IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO FSD 200 of 2015 (IMJ)

IN THE MATTER OF THE COMPANIES LAW (2013 REVISION)

AND IN THE MATTER OF STERLING MACRO FUND

IN CHAMBERS

Appearances: **Mr. P Jones Q.C. instructed by Mr. P Kendall of Walkers for the Petitioner.**
Mr. T Lowe Q.C. instructed by Mr. J Harris of Higgs & Johnson for the Respondent.

Before: **The Hon. Justice Ingrid Mangatal**

Heard: **7 July 2016**

Draft Judgment Circulated: **1 August 2016**

Judgment (No.3) Delivered to Parties and Counsel only: **3 August 2016**

Released for Publication: **6 April 2017**

HEADNOTE

Winding Up Petition on Just and Equitable Grounds - Proposed Amendment to Points of Defence to Plead Champerty and Maintenance - Whether Proposed Defences raise arguable, tenable Defence - Whether relevant to Substantial Determination - In any event, need to avoid satellite litigation.

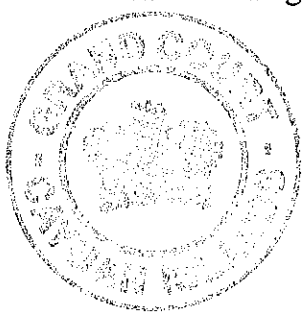
RULING

Introduction

1. The Company, Sterling Macro Fund ("Sterling") has sought to amend its Points of Defence by including in paragraph 12(7) and paragraphs 108 to 110 of the Amended Points of Defence an assertion that the Petitioner, Worthing Properties Ltd ("Worthing"), is not

entitled to bring the winding up proceedings, alternatively that they are an abuse of process, by reason of unlawful maintenance or champerty.

2. Paragraph 2 of the Order for Directions which I made on 26 May 2016 provided as follows:



"The Company has leave to amend its Points of Defence....subject to the Petitioner being permitted to object in writing to such amendments within 7 days of receipt of the same and having liberty to apply in respect of such objections."

3. By a summons issued on 28 June 2016 Worthing sought an order that the Company be refused leave to make these amendments as follows:-

> *"1. The Company be refused leave to amend its Points of Defence as set out in paragraphs 12(7) and 108 to 110 of its Amended Points of Defence dated 21 June 2016 on the grounds that the matters set out therein disclose no defence to the Petition;*
>
> *2. Costs in the application; .."*

4. I accept Sterling's submission that the approach to the amendment of winding up petitions is the same as for all other proceedings - see ***Re: Richbell Strategic Holdings*** (24 July 1997, Neuberger J). In the Cayman Islands the rule was set out in ***Swiss Bank and Trust Co v Iorgulescu*** [1994-5] CILR 149) where the Cayman Court of Appeal at p154 approved the dictum of Brett LJ in ***Clarapede & Co v Commercial Union Assn.*** (1883) 32 WR 262, as follows:-

> *"However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."*

5. The objection by Worthing is, essentially, that the amendment alleging that these proceedings are champertous is (a) not tenable and (b) does not provide a defence. I accept Sterling's submission that at this stage of the proceedings the test is whether the amendments arguably raise such a defence both in the sense of (a) and (b).

6. Unlike the UK where champerty and maintenance were abolished as crimes or torts by S.13 and 14 of the Criminal Law Act 1967, that has not occurred in the Cayman Islands. It is therefore a criminal offence to bring proceedings which are champertous.

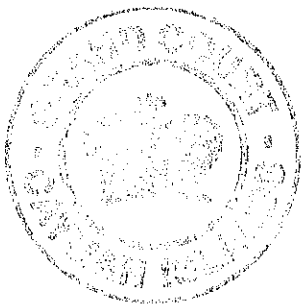
What amounts to Maintenance and Champerty

7. In ***Quayum et al v Hexagon Trust Company (Cayman Islands) Limited*** [2002 CILR 161], Smellie CJ, held, amongst other matters, that the English Law relating to champerty and maintenance, was received as part of the Law of the Cayman Islands - see paragraphs 14 - 22. Smellie CJ accepted, the definition of maintenance and champerty, set out at *9 Halsbury's Laws of England*, 4th Edition, paragraph 400, at 272 . At paragraph 11 of the ***Quayum*** judgment, it is stated as follows:

> *"**Maintenance and Champerty:***
>
> *11. 9 Halsbury's Laws of England, 4th Ed., para. 400, at 272 defines maintenance as "the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any motive recognised by the law as justifying his interference," and in para. 401, at 273 (citing the dictum of Fletcher Moulton, L.J. in **British Cash & Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.** (5) ([1908] 1 K.B. at 1014)), in the wider sense, as "directed against wanton and officious intermeddling with the disputes of others in which the maintainer has no interest whatever, and where the assistance he renders to the one or the other party is without justification or excuse." Champerty is described (ibid, at 272) as being "a particular kind of maintenance, namely*

maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action."

8. The Learned Chief Justice, at paragraph 12 of the judgment, continued, as follows:

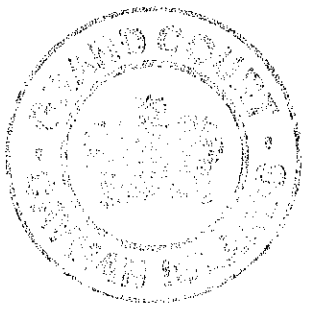


"12.Champerty is thus a species or category of maintenance: see ***In re Trepeca Mines Ltd.*** *(No. 2) (17) ([1963] Ch. At 266) where Pearson, L.J. said that it was convenient to use the phrase "champertous maintenance," distinguishing it from "simple maintenance, in which the element of champerty is not present."*

9. Thus, champerty is wanton and officious intermeddling with the disputes of others in which the (maintainer) has no interest whatever, and where the assistance he renders to the one or other party is without justification or excuse. A division of the spoils of litigation renders such maintenance prima facie champertous -see ***Giles v Thompson*** [1994] 1 AC 142, 161.

10. Further dicta of Lord Mustill, delivering his speech on behalf of the House of Lords in ***Giles v Thompson*** , at page 153, is instructive as to the antiquity of champerty and maintenance:

"My Lords, the crimes of maintenance and champerty are so old that their origins can no longer be traced, but their importance in medieval times is quite clear. The mechanisms of justice lacked the internal strength to resist the oppression of private individuals through suits fomented and sustained by unscrupulous men of power. Champerty was particularly vicious, since the purchase of a share in litigation presented an obvious temptation to the suborning of justices and witnesses and the exploitation of worthless claims which the defendant lacked the resources and influence to withstand. The fact that such conduct was treated as both criminal and tortious provided



an invaluable external discipline to which, as the records show, recourse was often provided."

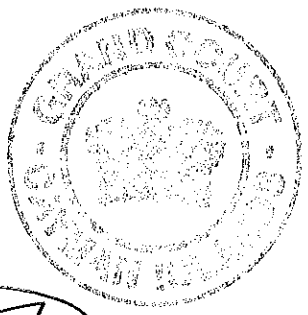
11. It is common ground between Worthing and Sterling that the question whether an agreement is champertous is a matter of fact, and therefore the Court cannot, and is not called upon to determine on an application to amend, whether the alleged arrangement was champertous.

12. It is also common ground between the parties that it is no defence to an action at law that an agreement is champertous - see ***Skelton v. Baxter*** [1916] 1 KB 321, ***Martell v Consett Iron Co. Ltd*** [1955] 1 Ch 363, and other authorities cited by Mr. Jones QC, on behalf of Worthing. Mr. Lowe QC, however, on behalf of Sterling, submits that this is a winding up application, which is, as submitted in relation to an earlier application by Worthing for summary judgment, a discretionary equitable jurisdiction. The question, and only question therefore, Sterling advances, is whether it is arguable that the Court can take this into account in exercising its equitable jurisdiction.

13. In my judgment, Worthing is correct, that in this case, even if there is unlawful maintenance and champerty, (which is stoutly denied by Worthing), it is clear that this would not amount to a defence to the proceedings, because here, it is not alleged that the unlawful agreement impeaches the very title upon which the Petitioner, Worthing, has sought to sue. In my view, this would also for the same reasons, not assist in informing the Court's decision as to how to exercise its equitable jurisdiction and discretion to wind up the Company. The proposed amendments are therefore not relevant to the substantive or other issues that arise for determination on the hearing of the Petition.

14. I also accept Worthing's submission that the proposed amendments to the Points of Defence, even if relevant, which I have held they are not, would create, or tend to create satellite litigation, which Courts are loathe to encourage. This point gains acute perspective when one appreciates that this Winding up Petition is already the subject of a 10 day substantive hearing, fixed for trial to commence on 12 September 2016.

15. I therefore make an order in terms of paragraphs 1 and 2 of the Summons filed by Worthing on the 28 June 2016.



THE HON. JUSTICE MANGATAL
JUDGE OF THE GRAND COURT