IN THE CAYMAN ISLANDS COURT OF APPEAL
ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) Appeal No. 0014 of 2022
(Grand Court Cause No. FSD 0157 of 2021 (DDJ))

IN THE MATTER OF THE EXEMPTED LIMITED PARTNERSHIP ACT (2021 REVISION) AND IN THE MATTER OF AQUAPOINT L.P.

BETWEEN

AQUAPOINT L.P.

Appellant

-and-

XIAOHU FAN

Respondent

Before: **The Rt. Hon. Sir John Goldring, (President)**
The Hon. Sir Richard Field, Justice of Appeal
The Hon. Sir Michael Birt, Justice of Appeal

Appearances: **Tom Smith KC and Rupert Bell of Walkers on behalf of the Appellant**

Ben Valentin KC and Bhavesh Patel of Travers Thorp Alberga on behalf of the Respondent

Date of hearing: **1 May 2023**

Date circulated: **22 September 2023**

Judgment delivered: **4 October 2023**

JUDGMENT

Field JA

Introduction

1. This is an appeal from the order of Justice Doyle ("the judge") dated 13 June 2022 winding up the appellant exempted limited partnership ("ALP") on the just and equitable basis on four

separate grounds. The order was preceded by a judgment dated 10 June 2022 ("the Judgment").

2. ALP was formed on 16 February 2017 under the Exempted Limited Partnership Act ("the ELPA"). The petitioner seeking the winding up order was the respondent Dr Xiaohu Fan ("Dr Fan") who became a limited partner in ALP having executed on 25 May 2017 a subscription agreement ("the Subscription Agreement), an Amended and Restated Limited Partnership Agreement ("the LPA") and an acknowledgement agreement ("the Acknowledgement"). The judge referred to this suite of agreements as "the 2017 Agreement" and I shall do likewise.

3. The sole asset owned by ALP was and remains its holding of 30,320,000 ordinary shares of US$0.0001 each in Legend Biotech Corporation ("Legend Cayman"), a Cayman Islands exempted limited company listed on NASDAQ. This holding represented 15.6% of Legend Cayman's issued shares in 2017.

4. Legend Cayman is the parent company in a group of companies ("the Legend Group") which carry on business developing novel cell therapies for oncology. The Legend Group's principal operations and employees are located in Nanjing and Zhenjiang in the PRC.

5. At all material times the general partner of ALP ("the GP") was and remains GenScript Corporation ("GenScript"), a Delaware corporation registered in the Cayman Islands under Part IX of the Companies Act. From the start, Genscript was and remains under the control of its majority shareholder, Dr Fangliang Zhang ("Dr Zhang").

6. In addition to Dr Fan, the other limited partners of ALP are the Ye Wang Family Trust and GenScript. The respective percentage shares of the three limited partners in ALP's sole asset are 65.96%, 32.98% and 1.06%. The interest held by the Ye Wang Family Trust is the result of a transfer by Ms Ye Wang of her original interest of 32.98%. Dr Fan's 65.96% interest equates to 19,999,072 ordinary shares in Legend Cayman.

7. It was in July 2002 that Dr Zhang, Dr Larry Wang and Ms Ye Wang ("Ms Wang") founded the GenScript Group of companies which subsequently became subsidiaries of Legend Cayman. In 2014 the GenScript Group decided to form a subsidiary company named "Legend" to develop novel biological drugs and they invited Dr Fan, who was working within the GenScript Group doing important research on cell therapy, immunology and cell biology, to

be involved in this venture. Dr Fan accepted the invitation and was appointed Chief Scientific Officer of the new project.

8. In November 2014, GenScript incorporated Nanjing Legend Biotechnology Co Ltd ("Legend Nanjing") in the PRC with a view to it issuing an IPO. In order to incentivise Dr Fan, Legend Nanjing, acting by Dr Zhang, entered into an agreement with him dated 1 January 2016 ("the 2016 Agreement") under which Legend Nanjing agreed to grant Dr Fan a 10% holding of the shares in Legend Nanjing (10,000,000 shares) on terms that he pay RMB 100,000 annually for five years and that, prior to Legend Nanjing's IPO, he could not transfer these shares or create any security interest over them without Legend Nanjing's approval.

9. Since late 2014, Dr Fan had been significantly involved in critical developments of a number of therapies for the treatment of myeloma. In March 2016, he was responsible for the invention of citacabtageneautoleucel (Cilta-cel), a ground-breaking investigational B-cell maturation antigen directed chimeric antigen receptor T cell (CAR-T) therapy.

10. Subsequently, it was decided that instead of proceeding with an IPO by Legend Nanjing, the listing vehicle should be Legend Cayman which would proceed with an IPO on NASDAQ. In conjunction with this change of strategy, Dr Zhang set out to persuade Dr Fan: (a) to enter into an arrangement based on the establishment of a Cayman Islands exempted limited partnership ("ELP") which would hold approximately 15% of Legend Cayman's shares and whose limited partners would be Dr Fan, Ms Wang and GenScript; and (b) to accept that the 2016 Agreement would terminate when he became a limited partner in the ELP.

11. The implementation of Dr Zhang's plan to persuade Dr Fan to become a limited partner in a Cayman ELP began around mid to late July 2016. (Earlier, on 7 June 2016, Ms Wang had sent Dr Fan a draft agreement in Chinese for the establishment of an PRC partnership but nothing came of this). By mid to late July 2016, there had been good progress in the first dosing of Cilta-cel. The persuasion of Dr Fan was largely delegated to Ms Wang, who was a director of GenScript, acting on Dr Zhang's instructions, although Dr Zhang also played a direct role. Thus, it was Ms Wang who sent to Dr Fan the developing and the final versions of the LPA for signature and the Subscription Agreement and the Acknowledgement by which Dr Fan acknowledged that the 2016 Agreement contained only "general provisions and principles" and would terminate upon his becoming a limited partner in ALP. It was principally Ms Wang,

reflecting the views of Dr Zhang, who dealt with Dr Fan's questions and comments on the documents she sent him.

12. When Dr Fan was approached with Dr Zhang's new strategy, his chief concern was that he should still be entitled after the IPO to be registered as the owner of 10% of the shares in the listing entity, as he had been under the 2016 Agreement in respect of 10% of the shares in Legend Nanjing. He made this very clear on several occasions to Ms Wang and Dr Zhang who both assured him that the 2016 Agreement would be "rolled over" into the arrangement involving a Cayman ELP. Dr Fan relied on these assurances when signing the 2017 Agreement: he would not have signed the constituent agreements if the assurances had not been given. His interest in the partnership under the 2017 Agreement was the equivalent of 10% of the shares in Legend Cayman which was the same percentage he was promised in respect of the shares in Legend Nanjing. In the light of these matters the judge held that Dr Fan had a legitimate expectation and reasonable understanding that 6 months after the Legend Cayman IPO he would be entitled to have access to 10% of the shares in Legend Cayman[1].

13. Legend Cayman was listed on NASDAQ on 5 June 2020, at which time GenScript and Dr Zhang owned 169,680,000 and 34,234,267 Legend Cayman shares respectively, which holdings constituted 76.9% and 15.2% of the company's issued share capital.

14. On 12 October 2017, Dr Fan paid RMB 2,500,000 in respect of the 10% of the Legend Cayman shares he had been assured would be registered in his name and available for disposition six months after the Legend Cayman IPO. He was then reimbursed RMB 2 million over a four-year period. RMB 2,500,000 was the sum that was payable under the 2016 Agreement.

15. Following the end of the 6 month lock in period, Dr Fan informed Ms Wang and Dr Zhang that he wanted access to 10% of the Legend Cayman shares held by ALP. He first suggested that ALP be dissolved to achieve this and was invited to serve a written request that his Legend Cayman shares be sold subject to the GP exercising its discretion accordingly. He then proposed that 2 million Legend Cayman ADS shares (equivalent to 20 million ordinary shares) be sold as an interim measure whilst the differences between him and Dr Zhang and Ms Wang were sorted out. At a meeting on 26 February 2021, Dr Zhang refused Dr Fan's sales plan, mentioning that maybe Dr Fan would be able to sell about 30,000 Legend Cayman

[1] It was a term of the Legend Cayman IPO that the shares in Legend Cayman were to be the subject of a 6 month lock up period.

ADS shares raising about US$ 1 million, which would have meant that it would have taken over 300 years for Dr Fan's total shares to be sold. Dr Zhang's declared reason for this response was that the company needed to raise funds and Dr Fan's sales plan would "crash the stock price". Dr Fan then asked Dr Zhang on 5 March 2021 for an offer to allow the sale of a reasonable amount of his shares to which Dr Zhang responded the same day, stating that the Legend Cayman management team and board were only prepared to sell 200,000 ADS shares producing around $US 4.5 million and this was a final offer. This offer Dr Fan accepted, but no steps were taken by the GP to implement it. Instead, Dr Zhang let Dr Fan know that he had been instructed not to sell the shares. Following a chasing letter from Dr Fan's attorneys, Travers Thorp Alberga ("TTA"), ALP's then attorneys, Dentons, stated in a letter dated 21 May 2021 that Dr Fan had not adopted the correct methodology for attempting to transfer his interest in the partnership and added that he could not be allowed to sell 10% of the Legend Cayman shares on account of the impact this would have on the share price. Five days later, by a letter dated 26 May 2021, Dentons, on behalf of ALP, offered to release 5% of the Legend Cayman shares held under Dr Fan's interest in the partnership followed by 3.5% every year thereafter but Dr Fan rejected this offer.

16. The winding up petition was due to come on for trial on 17 September 2021 but the hearing was adjourned at very short notice to accommodate an application by ALP for the petition to be struck out on the ground that it was an abuse of the process. That application was dismissed with detailed reasons by the judge on 26 October 2021 ("the strike out judgment") and on the same day Dr Fan served an Amended Petition that began to be heard on 26 January 2022. However, at the end of the first day, the GP applied for another adjournment, this time because its Cayman Islands' registration as a foreign company had been terminated on the grounds that it had failed to maintain a registered office and its registration in the Cayman Islands. The application was granted with indemnity costs against the GP and the hearing of the Amended Petition re-commenced on 20 April 2022, over six months after the date it had first came on for trial before the Grand Court.

17. On 11 March 2022, Dr Fan resigned from his position in Legend Cayman shortly after learning that he was no longer described on the company's website as a "Co-Founder" of the company.

The judgment below

The judge's four distinct grounds for winding up ALP

18. The distinct grounds that the judge found justified an order for the winding up of ALP on just and equitable grounds were:

(1) **Frustration of Dr Fan's legitimate expectation that the GP would transfer 10% of the shares in Legend Cayman shares into his name as the beneficial owner thereof**: see para [167] of the Judgment**:**

> "Dr Fan had a legitimate and reasonable understanding outside the 2017 Agreement. The legitimate expectations and reasonable understanding was that 6 months after the IPO he would be entitled to have access to 10% of the shares in Legend Cayman. The legitimate expectation and understanding was created and encouraged by Dr Zhang and Ms Wang on Dr Zhang's behalf. The legitimate expectation and understanding has been unreasonably frustrated by the Partnership, the GP and Dr Zhang".

(2) Irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence.

Paras [182] – [184] of the Judgment read:

> "It is plain to me that at the early stage when Dr Fan joined up with Dr Zhang that their relationship was one of mutual trust and confidence but that relationship has now irretrievably broken down and, on an objective analysis, Dr Fan has lost trust and confidence in Dr Zhang, the GP and the Partnership. Dr Fan's relatively recent resignation was not, in my judgment, a tactical ploy. It is plain that Dr Fan could not work in the environment created by Dr Zhang. Dr Zhang has attempted to belittle Dr Fan's role and contribution. Dr Zhang has preferred his own interests over the interests of Dr Fan. The GP, for reasons best known to itself, filed evidence that made reference to Dr Fan and an insider dealing incident. It had no relevance to the issues before the court for determination. It was not referred to in the comprehensive legal submissions before the court but the filing of it is a further indication of the lack of trust and confidence between the parties". [182]

"The GP agreed via Dr Zhang's communication of 5 March 2021 to permit 200,000 shares to be sold, but then reneged even on this meagre offering. There is significant hostility and lack of trust between the parties. Dr Fan has now resigned. That must have been a very difficult decision for him. Mutual trust and confidence no longer exists. This situation cannot continue indefinitely. The Partnership and the GP have already dragged these proceedings out for far too long". [183]
"This is not a case of a dissatisfied investor, having been treated fairly, simply wanting an early exit and a return on his investment outwith the terms of the agreements he signed up to and the relevant constitutional documents. In my judgment there is plainly "something more" in this case and fairness requires equitable considerations to trump the strict rights and obligations of the parties pursuant to the contractual and constitutional documents". [184]

(3) The justifiable loss of trust and confidence in the management of the Partnership judged to the requisite objective standards in the circumstances of this case.

See para [166] and para [10(12)] of the judge's judgment refusing ALP's application to strike out the winding up petition ("the strike out judgment") referred to in the Judgment at [158]:

"Dr Fan has proved a justifiable loss of trust and confidence in the management of the Partnership by the GP judged to the requisite objective standards in the circumstances of this case. Moreover, in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang being in the driving seat in that respect] in a manner which is oppressive and in breach of Dr Fan's legitimate expectation and understanding." [166]

"It is well established that a company can be wound up on the just an equitable ground if it is established that there has been a justifiable loss of confidence in management, for example, on account of serious misconduct or serious mismanagement of the affairs of the company by the management or the majority owners (paragraph 22 Martin JA in *Tianrui*). For a loss of confidence ground to succeed it has to be a justifiable loss of confidence in the conduct and management of the company's affairs and not a subjective loss of confidence arising from dissatisfaction about the conduct of the domestic policy of the company (*RCB Thai v Asia Fund* 1996 CILR 9 at pages 22-23 per Smellie J, as he then was). This loss or lack of confidence must be grounded on the conduct of management, not in regard to their private lives or affairs, but in regard to the company's business; lack of probity in the conduct of the companies affairs may make it just and equitable that the company be wound up (Lord Shaw, in the Judicial Committee of the Privy Council in *Loch v Blackwood Ltd* [1924] AC 783 at 788." [10 (12)]

(4) The GP's conflict of interest and breach of the fiduciary duty to act in good faith.

See [171] – [179], especially [171] and [179] of the Judgment which read:

> "There is considerable strength in Dr Fan's point that the GP has been acting in breach of its fiduciary duties in particular its duty to act in good faith and in the best interests of the Partnership. Dr Zhang is in control of the GP. Dr Zhang is hopelessly conflicted. He is the beneficial owner of shares in Legend Cayman. He also has control of the Partnership's shares in Legend Cayman. The GP (through the actions of Dr Zhang) is not acting in the best interests of the Partnership. The clearest example of this is the GP's approach when it receives a request from Dr Fan for his portion of the shares to be transferred to him. A general partner acting in good faith and in the best interests of the Partnership would primarily have regard to the position of the limited partners and yet remarkably there is no evidence of the GP consulting Ms Wang and seeking her views. I also note that Ms Wang as a limited partner has not opposed the making of a winding up order". [171]
>
> "The conflicted position of the GP (under the control of Dr Zhang) and its preference of the interests of Dr Zhang, Legend Cayman and the Legend Biotech group as a whole over and above the interests of Dr Fan a limited partner (holding almost 70%) persuades me that the position of the GP is unsustainable and the Partnership must be brought to an end in the best interests of the limited partners. Dr Fan applies for a winding up order and this has not been opposed by Ms Wang, the only other limited partner". [179]

19. In respect of all four of the above grounds for winding up ALP, the judge held that there was no reasonable alternative remedy to a winding up order. In his view, Dr Fan was entitled to the shares represented by his interest in the limited partnership and only a winding up order would give him his shares.

Jurisdiction

20. Referring to the decisions of Parker J in *Padma Fund LP* (unreported FSD judgment 8 October 2021 and Kawaley J in *Formation Group (Cayman) Fund I* (unreported FSD judgment 21 April 2022)[2], the judge noted that there is an unresolved issue as to whether the jurisdiction of the Court to hear a petition presented by a limited partner to wind up a limited partnership on just and equitable grounds is derived from section 35 of the Partnership Act, pursuant to section 3 of the ELPA, and/or Part V of the Companies Act pursuant to section 36 (3) of the ELPA. In light of the fact that it was common ground that the Court had jurisdiction under one or other or both of those statutory provisions, the judge decided it was unnecessary to pronounce on the issue, observing that "it may require a judgment of the Court of Appeal

[2] See also *In the Matter Rhone Holdings LP* [2016 (1) 273] [CICA] and the judgment of Kawaley J in *In the Matter of XIO Diamond LP* (unreported, 30 April, FSD 256 of 2019.

or the Privy Council or legislation to finally determine and put these knotty jurisdictional issue to bed".

21. For my part, I would have been disposed to this Court deciding the issue if we had received written and oral submissions on the point. However, perhaps unsurprisingly, neither side advanced any submissions before us on the point and in these circumstances it would plainly be inappropriate to decide the question.

The legal principles relied on by the judge

22. The judge proceeded on the basis[3] that the success of Dr Fan's winding up petition depended on its factual basis being within the reach of those situations where the context was not an out and out conventional partnership but was sufficiently akin to that relationship in accordance with the indicia identified by Lord Wilberforce in *Ebrahimi v Westbourne Galleries* [1973] AC 360 to justify a winding up on just and equitable grounds.

23. It will be recalled that in *Ebrahimi*, the appellant Mr Shokrollah Ebrahimi and Mr Asher Nazar had carried on the business as dealers in Persian carpets as partners equally sharing management and profits for a number of years. In 1945, however, the business was taken over by the respondent company with Mr Ebrahami and Mr Asher Nazar each becoming directors and holding 500 shares. Soon after the formation of the company, Mr Asher Nazar's son, George Nazar, was appointed a director and Mr Ebrahimi and Mr Asher Nazar each transferred to him 100 shares. The profits of the company were distributed as directors' remuneration. About ten years later, the Nazars, father and son, secured the passing of an ordinary resolution effective by virtue of section 184 of the Companies Act 1948 ("the 1948 Act") removing Mr Ebrahami from the office of director. Mr Ebrahami presented a petition under section 222 (f) of the 1948 Act that the company be wound up on the ground that it was just and equitable so to do.

24. Although they have frequently been cited in numerous subsequent cases I think it appropriate to set out the key passages in Lord Wilberforce's judgment that followed his review of numerous English, Scottish and some Commonwealth decisions.

[3] See [10 (11)] and [10 (12) of the strike out judgment referred to in [158] of the Judgment.

"My Lords, in my opinion these authorities represent a sound and rational development of the law which should be endorsed. The foundation of it all lies in the words " just and equitable " and, if there is any respect in which some of the cases may be open to criticism, it is that the courts may sometimes have been too timorous in giving them full force. The words are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The "just and equitable" provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights or to exercise them in a particular way. It would be impossible, and wholly undesirable, to define the circumstances in which these considerations may arise. Certainly the fact that a company is a small one, or a private company, is not enough. There are very many of these where the association is a purely commercial one, of which it can safely be said that the basis of association is adequately and exhaustively laid down in the articles. The superimposition of equitable considerations requires something more, which typically may include one, or probably more, of the following elements: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence—this element will often be found where a pre-existing partnership has been converted into a limited company; (ii) an agreement, or understanding, that all, or some (for there may be "sleeping " members), of the shareholders shall participate in the conduct of the business; (iii) restriction upon the transfer of the members' interest in the company —so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere." [emphasis added]

"It is these, and analogous, factors which may bring into play the just and equitable clause, and they do so directly, through the force of the words themselves. To refer, as so many of the cases do, to " quasi-partnerships " or " in substance partnerships " may be convenient but may also be confusing. It may be convenient because it is the law of partnership which has developed the conceptions of probity, good faith and mutual confidence, and the remedies where these are absent, which become relevant once such factors as I have mentioned are found to exist: the words " just and equitable " sum these up in the law of partnership itself. And in many, but not necessarily all, cases there has been a pre-existing partnership the obligations of which it is reasonable to suppose continue to underlie the new company structure. But the expressions may be confusing if they obscure, or deny, the fact that the parties (possibly former partners) are now co-members in a company, who have accepted, in law, new obligations. A company, however small, however domestic, is a company not a partnership or even a quasi-partnership and it is through the just and equitable clause that obligations, common to partnership relations, may come in."

25. In paragraph [159] of the Judgment the judge referred approvingly to the decision of the Hong Kong Court of Final Appeal in *Re Yung Kee Holdings Ltd* [2015] 6 HKC 644 where, following *Ebrahimi,* the court proceeded on the basis that considerations of a personal character arising between individuals might make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way which might come in the form of a mutual understanding and there could be situations in which equity might find sufficient unfairness or breaches of good faith so as to attract relief but the discretion had to be exercised in a principled manner.

26. In paragraphs [160- 161], the judge said:

> [160] "Lord Wilberforce in *Ebrahimi* wisely stated that it "would be impossible and wholly undesirable to define the circumstances in which these considerations may arise". Lord Wilberforce referred to relationships being sometimes adequately and exhaustively laid down in the relevant constitutional documents adding: "The superimposition of equitable considerations requires something more", typically including an element of a personal relationship involving mutual confidence and/or an agreement or understanding over and above what is specified in the constitutional documents".
>
> [161] "… I agree that when courts at the first instance are considering whether there is "something more" they must conduct such exercise in a principled way and with full regard to the desirability of legal certainty especially in matters of commerce. They should not however sacrifice justice, equity and fairness on the altar of legal certainty".

The judge's findings of fact

27. The judge conducted a detailed review of the evidence which consisted of affidavits and oral testimony from, inter alios, Dr Fan, Dr Zhang and Ms Wang, a large number of emails and WeChat messages between these three witnesses, and other documents including the Subscription Agreement, the LPA, the Acknowledgement and the 2016 Agreement. There is no appeal from any of his significant findings of fact[4] (as distinct from the legal significance he found them to have).

[4] ALP submitted that the judge erred in stating that there was no evidence of the GP consulting Ms Wang and seeking her views on Dr Fan's request to have access to his 10% of the shares in Legend Cayman. Support for this submission was said to be the fact that Ms Wang rejected a request Dr Fan sent to her seeking the transfer of Legend Cayman shares. In my view, this submission lacks merit given the evidence that throughout Ms Wang was essentially acting as Dr Zhang's conduit who was the GP's controlling shareholder.

28. In paragraph [168] the judge set out 13 "obvious examples" of the "ample evidence" that supported his finding expressed in [167]. Since the judge's findings of fact are of great importance in this appeal, I proceed to set out some of these examples, occasionally together with the relevant text of the emails referred to:

(1) The evidence of Dr Fan which he preferred to the evidence of Dr Zhang and Ms Wang where his evidence differed from that given by those two witnesses.

(2) The evidence of Ms Wang was that they intended to honour what Dr Zhang had promised by way of the 2016 Agreement and Dr Zhang seemed to accept this.

(3) I do not accept Dr Zhang's evidence that where he was referring … to "your stock" he was referring to "some stock in the limited partnership". The references to "your stock" were, I find, to the shares in the company which was the subject of the IPO. [The email in question dated 15 June 2017 reads: "A good leader should take care of the employees first. If their employees are not successful, the leader cannot possibly be successful. Since it has taken a long time [to] take care of your stock, can we spend some time to take care of your employees first?"]

(4) Dr Fan's uncontradicted legitimate expectation and understanding is plain from his email to Ms Wang (cc Dr Zhang) dated 26 September 2016 ["Recently Frank told me that you are helping roll over the share purchase plan to Legend Cayman …] and his reference to "roll over the share purchase plan to Legend Cayman."

(5) Dr Zhang in his WeChat with Dr Fan on 19 February 2017 referred to "After all, it is the company, not you, that proposed your shareholdings in Legend first, correct?...the new investment agreement is executed only to make things clearer.."

(6) Ms Wang in her WeChat with Dr Fan on 3 June 2017 openly confirmed the position: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend. The entity to be listed will definitely be Cayman Legend and can't be Nanjing Legend by any means. This is what really matters."

(7) Ms Wang also recognised that Dr Fan had a 10% share in her email dated 7 June

2017. ["Attached please find the Legend subscription agreement. Please keep it confidential. Your percentage of share may not be straightforward stated as 10% in this document. I will forward another email from the attorney explaining how it was set up. The document hasn't been completed yet, mainly they have to determine if RMB can be accepted in this document. Do let me know first if you have any question."]

(8) Dr Fan's legitimate expectation and understanding was further confirmed by Ms Wang by way of a WeChat exchange on 8 June 2021. Ms Wang confirmed that the 2017 Agreement "is not to change any material personal interest of yours. It's only intended to make the original he intended to make the original agreement legitimate and to create scope for future development." I find that the reference to the "original agreement" in that context was the 2016 Agreement. I also find that Ms Wang was at pains to provide reassurance to Dr Fan that his "material personal" interests would not be changed by way of the 2017 Agreement.

(9) Dr Zhang in effect confirmed this again by his email to Dr Fan on 14 of June 2017 and the reference to "your stock".

(10) Furthermore when Dr Fan in his email dated 17 February 2021 to Dr Zhang and Ms Wang refers to "my shares in Legend" neither of them sought to contradict him.

29. In addition to the factual findings stated in the paragraphs of the Judgment referred to in paragraph [18] above, I draw attention to the following:

(A) The findings in paras [169] – [170].

(a) Dr Fan in entering into the 2017 Agreement trusted Dr Zhang and Ms Wang to do the right thing and to honour the roll over of Dr Fan's Legend Nanjing shares to Legend Cayman shares. Dr Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated. It was not mere "wishful thinking" by Dr Fan. It was a reasonable and legitimate

expectation that he would get the Legend Shares after the IPO, whatever was stated in the 2017 Agreement. [169]

(b) It is only fair, just and equitable that he shares in the benefits now rather than having to wait 300 years (as originally in effect suggested by the GP) or 26 years (as subsequently in effect suggested by the GP) to obtain his shares. The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition. [170]

(B) The following WeChat message from Ms Wang to Dr Fan on 8 June 2017 very shortly before Dr Fan signed the LPA

> "The agreement is not to change any material personal interest of your's. It's only to make the original agreement legitimate, and to create scope for future development." [124]:

ALP's/GP's case on appeal

30. The principal case advanced on behalf of ALP by the GP is that the judge erred in holding that the facts on which Dr Fan's petition is founded fell within Lord Wilberforce's indicia of those relationships which are sufficiently related to conventional partnership to justify a winding up on just and equitable grounds. Two distinct submissions were advanced by Mr Smith KC under this broad rubric:

(i) In the light of the Subscription Agreement, the LPA and the ELPA, ALP lacks any of the characteristics that, pursuant to *Ebrahimi*, are necessary for the relationship between ALP (acting by the GP) and Dr Fan to constitute the type of "quasi-partnership" or other relationship sufficiently akin to partnership required for it to be open to the Court to wind up ALP on the just and equitable ground.

(ii) The LPA, which was specifically negotiated and agreed over a quite a lengthy period of time, and the Subscription Agreement preclude resort to the just and equitable winding up ground since those agreements are and were intended to be an exhaustive statement of the parties' rights and obligations and specifically deal with the limited partner's rights to withdraw or transfer his/her/its interest in the partnership and to a distribution. Accordingly, the judge erred in proceeding on the basis of his finding that Dr Fan had a legitimate expectation that 10% of the Legend Cayman shares would be transferred into his ownership conditioned the rights and obligations of the GP under the LPA.

31. In support of these submissions, Mr Smith drew attention to the following differences between a partnership under the Partnership Act and an ELP under the ELPA that were adverted to by this Court in *Kuwait Ports Authority et al v Port Link GP Ltd et al* at [24] [unreported 20 January 2023]:

(i) Limited partners of an ELP are not liable for the debts of the ELP (see section 4 (2) of the ELPA) whereas the General Partner is liable for the debts and obligations of the ELP.

(ii) Limited partners are prohibited from having any active involvement in the business of the ELP which is carried on by the General Partner who enters into all contracts by and on behalf the ELP.

(iii) Section 19 (1) of the ELPA imposes an express duty of good faith on the General Partner of an ELP requiring the General Partner to act in the best interests of the ELP.

(iv) Whereas in an ordinary partnership, mutual and reciprocal rights and obligations are owed to each other by partners, section 19(2) of the ELPA provides that unless the partnership agreement provides to the contrary, a limited partner owes no fiduciary duty either to the ELP or to other partners.

32. Mr Smith submitted that it followed from (ii) and (iv) that, unlike in the usual quasi-partnership type of case, Dr Fan as a limited partner had no expectation that he would participate in ALP's business which in any event consisted of simply acting as a vehicle to

hold shares in Legend Cayman. There was also nothing in the LPA that provided that Dr Fan owed a fiduciary duty to the ELP, the General Partner or to other limited partners. Thus, there was no mutuality of obligations of good faith between Dr Fan *quo ad* Ms Wang in her capacity as a limited partner or *quo ad* the GP, acting by Dr Zhang and/or Ms Wang as directors thereof, which was one of the classic indicia of a quasi-partnership. Indeed, despite the word "partnership" in the name "exempted limited partnership" given by the ELPA to an entity formed under section 9 thereof, such an entity lacked any of Lord Wilberforce's indicia of a relationship akin to conventional partnership and thus no just and equitable winding up petition to wind it up based on such a relationship could ever succeed.

33. Mr Smith took us to section 32(3) ELPA that provides in relevant part that "where the requirements for all conditions to an admission contained in the partnership agreement have been complied with in accordance with the terms… any person however admitted shall … be deemed to have adhered to and agreed to be bound by the terms and conditions of the partnership agreement and shall have the rights and be subject to the obligations contained in the partnership agreement, and this Act …"

34. Mr Smith also referred us to the following provisions in the LPA and the Subscription Agreement:

<u>The LPA</u>

(i) Clause 3.1, that sets out the limited liability of a limited partner and Clause 3.2 that sets out five broadly drawn limitations on the authority of limited partners including a lack of authority to take part in the conduct, administration, control, management or conduct of the partnership business;

(ii) Clause 6.2 of the LPA, that provides that for a subscriber to become a limited partner he, she or it must execute an effective deed of adherence to the LPA;

(iii) Clause 7.1, that provides that the limited partners are to have capital accounts in respect of their interests in the partnership and Clause 7 .7 that provides that no limited partner will be permitted to withdraw from the partnership or to withdraw any part of his, her or its capital account save with the General Partner's prior consent which consent may be given or withheld for any reason or no reason at all in

the sole absolute discretion of the General Partner;

(iv) Clause 9: "At the time or times determined by the General Partner, the General Partner shall cause the Partnership to distribute any assets of the Partnership that it does not, in its discretion, consider to be necessary to the operation of the Partnership. Any distribution pursuant to this Clause 9 shall be made to the Partners pro rata in accordance with the Partners' respective interests determined by reference to their Capital Contribution from time to time."

(v) Clause 12. 2, that states that it was not anticipated that meetings of the partners will be held;

(vi) Clause 12.11 -- the Entire Agreement Clause - that provides: "This Agreement, together with the other documents required to be delivered pursuant hereto, constitutes the entire agreement between the parties to this Agreement with respect to the subject matter of this Agreement, and cancels and supersedes any prior understandings and agreements between the parties with respect to such subject matter. There are no representations, warranties, terms, conditions, undertakings, or collateral agreements, express, implied or statutory, between the parties with respect to the subject matter of this Agreement, other than those expressly set forth in this Agreement, and/or the other documents required to be delivered pursuant to such agreements".

The Subscription Agreement

(i) Paragraph 4 of the introduction to the agreement

EACH ACQUIROR OF A PARTNERSHIP INTEREST MUST BE PREPARED TO BEAR THE ECONOMIC RISK OF INVESTMENT THEREIN FOR AN INDEFINITE PERIOD OF TIME. THE SUBSCRIBERS ARE ENCOURAGED TO SEEK INDEPENDENT LEGAL, ACCOUNTING, INVESTMENT AND TAX ADVICE REGARDING THEIR INDIVIDUAL CIRCUMSTANCES AND FINANCIAL OBJECTIVES IN DETERMINING WHETHER TO SUBSCRIBE FOR AN INTEREST IN THE PARTNERSHIP

(ii) Clause 3 (e): "… the subscriber agrees to comply with the terms of the Partnership Agreement …"

(iii) Clause 5: "To induce the Partnership to accept this subscription, the Subscriber hereby makes the following representations, warranties and covenants to the General Partner, the Partnership and ...":

> "The Subscriber further understands the Interest is transferable only with the consent of the General Partner." [5 (b)]
>
> "The Subscriber … will not sell, transfer, distribute or otherwise dispose of the Interest without the consent of the General Partner, which may be granted or withheld in its sole discretion …" [5 (c)]
>
> "… in formulating a decision to invest in the Partnership, the Subscriber has not relied or acted on the basis of any representation or other information purported to be given on behalf of the Partnership or the General Partner except as set forth in the Partnership Agreement (it being understood that no person has been authorised by the Partnership or the General Partner to furnish any such representation or other information)." [5 (e)]

(iv) Clause 7: The Subscriber hereby represents and warrants to the General Partner …

> "the Subscriber has reviewed and understands the Partnership Agreement and this Subscription Agreement …" (b)
>
> "the Subscriber acknowledges and agrees that, except as set forth in the Partnership Agreement, this Subscription Agreement or an additional written document (executed by a director or officer of the General Partner) which clearly and explicitly indicates that the Subscriber is entitled to rely thereon, the Subscriber has neither received, nor is entitled to rely upon, any representations or warranties from the Partnership, the General Partner, or any partner, member, director, officer, employee or agent thereof". (c)
>
> "the Subscriber is aware that except as provided in the Partnership Agreement, the Subscriber will have no right to withdraw from the Partnership or to receive distributions in liquidation of the Partnership Interest". (d)
>
> "the Subscriber is not relying on the Partnership, the General Partner, or any of their partners, members, directors, officers, employees agents or representatives for legal, accounting, investment or tax advice, and the Subscriber has sought independent legal, accounting, investment and tax advice to the extent the Subscriber has deemed necessary or appropriate in connection with the Subscriber's decision to subscribe for the Partnership Interest."(g)

> When referring hereafter to 'the entire agreement clauses', I include clause 12.11 of the LPA, clauses 5(e) and 7(c) of the Subscription Agreement and similar provisions in the Acknowledgement.

35. Mr Smith pointed out that the disclosed documents showed there were occasions when Dr Fan commented on and suggested amendments to certain provisions in the drafts of the LPA sent to him from the beginning of February 2017. (The first draft he received in early February 2017 can be ignored since this related to a PRC partnership). In respect of later drafts of the LPA, Dr Fan's suggestions included an observation that clause 7.8 (dealing with when a limited partner can be required to withdraw his interest) was too harsh and his provision of a marked-up version of the LPA showed proposed changes in red, including changes to clause 7.8. Some of Dr Fan's proposed amendments were accepted and some not. Mr Smith also relied on Dr Fan's acceptance in his oral evidence that he paid attention to detail and that he had read and signed the Subscription Agreement and had read the LPA.

36. Mr Smith made a number of submissions founded on the italicised words in the following passage that begins at p. 379B in Lord Wilberforce's judgment in *Ebrahimi.*

> The words [just and equitable] are a recognition of the fact that a limited company is more than a mere legal entity, with a personality in law of its own: that there is room in company law for recognition of the fact that behind it, or amongst it, *there are individuals, with rights, expectations and obligations inter se which are not necessarily submerged in the company structure. That structure is defined by the Companies Act and by the articles of association by which shareholders agree to be bound. In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small. The just and equitable provision does not, as the respondents suggest entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable a court to subject the exercise of legal rights to equitable considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.*

37. In Mr Smith's submission, Lord Wilberforce was here concerned with a case where the rights, expectations and obligations are not set out in the documents of the company. Mr Ebrahami and Mr Nazar *père* had not concluded any agreement as to the circumstances in which the former might be removed as a director. Whereas, if the arrangements and relationships between the parties are set out (submerged) in the constitutional and/or contractual documents, this is sufficient and exhaustive and does not allow for the intervention of equitable considerations derived from the words "just and equitable". In short, the agreements "occupied the field". It follows that the just and equitable jurisdiction

is not available in the instant case in light of the detailed provisions in the LPA and the Subscription Agreement, particularly those that declare that the GP has a sole and absolute discretion as to the transfer or withdrawal of a limited partner's interest and distributions and the entire agreement clauses. What Dr Fan is attempting to do, contended Mr Smith, is impermissibly to circumvent the clear meaning of the 2017 Agreement, by seeking to bring his case within the scope of Lord Wilberforce's judgment in *Ebrahimi*, when the proper course was for him to establish by an action in contract that he is not bound by those provisions in the 2017 Agreements that constitute very substantial obstacles in establishing his "frustration of a legitimate expectation" case. Indeed, to permit Dr Fan to challenge the effect of the 2017 Agreements by petitioning for a winding up on just and equitable grounds rather than bringing proceedings in contract would set a very undesirable precedent as it would open the door to an investor avoiding the effects of a relevant agreement governing his investment by establishing that its terms do not properly reflect his own subjective expectation at the time of entering into the agreement.

38. Mr Smith further relied on a number of passages in the judgments in the following "unfair prejudice" cases[5] : *O'Neill v Phillips* [1999] 1WLR 1092; *Re Coroin Ltd* (No 2) [2012] EWHC 2343 (Ch); and *Cool Seas (Seafoods) Ltd v Interfish Ltd et al* [2018] EWHC 2038 (Ch).

<u>*O'Neill*</u>

Lord Hoffmann at p. 1102 B –

> "6. *Legitimate expectations*
>
> In *In re Saul D. Harrison & Sons Pic.* [1995] 1 B.C.L.C. 14, 19, I used the term "legitimate expectation," borrowed from public law, as a label for the "correlative right" to which a relationship between company members may give rise in a case when, on equitable principles, it would be regarded as unfair for a majority to exercise a power conferred upon them by the articles to the prejudice of another member. I gave as an example the standard case in which shareholders have entered into association upon the understanding that each of them who has ventured his capital will also participate in the management of the company. In such a case it will usually be considered unjust, inequitable or unfair for a majority to use their voting power to exclude a member from participation in the management without giving him the opportunity to remove his capital upon reasonable terms. The aggrieved member

[5] Brought in *O'Neill* under s.459(1) of the Companies Act 1985 as amended by the Companies Act 1989 and in *Coroin* and *Cool Seas* under s. 994 of the Companies Act 2006

could be said to have had a "legitimate expectation" that he would be able to participate in the management or withdraw from the company. It was probably a mistake to use this term, as it usually is when one introduces a new label to describe a concept which is already sufficiently defined in other terms. In saying that it was "correlative" to the equitable restraint, I meant that it could exist only when equitable principles of the kind I have been describing would make it unfair for a party to exercise rights under the articles. It is a consequence, not a cause, of the equitable restraint. The concept a legitimate expectation should not be allowed to lead a life of its own, capable of giving rise to equitable restraints in circumstances to which the traditional equitable principles have no application. That is what seems to have happened in this case".

Coroin

Richards J (as he then was)

[635] "For part of his case, however, Mr McKillen relies also on legitimate expectations of participation in the management of the company. In my judgment, this is not sustainable. The importance of the passage from the speech of Lord Wilberforce in *In re Ebrahimi Ltd* cited by Lord Hoffmann in *O'Neill v Phillips* is that it indicates the circumstances in which reliance may be placed on equitable considerations (Lord Hoffmann deprecates the use of the expression 'legitimate expectations', regretting that he introduced it into this area of the law: see p.1102) as giving rise to a possible case of unfair prejudice. It is very important to note that in that passage, having identified that the structure of a company is defined by company law and the articles of association, Lord Wilberforce observed that;

> *"In most companies and in most contexts, this definition is sufficient and exhaustive, equally so whether the company is large or small."*

Equitable considerations, affecting the manner in which legal rights can be exercised, will arise only in those cases where there exist considerations of a personal character between the shareholders which makes it unjust or inequitable to insist on legal rights or to exercise them in a particular way. Typically that will be in the case of a company formed by a small number of individuals on the basis of participation by all or some of them in the management of the company."

[636] "In my judgment, there is no room for equitable considerations of this kind in the present case. The company was formed by a group of highly sophisticated and experienced business people and investors with a view to the purchase of a well-known group of hotels for a price running into many hundreds of millions of pounds and to retaining and managing some of those hotels. There was little prior relationship between many of the investors and some were unknown to each other until a few days before the company was formed. More importantly, articles of association and a shareholders agreement were negotiated and drafted, containing lengthy and complex provisions governing their relations with each other and with the company. I find it hard to imagine a case where it would be more inappropriate to

overlay on those arrangements equitable considerations of the sort discussed by Lord Wilberforce and Lord Hoffmann."

[637] "This part of Mr McKillen's case arises in relation to his allegation that he has been unfairly prejudiced by exclusion from participation in management. His right to participate in the management of the company is defined by his right as the holder of a particular class of shares to appoint a director to the board of the company. He exercised that right by appointing himself and by appointing Mr Cunningham as his alternate. There has been no interference with that right and no interference with the rights of either Mr McKillen, or in his absence, Mr Cunningham to attend board meetings. On the contrary, they, but mainly Mr Cunningham, have attended all or most of the board meetings held since the purchase of Misland by the Barclay interests. It is clear from the evidence that Mr McKillen and Mr Cunningham have been in no respect inhibited from exercising their rights as directors and from arguing their position. Mr McKillen submits that he has been put in a position of being a permanent minority because directors appointed by the Barclay interests and by Mr Quinlan formed a majority. But there is clearly nothing in the articles or the shareholders' agreement which entitles directors to more than the votes at board meetings conferred on them by the shareholders' agreement. Nor do the articles or the shareholders agreement prohibit particular groups of shareholders from co-operating with each other unless they have done so in a way which triggers the pre-emption provisions or which constitutes in some way a breach of the obligations of good faith to which I shall later return. The fact that the directors appointed by the Barclay interests and Mr Quinlan may take a position different to that of Mr McKillen does not involve any exclusion of Mr Quinlan or any unfairness unless the position which they take is taken in breach of their duties as directors."

Cool Seas

Rose J (as she then was)

[126] "Applying the principles from those authorities[6] to the present case I am fully satisfied that there was no legitimate expectation that Mr Anderson and Colin Anderson would continue as directors once they ceased to be employed by the company for whatever reason. The relationship between all the participants in the transaction in January 2014 and thereafter was as set out in the contractual documents and there are no overlying equitable considerations applicable here. The factors I have taken into account when arriving at that conclusion are as follows."

[127] "First, there was no previous personal relationship, such as a partnership or family connection, between these parties. Prior to 2013, the only business dealings between Fresh Catch (on the one hand) and Interfish and Altaire (on the other hand) had been a short business relationship for around a year in the 1990s when Interfish placed a large order with Fresh Catch for mackerel fillets..."

[6] *Re Saul D Harrison & Sons*; *Ebrahimi; O'Neill; Fisher v Cadman et al* [2005] EWHC 377 (Ch); *Grace v Biagiolo et al* [2005] EWCA (Civ) 1222.

> [128] "… I accept Mr Colam's evidence was that he viewed the relationship between Interfish and Cool Seas as a commercial relationship on terms that had been negotiated and agreed between them in detailed contractual documents which were developed with the benefit of professional advice. I do not believe that Mr Anderson can have formed any different view."
>
> [129] "Secondly, this is not a case where the constitution of the company is an off-the-shelf draft which is not revised to reflect the underlying agreement between the parties as to how the business would be run. On the contrary the agreements entered into on 2 January 2014 were bespoke agreements carefully drafted by each side's solicitors, going through several drafts following the signature of the initial Heads of Terms."

39. Turning to the judge's second ground for winding up ALP on just and equitable grounds – the irretrievable breakdown in the relationship between Dr Fan and Dr Zhang – Mr Smith contended that this ground required it being established that the relationship between the individuals involved was that of a "quasi partnership" of the sort contemplated in *Ebrahimi* and the judge had erred in proceeding on the basis that this requirement had been met. For the first part of this contention Mr Smith relied on *Lau v Chu* [2020 UKPC 24 at [14] – [17] where Lord Briggs distinguished between "functional deadlock" in the management of a company and an "irretrievable break down in trust and confidence" between the participating members where the company is a "quasi partnership".

40. Turning to the second part of his contention, Mr Smith relied on the submissions based on *Ebrahimi* he advanced when contesting the judge's first ground for winding up ALP – frustration of a legitimate expectation. In particular, Mr Smith laid stress on the fact that Dr Fan was simply a limited partner with no role in the conduct of the business of the partnership so that it would have made no difference to the management and administration of the partnership if the two doctors never met or spoke to each other. In this regard, Dr Fan's situation was to be contrasted with that in the well-known case of *In Re Yenidje Tobacco Company Ltd* [1916] 2 Ch 426 where it was held that it was just and equitable to wind up a private company formed by two traders in tobacco products who held equal shareholdings and constituted the board of directors and had become so hostile that neither spoke to the other. In Lord Cozens-Hardy MR's view, the court was "bound to say that circumstances which would justify the winding up of a partnership between these two by action are circumstances which should induce the Court to exercise its jurisdiction under the just and equitable clause to wind up the company".

41. In regard to the judge's third ground for winding up ALP – justifiable loss of trust and confidence in the management of the partnership – Mr Smith first summarised uncontroversially the law applicable to this ground by reference to paragraph [22] in Martin JA's judgment in *Tianrui (International) Holding Co Ltd v China Shanshui Cement Group Ltd* [2019(1) CILR 481:

> "It is well established that a company may be wound up on the just and equitable ground if it is established that there has been a justifiable loss of confidence in the management, for example on account of serious misconduct or serious mismanagement of the affairs of the company by the directors or the majority shareholders: Loch v John Blackwood Ltd ([1924] AC at 788)".

42. Mr Smith then went on to submit that the judge had failed properly to apply the test inherent in this statement of the law because he did not identify in paragraph [166] the material on which he was relying for his conclusion. What the judge should have done was to identify the relevant material before the court calling into question the conduct and management of the affairs of the partnership and then to have determined on the basis of that material whether Dr Fan had justifiably lost trust and confidence in the management of the partnership on account of serious misconduct or serious mismanagement of the partnership's affairs. If the judge had proceeded as he ought to have done, he would have been bound to find that there was no material from which he could conclude that this third ground for winding up ALP was sustainable.

43. Mr Smith further argued that, even if it be permissible to look at findings made by the judge in paragraphs other than [166], the common thread of these is that they are all premised on Dr Fan's case that he had a legitimate expectation and understanding arising from a relationship akin to partnership as contemplated by Lord Wilberforce in *Ebrahimi,* which case is misconceived for the reasons he (Mr Smith) had already advanced. In short, the GP should not be condemned and found guilty of serious misconduct and mismanagement for acting in accordance with the 2017 Agreement.

44. Mr Smith then turned to the judge's fourth ground for winding up ALP – the GP's conflict of interest and breach of the fiduciary duty to act in good faith. He submitted that if the judge reached his conclusion that the GP failed to act in good faith because it frustrated Dr Fan's legitimate expectation by refusing his request to have transferred to him 10% of the Legend Cayman shares, the judge erred because his legitimate expectation finding was

misconceived for the reasons he (Mr Smith) had earlier advanced. This left the question whether the GP's decision to decline to approve Dr Fan's request for the transfer of 10% of the Legend Cayman shares was outwith the discretion conferred by Clauses 7.7 and 9 of the LPA.

45. Arguing that the section 19 ELPA good faith duty was owed to the partnership as a whole and not to an individual limited partner apart from any other such partners, Mr Smith contended that it was open to the GP to take into account the wider interest of the partnership in Legend Cayman continuing to thrive and not have regard simply to the interest of Dr Fan as a limited partner, and this is what the GP did. The evidence provided in Dr Zhang's second affidavit showed that the reason the GP declined to grant the approval sought by Dr Fan was that, although Cayman Legend had great potential and had achieved a high initial capitalisation, it was spending so much capital on activities such as research and clinical trials that it was loss making and needed to raise fresh capital from the market on a regular basis which would be jeopardised if a large block of shares became available at the same time. In Dr Zhang's view, "if Dr Fan's request to sell $ 56 million worth of stock to the public had been granted, Legend [Cayman] would not have been able to raise $300 million in May 2021, impacting Legend's survival. Therefore, approval and control of inside selling is vital for Legend to survive …".

46. Mr Smith also argued that Dr Fan was clearly aware of the role of Dr Zhang at the time he entered into the 2017 Agreement and thereby consented to and/or waived any conflict of interest which did exist by reason of Clause 10 of the Subscription Agreement:

> "The Subscriber further acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold by the Partnership".

47. Finally, Mr Smith contended that there was an adequate alternative remedy open to Dr Fan, namely a direct claim against the GP for breach of the section 19 good faith duty. In support of this submission, Mr Smith referred to [64] of the judgment of this Court in *Kuwait Ports Authority*[7]. We were also referred to [23] of the judgment of this Court in *Tianrui* where Martin JA stated that it is well settled that a winding up petition will not succeed if there

[7] "In summary, for the reasons we have given, we dismiss the GP's appeal against the judge's refusal to strike out the plaintiffs' direct claims against the GP. The consequence is that the plaintiffs may bring their direct claim against the GP".

exists an adequate alternative remedy which the petitioner has unreasonably failed to pursue. Mr Smith submitted that the court hearing a breach of the section 19 duty case would have available a more flexible range of remedies to meet the situation as it sees fit, than the court hearing a winding up petition which was effectively a "nuclear" all or nothing option.

Dr Fan's case in response

48. The overall submission made on behalf of Dr Fan by Mr Valentin KC was that the judge's winding up order was validly made for the reasons the judge gave in both of his judgments. The judge did not err in finding that the relationship between Dr Fan and Dr Zhang was a close and personal one akin to the relationship that exists between partners of the sort identified by Lord Wilberforce in *Ebrahimi* both at the time when: (i) before ALP was constituted, Dr Fan was assured by Dr Zhang and his delegate, Ms Wang, that 6 months after the IPO he would be given access to the Legend Cayman shares represented by his interest in the partnership that was the equivalent of 10% of Legend Cayman's issued capital; and (ii) when, after the establishment of ALP, Dr Fan's request that those shares be transferred into his ownership was repeatedly refused by Dr Zhang on behalf of the GP, at which time the GP was also under the duty to act at all times in good faith in the interest of the exempted partnership imposed by section 19 (1) ELPA and under an equitable duty to avoid a conflict between Dr Zhang's interest in Cayman Legend's share capital and Dr Fan's interest in obtaining his shares.

49. Mr Valentin drew support for this submission from the following passages, amongst others, in Lord Wilberforce's judgment:

(1) "No doubt, in order to present a petition [the petitioner] must qualify as a shareholder, but I see no reason for preventing him from relying upon any circumstances of justice or equity which affect him in his relations with the company or, in a case such as the present, with other shareholders." [p.375A]

(2) "It would be impossible, and wholly undesirable, to define the circumstances in which these considerations [of a personal character arising between one individual and another, which may make it unjust, or inequitable to insist on legal rights, or to exercise them in a particular way], may arise." [p.379 C/D & E]

(3) Elements (i) and (iii) referred to on p. 379E-G that may require equitable considerations, namely: (i) an association formed or continued on the basis of a personal relationship, involving mutual confidence, an element that will often be found where a pre-existing partnership has been converted into a limited company; (iii) a restriction upon the transfer of the member's interest in the company – so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

50. Mr Valentin challenged Mr Smith's contention that no petition to wind up an exempted limited partnership established in conformity with section 9 ELPA based on an alleged relationship between the petitioning limited partner and another limited partner and/or the GP of the sort identified by Lord Wilberforce, could ever be properly granted. Mr Valentin submitted that Mr Smith could not escape from the fact that an exempted limited partnership was a partnership, albeit of a particular kind, and section 36 ELPA expressly provides that "on application by a *partner*, creditor or liquidator, the court may make orders and give directions for the winding up and dissolution of an exempted limited partnership as may be just and equitable". [emphasis supplied]

51. Mr Valentin also challenged Mr Smith's reliance[8] on the penultimate and ultimate sentences of the passage set out in paragraph [36] above. In Mr Valentin's submission, in these sentences Lord Wilberforce was not positively adopting the submission that the phrase "just and equitable" does not operate so as to entitle one party to disregard the obligation he assumes by entering a company, nor the court dispensing him from it; rather, he was dismissing the argument advanced by junior counsel for the respondent that is reported at p.369C-D:

> "The words of section 222 *(f)* are ex facie unlimited in scope. There are five considerations which should be borne in mind in construing it. (1) … (2) … (3) It is an accepted principle of our law that pacta sunt servanda, and when one is construing even words as wide as " just and equitable " that principle should be borne in mind; it would follow that, certainly in the absence of bad faith, the majority of the shareholders should not be punished for carrying out a power which, as well as being in the Act, is part of the express contract between the parties. (4) …"

52. Turning to Mr Smith's submission that the 2017 Agreement occupied the field and thereby left no room for the application of just and equitable principles, Mr Valentin submitted as follows.

[8] See para [37] above.

(i) Mr Smith's submission is inconsistent with the *Ebrahimi* decision where the company had the contractual right under the articles and the statutory right to remove Mr Ebrahimi from his office as a director but nonetheless equity intervened to wind up the company.

(ii) Dr Fan's complaint is not that the entirety of the provisions of the 2017 Agreement that established the partnership are void or voidable on grounds of misrepresentation, mistake or *non est factum*. Instead, given the assurances conveyed to Dr Fan that after the IPO 10% of the shares in Legend Cayman would be his to sell, the GP should be held to that assurance, this being something within the power of the GP under Clause 7.7[9].

(iii) Lord Wilberforce's observation at p.380B-E that, even where there is a statutory power to remove a director and the articles provide for other removal powers, *the just and equitable provision nevertheless comes to [the director's] assistance if he can point to, and prove, some special underlying obligation of his fellow members in good faith, or confidence…"* supports Dr Fan's case.

(iv) The decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the instant case since in none of the former was there an assurance made outside the pertinent agreements that a power would be exercised in a particular way in favour of shareholder which was not honoured by the assurer.

(v) ALP is not entitled to rely on the entire contract clause in the ELP or Clause 7(c) in the Subscription Agreement because to do so would be contrary to general considerations of equity arising from the relationship between Dr Fan and Dr Zhang in light of the assurance given and also because reliance on this provision would be: (i) a breach of the section 19 ELPA good faith duty; and (ii) an implied duty to act in good faith; see *Familymart China Holding Co. Ltd. v Ting Chuan (Cayman Islands) Holding Corporation* [CICA Appeals 7 & 8 of 2019, unreported, 23 April 2020]

[9] When making his oral submissions Mr Valentin rightly accepted that Clause 7.7 rather than clause 9 was the power that best suited his argument.

53. *Familymart* was a case involving a petition to wind up a joint venture company ("the Company") on, inter alia, the just and equitable ground that an "understanding" as to how part of the business was to be operated had been abandoned after several years by the majority shareholder. The Company had been incorporated pursuant to Foundation Agreements which were amended from time to time leading, inter alia, to a Shareholders Agreement ("the SHA"), clause 20.2 of which provided: "without prejudice to any other provisions under this Agreement, this Agreement … upon the Effective Date, constitute (sic) the entire agreement and supersedes all prior agreements and *understandings*, both written and oral, among the Parties with respect to the subject matters hereof." [emphasis added]. The lead judgment was delivered by Sir Alan Moses JA with the concurrence of Rix and Martin JAA. The Court of Appeal reversed the decision of the judge below that reliance in the petition on the "understanding" should be struck out by reason of clause 20.2. In para 37 of his judgment Moses JA said:

> "Even where parties to a commercial joint venture agreement include an entire agreement clause, as in the instant case, an obligation to act in good faith may be imposed. (**See Ross v Waverley Commercial** [2004] BCLC 545] and **Sheikh Tahnoon Al Nehayan v Kent** [2018] EWHC 333 (Com)."

The Court of Appeal also reversed Kawaley J's order staying the petition on the ground that the dispute was governed by an arbitration agreement contained in the SHA. On 20 September 2023 the Privy Council set aside the Court of Appeal's order on the sole ground that the dispute was indeed covered by the arbitration agreement[10].

54. When dealing with the second just and equitable ground upheld by the judge – irretrievable breakdown in the relationship between Dr Fan and Dr Zhang that had begun as one of mutual trust and confidence – Mr Valentin accepted that this ground depended on the establishment of a relationship akin to partnership of the sort envisaged by Lord Wilberforce and submitted that the judge correctly stated the law in paragraphs [182] – [183] of the Judgment and paragraphs [74] – [75] in the strike out judgment which the judge correctly applied to the relevant facts in reaching his conclusion that this ground was established.

55. Turning to the judge's third winding up ground – justifiable loss of trust and confidence in the management of the partnership – Mr Valentin submitted that the judge's statement of the applicable law in [10(12)] of the strike out judgment was impeccable. The establishment of

[10] [2023] UKPC 33

this ground did not depend upon there being a relationship between Dr Fan and Dr Zhang that was akin to partnership in accordance with criteria set in *Ebrahimi*. Responding to Mr Smith's contention that there was no material from which to conclude that there had been an objectively verifiable loss of confidence in the GP, Mr Valentin identified the following findings made by the judge:

(i) "*in my judgment the affairs of the Partnership have been conducted by the GP (with Dr Zhang in the driving seat in that respect) in a manner which is oppressive and in breach of Dr. Fan's legitimate expectation and understanding*"[166]. Mr Valentin submitted that this is a reference to the judge's (correct) findings at [167] that Dr Zhang had created and encouraged Dr. Fan to believe that six months after the IPO, he would be entitled to have access to 10% of the Legend Cayman shares, but that expectation and understanding had then been unreasonably frustrated by the Partnership, the GP and Dr. Zhang. The "oppression" of Dr. Fan consisted in the failure by the GP (represented by Dr. Zhang) to honour what Dr. Zhang had promised Dr Fan in respect of the Legend Cayman shares. It also includes the attempts of Dr Zhang to belittle Dr Fan's role and contribution referred to by the judge in [182] and [154]).

(ii) *"Dr. Fan in entering into the 2017 Agreement trusted Dr. Zhang and Ms Wang to do the right thing and to honour the roll over of Dr. Fan's Legend Nanjing shares to Legend Cayman. Dr. Zhang and the GP have betrayed that trust and it can easily be seen how Dr Fan legitimately and reasonably believes, after his significant contribution to the increasing value of Legend Cayman, that he has been badly let down by the GP and those that control the GP. Dr Fan has been unfairly treated."* [169]

(iii) "*The GP's consideration of and reactions to Dr Fan's reasonable requests for the shares shows the GP in a bad light. Such is indicative of the GP's breach of its fiduciary duties and its failure to act in the best interests of the Partnership and its limited partners. Dr. Fan had nearly a 70% interest. He should have been treated with respect and fairness. He was not so treated. He was left with no reasonable alternative but to file the petition*." [170]

56. In regard to the judge's fourth winding up ground – the GP's conflict of interest and breach of the fiduciary duty to act in good faith – Mr Valentin disputed Mr Smith's contentions that: (a) the GP was entitled to be regarded as acting in the overall interest of the partnership consistently with the section 19 (1) good faith duty and in accordance with the 2017 Agreement in declining to allow Dr Fan to have access to 10% of the Legend Cayman's issued shares at a time when the company needed to raise capital to fund its clinical trials and research; and (b) there was in any event no conflict between the interests of the partnership, Legend Cayman and Dr Zhang, all of whom had an interest in protecting and enhancing the value of Legend Cayman. Mr Valentin argued that in considering what is in the interest of the partnership viz the limited partners, the GP must ignore its and its majority shareholder's interest in Legend Cayman, and this the GP, acting by Dr Zhang, manifestly

failed to do as the judge was fully entitled to find in [178]. Further, even if the sole interest of Dr Zhang and Legend Cayman was in protecting and enhancing the value of Legend Cayman (a proposition not supported by the evidence), it does not follow that this was Dr Fan's interest (or sole interest). It is also to the point that Ms Wang did not oppose Dr Fan's petition.

57. Mr Valentin, next turned to Mr Smith's contention that by Clause 10 of the Subscription Agreement[11], Dr Fan had consented to or waived any conflict of interest that the GP (through Dr Zhang) might have had. In Mr Valentin's submission, the judge had plainly been correct to hold in [178] that there was nothing in Clause 10 that could come to the rescue of the GP in this case.

58. Finally, Mr Valentin challenged Mr Smith's contention that a more suitable and reasonable remedy than a winding up petition for Dr Fan to take was a claim for breach of the section 19 (1) good faith duty against the GP wherein the court would have available a more flexible range of remedies to meet the situation as it saw fit. Mr Valentin submitted that Dr Fan wanted the shares in Legend Cayman he had been promised and a winding up petition was by far the most straightforward way of achieving this objective.

59. In support of this submission, Mr Valentin relied on paragraphs 36 and 37 of Martin JA's judgment in *Tianrui*. In that case the appellant ("Tianrui") presented a petition to wind up the respondent ("the Company") on the just and equitable basis on the ground, inter alia, that two of the other three significant shareholders of the Company, ACC and CNBM, had acted unfairly and/or oppressively towards Tianrui and/or that the affairs of the Company had been conducted with a lack of probity and Tianrui had justifiably lost confidence in the management of the Company. At first instance, Mangatal J struck the petition out on the ground that the Tianrui had available alternative remedies which could be reasonably pursued. Paragraphs 36 and 37 of Martin JA's judgment read:

> 36. "If the allegations set out in the petition are true, it seems to us clear that they are capable of establishing that it would be just and equitable to wind up the company. Put simply, Tianrui's position as evinced by its petition is that it cannot be expected to remain in association with CNBM and ACC in light of their conduct towards it. None of the remedies identified by the judge deals with that underlying complaint".

[11] "The Subscriber acknowledges and is aware that the General Partner, its directors or any of its associates may invest in, directly or indirectly, or manage or advise other collective investment schemes or accounts which invest in assets which may also be purchased or sold to the Partnership".

37. "The company suggests that if the underlying complaint is as we have identified, Tianrui can bring its association with CNBM and ACC, and with the company, to an end by selling its shares on the Hong Kong stock exchange. It accepts that Tianrui could only sell the shareholding it now has, and that a 21.40% shareholding might fetch proportionately less than the 28.16% shareholding that Tianrui originally had, since its former shareholding enabled Tianrui to block special resolutions; but the company says that the effect of selling would be to crystallize a claim for damages which could then be pursued by means of an action for conspiracy. In our view, these assertions epitomize what is wrong with the company's position. If the actions of the company, prompted by directors appointed at the instance of a majority of its shareholders, have resulted in a justifiable loss of confidence in the management of the company, Tianrui has a statutory right to petition for the winding up of the company on the just and equitable ground. It cannot be deprived of that right merely because the company can point to other remedies which, alone or in combination, might arguably go all or some of the way to compensating Tianrui for what has occurred. In our judgment, Tianrui may legitimately take the view that it prefers the company to be wound up to having to pursue piecemeal a series of actions, by litigation or otherwise, or by a combination of litigation and other steps, that might be capable of redressing some, or even all, of its concerns."

Discussion and decision

The first winding up ground

60. Upon signing the 2016 Agreement Dr Fan had an unconditional and unqualified contractual right to have transferred into his ownership 10% of the issued shares in Legend Nanjing after completion of the company's contemplated IPO, regardless of the effect on the value of the company's shares if he chose to sell his 10% shareholding. As a consequence of the assurances he received from Dr Zhang and Ms Wang that he would have the exact equivalent of his entitlement under the 2016 Agreement in respect of shares in Legend Cayman's shares ("the assurances"), Dr Fan signed the 2017 Agreement (the LPA, the Subscription Agreement and the Acknowledgement) on 9 June 2017. Dr Zhang and Ms Wang were directors of Genscript and Dr Zhang held the majority of the shares in that company. ALP was established on 16 February 2017 with Genscript as its General Partner. The assurances began to be given from about mid-June 2016 and continued on and off until shortly before Dr Fan executed the 2017 Agreement. As recorded above, in her email to Dr Fan dated 3 June 2017 Ms Wang stated: "The best news for you is that your stake in Nanjing Legend will be turned into shares in Cayman Legend". This was followed by her WeChat message of 8 June 2017: "This agreement is not to change any material interest of your's. It's only intended to make the original agreement legitimate, and to create scope for future development." As Dr Zhang and Ms Wang must have realised, Dr Fan accepted their assurances without seeking independent legal advice because he trusted them having worked closely with them for

Genscript since 2014. As the judge found at [169], he relied on them to honour the assurances whatever was stated in the 2017 Agreement.

61. In my opinion, the repudiation by the GP (Genscript) of the assurances it gave to Dr Fan through Dr Zhang and Ms Wang is an egregious act of bad faith and the judge was right for the reasons that follow to order the winding up of ALP on the ground that the GP had frustrated Dr Fan's legitimate expectation that the GP would transfer to him 10% of the issued shares in Legend Cayman following the IPO and the end of the ensuing six month lockdown period.

62. ALP is very different from a conventional partnership under the Partnership Act for the reasons identified by Mr Smith. Nonetheless, under the law of the Cayman Islands it is a partnership, albeit an exempted limited partnership, and a partner therein has a statutory right under section 36 (3) (g) to petition for its winding up on the ground that it is just and equitable to do so.

63. As recorded above, Dr Fan received the assurances both before and after Genscript had become the General Partner of ALP. The assurances were not included in the 2017 Agreement and were intended to induce Dr Fan to become a limited partner of ALP and succeeded in doing so as a result of Dr Fan having a close and trusting relationship with the assurers. Honouring the assurances depended on the necessary action being taken by the GP which alone had authority (acting by Dr Zhang) to conduct the business of ALP. Furthermore, as envisaged at (iii) of the indicia for the existence of 'something more' for the superimposition of equitable considerations in the passage from *Ebrahimi* quoted at paragraph [24] above, Dr Fan could not exit from ALP without the consent of the GP. It follows in my judgment that, as the judge held, the relationship between Dr Fan and Dr Zhang was sufficiently akin to partnership of the sort contemplated by Lord Wilberforce in *Ebrahimi* for the assurances to be of a character arising between one individual and another that made it inequitable for the GP to insist on a claimed entitlement to refuse to agree to Dr Fan's request to have 10% of the Legend Cayman shares transferred to him.[12]

64. I reject Mr Smith's submission that the GP had a duty to do what it considered to be in the best interests of the partnership which was that they were best served by refusing Dr Fan's

[12] Cf *Ebrahimi* at p.379D

request for else the fortunes of Legend Cayman and ALP's interest in the company would be adversely affected. As stated above, Dr Fan had an unqualified right under the 2016 Agreement to own, and sell if he chose to do so, 10% of the shares in Legend Nanjing post the IPO, regardless of the effect that this might have on the value of Legend Cayman's shares; and the assurances he was given were that he would have the equivalent right in respect of the Legend Cayman shares. ALP (effectively the limited partners) should therefore have taken the consequences resulting from the honouring of the assurances for the value of Legend shares, those assurances having been given by Dr Zhang of the GP (also a limited partner) and Ms Wang, a limited partner.

65. As will be apparent from [64], I am not persuaded by Mr Smith's submission that the terms of the 2017 Agreement, including in particular Clause 7.7 and the entire agreement clauses, preclude a winding up on just and equitable grounds. As Mr Valentin submitted, the decisions in *O'Neill, Coroin* and *Cool Seas* are all distinguishable from the case in hand and, as Mr Valentin noted, Dr Fan's petition is consistent with the 2017 Agreement since the GP had power under Clause 7.7 of the LPA to honour the assurances by acceding to Dr Fan's request for the transfer of 10% of the Legend Cayman shares. In my view, the case falls squarely within the emphasised passage in *Ebrahimi* quoted at paragraph [24] above. The existence of the assurances made it unjust and inequitable for the GP to exercise the power conferred on it by clause 7.7 in a particular way, i.e. by refusing consent to the withdrawal rather than consenting. I would also point out that the assurances were not merely Dr Fan's own subjective expectation at the time of concluding the 2017 Agreement, as suggested by Mr Smith[13], but were objectively found by the judge to have been repeatedly given, from which finding there is no appeal.

66. So far as the entire agreement clauses are concerned, I am of the view that reliance thereon in the circumstances of this case would be inconsistent with the free-standing duty to act in good faith which I find to be engaged in respect to the assurances, the honouring of which is a matter that I find affected the conscience of the GP; see *Familymart* at [37] (quoted at paragraph [53] above) and the following passage in the judgment of Smith J in *In re Wondoflex Textiles Pty Ltd* [1951] VLR 458, cited with strong approval[14] by Lord Wilberforce) in *Ibrahimi* at 378E-H:

[13] See paragraph [37] above
[14] "The whole judgment is of value."

> " It is also true, I think, that, generally speaking, a petition for winding up, based upon the partnership analogy, cannot succeed if what is complained of is merely a valid exercise of powers conferred in terms by the articles: .. . To hold otherwise would enable a member to be relieved from the consequences of a bargain knowingly entered into by him: . . . But this, I think, is subject to an important qualification. Acts which, in law, are a valid exercise of powers conferred by the articles may nevertheless be entirely outside what can fairly be regarded as having been in the contemplation of the parties when they became members of the company; and in such cases the fact that what has been done is not in excess of power will not necessarily be an answer to a claim for winding up. *Indeed, it may be said that one purpose of [the just and equitable provision] is to enable the court to relieve a party from his bargain in such cases."* [emphasis supplied].

67. I am also of the view that to rely on the entire agreement clauses would be a breach by the GP of the section 19 (1) EPLA duty of good faith. The duty is owed to "the exempted limited partnership" which must mean the limited partners, which include Dr Fan and, in my opinion the other limited partners, the GP, Ms Wang and later the Ye Wang Family Trust -- would surely have no standing to dissent because the GP and Ms Wang gave and repudiated the assurances. If I am wrong about this, the free-standing duty of good faith that I have held in [66] to apply to the assurances will be unaffected.

68. In my judgment, the judge did not err in holding that proceedings by Dr Fan for breach of the section 19 (1) duty to act fairly would not be a more reasonable remedy than his winding up petition. As the judge observed, Dr Fan is seeking the transfer into his ownership from the shares held by ALP the equivalent of 10% of Legend Cayman's issued shares which will be the result if his winding up petition succeeds, and this represents a much more straightforward proceeding than a claim under section 19(1) ELPA.

<u>The second winding up ground</u>

69. Mr Smith's challenge to this winding up ground is founded on Lord Briggs' statement in *Lau v Chu* at [15]: that: "where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between *participating* members may justify a just and equitable winding up" [emphasis added].

70. I have already held that by reason of Dr Fan having been induced to become a limited partner of ALP by the assurances given by the GP (acting by Dr Zhang and Ms Wang) and the

existence of (iii) of the indicia indicated in *Ebrahimi*, the relationship between Dr Fan and the GP was sufficiently akin to a partnership to engage the applicability of the just and equitable winding up ground consistently with Lord Wilberforce's judgment in *Ebrahimi*, as the judge found.

71. I turn to consider whether it is necessary for the establishment of this second ground that, in addition to there being a relationship akin to partnership consistent with *Ebrahimi*, the petitioner has to have been a participant in the running of the business. In paragraph [9] of *Lau v Chu*, Lord Briggs observed that the jurisdiction to wind up a BVI company on the just and equitable ground was entirely statutory following the similar jurisdiction in UK with the result that the UK case-law was the primary source of authority for the scope of the jurisdiction. He then went on to say in [17] that where the company is *a corporate quasi-partnership* a winding up on just and equitable grounds "is the response of equity to a state of affairs between individuals *who agreed to work together* on the basis of mutual trust and confidence where that trust and confidence has completely gone." [emphasis supplied]. In light of the fact that the judge and the parties in the proceedings below also took the approach that the UK case-law was the primary source of authority for the scope of the just and equitable jurisdiction in the case of a Cayman Islands ELP, with the judge stating in [158] that he had had regard to *Lau v Chu*, I find I find myself constrained to conclude that in respect of this second winding up ground, Dr Fan had to establish that he was a participant in running the business of ALP which was a condition that on the evidence he was never going to be able satisfy. As Mr Smith was at pains to point out, Dr Fan was never going to be involved in running the business of the partnership by reason of the effect of section 14 (1) & (2)) ELPA. It follows in my view that Mr Smith's challenge to the judge's second winding up ground succeeds and in consequence this ground should be set aside.

<u>The third winding up ground</u>

72. It is important to appreciate that the establishment of this just and equitable ground is not dependent on there being a relationship akin to partnership in accordance with Lord Wilberforce's judgment in *Ebrahimi*.

73. I am not persuaded by the submissions Mr Smith advanced in seeking to have this winding up ground overturned. On a fair reading of the Judgment, it is clear in my view that in finding this ground was established, the judge proceeded on the basis of his findings in paragraphs

[166], [167], [169] and [182] that the GP's failure to honour the assurances which it was obliged to do in good faith amounted to misconduct in the management and affairs of the partnership. For the reasons I have given in upholding the judge's first winding up ground, I am also satisfied that the judge was entitled to make this finding and to conclude that by reason of this misconduct on the part of the GP, Dr Fan had justifiably lost trust and confidence in the management of the affairs of the partnership to the requisite objective standards.

The fourth winding up ground

74. In my view, the judge's conclusion in paragraph [178] of the Judgment that the wording of Clause 10 of the Subscription Agreement does not mean that Dr Fan consented to or waived any conflict of interest to which the GP was subject is unassailable.

75. I am also of the opinion that the judge was entitled to conclude that the GP (acting by Dr Zhang) was in breach of the fiduciary duties to act in good faith and avoid a conflict of interest. However, this conclusion is dependent on the judge's finding that the GP frustrated Dr Fan's legitimate expectation that the GP would transfer into his ownership 10% of the Legend Cayman shares contrary to the good faith duty it owed in regard to the assurances. Thus, if Mr Smith's submission that the judge's first ground for winding up ALP should be set aside, on the ground say that the terms of the 2017 Agreement preclude the first winding up ground, the GP would have been entitled to conclude that the interests of the partnership would be better served if Dr Fan were not permitted to sell his claimed 10% of Legend Cayman shares. It follows that in substance the first and the fourth winding up grounds are duplicitous, but I do not think that this is a reason for setting the fourth ground aside.

Conclusion

76. For the reasons given above I would uphold the first, third and fourth grounds of the judge's decision for winding up ALP and reject the second ground. It follows that the appeal against the judge's winding up order is dismissed.

A closing observation

77. No doubt for sound and sensible reasons which I do not for a moment criticise, the hearings below and on appeal in this litigation were conducted on the basis that the English and Welsh and Commonwealth jurisprudence (including decisions of the Privy Council) was applicable to petitions to wind up on just and equitable grounds a Cayman Islands ELP, the new kid on the block, pursuant to section 36 (3) (g) ELPA, notwithstanding the marked differences between an ELP and a partnership governed by the Partnership Act and a company incorporated under the Companies Act. For my part, I would have been very interested to have heard a "further and in the alternative" case that the expression "just and equitable" in section 36 (3) (g) ELPA was to be construed in an expansive and flexible way, taking full account of the special nature of an ELP and less account of the overseas jurisprudence.

Birt JA

78. I agree.

Goldring JA (President)

79. I also agree.