

IN THE COURT OF FIRST INSTANCE  
OF THE ASTANA INTERNATIONAL FINANCIAL CENTRE

4 March 2022

CASE No: AIFC-C/CFI/2021/0011

WEMINING LIMITED

Applicant

v

WEMINING LLP

Respondent

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JUDGMENT AND ORDER

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Justice of the Court:

Justice Andrew Spink QC

**ORDER**

1. The Court directs pursuant to Regulations 27(2)(a) and/or 27(6) of the AIFC Court Regulations 2017 and/or Rule 1.7 of the AIFC Court Rules 2018 that for all purposes related to and/or consequential on this Order and Judgment:
  - (a) the Claim/Application Form in Case Number AIFC-C/CFI/2021/0011 (“the Claim Form”) issued on 6 December 2021 shall be deemed to be a Claim Form issued under the ‘Abridged Procedure’ set out in Part 23 of the AIFC Court Rules 2017 and, to the extent necessary, shall also stand as any application notice required for the purposes of making the application sought in the Claim Form;
  - (b) the party named as “Claimant 2” in the Claim Form shall be deemed to be the Defendant to the claim brought by and the Respondent to the application made in the Claim Form (and to have been properly served with the Claim Form for both the bringing of the claim and, to the extent necessary, the making of the application); and
  - (c) the party named as “Claimant 1” in the Claim Form shall be deemed to be the Claimant to that claim and the Applicant to that application.
2. The Court sanctions under section 124 of the AIFC Companies Regulations 2017 the proposed arrangement for a reconstruction involving the amalgamation of the Applicant with the Respondent.
3. Pursuant to section 126 of the AIFC Companies Regulations 2017 the Court orders that the Respondent be amalgamated with the Applicant on the basis set out in the Amalgamation Agreement between them dated 17 November 2021.

## **JUDGMENT**

### **Introduction**

1. By an application filed in Case Number AIFC-C/CFI/2021/0011 by Claim/Application Form dated 6 December 2021 (“the Claim Form”), the parties referred to in the Claim Form as (1) “Claimant 1”, identified there as “Wemining Limited” and by Business Identification Number (“BIN”) 200840900057 (“the Company”) and (2) “Claimant 2”, identified there as “TOO ‘Wemining’” and by BIN 200740013652 jointly seek:
  - (a) an order under section 124 of the AIFC Companies Regulations 2017 (“the AIFC Companies Regulations”) sanctioning an arrangement proposed between the Company and its 100% shareholder, Kim Jin Min (“the Shareholder”) for a reconstruction involving the amalgamation of Wemining Limited Liability Partnership (“the LLP”) with the Company; and
  - (b) an order under section 126 of the AIFC Companies Regulations giving effect to the amalgamation of the LLP with the Company (although section 126 is not expressly referred to in the application, this is the appropriate section of the AIFC Companies Regulations for the order sought in subparagraph (b) herein and I proceed on that basis).

### **Procedural matters**

2. It is necessary for me to deal first with two preliminary procedural matters.
3. First, the name given to “Claimant 1” in the title of the Claim Form (“TOO ‘Wemining’”), which it is clear is intended to be a reference to the LLP, appears to be different to the name given to the LLP elsewhere in the Claim Form and the accompanying documentation, where the LLP is referred to as “Wemining Limited Liability Partnership” or “Wemining LLP”. However, it is clear that ‘TOO “Wemining’” and “Wemining Limited Liability Partnership/LLP” are one and the same entity because they are both identified in the papers before me by the same BIN, 200740013652 (see, for example, Document 1, which is the “Certificate of state registration of a legal entity” for “Wemining LLP” identifying this entity by reference to BIN200740013652). The explanation for this is apparent from Document 7 (the Articles of Association of the LLP). which make it clear that “TOO ‘Wemining’” is the Russian name for the LLP, whereas “Wemining LLP” is the English name.
4. I therefore proceed on this basis, such that the LLP is a party to the Claim Form and, in bringing the application made in the Claim Form as one of the ‘Claimants’, can be deemed to have indicated its

consent to the application being made and disposed of in the manner sought in the Claim Form. It is relevant to note this not only for good order but because this feeds into the second preliminary procedural matter with which I have to deal, to which I now turn.

5. Secondly, of somewhat more substance is the fact that, on its face, there is no Defendant to the claim brought by or Respondent to the application made in the Claim Form. In addition, it is not clear whether the Claim Form is intended to stand as a claim form issued pursuant to Part 4 of the AIFC Rules 2018 (“the AIFC Rules”) (which sets out the general rules for commencing claims), alternatively pursuant to Part 23 of the AIFC Rules (which sets out the “Abridged Procedure for Claims”). The relevance of this is highlighted by Rules 6.1 and 6.2 of the AIFC Rules, which provide as follows in relation to the bringing of any application:

*“6.1 When a party makes an application to the Court:*

*(1) before a claim is brought in accordance with Part 4, he shall issue and serve an Abridged Procedure Claim Form under Part 23 of the Rules, unless the Court orders otherwise;*

*(2) after a claim is brought in accordance with Part 4, he shall file and serve an application notice subject to the rules of this Part.*

*6.2 In this Part:*

*(1) ‘application notice’ means a document in which the applicant states his intention to seek a Court order; and*

*(2) ‘respondent’ means:*

*(a) the person against whom the order is sought; and*

*(b) such other person as the Court may direct.”*

6. If the Claim Form were to be treated by the Court as a claim form issued under Part 4 of the AIFC Rules not only would there have to be a defendant, who would have to be served, but various procedural steps would thereafter have to be followed following service of the Claim Form on the defendant, as set out in Part 4, including service of Particulars of Claim and a Defence in accordance with Part 11, none of which would be appropriate or necessary in a claim such as this. This claim, in which the only relief sought is an order on the single application brought under Sections 124 and 126 of the AIFC Company Regulations and which is unlikely to involve a substantial dispute of fact is much better suited to the “Abridged Procedure for Claims” set out in Part 23 of the AIFC Rules (see Rule 23.1(1)).
7. Were the Claim Form to be treated by the Court as one issued under Part 23, however, this would have the knock-on effect of engaging Rule 6.1(1) in relation to the making of an application, whereby it seems tolerably clear that no separate application notice is required if the necessary application is made in the Part 23 Claim Form (whereas a separate application notice would certainly be required if the proceedings had been commenced by a Part 4 claim form: see Rule 6.1(2)).

8. Furthermore, where the Part 23 “Abridged Procedure for Claims” is used, no Defence needs to be filed (see Rule 23.4(1)(a)).
9. Significantly, there is also provision in Rule 23.6 for a Practice Direction to be made setting out circumstances in which an ‘Abridged Procedure Claim Form’ may be issued without naming a defendant. Although no such Practice Direction has yet been made, this confirms that, in accordance with the Overriding Objective set out in Rule 1.6 of the AIFC Rules, the policy underlying Rule 23.6 is to promote expeditious and efficient disposal of matters suitable for the Part 23 “Abridged Procedure for Claims” even, potentially, to the extent of disposing with the need for a Defendant altogether.
10. Absent a Practice Direction to that effect, I do not consider that the Court can proceed without a Defendant in this matter in the way contemplated specifically by Rule 23.6. However, having regard to the evident underlying policy to which I have referred, it does seem to me (and I conclude) that it is open to the Court in the exercise of its relevant management powers to direct in an appropriate case that one of the “Claimants” named in the Claim Form be deemed to be the Defendant to the claim brought and (to the extent necessary) the Respondent to the application made by the Claim Form.
11. Those case management powers are to be found in Regulations 27(2)(a) (“(2) *The Court may: (a) make orders in matters over which it has jurisdiction to make any orders it considers appropriate, including in relation to the management of cases, interim orders, and enforcement;*”) and/or 27(6) (“(6) *The Court may waive any procedural requirements if it is satisfied that it is in accordance with the overriding objective to do so*”) of the AIFC Court Regulations as underpinned by Rules 1.7 and 1.8 of the AIFC Court Rules.
12. In my view, this is an appropriate case in which to take this approach because, as stated above in paragraph 6 of this Judgment, in bringing the application made in the Claim Form as one of the “Claimants”, the LLP can be deemed, at least as a matter of substance, to have indicated its consent to the application being made and disposed of in the manner sought in the Claim Form and, I would add, to the Court taking all necessary steps within its powers to facilitate that outcome. Consequently, it seems to me that no prejudice is caused – and the Overriding Objective is promoted - by making an order that puts that substantive intention into the proper procedural form. Accordingly, I propose to make the direction set out in paragraph 1 of the Order.
13. For the avoidance of doubt, paragraph 1(a) is included in the Order because Rule 23.5(1) of the AIFC requires a Part 23 Claim Form to state that the claim is brought under the “Abridged Procedure for Claims”. The Claim Form does not state this and so an order directing that it should nonetheless stand as a Part 23 Claim Form is required.

14. The consequence of paragraph 1(c) of the Order will be that it will be for the Company (as the deemed Claimant/Applicant) to take the follow-up steps required to be taken under Section 125(5) of the AIFC Companies Regulations.

**The substantive application under Sections 124 and 126 of the AIFC Companies Regulations**

15. I now return to the substantive application for relief under Sections 124 and 126 of the AIFC Companies Regulations.
16. The Company is a Private Company incorporated in the Astana International Financial Centre (Document 2) and is a “Company” within the meaning of the AIFC Companies Regulations (see the definitions in paragraph 4 of schedule 1 to those Regulations). The Shareholder is a natural person, who is the “incorporating” and sole shareholder in the Company (Document 4 and Details of Claim/Application paragraph 2). The LLP is a legal entity registered outside the AIFC and operating in accordance with the legislation of the Republic of Kazakhstan (Document 1; Details of Claim/Application paragraph 3; Document 7). The Shareholder is also the sole founder of shareholder of and/or sole participant in the LLP (Document 1; Details of Claim/Application paragraph 3; Document 7).
17. As outlined above and pursuant to paragraph 1 of the Court’s order, the Company is the deemed Claimant to the claim brought by the Claim Form and the deemed Applicant to the application for orders under Section 124 and 126 of the AIFC Companies Regulations. The LLP is the deemed Defendant/Respondent. The application is not opposed.
18. It is stated in the Details of Claim/Application, supported by a statement of truth signed by the Company’s authorised legal representative, Gaussar Abduova of International Law Company Limited, that the Shareholder has agreed on behalf of the Company and the LLP to the amalgamation of the LLP with the Company (paragraphs 4 and 5). It is stated further that, although Section 124(2) of the AIFC Companies Regulations empowers the Court to order a shareholders’ meeting, no such order is required in this case because the sole shareholder has already approved the proposed procedure (paragraph 7), further that the requirement under Section 124(3) that a majority representing three-quarters of the votes of the shareholders present and voting at the shareholders’ meeting has been met, further that the LLP has obtained the consent of all creditors to the transfer of obligations from the LLP to the Company, notice of the offer made by the LLP to transfer those obligations to the Company and the Company’s assent thereto having been published.
19. Documents filed in support of the application include:

- (a) the LLP's Articles of Association, approved by the sole participant on 16 July 2020 (Document 7), and the Company's Articles of Association (Document 8);
- (b) an Amalgamation Agreement between the Company and the LLP, dated 17 November 2021 (Document 5);
- (c) a record, dated 17 November 2021, of the resolution of the Shareholder in his capacity as "incorporating shareholder" of the Company, that the Company desires to amalgamate with the LLP and continue as one company and that the Company assumes all liabilities of the LLP in view of the amalgamation (Document 4);
- (d) a record, dated 17 November 2021, of the decision of the Shareholder, in his capacity as "sole founder" of the LLP, accepting the reorganisation of the LLP in the form of a merger with the Company with all obligations of the LLP being assumed by the Company (Document 3); and
- (e) letters from various creditors of and/or contracting counterparties with LLP consenting to the transfer by LLP to the Company of LLP's respective liabilities or contractual obligations owed to each of those creditors/counterparties (Documents 10, 11, 12, 13, 14 and 15).

20. The Amalgamation Agreement dated 17 November 2021 describes an agreement between the LLP and the Company to merge by combining their businesses and assets and thereafter to continue in existence combined together as the Company, with property or each of the LLP and the Company remaining the property of the Company (Clause 3.2), the Company continuing to be liable for the obligations of the LLP (Clause 3.3), and existing grounds for any claim or "obligation to pursue" that may be vested in LLP being assigned to the Company (Clause 3.4). (Note that Clause 3.4 is confusingly drafted, or at least translated, but I consider can only sensibly be construed in the way set out in the previous sentence of this Judgment). It is expressly recorded in the Amalgamation Agreement that the Company and the LLP have fully disclosed to each other all of their respective assets and liabilities.
21. I am satisfied that Section 124 of the AIFC Companies Regulations applies in this case, in that the matters summarised above constitute an arrangement proposed between the Company and its 100% shareholder, Kim Jin-Min (Section 124(1)(b)).
22. There is no application for the Court to order that a meeting of shareholders be held to vote on the proposal (Section 124(2)), and I take the view that no such order is needed, since the information provided to the Court is that a meeting has already been held at which the Shareholder (being the sole shareholder in the Company) has already passed a resolution in favour of the proposal (Document 4).

23. The Court has not been informed of any objection to the proposal. Moreover the proposal appears adequately to protect the position of third parties by the transfer of all obligations of the LLP to the Company in circumstances where (a) all those creditors/contracting counterparties in respect of whom information has been provided to the Court have agreed to the transfer by LLP to the Company of LLP's respective liabilities or contractual obligations owed to each of those creditors/counterparties, (b) more generally, the consent of all of LLP's creditors to the transfer of its obligations to the Company has been received, (c) each of the Company and the LLP consent to the proposal, and in particular to the transfer of all the LLP's obligations to the Company, the Company and the LLP having first fully disclosed to each other all of their respective assets and liabilities, and (d) notice of the offer made by the LLP to transfer its obligations to the Company and the Company's assent thereto has been published.
24. In the circumstances I consider it appropriate for the Court to sanction the proposed arrangement by order under Section 124(3) of the AIFC Companies Regulations.
25. Section 126 of the AIFC Companies Regulations provides that if an application is made to the Court under Section 124 for the sanctioning of an arrangement between a Company and its shareholders, *"the Court may make any orders as it considers appropriate to facilitate the ... arrangement, including a reconstruction of the Company, or an amalgamation of the Company with any other Company"*. It provides further that *"in this section Company may be taken to include a Body Corporate incorporated outside the AIFC"*.
26. This raises the question of whether the Court has power to make an order under Section 126 where, as here, one of the entities to be involved in the amalgamation, namely the LLP, is neither a *"Company"* in its primary sense of being a *"Private Company or a Public Company"* incorporated in the AIFC (as per paragraph 4 of Schedule 1 to the AIFC Companies Regulations) nor a *"Body Corporate incorporated outside the AIFC"* because it is a limited liability partnership rather than a body corporate. As to this, I respectfully agree with and adopt the approach to the making of the Section 126 part of the Order taken by Justice Sir Stephen Richards in AIFC Court Case No. AIFC-C/CFI/2021/0002 at [11] in his Judgment, where he said:

*"The amalgamation of the LLP with the Company is at the heart of the proposed arrangement and it is appropriate in my view for the amalgamation to take place to facilitate the arrangement. An amalgamation involving a limited partnership registered outside the AIFC does not fall within the express wording of the section, **but that wording is not exhaustive of the forms of amalgamation that may be ordered** ("including ... an amalgamation of the Company with any other Company"). I see no reason of principle why an order should not extend in an appropriate case to the amalgamation*

*of a Company with a limited partnership, nor why a limited partnership registered outside the AIFC should be in any worse a position in that respect than a body corporate incorporated outside the AIFC.” (emphasis added)*

27. I therefore conclude that the Court should make an order under Section 126 of the AIFC Companies Regulations that the LLP be amalgamated with the Company on the basis set out in the Amalgamation Agreement between them dated 17 November 2021.

By the Court,

Andrew Spink QC,  
Justice, AIFC Court