to keep it in mind that if this Court ultimately decides in favour of the merger deal price, then the Plaintiffs who have been paid up, will not have been prejudiced by any withholding of their entitlements.

32. Of course, it is not possible to forecast (with any reasonable certainty) the decisions of this Court on the issue of fair share valuation. I accept that there is caselaw from both the Cayman Islands and the Delaware Courts in which the decisions leaned in preference of a deal price approach based on the particular facts of that case. However, I would not go so far to say that the existence or even volume of this case law is able to signal me into a pre-conclusion or generic view that the transaction price is the preferred or even starting approach. This Court would require the benefit of full argument on well researched legal submissions in order to grapple with the relevant variations between Bermuda's legal regime and that of the other jurisdictions. Inevitably, the Court will find that the application of the law must be made in consideration of the particular facts of the case and any other relevant factors which might tailor the ultimate decision.

33. For good reason, this Court declines any invitation to form a preliminary view on the question of the most appropriate analysis for share valuation. The nuanced question of fair value is complex, evidentially and legally. This is more than tacitly accepted on the Defendant's evidence where Mr. Tiliakos contemplates costs between US$1.5M and US$3M to instruct an outside appraisal expert. After all, Mr. Tiliakos himself warned that these proceedings are likely to involve particularly complex points of law for which there is minimal case law guidance.

34. It is a matter for trial as to whether reliance on the market price, the transaction price and/or the comparable companies' analysis is best. Alternatively, it may prove appropriate to employ the DCF analysis as outlined by Segal J in the *Trina* case, even though that the DCF analysis has been fact-specifically rejected in some of the case law placed before this Court. In any event, one cannot yet reasonably predict how a valuation derived from any of these analyses will compare to the merger consideration paid. I am therefore unable to positively find that the Plaintiffs are at minimal risk of prejudice on the grounds that they have already been paid the merger consideration.

35. As I have refrained from forming any view on the likely outcome of the Plaintiffs' claims, I must proceed on the basis that there is a chance that this Court will ultimately find that the Plaintiffs have been shortchanged on the merger consideration.

What is likely to be the Extent of Delay before a Judgment is rendered by the Privy Council in the Jardine Proceedings?

36. It is understood that the appeal will entail arguments on (i) the Jardine Dissenters' standing and (ii) on whether shareholders are entitled to company privileged documents as part of discovery.

37. Mr. Jaegar, estimating a 12-month period between the hearing of the Jardine appeal and the delivery of the Privy Council's judgment, identified 12 rulings between 2022 and 2023 in which the Privy Council delivered a ruling after having reserved for a period ranging from six months (183 days) to twenty-five months (762 days). However, Mr. Mason, calculated that the mean average of the time-frame of 2023 judgments delivered by the Privy Council is 3.7 months, the median average being 3 months.

38. There was some contention between Counsel over the projected listing of the Jardine appeal. This Court takes judicial notice that subsequent to the hearing before me, the Jardine appeals were provisionally fixed to be heard on 5-6 March 2025. So, any analysis of the likely timeframe for the delivery of a judgment can be applied to the period immediately following this fixture.

39. I am mindful that this is likely to be a complex and difficult appeal The complexity of the fair share value issues was characterized as generically difficult by Laden Arden herself, who is quoted in the material produced by Mr. Mason as having said:

"*There may also be the problem that to determine the fair value without reference to the merger price may encourage litigation. It may even encourage people to buy shares with a view to exercising appraisal rights, and this could also have an adverse impact on court resources. It may also make it difficult to achieve mergers efficiently and have adverse economic consequences: there may be less rationalisation of industries that have become outmoded.*

These are some of the difficult issues that may have to be considered in the future and therefore I express no view on them. There may indeed be no answers according to the facts of the case. We shall have to see."

40. I am reinforced in my view of the plethora of difficult issues to be considered by the Privy Council, having had regard to (i) Hargun CJ's 47-page dismissal of the company's strike-out application (ii) Hargun CJ's discovery-related rulings and (iii) the Bermuda Court of Appeal's 80-page judgment by Clarke P on the disclosure issue alone together with the Court of Appeal's 33-page judgment on the strike out application. Clarke P reserved for nearly 4 months before delivering the Court of Appeal's discovery ruling. From this I may form a reasonable impression on the general timeframe which might be required by the Privy Council before ruling on these issues. I find that it is reasonable for this Court to suppose that a ruling on both

the discovery issues and the strike out application relating to the Jardine dissenters' standing might take the Privy Council up to 6 months or more before delivery of its judgment.

41. Using a broad-brush assessment, I find that it would be reasonable to contemplate that delivery of the Judicial Board's judgment may not occur until late 2025 if not at some point in 2026. Of course, that cannot be known with any degree of certainty.

The estimated length of the litigation in these proceedings

42. Mr. Tiliakos noted in his affidavit evidence on the issue of delay that share appraisal proceedings can run for up to three to four years in length.

43. Mr. Jaegar, however, stated in his evidence [16]: "…*Mr. Tiliakos has significantly understated how much a stay is likely to delay these proceedings. Whilst it is difficult to predict how long a court proceeding will take, I note that, pursuant to the directions order the Plaintiffs sent to the Defendant on 4 January 2024, a pre-trial CMC would be listed within approximately 11 months of the date of the directions order. Contrary to Mr. Tiliakos' assertions, on the basis of the Plaintiff's proposed directions order, the proceedings would not take up large amounts of this Court's resources between now and February 2026 (i.e. the date on which the Jardine ruling may be handed down*…)

44. In forming a view on the estimated timeframe needed for this litigation to run its full course, the Defendant asks this Court to refrain from relying on the draft trial directions as proposed by Mr. Duncan KC simply because they are not agreed directions between Counsel. While I agree that the proposed directions are not authoritative, it is insightful to know what Mr. Duncan KC, a very senior and experienced Counsel, considers to be the required period for his clients, the Plaintiffs, to prosecute their claims.

45. Artificially adding 6 months to Mr. Duncan's proposed timeframe, it would appear that the pre-trial stage of these proceedings may span between 11 and17 months. The trial may continue for 2-4 weeks and delivery of judgment may take between 2-6 months depending on various moving factors. That is not a prediction; it is merely an impression aided by the competing views expressed. At this early stage of the proceedings, it is not open to the Court to take a strong view either way, in this regard.

What is the Plaintiffs' risk of irrecoverable pecuniary loss if a stay is granted?

46. Mr. Duncan KC argued that the Plaintiffs have no recourse to adequate compensation for the delay caused by a stay. He robustly rejected the Defendant's suggestion that a statutory award of pre-judgment interest at 3.5% would cure the resulting prejudice, contrasting it to the commercially available returns to which the Plaintiffs would otherwise be privy. Opening up to Mr. Jaegar's evidence, Mr. Duncan KC highlighted that risk free US treasury interest rates currently range between 4.14% and 5.38%. This represents the lowest end of the range of commercially available returns. Mr. Jaegar's evidence also refers to interest rates up to 5.5% at the U.S. Federal discount rate and 8.5% representing the U.S. prime rate, a benchmark used by banks when lending money to their most favoured customers on consumer loan products.

47. Considering the extremity on the high end of the range, Mr. Duncan KC pointed to the Plaintiffs' evidence of the annualized returns of 13.17% for the S&P 500 over the last 5 years, without overlooking the 23.16% rise reported over the preceding year. This, Mr. Duncan KC said, is to be characterized as a "concrete prejudice" as the Plaintiffs are being deprived of the opportunity to yield as much as 10% per annum because of the delay in the trajectory for a judgment.

48. As Mr. Duncan KC put it, Argo is making money out of the delay. He argued that if the Court ultimately finds in favour of a 30% uplift on the merger consideration, Argo would have retained the additional benefit of having held on to the Plaintiffs US$50m increase for as long as the proceedings are stayed, disgorging only a small portion in statutory interest.

49. As I see it, this was a particularly strong point, and one could hardly expect Mr. Mason to effectively refute it. Although Mr. Mason cleverly sought to compare other instances of possible prejudice to the Defendant and to downplay the likelihood of the Plaintiffs ever receiving an uplift on the merger consideration, the fact of the matter is that this Court accepts that it cannot put the Plaintiffs' prospects of ultimate success below or over 50%. This means that the Court must proceed on a hypothetical basis that there is a 50% chance that the Plaintiffs will obtain judgment for a sum exceeding the merger consideration. If that 50% chance is realised, then the Plaintiffs will have been deprived of possessing their additional entitlements for the entire period leading up to the judgment of the Court. The deprivation period in respect of any such additional entitlements equates to a real loss of commercial opportunity for the Plaintiffs as the restrictive pre-judgment statutory interest does not compare to the commercially available rates.

What is the Defendant's risk of irrecoverable pecuniary loss if a stay is refused?

50. Mr. Mason pointed out that the Defendant would be prejudiced if the stay is refused as the legal expenses of the litigation in these proceedings cannot be fully recovered. Mr. Tiliakos

stated in his evidence that the preparation required for these proceedings would entail instructing an outside appraisal expert which could cost between US$1.5M and US$3M. He also warned of the necessity to retain Counsel from firms in both Bermuda and the United States and of the fact that there is very little guidance by way of case law, making these proceedings particularly complex and costly. Of course, the inability to recover the full sum of legal costs is a risk equally incurred by the Plaintiffs, as Mr. Duncan KC countered.

51. Mr. Jaegar's evidence also covered his concerns for transparency and uncertainty as to the Defendant's ongoing financial status, now that the Defendant is no longer a publicly listed company publishing its financial information. Implicitly, he contends that so long as the litigation period is extended, the Plaintiffs are prejudiced by the risk of unknowingly engaging in litigation against a party who may become financially restricted from meeting its costs liabilities.

Whether the Jardine Appeal will likely dispose of the need for the present litigation

52. To some extent, it is accepted by Counsel for both sides that if the Privy Council find in favour of Jardine's argument that short-term shareholders have no standing to seek a fair value appraisal under section 106(6) of the CA 1981, then the Plaintiffs' case in the current proceedings before me may be defeated. Mr. Duncan KC describes this more as a possibility in his written submissions before this Court while Mr. Mason puts it at a near certainty.

53. Relying with optimism on the prospect of Jardine's success in the Privy Council, the Defendant emphasized that this Court should be swayed in favour of a stay of proceedings for the Defendant in these proceedings, when considering the disposal impact on these proceedings if the Jardine Defendants achieve a successful outcome on the issue of standing. The prejudicial impact of this to the Defendant is stated by Mr. Tiliakos in his affidavit evidence [22.3.3.2] : "*… A timely process after the stay and interest on any damages awarded cures any such prejudice or delay. On the other hand, not granting the stay would cause the Court and Argo to expend great time and expense with a real possibility…that all will be unnecessary and wasted. This cannot be fair and just or in line with the overriding objective*."

54. Mr. Mason urged this Court not to overlook the fact that the Court of Appeal, by granting Jardine leave to appeal to the Privy Council, satisfied itself that there is a real possibility that the appeal will succeed. That being the case, Mr. Duncan KC sharply pointed out that it begs to question why a stay of proceedings was not sought or ordered in the Jardine proceedings itself.

55. Administering a similar dose of caution as did Kawaley J in the *Nord Anglia Education* case [31], I caution myself about the inherent difficulties of assessing the strength and merits of an

appeal at the interlocutory stage. This is particularly so as the Jardine appeal is an entirely separate proceeding from the present proceedings which have yet to be tried. As for the significance of the Court of Appeal's granting of leaving in the Jardine proceedings, it warrants reiteration that an arguable appeal may be entirely distinguishable from an appeal based on especially strong grounds (See the *Nord Anglia Education* case [14]).

56. In any event, I accept that there is a strong probability that the Privy Council's judgment for the Jardine proceedings will be handed down prior to the conclusion of the litigation in the present case. So, there is no real cause for concern that the proceedings will be decided or settled without the benefit of the Board's judgment on the legal issue of fair share value.

THE LEGAL PRINICPLES FOR DETERMINING A STAY OF PROCEEDINGS

57. A constitutional analysis, ranking over all other considerations, is the Court's starting point in deciding any question as to whether civil proceedings ought to be suspended, whatever the basis for the application. While the greater portion of section 6 specifically applies to criminal proceedings, section 6(8) of the Bermuda Constitution requires litigants in civil cases to be given "a fair hearing within a reasonable time." Of course, the question as to what constitutes "a reasonable time" engages the particular facts and circumstances of the case.

58. The source of the Court's powers to stay litigation proceedings always includes its inherent jurisdiction. In *Re Celestial Nutrifoods (in liquidation)* [2017] Bda LR 11 Kawaley CJ explained that the Court, independent of the statutory insolvency stay powers with which he was concerned, is empowered under its inherent jurisdiction to impose a stay of proceedings. Sections 12 and 18 of the Supreme Court Act 1905 is where the Court derives its authority to exercise these fundamental powers with which it never separates.

59. The use of the Court's inherent jurisdiction is also relied on as a matter of English law. Halsbury's Laws of England / Civil Procedure Volume 12 (2015) para 1039 provides:

"*A stay of proceedings arises under an order of the court… which puts a stop or 'stay' on the further conduct of the proceedings in that court at the stage which they have then reached, so that the parties are precluded thereafter from taking any further step in the proceedings… The object of the order is to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process…*

The court's power to stay proceedings may be exercised under particular statutory provisions…, or under the Civil Procedure Rules…or under the court's inherent

jurisdiction…or under one or all of these powers, since they are cumulative, not exclusive, in their operation."

60. It is common ground between the parties that the application before the Court is for a stay on case management grounds. In the written submissions of Mr. Mason, he argued that the Court has a broad discretion to make an Order of stay. The Defendant flagged the Court's duty to have regard to its general case management powers and obligations under the Overriding Objective. In my earlier ruling in *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2020] SC (Bda) 4 Com (17 January 2020) this Court had regard to the RSC Order 1A which provides:

1A/1 The Overriding Objective
(1) These Rules shall have the overriding objective of enabling the court to deal with cases justly.
(2) Dealing with a case justly includes, so far as is practicable-
(a) ensuring that the parties are on equal footing;
(b) saving expense;
(c) dealing with the case in ways which are proportionate-

(i) to the amount of money involved;
(ii) to the importance of the case;
(iii) to the complexity of the issues; and
(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases

1A/2 Application by the Court of the Overriding Objective
2 The court must seek to give effect to the overriding objective when it-
(a) exercises any power given to it by the Rules; or
(b) interprets any rule.

1A/3 Duties of the Parties
3 The parties are required to help the court further the overriding objective.

1A/4 Court's Duty to Manage Cases
4 (1) the court must further the overriding objective by actively managing cases.
(2) Active case management includes-

a) *encouraging the parties to co-operate with each other in the conduct of the proceedings;*
b) *identifying the issues at an early stage;*
c) *deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;*
d) *deciding the order in which issues are to be resolved;*
e) *encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;*
f) *helping the parties to settle the whole or part of the case;*
g) *fixing timetables or otherwise controlling the progress of the case;*
h) *considering whether the likely benefits of taking a particular step justify the cost of taking it;*
i) *dealing with as many aspects of the case as it can on the same occasion;*
j) *dealing with the case without the parties needing to attend at court;*
k) *making use of technology; and*
l) *giving directions to ensure that the trial of a case proceeds quickly and efficiently*

61. Mr. Duncan KC invited the Court to pay particular attention to its duty to ensure that cases are dealt with expeditiously and fairly. Mr. Mason, on the other hand, argued that the other factors, such as the need to ensure that parties are on equal footing and the need to save expense, strengthen the merits of the Defendant's application to stay the proceedings.

62. Mr. Duncan KC submitted that the Court, although empowered to order a case management stay, will only do so in "rare and compelling circumstances", citing *Griffin Line General Trading LLC v Centaur Ventures Ltd et al* [2023] SC (Bda) 24 Civ. 31 March 2023. Mr. Duncan KC also relied on *Athena Capital Fund SICAV-FIS S.C.A. v Secretariat of State for the Holy See* [2022] 1 WLR 4570 where Males LJ said [59]:

"*There is, as it seems to me, no reason to doubt that it is only in rare and compelling cases that it will be in the interests of justice to grant a stay on case management grounds in order to await the outcome of proceedings abroad. After all, the usual function of a court is to decide cases and not to decline to do so, and access to justice is a fundamental principle under both the common law and article 6 ECHR. The court will therefore need a powerful reason to depart from its usual course and such cases will by their nature be exceptional."*

63. *Athena Capital Fund* was cited by Hargun CJ in *Griffin Line General Trading LLC v Centaur Ventures et al* [2023] SC (Bda) 24 Civ [34]: "…*the authorities also demonstrated that the Court should be slow to order case management stay of bone fide claims based on properly pleaded causes of action*." In that decision Hargun CJ [33] also quoted the following passage from Butcher J in *Banca Intesa Sanpaola SpA v Commune di Venezia* [2020] EWHC 3150

(Comm) on the specific factors to be taken into account when considering whether to order a stay:

"…
(2) "Exceptionally strong grounds" are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: Mazur Media Ltd v. Mazur Media GmbH [2004] 1 WLR 2966 at [69]–[70] (Lawrence Collins J); Jefferies International Ltd v Landsbanki Islands HF [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast ("BIR"), especially exclusive jurisdiction: Mazur, supra, at [71].

(3) The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: Mazur, supra, at [69]; Jefferies, supra, at [26]. A defendant should not be permitted "under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door": Skype Technologies SA v. Joltid Ltd[2009] EWHC 2783 (Ch) at [22] (Lewison J).

(4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH[2005] EWHC 1453 (Comm) at [21] (Gloster J)."

64. Mr. Duncan KC also cited *Re Yates Settlement Trust* [1954] 1 WLR 564, quoting Lord Evershed MR as follows:

"*It may well be that if an important case is known to be subject to appeal to the House of Lords, or to appeal from a judge of first instance to the Court of Appeal, a judge may reasonable and properly think that it is in the public interest not to decide another similar case until the result of the case under appeal has become known: whether he should so decide depends very much on all the circumstances of the particular cases*…"

65. Mr. Duncan KC submitted that the development of English case law post *Re Yates Settlement Trust* shows that a stay of proceedings is granted mostly, if not only, in cases where the Court is refraining to deliver a ruling on a strike out application or on an application for summary judgment, citing *Green v Skandia Life Assurance Company Ltd* [2006] EWHC 1626 (Ch) at [66]. I accept this to be so for the narrow class of cases where an application for a stay is made pending the resolution of an appeal in another case where an important legal issue is expected

to be settled. That being so, as I have now repeatedly forewarned, the ultimate decision of the Court must fit the particular facts and circumstances of the case.

66. Mr. Mason relied on Hargun CJ's decision in *Ashley Dawson-Damer v Lyndhurst Ltd* [2019] SC (Bda) 72 Civ. In that case, the Court granted a stay of the proceedings in Bermuda pending the final disposition of related proceedings in the Bahamas. However, it has to be said that the case of *Ashley Dawson-Damer v Lyndhurst Ltd* does not assist me in these proceedings for one glaring reason: the facts relevant to the case before Hargun CJ in Bermuda were linked to the facts relevant in the Court proceedings in Bahamas.

67. Ms. Dawson-Damer was a discretionary beneficiary of a trust settlement governed by the laws of The Bahamas. The trustee of the settlement was a Bahamian private trust company, Grampian Trust Company Limited ("Grampian"). In 2006 and 2009 Grampian made two appointments (the "appointments"), the effect of which was to divest the trust settlement of approximately 98% of its assets. Those assets were appointed to, *inter alia*, The Bermuda Trusts. The Respondent, Lyndhurst Limited ("Lyndhurst") was the trustee of The Bermuda Trusts.

68. In March 2015 Ms. Dawson-Damer brought an action against Grampian in the Supreme Court of The Bahamas seeking to set aside the appointments. Lyndhurst, having been added as a defendant to the Bahamian proceedings in July 2018, refused to submit to the jurisdiction and did not participate in the Bahamian proceedings. Ms. Dawson-Damer then invited Lyndhurst to make an undertaking not to dissipate the assets pending the proceedings in Bahamas which could result in an order that the traceable proceeds be held on bare trust for Grampian. Lyndhurst did not consider it appropriate to offer the undertaking, hence Ms. Dawson-Damer's commencement of proceedings in Bermuda for interim injunctive relief by way of a preservation order.

69. One can thus immediately appreciate how this case falls short of assisting with the question of a stay pending factually unrelated proceedings which merge only on a commonality of nuanced legal issues. Where an application for a stay arises in relation to the same parties and the same facts, disjointed only by adjudication under two separate proceedings, the position differs. The following principle stated by Kawaley J (as he then was) in *Robinson v Elbow Beach Hotel* [2005] Bda L.R. 8 applies to factually linked proceedings [page 3]:

"*The power to stay proceedings on abuse of process grounds in this context arises under the inherent jurisdiction of the Court and is discretionary in nature. It is clear that the principle applies not just to concurrent court proceedings, but to proceedings before a court and some other judicial tribunal, such as arbitration proceedings : Supreme Court Practice 1999, Volume 2, paragraph 20A–394. The power may be exercised where the plaintiff in one set of*

proceedings is the defendant in another; and the broad rule governing the exercise of the discretion is that if two tribunals are faced with substantially the same issue, a stay should where justice dictates be granted to ensure that only one tribunal decides the common issue: The Royal Bank of Scotland Ltd. v Citrusdale Investments Ltd. UNK [1971] 3 All ER 558 at 561-562. "

70. The clear distinction to be made between the present case and cases such as *Ashley Dawson-Damer v Lyndhurst Ltd* and *Robinson v Elbow Beach Hotel* is that the two sets of proceedings in the latter cases involved at least one of the same parties and that both proceedings were commenced to determine substantially the same issue. This crucial difference is illustrated by the Court of Appeal's decision in *Trott & Duncan v Fidelity National Title Insurance* [2022] Bda LR 55 by which my refusal to grant a stay was reversed and substituted with an order of stay made on terms customized by the Court. The Court of Appeal found that the binary choice put by Counsel ought not to have been the full extent of the case-management analysis. Clarke P explained that the judicial scrutiny needed was for a stay in more moderate terms than those considered by Counsel and the Court. In the context of the present case, what is important is that the Court of Appeal was open to the imposition of a stay in circumstances involving broadly the same parties and factual and legal issues. Clarke P said [31]-[38]:

"…
31. Lastly we are not convinced that such costs as are incurred in the progress of the negligence action are likely to be wasted. On the contrary it would seem to be advantageous for the negligence proceedings to be close to readiness for a hearing not long after the first judgment in the mortgage action.

32. Accordingly, the orders that we make are as follows:

- *i. the appeal is allowed;*

- *ii. the trial before the Supreme Court in this action i.e. Fidelity National Title Insurance Company v Trott & Duncan Limited Civil Jurisdiction 2018 No 74 shall not take place until after the determination by the Supreme Court in the case of Mexico Infrastructure Finance LLC v Corporation of Hamilton Civil Jurisdiction 2017 No 295;*

- *iii. nothing in this order shall prevent any interlocutory proceedings in Action 2018 No 74, nor preclude a trial thereof in the event that Action 2017 No 295 terminates before a determination of that case by the Supreme Court.*

33. These orders leave open the position that the Court might take once a determination had been reached by the Supreme Court in the mortgage action. It is possible that the Court

might stay the negligence action at that stage. But whether it should do so is much better addressed when the result of the mortgage action is known.

34. This Court is clearly entitled to take this course for the following reasons.

35. First, the learned judge did not, as it seems to us, take account of: (i) the clear need for the question of the validity of the mortgage to be decided before anything else; (ii) the manifest appropriateness of that question being decided in proceedings between the parties to the mortgage; and (iii) the manifest inappropriateness of it being decided before any decision had been reached as between the parties to the mortgage.

36. Second, she was distracted from making the case management orders which we think appropriate by the nature of the application made to her, namely an application to stay the current action until the conclusion of any appeal proceedings. A stay of that nature had the potential to be very long and be unacceptably prejudicial to Fidelity. But what needed to be considered was whether something less than that would be the appropriate case management decision.

37. Third, it became apparent during the course of argument before us that our orders are in fact broadly acceptable to the parties.

38. Although we are allowing this appeal Trott & Duncan has not secured any stay of these proceedings, either in the form that it sought in its original summons or in the form sought in the notice of appeal, or even as suggested in argument (viz that, if the mortgage action is to be tried first, there should be a stay of any further progress in the negligence action until that happened). The proceedings before the judge were conducted on the basis that the choice was between stay or no stay. A direction such as the one we propose to make was not canvassed. At the same time Fidelity had sought, at a time when an order such as the one we purpose [propose] *to make was not under discussion, to uphold the decision of the learned judge which, if it remained, would have enabled the negligence action to go ahead before the mortgage action was ever tried.* "

71. The Grand Court ruling in *Nord Anglia Education, Inc*, per Kawaley J was placed before this Court by Counsel. Two immediate observations are to be made about this case:

    (i) The application in *Nordic Anglia Education, Inc* was for a stay of execution of a money judgment, whereas the current case entails an application for a stay pending trial proceedings based on case management grounds. And

(ii) The company's application for a stay of execution was pending an appeal in the same proceedings. In this case, the basis for a stay would be to allow an appeal in unrelated proceedings to conclude.

72. In *Nord Anglia Education, Inc*, Kawaley J made a "Fair Value Order' which exceeded the true fair value in the view of the appellant company but fell short of the correct valuation on the dissenting shareholders' cross-appeal. The company sought a partial stay pending appeal which was opposed by the dissenters who relied on section 19(3) of the Cayman Court of Appeal Law (2011 Revision) (the "Cayman Court of Appeal Law" to support their submission that the starting presumption is that they were entitled to the fruits of their judgment. Section 19(3) provides:

"*(3) No stay of execution or other proceedings shall be granted upon any judgment appealed against save upon payment by the appellant into the Grand Court of the whole sum, if any, found due upon such judgment and the amount of any costs awarded to the other party or parties to the action, or upon good cause shown to the Court or to the Grand Court*."

73. Section 19(3) of the Cayman Court of Appeal Law, somewhat like a case management stay rooted from the Court's exercise of its inherent jurisdiction, operates on the starting basis of a stay being refused.

As Sir Richard Field JA explained in the *Shanda Games Ltd* case when considering Rule 20(1) of the Court of Appeal Rules:

"*27. …the starting point is that an appeal shall not operate as a stay of execution which means that it is for an appellant to satisfy the Court of Appeal that the normal position that execution on the judgment can proceed immediately upon judgment being handed down ought to be departed from. Given this starting point, on would expect the Court to have a wide discretion in deciding whether to grant a stay or not. That indeed is and has been the position in England (where there is now no statutory provision equivalent to s.19(3)) since well before the promulgation of the CPR in 1999. Thus in Winchester Cigarette Machinery v Payne (No. 2)….the Court of Appeal (Ralph Gibson and Hobhouse LJJ) held that, in granting a stay of execution of a money judgment pending an appeal, the Court had to start with the assumption that a person should not be stopped from exercising the necessary procedures in order to have the benefit of the money judgment made in his favour. In the view of Hobhouse LJ the appellant had to show special circumstances which took the case out of the ordinary.*

28. This decision was referred to by Potter LJ in Leicester Circuits v Coates Brothers plc [2002] EWCA Civ 474 in paragraph [12] before going on to say in [13]:

'The proper approach is to make the order that best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is no stay, but where the justice of that approach in in doubt, the answer may well depend on the perceived strength of the appeal.'…"

74. Speaking directly to the Cayman Island Court of Appeal's construction of section 19(3), Sir Richard Field JA said:

"*29. ….It follows that, if the Cayman Islands Court of Appeal, in the exercise of this wide discretion is of the view, having regard to all relevant factors, including the strength or weakness of the grounds of appeal, that a stay should be granted, it ought usually, pursuant to s. 19(3), to require payment into the Grand Court of the whole sum found due under the judgment appealed against, unless there is good cause for not imposing this requirement. … Even if the appellant has offered to pay or has paid into court the judgment sum and the amount of ay costs awarded to the other party or parties, the Court of Appeal, in the exercise of its discretion, may decide not to grant a stay of exécution, for instance where the grounds of appeal are extremely weak and the judgment creditor is very likely to collapse financially if the judgment su mis not received before the proposed appeal is likely to be determined*."

75. While the effect of the stay granted in Nord Anglia was to prevent immediate execution of judgment and procure a payment into Court, it is evident that there are some broad and significant similarities in the approach to be used to determine a stay of execution and a stay of trial proceedings on case management grounds. In both cases the starting point is that a stay will not be imposed. However, in both classes of a stay application the Court will engage in a balancing exercise, looking at all of the relevant factors which will assist the Court in forming a view on the question of prejudice to each side. Of course, one of the relevant factors that the Court may consider for a stay of execution application is the strength or weakness of the grounds of appeal. That is not a factor in a case involving a stay pending trial. However, for both types of a stay order, the Court will likely consider the risk of prejudice to both sides in the granting and refusal of the application.

76. The English High Court decision in *Reichhold Norwary A.S.A and Another v Goldman Sachs International (a Firm)* [1999] 1 ALL ER (Comm) 40 (upheld by the English Court of Appeal in *Reichhold Norway A.S.A. v Goldman Sachs (C.A.)* [2000] 1 WLR 173) has long been cited in Courts of this jurisdiction as the leading English authority on the exercise of the Court's inherent jurisdiction to grant an application for a stay of proceedings on the grounds of case management.

77. In *Reichhold Norway* Moore-Bick J (as he then was) held at pages 46-47:

The court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by s.49(3) of the Supreme Court Act 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interests of justice. I am in no doubt, therefore, that I do have jurisdiction to stay the present proceedings; the question is whether it would ever be right to do so in a case such as the present, and if so under what circumstances.

As a starting point I accept that in principle a plaintiff who has claims against a number of different people is entitled to choose for himself whom to sue and whom not to sue… …However, choosing whom to sue is one thing; choosing in what order to pursue proceedings against different defendants may be another, especially when two related sets of proceedings are being, or could be pursued concurrently. In such a case the court itself has a greater interest, 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. A situation of that kind can arise even when none of the parties to the actions are common, as happened, for example, in the case of the recent Lloyd's litigation where many names on different syndicates managed by different agents brought broadly similar claims…In those circumstances the court considered it desirable to identify a small number of cases which raised issues of fact and law which were common to very many of the actions and to direct that they proceed as 'lead actions' while staying the others. That was done in the reasonable expectation that decisions in the lead actions would enable the others to be resolved without the need for a full hearing. It is relatively easy to justify taking steps of that kind to manage litigation where all the actions are pending before the same court, because the court has both the right and the duty to manage its own business with due regard to the resources available to it and the interests of other litigants, as well as the interest of the immediate parties themselves…

78. Upholding Moore-Bick J, in *Reichhold Norway ASA v Goldman Sachs* [2000] 1 W.L.R. 173 at 186C(C.A.) Lord Bingham C.J. agreed that the Court should only exercise its discretion to stay an action pending the final disposition of another claim in another forum in "*rare and compelling circumstances*".

Decision

79. These proceedings are currently in the pre-trial discovery stage. Mr. Mason, expressing concerns for the risk of being directed to give discovery of privileged company documents, pointed out that legal questions as to the extent of discovery to which a shareholder is entitled is part of the subject-matter of the Jardine proceedings before the Privy Council. I would

envisage that any concerns or risks relating to discovery of privileged material may be cured by the use of a protocol to preserve any such legal professional privilege entitlements. Such a protocol has been employed in the Jardine proceedings as was previously done by this Court in *A Law Firm and Estate of the Deceased v The Commissioner of Police* [2018] Bda LR 27.

80. In my judgment, this Court has an obligation to make use of its case-management tools to ensure that this case is dealt with expeditiously and fairly. That is part of the starting point, particularly in this case where the stay proposed is contingent on the conclusion of unrelated proceedings. The shared legal issues between these proceedings and the Jardine proceedings do not justify a stay pending the final appeal in the Jardine proceedings. This is especially so having regard to the fact that both the Supreme Court and the Court of Appeal viewed the legal standing issue of the dissenting shareholders in the Jardine proceedings through virtually the same lenses. Effectively, the Defendant is asking for this Court to hold these proceedings in abeyance on the chance that Jardine proves successful on its last bite of the cherry. In my judgment, it would be more unfair and prejudicial to the Plaintiffs to stay the proceedings than it would to the Defendant if the Court refuses a stay.

81. I attach a significant risk of prejudice to the Plaintiff's who, if successful at trial, would have been deprived of the commercial interest rates available on any unpaid portion of their winnings. That said, I must emphasize that this Court is ought not and has not formed a view, one way or the other, on the prospects of the success of either party at trial. I have therefore approached the issue on the hypothesis that there is no less than a 50% chance that this case will be decided in favour of the Plaintiffs. With that in mind, I am bound to find that the delay in this case would not jeopardize the pecuniary rights of the Defendant as it potentially does with the Plaintiffs. The longer these proceedings continue, the greater the pecuniary loss to the Plaintiffs if they win at trial by obtaining judgment for a sum greater than that paid under the merger consideration. So, I find that a stay of these proceedings up to a period which will likely creep into the latter part of 2025 or event 2026 would be more prejudicial to the Plaintiffs than the Defendant, when balancing the risk of prejudice to both parties.

82. On my assessment of the facts and circumstances of this case, the Plaintiffs are entitled to see their case advanced, at least to the point to trial readiness. Should (i) Jardine prove successful in its appeal before the Privy Council and (ii) these proceedings come to be aborted as an indirect result of the Judicial Board's decision in the Jardine proceedings, then the Defendant will likely pursue recovery of its costs in these proceedings as the ultimate victor in this litigation. However, using the stay mechanism to gamble on the chance of these two occurrences coming to pass would be a misuse of the Court's case-management powers in my judgment. Both parties face the inevitable risk of incurring legal costs which will not be fully recoverable. That is the reality of the normal costs regime under RSC Order 62. The Court's duty to save litigation expense does not require it to bet on a particular outcome of another case

in anticipation of a possible result, especially in circumstances where the relevant legal principle has already been decided with binding effect.

83. For these reasons, I refuse the Defendant's application for a stay.

Postcript

84. This Ruling is being delivered approximately 4 ½ months after the hearing.

85. I wish to express my gratitude to Counsel and to the parties for their respectful patience in awaiting this Ruling which was not sooner delivered for the following reasons:

    1. I was out of office on annual leave for the majority portion of August 2024;

    2. Two separate judicial projects were earmarked with priority for the months of September October and November:

        (i) Bermuda hosted the Caribbean Association of Judicial Officers' ("CAJO") 8th Biennial Conference from 20-23 November 2024.

        The significance of this international event is evidenced by the presence of the various heads of judiciaries including the President and Justices of the Caribbean Court of Justice. Approximately 100 judicial officers of all levels of Court traveled to Bermuda representing up to 23 of the membership countries.

        In my role as both the Chairperson of the Bermuda Committee and a member of CAJO's Executive Management Committee I was required to commit to the supervision, management and preparation of this large-scale judicial project. This proved particularly time-consuming in the final months preceding the conference.

        (ii) During this period, I also carried out the final phases of my commitments as a as co-author and co-editor of a legal text on commercial law which is due to be published in 2025.

86. I am unaware of any enquiries previously made by either party as to the expected delivery of this Ruling. Further, I have not been asked by any person or party to provide this explanation. However, I find that the parties are nevertheless entitled to an explanation on the belatedness of this Ruling, given the nature of the application.

Conclusion

87. I have refused the Defendant's application for a stay of proceedings.

88. The Plaintiffs are at liberty to be heard on a summons for trial directions.

89. Either party may be heard on the issue of costs upon filing a Form 31TC within 21 days of the date of this Ruling. Otherwise, costs of this application should follow the event and be granted in favour of the Plaintiffs on a standard basis to be taxed if not agreed.

Dated this 3rd day of December 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

_____

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT