

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION**

CLAIM No. BVIHC (COM) 0337 of 2024

IN THE MATTER OF DECENT MANAGEMENT LIMITED

**AND IN THE MATTER OF THE APPOINTMENT OF LIQUIDATORS UNDER S.162
INSOLVENCY ACT 2003**

BETWEEN:

**[1] SPA II GUANGDONG LTD
[2] SPA II-A GUANGDONG LTD**

Applicants

-and-

**[1] DECENT MANAGEMENT LIMITED
[2] FAVOR SHARP ENTERPRISES LIMITED**

Respondents

Appearances:

Mr. Michael Todd KC and Ben Griffiths (instructed by Kendall Law) and, with them, Mr. John Carrington KC of Kendall Law, for the Applicants
Mr. Matthew Hardwick KC (instructed by Harney Westwood & Riegels) and, with him, Mr. Mark Wells of Harney Westwood & Riegels, for the Second Respondent

2025: June 2;3
August 8.

JUDGMENT

Introduction, Background and Issues

- [1] **MITHANI J. [Ag]:** In this application (“the Application” or “these Proceedings”), the Applicants are SPA II GUANGDONG LTD and SPA II-A GUANGDONG LTD (individually or collectively referred to as the “Applicants” or “CBRE”).
- [2] The Applicants seek the appointment of joint liquidators (“the Liquidation Order”) over Decent Management Ltd (“the Company”), a company incorporated and registered in the BVI.
- [3] The Application is made pursuant to s. 162(1)(b) of the **BVI Insolvency Act 2003** (“the **BVIA 2003**”) on the ground that it is “just and equitable” to do so.
- [4] The Application was brought by the Applicants by way of an Originating Application dated 11 July 2024. The Company is a notional respondent to the Application. FAVOR SHARP ENTERPRISES LIMITED (referred to as “FSE” or “the Second Respondent”) is the second respondent to the Application. I will, for the sake of convenience, when referring to the Applicants or CBRE, include either or both of them (or any company or entity controlled by them or any individual or entity that owns or controls them), as the context may require; and, likewise, when referring to the Second Respondent or “FSE”, include FAVOR SHARP ENTERPRISES LIMITED or any company or entity controlled by it or any individual or entity that owns or controls it), also as the context may require.
- [5] The Company is a solvent entity incorporated in the BVI, primarily holding an indirect interest in the Guangdong Development Bank Tower in Shanghai (“the Property”).
- [6] The Property is owned by Shanghai TaiQi Real Estate Co Ltd (“SHTQ”), which is 95% owned by Samman Investments Limited (“Samman”) and 5% by Shanghai Kaishhiying Investment Management Ltd (“KSY”), a company

incorporated in the PRC. The Company itself holds 100% of the issued share capital in Samman, a company incorporated in Hong Kong. SHTQ owns the Property and other assets, comprising a mixture of commercial retail premises and office building. A full corporate structure chart is included in the skeleton argument filed on behalf of FSE by Mr. Hardwick KC and Mr. Wells.

[7] The Company was incorporated on 3 July 2007. FSE was its sole shareholder until 7 March 2008. The present shareholders of the Company, and the percentage shares they own in the Company, are as follows:

- (a) 54.74% by CBRE (being held as to 51.93% by SPA II GUANGDONG LTD and 2.81% by SPA II-A GUANGDONG LTD);
- (b) 37.26% by FSE;
- (c) 5% by Mr. Xiao Dong ("Mr. Dong"), an individual in the PRC; and
- (d) 3% by Aimswin Ltd ("Aimswan") a BVI company.

[8] The dispute between the parties has a long, complicated, and chequered history. It only needs to be referred to briefly for the purpose of this Judgment.

[9] On or around 25 March 2008, CBRE, FSE, Mr. Dong and Aimswin ("the Shareholders") entered into a Shareholders' Agreement (the "Shareholders' Agreement") to, *inter alia*:

- (1) govern the affairs of the Company and the relationship between the Shareholders;
- (2) provide for the establishment and composition of the Company's Board;

(3) assure the parties of continuity in the management of the Company; and

(4) limit the manner and terms for the transfer of shares.

[10] The terms of the Shareholders' Agreement do not require express mention, though, so far as it is necessary for me to do so, I will refer to its relevant terms below.

[11] In July 2016, CBRE expressed a desire to exit its investment in the Company. However, despite protracted negotiations, it was not possible for any final agreement to be reached between the parties, allowing CBRE to do so.

[12] On 4 February 2019, CBRE commenced proceedings under Claim No. BVIHC (COM) 0016 of 2019 against the Company and FSE. The claim made in the proceedings was for relief under s.184I **Business Companies Act 2004** ("**BCA 2004**") on the ground that the affairs of the Company were being run in a manner unfairly prejudicial to CBRE. Those proceedings were stayed by Michael Green J (Ag) on 15 April 2019, on the basis that the parties should have referred their dispute to arbitration as required by clause 17.1 of the Shareholders' Agreement.

[13] In consequence, on 7 May 2019, CBRE commenced arbitration proceedings against FSE before the Hong Kong International Arbitration Centre by way of a request for arbitration (the "HKIAC Arbitration").

[14] On 31 December 2023, the tribunal, constituted pursuant to the HKIAC Arbitration ("the Tribunal"), issued its first partial award on liability (the "FPA"). The FPA is a convention award within the meaning given to that expression by s. 2(2) of the **Arbitration Act 2013** and is thus enforceable, as provided for in ss. 84(1) and 85 of that **Act**.

[15] The findings of the FPA were, *inter alia*, as follows:

- (1) the affairs of the Company were in a “functional deadlock” because: (a) the Company had held no board meetings or made major decisions, or conducted essential business, in several years; (b) no dividends had been distributed by the Company since at least 2017 despite RMB 192million remaining to be distributed; and (c) CBRE was not the cause or the sole cause of the deadlock;
- (2) Samman was also in a “functional deadlock”;
- (3) certain problems, which had arisen at the Property and were continuing, were caused by the deadlock; and
- (4) there had been “a total breakdown in trust and confidence between the parties for which FSE was solely [or mainly] responsible.”

[16] Accordingly, CBRE seek the winding up of the Company “on the ground that there is functional deadlock in the affairs of the Company” (‘the Deadlock Ground’); alternatively, “on the ground that there has been an irretrievable breakdown of trust and confidence between the Shareholders and between the Applicants and the directors nominated by FSE for which the Applicants are [not responsible] or solely responsible (‘the Loss of Trust and Confidence Ground’).”

The Law

[17] For the purpose of determining the Application, only a brief exposition of the law is necessary. What follows, therefore, is that exposition, so far as it is relevant to the determination of the Application.

[18] Section 162(1)(b) of the **BVIA 2003** provides that the court may, on the application of, among others, a member, appoint a liquidator of a company under s. 159(1) of that **Act** if the court is of the opinion that it “is just and

equitable” to do so. However, this provision is subject to s. 167(3), which states that:

“Where an application to appoint a liquidator is made by a member under section 162(1)(b), if the Court is of the opinion that:

- (a) the applicant is entitled to relief either by the appointment of a liquidator or by some other means; and
- (b) in the absence of any other remedy it would be just and equitable to appoint a liquidator, it shall appoint a liquidator unless it is also of the opinion that some other remedy is available to the applicant and that he or she is acting unreasonably in seeking to have a liquidator appointed instead of pursuing that other remedy.”

[19] The leading authority in this jurisdiction on the application of the above statutory provisions is **Chu v Lau**,¹ a decision of the Privy Council, on appeal from the Court of Appeal of the Eastern Caribbean Supreme Court. In the context of determining the Application, it is only necessary for me to refer to the following passages of the opinion of Lord Briggs (with whom Lord Hodge, Lord Leggatt, and Lord Burrows agreed):

“[13] Remedies in the alternative to a just and equitable winding up include relief for the company itself, available by means of a derivative action and relief available on proof of unfairly prejudicial conduct, under **Pt XA of the BVI Business Companies Act 2004**. Relief for unfair prejudice includes a court order for a buy-out, the appointment of a receiver or the appointment of a liquidator under **s 159 of the 2003 Act**, on the just and equitable ground in **s. 162(1)(b)**.

[14] A just and equitable winding up may be ordered where the company's members have fallen out in two related but distinct situations, which may or may not overlap. First, a winding up may be ordered to resolve what may conveniently be labelled a functional deadlock. This is where an inability of members to co-operate in the management of the company's affairs leads to an inability of the company to function at board or shareholder level. Functional deadlock of this paralysing kind was first clearly recognised as a ground for a just and equitable

¹ [2020] UKPC 24.

winding up by **Vaughan Williams J in Re Sailing Ship Kentmere Co [1897] WN 58**, a decision on the jurisdiction conferred by **s. 79 of the (UK) Companies Act 1862 (25 & 26 Vict, c 89)**.

- [15] Secondly, where the company is a corporate quasi-partnership, an irretrievable breakdown in trust and confidence between the participating members may justify a just and equitable winding up, essentially on the same grounds as would justify the dissolution of a true partnership. This jurisprudence was developed as an aspect of the law of partnership in England in the mid-19th century, and is exemplified in the following passage from the judgment of **Sir John Romilly MR in Harrison v Tennant (1856) 21 Beav 482 at 496–497, (1856) 52 ER 945 at 951**: 'I do not base my decision upon any particular reported case, but upon the principle that the circumstances under which the parties entered into the partnership have, by matters over which they have no control, materially altered, that these altered circumstances have, combined with the conduct of the parties themselves, produced a mistrust which the Court cannot say is unreasonable; and that, taking all these things together, it is impossible that the partnership can be conducted upon the footing on which it was originally contemplated, without injury to all these persons concerned, and that taking all these matters together, it makes this a case in which, in my opinion, it is the duty of the Court to pronounce a decree for the dissolution of the partnership.'

It is clear, for example from **Pease v Hewitt (1862) 31 Beav 22, (1862) 54 ER 1045** and **Atwood v Maude (1868) LR 3 Ch App 369 at 373**, that a dissolution of a partnership might be ordered even where both parties were to blame for the breakdown in mutual trust and confidence.

...

- [18] The well-known leading case on whether a company is a quasi-partnership is **Ebrahimi v Westbourne Galleries Ltd [1972] 2 All ER 492, [1973] AC 360**. It contains a summary of the circumstances in which the relationship between the members of a company may cause their strict legal rights to be subjected to equitable considerations which has stood the test of time. Lord Wilberforce said this (**[1973] AC 360 at 379–380, [1972] 2 All ER 492 at 499–500**): '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.

[19] The **Ebrahimi** case reinforces the principle that an applicant for a just and equitable winding up is not barred from his remedy merely because the breakdown or deadlock upon which he relies has been caused to some extent by his own fault ... [per **Lord Cross** ([1972] 2 All ER 492 at 503–504, [1973] AC 360 at 383–384) ...

[20] It is well established that winding up is a shareholders' remedy of last resort. But this does not mean that winding up is unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word. As is clearly enshrined in **s 167(3) of the 2003 Act**, the court carries out a three-stage analysis, asking:

- (a) Is the applicant entitled to some relief?
- (b) If so, would a winding up be just and equitable if there were no other remedy available?
- (c) If so, has the applicant unreasonably failed to pursue some other available remedy instead of seeking winding up?

[21] The legal burden of proof is on the applicant at stages (a) and (b). But it shifts to the respondent at stage (c) ... **In Re a company (No 002567 of 1982) [1983] BCLC 151 at 158, [1983] 1 WLR 927 at 933, Vinelott J** held that 'other remedy' in s 225(2) was not limited to a statutory remedy provided only by the court. For example, an unreasonable refusal to accept a fair offer for the applicant's shares might bar relief by way of winding up. The Board agrees with this analysis."

[20] As noted above, in **Lau v Chu**,² Lord Briggs stated where the burden of proving the matters referred to in para. [20] of his judgment lay.

[21] The standard of proof at each of the above stages is the usual civil standard of proof – the balance of probabilities. There is no heightened standard of proof simply because the allegations which each party makes against the other (particularly those made by the Applicants against FSE in the present case) are of a serious nature, involving want of probity and other serious conduct on the part of one or the other parties: see the decision of the House of Lords in **Re B**³ and of the UK Supreme Court in **Re S-B**.⁴

[22] The overall assessment of the evidence in connection with an issue arising in a claim is within the sole province of a trial judge. However, in the present case, for the reasons referred to in this Judgment, any factual findings I need to make will not be based on the niceties of where the burden of proof lies. That is because wherever the burden lies, the evidence supporting the findings that I have made is clear.

² [2020] UKPC 24, at [21].

³ [2008] UKHL 35.

⁴ [2009] UKSC 17.

[23] As I would expect with two very able silks, leading extremely eminent juniors, numerous points have been raised by them to support the case that they are advancing before me. I have not considered it appropriate to decide every point which has been advanced by the parties in these Proceedings in order to determine the issues that arise in them. It is only necessary for me to decide whether the matters relied upon by the Applicants are supported by the material which I have seen, the limited oral evidence that I have heard, and the submissions (both written and oral) made by the parties; and, if they are, whether they warrant the relief sought by them against FSE being granted to them: see, by way of examples, **Weymont v Place**⁵ and **English v Emery Reimbold & Strick Ltd.**⁶

Analysis and Discussion

[24] Before I deal with the analysis of the rival positions advanced before me about whether a liquidation order over the Company should be made, it is necessary for me to record an important factual matter.

[25] The Applicants offered Mr. Michael Pierce (“Mr. Pierce”), who had furnished three affidavits and/or witness statements in these Proceedings, to be questioned upon those affidavits and witness statements. Mr. Pierce was sworn to their contents. However, Mr. Hardwick declined the invitation to question him. FSE did not offer its witness, Mr. Liu Guoqing (“Mr. Liu”), to be questioned on his written evidence. That must mean that, unless Mr. Pierce’s written evidence was weak, tenuous, inherently inconsistent, expressly or impliedly contradicted by other more persuasive evidence, or otherwise simply did not withstand proper scrutiny, I should accept what Mr. Pierce has to say.

[26] FSE challenges the Applicants' ability to enforce the FPA. I do not consider that these Proceedings are the appropriate forum in which to do so (in the sense that

⁵ [2015] EWCA Civ 289 at [4]–[6], per Patten LJ.

⁶ [2002] EWCA Civ 605, [2002] 3 All ER 385, [2002] 1 WLR 2409.

this Court cannot, in the exercise of its insolvency jurisdiction, set aside arbitral or other tribunal awards), and I do not, therefore, decide that issue. However, in my judgment, in the absence of a formal challenge to the FPA brought to the appropriate court or tribunal, the findings made by the Tribunal in the HKIAC Arbitration can be carried through to these Proceedings without having to be relitigated by any of the parties to the arbitration, absent compelling reasons: see **Russell on Arbitration**.⁷ That is because there has been no challenge to those findings in these or any other proceedings.

[27] Mr. Hardwick concedes this point, for the purpose of these Proceedings: see paras. 58-59 of his skeleton argument in which he says:

“58. FSE confirms that solely for the sake of expediency it will not be contesting the points that: (1) the Award is a Convention award (s2(2) of the 2013 Act); (2) the Award is enforceable in this Court (s84(1) of the 2013 Act); (3) the Award is to be treated as final and binding for all purposes on the persons between whom it was made; and (4) (without prejudice to its rights if the Applicants were otherwise to seek enforcement of the Award), no defence to enforcement is advanced in this Liquidation Application under s86(2)(b) and (d) and s86(3)(b) of the 2013 Act.

59. This position, which FSE takes in the spirit of a constructive approach and in accordance with the overriding objective, is likely to save the Court and the parties considerable time at the hearing.”

[28] However, this concession does not mean that this court (“this Court” or “the Court”) must make a liquidation order under s. 162(1)(b) of the **BVIA 2003**. The reason for this is obvious, but is worth stating.

[29] The making of a liquidation order over a company is solely within the discretion of the Court. The Court is engaged in an entirely different process and function in deciding whether a liquidation order over a company should be made. The enquiry that the Court must undertake before deciding whether to make a liquidation order is extremely wide. Before the Court makes what has variously been described as a “draconian order” or a “measure of last resort”, it will need

⁷ Sutton, D, and others, 24th Edition, 2015, Sweet and Maxwell, at 6-176.

to carefully examine whether, even if the facts support the making of a liquidation order, there may be circumstances which militate against the Court taking that course of action. Perhaps, the best example of this is my own decision in **Re The Whitehall Partnership Ltd, Taylor v The Whitehall Partnership Ltd and another**,⁸ in which the company was deadlocked but I declined to wind it up under the provisions of s. 122(1)(g) of the **Insolvency Act 1986**, as it applies to England and Wales (the equivalent of s. 162(1)(b) of the **BVIA 2003**) because the petitioner's conduct made it inappropriate for me to do so.

[30] What is particularly important, in this context, is, as I have said above, the power of a court to make a liquidation order under s. 162(1)(b) of the **BVIA 2003** is discretionary. The discretion is wide and unfettered, subject only to the limitation that it should be exercised judicially, taking into account all the circumstances of a particular case and having regard to the purpose for which the discretion exists. This means that the circumstances in which the Privy Council said in **Lau** that the discretion might be exercised are not exhaustive. There are many other circumstances in which the court could make a liquidation order under s. 162(1)(b) of the **BVIA 2003**. As Lord Wilberforce said in **Re Westbourne Galleries**⁹ at 374-5: "there has been a tendency to create categories or headings under which cases must be brought if the clause is to apply. This is wrong. Illustrations may be used, but general words should remain general and not be reduced to the sum of particular instances."

[31] Lord Wilberforce made the same comment later on in his judgment, at 376:

"In England, the leading authority is the **Court of Appeal's decision in Yenidje Tobacco Co Ltd, Re [1916] 2 Ch. 426**. This was a case of two equal director shareholders, with an arbitration provision in the articles, between whom a state of deadlock came into existence. It has often been argued, and was so in this House, that its authority is limited to true deadlock cases. I could, in any case, not be persuaded that the words 'just and equitable' need or can be confined to such situations. But **Lord Cozens-Hardy M.R. [in Yenidje Tobacco]** clearly puts his judgment on wider grounds. Whether there is deadlock or not, he says,

⁸ [2023] EWHC 596 (Ch), [2023] 1 BCLC 495.

⁹ [1973] A.C. 360.

at 432, the circumstances 'are such that we ought to apply, if necessary, the analogy of the partnership law and to say that this company is now in a state which could not have been contemplated by the parties when the company was formed ...' **Warrington L.J.** adopts the same principle, treating deadlock as an example only of the reasons why it would be just and equitable to wind the company up." (Emphasis added by the Judge).

[32] In **O'Neill v Phillips**,¹⁰ Lord Hoffmann, adopting the above passages from Lord Wilberforce's speech, held in a similar vein:

"I do not suggest that exercising rights in breach of some promise or undertaking is the only form of conduct which will be regarded as unfair for the purposes of section 459. For example, there may be some event which puts an end to the basis upon which the parties entered into association with each other, making it unfair that one shareholder should insist upon the continuance of the association. The analogy of contractual frustration suggests itself. The unfairness may arise not from what the parties have positively agreed but from a majority using its legal powers to maintain the association in circumstances to which the minority can reasonably say it did not agree: *non haec in foedera veni*. It is well recognised that in such a case there would be power to wind up the company on the just and equitable ground (see **Virdi v Abbey Leisure Ltd [1990] B.C.L.C. 342**) and it seems to me that, in the absence of a winding up, it could equally be said to come within **s.459** [of the former **Companies Act 1985**, as it applied to England and Wales). But this form of unfairness is also based upon established equitable principles, and it does not arise in this case."

[33] However, as Mr. Todd KC, who appears on behalf of the Applicants with Mr. Ben Griffiths, rightly points out, referring to **Hollington on Shareholders' Rights**,¹¹ para. 10-11, the traditional categorisation of cases where a court would be willing to make a winding-up order on the just and equitable ground can be grouped under four broad headings:

- (a) loss of substratum;
- (b) deadlock;

¹⁰ [1999] 1 W.L.R. 1092 at 1101H-1102B.

¹¹ 10 Edition, Hollington, R, 2023, Sweet and Maxwell.

- (c) justifiable loss of trust and confidence due to want of probity or mismanagement; and
- (d) in the case of a quasi-partnership, (i) exclusion of “working partner”; or (ii) breakdown between “the partners” of the relationship of trust and confidence.

[34] The Applicants do not rely on ground (a) or (d), above. They only rely on grounds (b) and (c).

[35] The bases upon which the Applicants seek a liquidation order are simple. They say that the Company is in a state of deadlock, with no board meetings or major decisions made since 2017; alternatively, they maintain that there has been a breakdown of trust and confidence between the parties, caused solely or mainly as a result of the wrongful conduct of FSE, such as to make it appropriate for the Court to exercise its discretion in favour of making a liquidation order.

The Deadlock Ground

[36] Given that there is no challenge to the FPA, the Applicants contend that this Court must come to the sure conclusion, on the standard of proof that it needs to apply, that this ground is made out. However, FSE challenges this contention. It says that while the affairs of the Company were, or may previously have been, deadlocked, they are no longer so.

[37] The position of FSE is summarised in the following paragraphs of Mr. Hardwick’s skeleton argument:

- “61. The Deadlock Ground is denied ... essentially that the Applicants and FSE “cooperate regularly including attending to the ongoing day-to-day management of the Company, and its wider affairs” ... For the purposes of this skeleton three particular points require emphasis...
- 62. First, in challenging this Deadlock Ground FSE accepts the findings of deadlock as contained in the Award ...

63. Second ... “the Applicants have failed to refer to a single instance incurring since 2019 that supports the allegation of deadlock”. In short the historic issues from 2018/2019 found by the Tribunal to amount to deadlock do not mean that there is any present deadlock ...
64. Third, applying **Chu v Lau** at [23], it is perfectly clear that there is no “complete functional deadlock” and no “paralysis” in the graphic language of Lord Briggs. Certainly there was a major difference of view in relation to the SHYS Loan and the “gentlemen’s agreement” with KSY in 2018. But that was some 7 years ago. What is relevant is the state of management now – yet the Applicants do not identify a single event arising after August 2020 to support an allegation of deadlock ...
65. Moreover, the business of the Company is as a holding company (Clause 4.1.1 of the Shareholder Agreement). Examples of current management of the Company are identified at Defence/21(b)(i) to (ix) and admitted as facts at Reply/31. Liu 1/76(a) to (j) develops and exhibits the evidence in respect of the same instances of management – including in particular a series of entirely constructive and courteous emails between Mr. Wang (director of FSE and Samman) and Mr. Pierce from 26 August 2024 to 8 November 2024 in relation to proposals for a profits distribution by SHTQ and the sale of the Property.”

[38] The Applicants reject this contention. On their behalf, Mr. Todd states that this is a classic case of a “functional deadlock” alluded to by Lord Briggs in **Lau**, in which, he said, at [14], that such a deadlock arises “where an inability of members to co-operate in the management of the company’s affairs leads to an inability of the company to function at board or shareholder level. Functional deadlock of this paralysing kind was first clearly recognised as a ground for a just and equitable winding up by Vaughan Williams J in **re Sailing Ship Kentmere Co**,¹² a decision on the jurisdiction conferred by section 79 of the **(UK) Companies Act 1862**.”

[39] Mr. Todd contends that if a company sought to be wound up is capable of being effectively managed, and decisions made about “important aspects of the direction of its business and assets” can be made at board level, there might be

¹² [1897] WN 58.

some basis to argue that the “deadlock” ground is not met. However, he refers to the following guidance given by Lord Briggs, at [23], to support his contention that this is simply not the position in the present case:

“... when addressing the question of functional deadlock it is the management of the company sought to be wound up that must be addressed. Deadlock about other matters is neither here nor there, if the subject company is still capable of being effectively managed, and decisions made about important aspects of the direction of its business and assets. Nonetheless the breadth of the parties’ falling-out over other business matters may be very relevant to the court’s assessment of the question whether an apparent deadlock within the subject company has become irremediable.”

[40] The Applicants contend that there is no substance in the assertion made by FSE that the affairs of the Company are not deadlocked simply because the Applicants and FSE have agreed on certain matters relating to the affairs of the Company in recent months. They contend that this premise is directly contrary to the findings of the Tribunal, which specifically ruled that the affairs of the Company were in a state of functional deadlock. Specifically, they refer to the fact that there have been no board meetings, written resolutions, or decisions on essential business matters in several years. In addition, no dividends have been distributed from the Company since at least 2017, even though, as at mid-2020, approximately RMB 192 million remained to be distributed.

[41] Mr. Todd, on behalf of the Applicants, goes on to say, at para. [95] of his skeleton argument, that “the position should be the same even in relation to matters which post-date the hearing before the Tribunal or its Award. The Tribunal delivered its Award on 31 December 2023, and this Winding-Up Application was commenced promptly afterwards (on 11 July 2024). If it were otherwise, the position would be unworkable: one would have a potentially never-ending series of arbitrations as at the conclusion of each arbitration a further arbitration would be required to determine whether, since the date of that arbitral award, the affairs of the Company had ceased to be deadlocked.”

[42] Mr. Todd further states, at para. 96 of his skeleton argument:

“96 Even if (contrary to CBRE’s primary position) it would be appropriate for the Court to revisit the issue of deadlock:

96.1 At the very least, the parties are bound by the Tribunal’s findings that the events addressed in 2018 and 2019 addressed in the Award amounted to deadlock of the Company’s affairs, and that such deadlock continued to exist at the date of the Award on 31 December 2023.

96.2 FSE seeks to raise issues in this Winding-Up Application concerning the ‘management’ of the Company’s affairs post the Award. ...

96.3 In short, none of the matters alleged by FSE demonstrate (i) that the Company will be able to take any steps to recover the sums paid pursuant to the unauthorised SHYS Loan, (ii) that the Company will be able to take steps to cause the payment of dividends or (iii) that CBRE and FSE have been or will be able to agree on the manner of CBRE’s Exit from the Company. There is no consensus between the parties on any of those fundamental matters.

96.4 The bulk of the matters on which FSE relies (as set out in Defence §§21(b)(i)-(vii)) are on their face merely routine day-to-day corporate administrative matters, such as payment of filing fees, the preparation and filing of accounts, or the provision of anti-money laundering information to the Company’s registered agent. A number of those matters do not in fact show any real cooperation between the parties but in fact a high degree of mistrust and breakdown in the relationship of trust and confidence between them. But in any case, they are all plainly not matters regarding the substantive management of the Company or ‘important aspects of the direction of its business and assets’. That is obvious even on a cursory review of the matters at face value, but Mr. Pierce in his evidence addresses each of these matters individually: see Pierce 3 §§23-53. The fact that the Company’s directors or shareholders have managed to deal with these limited matters in order to maintain the existence of the Company plainly does not amount to a break in the deadlock over the management and general direction of the Company.

96.5 There have been no communications between the parties since 2019 regarding the business affairs of the

Company or Samman: Pierce 3 §70. The deadlock continues. In particular, there has been minimal communication between the parties – and where there has been communication there has often been mutual distrust and lack of communication – and there has been no board meeting or resolution to manage the Company's business and investment: Pierce 3 §69.

96.6 There has still been no payment of any dividend: Pierce 3 §71. So far as the 'recent...email communications' concerning FSE's proposal for profits distribution by SHTQ (as pleaded in the Defence at §21(b)(vii)) are concerned:

- (a) These are only said to be communications, and it is not suggested that any agreement as to payment of dividends has been reached. On its face, therefore, this is no evidence of a break in the deadlock.
- (b) No consensus on this matter has in fact been reached.
- (c) Prior to 2024, all CBRE's proposals to declare dividends were ignored by FSE, and only proposals for dividends made by FSE were bundled up with other proposals, which were prejudicial to CBRE, as the Tribunal found.
- (d) Whilst FSE made a proposal in August 2024 for SHTQ to declare dividends, this in the context of the ongoing litigation has to be regarded as a tactical manoeuvre rather than a genuine proposal. It followed shortly after the commencement of this Winding-Up Application (on 11 July 2024). Moreover, FSE refused to guarantee that dividends distributed to it would be used to pay CBRE's costs of the Arbitration.⁴⁴ In any event, given the Winding-Up Application had by that time been issued, CBRE was not in a position to consider any proposal for payment of dividends pending termination of that application.
- (e) In any case, even if one dividend could have been agreed to have been paid in August 2024, that would not demonstrate that the wider deadlock between the parties have been broken.

96.7 As regards FSE's contention that there has been 'exploration' of a potential sale of property owned by SHTQ (as pleaded in the Defence at §21(b)(ix)), that overstates the position. On 28 August 2024, Mr. Wang contacted Mr. Pierce to say there may be an opportunity to sell Samman's investment in SHTQ and enquired whether CBRE would allow FSE's representative to look for and discuss sale terms with potential buyers, but (i) in response to an initial query from Mr. Pierce, Mr. Wang confirmed that no valuation of Samman's investment in SHTQ had been carried out (which would have been the obvious starting point when beginning talking to potential buyers) and (ii) Mr. Pierce indicated that CBRE was open to selling Samman's investments in SHTQ. That appears to have been the extent of any "exploration" of a potential sale. There has never been any specific proposal put to both CBRE and FSE to see whether agreement on the terms of a sale could be reached, even if there were a specific proposal from a potential buyer. Again, no consensus between the parties has been reached."

[43] Finally, at para. 97 of his skeleton argument, Mr. Todd states:

"FSE also contends that it cannot be said that the Company is presently deadlocked because there have been no attempts by CBRE to convene a board meeting since August 2020 ... The point goes nowhere. In circumstances where FSE has and the FSE directors of the Company and Samman have evinced a clear intention not to attend any board meeting, there is no reason to suppose there has been any change to the position. Had there been any change in attitude of FSE or the FSE directors, they would doubtless have proposed that a board meeting be convened. They have not."

[44] I entirely agree with Mr. Todd that the Company is functionally deadlocked.

[45] I cannot improve on Mr. Todd's analysis about why this is so. However, in deference to the skilful way in which Mr. Hardwick presented his client's case, it is appropriate that I do so briefly.

[46] Even disregarding the findings made and conclusions reached by the Tribunal, the suggestion by FSE that the Company is not presently deadlocked is, to say the least, fanciful.

[47] I agree with the Applicants that so far as there has been cooperation between the parties, it has been minimal and largely comprises day-to-day corporate administrative matters, such as the preparation and filing of accounts. It is unrealistic to suggest that this supports the premise that the Company is no longer deadlocked. On all the major issues referred to above, there has neither been any agreement between the parties nor the prospect of any such agreement being reached, whether now or at any time in the future.

[48] Examples (by no means exhaustive) of how the Company is functionally deadlocked come from several matters which Mr. Pierce summarises in his written evidence. This is what he says, at paras. 57 to 60 of his witness statement dated 10 May 2025:

“57. At paragraphs 70 and 71 of Liu's Affidavit, Mr. Liu claims that CBRE's assertion of deadlock focuses on events in late 2018 which are the subject matter of the 2019 Proceedings. While I agree that the 2019 Proceedings concern events which occurred between 2016 and 2018, it is not correct for Mr. Liu to say that CBRE's assertion of deadlock focuses on events in 2018. As clearly stated in paragraphs 214 to 222 of the Award ... the Tribunal took into account events which occurred after 2018 in concluding the Company is under deadlock, on which conclusion CBRE relies. The post-2018 events are not before the 2019 Proceedings.

58. At paragraphs 75 to 78 of Liu's Affidavit, Mr. Liu claims that the Company is currently no longer deadlocked based on purported examples listed in paragraph 76 of Liu's Affidavit. In response to this:

58.1 I disagree and have already addressed Mr. Liu's claims in Sections C and D of My 1st WS. As Mr. Liu rightly conceded, the only issues which the parties can agree on are merely "operational issues". No real business can be transacted and no dividends can be distributed. It is surprising that even under these circumstances, Mr. Liu does not consider the Company deadlocked.

58.2 By way of an obvious example, due to the deadlock between CBRE and FSE, it is difficult if not impossible for decisions and strategies to be discussed to improve and maximize the

income of SHTQ via the Property. Below is a table setting out the rental status of the Property as at February 2025 provided by SHTQ (see [1]), which shows that the vacancy percentage of the office section of the Property is as high as 78.60%, with many leases to expire soon this year ...”

[49] There follows the table containing the information referred to by Mr. Pierce, which I do not need to set out or comment on.

[50] Mr. Pierce then says, at paras. 59 and 60 of that witness statement, the following:

59. At paragraph 79 of Liu's Affidavit, Mr. Liu claims that CBRE made only one attempt to call a board meeting since late 2018 on 24 August 2020, which cannot suggest the Company is currently deadlocked. I disagree. Whether or not the Company is deadlocked, I suggest, must surely be assessed based on all the circumstances and not just on one particular attempt to convene a board meeting.

60. At paragraph 80 of Liu's Affidavit, Mr. Liu again complains CBRE does not cooperate with FSE's latest proposal to distribute dividends. I have already addressed this in paragraphs 54 to 62 of my 1st WS.”.

[51] Mr. Hardwick went to great pains to point out why what Mr. Pierce said was not correct. However, I am unable to see how it can realistically be said by FSE that what Mr. Pierce said in his written evidence was wrong. The fact is that whatever efforts may recently have been made to develop some sort of working relationship between the parties, the reality is that there is not the slightest evidence that the issues between the parties will be, or are capable of being, resolved in the future. Indeed, every indication is that they will get worse.

[52] The rival positions of the parties referred to above do not need further elaboration by me. They are summarised in the written evidence filed and served in these Proceedings on behalf of the parties. But what is clear is that there is little prospect of any agreement between the parties on any significant

matter concerning the effective and efficient running of the Company, whether in the short, medium, or long term.

[53] The position here, on the facts, is that even if one completely disregards who is at fault for the present functional deadlock in the Company, Mr. Todd must be right that the relationship of the parties has deteriorated to such an extent that one can see a multiplicity of referrals to arbitration being made on important issues concerning the running of the Company where, as is almost certainly likely to be the case, the parties are not able to agree on those matters. Even if Mr. Liu believes that the Company is not currently functionally deadlocked, which I am not able to accept, it will only be a matter of time before it is, particularly when the parties focus their minds on those matters.

[54] Of course, one would not always expect that rival factions running a company will be the best of friends and will repose complete trust in each other at every level. But some degree of cooperation between them is essential. As the above examples palpably demonstrate, there is little or none here; rather, given the serious allegations of want of probity made by the Applicants against FSE, it is difficult to see how, even applying a commonsense analysis of the present relationship between the parties, it can realistically be said that the relationship between the parties has improved since the FPA was issued or is likely to improve in the future.

[55] In my judgment, the Company is functionally deadlocked. However, even if I am wrong about that, it soon will be.

[56] There is no prospect whatsoever, in my judgment, that the parties will be able to set aside their differences at any time in the future. It must follow from this that even if the Company is not placed into liquidation now because it is not deadlocked, it will need to be placed into liquidation in the short term because it soon will be.

The “Loss of Trust and Confidence” ground

[57] The alternative ground upon which the Applicants rely is that there was a want of probity or mismanagement of the Company by FSE, leading to a justifiable loss of trust and confidence on the part of the Applicants in FSE.

[58] In **Loch v John Blackwood Ltd**,¹³ Lord Shaw of Dunfermline, giving the judgment of the Privy Council, said:

“It is undoubtedly true that at the foundation of applications for winding up, on the ‘just and equitable’ rule, there must lie a justifiable lack of confidence in the conduct and management of the company's affairs. But this lack of confidence must be grounded on conduct of the directors, not in regard to their private life or affairs, but in regard to the company's business. Furthermore the lack of confidence must spring not from dissatisfaction at being outvoted on the business affairs or on what is called the domestic policy of the company. On the other hand, wherever the lack of confidence is rested on a lack of probity in the conduct of the company's affairs, then the former is justified by the latter, and it is under the statute just and equitable that the company be wound up.”

[59] Under this ground, a company may be wound up even if it is not deadlocked: see **Financial Technology Ventures II (Q) LP v ETFS Capital Ltd**¹⁴ at [272(a)], per Mr. Jonathan Crow QC, sitting in the Jersey Court of Appeal:

“... it is important to recognise that *Loch v. John Blackwood* was not a quasi-partnership case, nor was it one in which there was any deadlock in management. Furthermore, although the facts of **Thomson v. Drysdale**¹ and of **Wondoflex Textiles**² might have justified a finding that they involved quasi-partnership companies, that was not the basis on which they were decided. All of these decisions were based on entirely general statements of principle that any shareholder in any company is entitled to expect its affairs to be managed with probity and in accordance with basic principles of fair dealing ...”

[60] In that case, at [272(b) and (c)], Mr. Crow also observed:

“... the use of the word 'probity' in **Loch v. John Blackwood**, and its conjunction with the word 'impartiality' in **Thomson v. Drysdale**, were both deliberate and significant. The courts did not confine their observations to cases involving actionable breaches of a director's duty, or of actual dishonesty: see also **Westbourne Galleries**, at 379E and

¹³ [1924] AC 783 at 788.

¹⁴ [2021] JCA 176.

381H. A want of probity and a lack of impartiality are broader concepts than either breach of fiduciary duty or dishonesty, although they may well include both. In particular, the word 'probity' embraces concepts both of honesty and of decency.

... the question whether any particular conduct constitutes a sufficient want of probity or lack of impartiality such as to justify a winding-up order on the just and equitable ground will always be context-specific ... In other words, a plaintiff has no enforceable legal right to demand a winding-up order in circumstances where he has justifiably lost confidence in the probity or impartiality of management: but the court is entitled to take into account any such loss of confidence when exercising its judgment whether it is just and equitable to wind up the company.” (Emphasis supplied by the Judge).

- [61] These cases establish that before reliance on this ground can be placed, there must have been some type of culpable conduct on the part of a respondent, usually relating to the management of the company, that caused the applicant to lose trust and confidence in the respondent.
- [62] In the course of his oral submissions, Mr. Hardwick made the point that neither the expression “want of probity” nor “mismanagement” was referred to in the FPA. I consider this to be immaterial. The Tribunal made trenchant criticisms of the conduct of FSE. Whatever words it may have used in expressing those criticisms, it is plain to me that it was describing the type of conduct that gave rise to a justifiable loss of trust and confidence on the part of the Applicants in FSE.
- [63] It does not appear to be necessary for definitive findings of want of probity or mismanagement about the conduct of the affairs of a company to be made in order to satisfy this ground. It suffices if there is some evidence upon which the court can conclude that the respondent has been guilty of want of probity or mismanagement. But even if I must make definitive findings on this issue, I do so, based on the fact that there was no challenge to Mr. Pierce’s written evidence, as verified by his oral evidence. I should make it clear, in this context, that I found nothing in his written evidence which could be said to be weak, tenuous, inherently inconsistent, or expressly or impliedly contradicted by other more persuasive evidence.

[64] Accordingly, I accept the substance of Mr. Pierce's written evidence, as verified by the oral evidence he gave.

[65] I am satisfied, therefore, that there is ample evidence to warrant a finding being made by me against FSE that there was culpable conduct (i.e., want of probity or mismanagement) on its part.

Cause of the deadlock and loss of trust and confidence

[66] Mere deadlock or loss of trust and confidence is not sufficient to make a liquidation order. The Court needs to take into account whether the deadlock or loss of mutual trust and confidence was caused by one party and, if it was, the extent to which the other party contributed to it.

[67] There is plainly an overlap between the Deadlock Ground and the Loss of Trust and Confidence Ground.

[68] In my judgment, even leaving aside the Deadlock Ground, there is sufficient evidence that the Loss of Trust and Confidence Ground is made out. The cause of the loss of trust and confidence between the parties was attributable solely or mainly to FSE's want of probity, or mismanagement of the Company by the Respondent. One only needs to consider the terms of the FPA and the findings supporting it, referred to above, to know that this is so.

[69] As considered above, in summary, in the absence of any cross-examination of Mr. Pierce and the failure of FSE to adduce the evidence of Mr. Liu, the only proper conclusion for me to come to is:

- (a) that the Deadlock Ground is made out;
- (b) further, or in the alternative, the Loss of Trust and Confidence Ground is also made out; and

- (c) so far as it is necessary for me to make this finding. I am satisfied that the deadlock and the loss of trust and confidence were caused by FSE, and the Applicants neither caused nor contributed to it.

Alternative remedy

- [70] The above analysis addresses the first two limbs of the three-limb test outlined in **Lau**.
- [71] As set out above, s. 167(3) of the **BVIA 2003** provides that where an application to appoint a liquidator is made by a member under s162(1)(b), the Court shall appoint a liquidator where it is of the opinion that the applicant is entitled to such relief and in the absence of any other remedy it would be just and equitable to appoint a liquidator “unless it is also of the opinion that some other remedy is available to the applicant and that he is acting unreasonably in not pursuing that remedy.”
- [72] This provision reflects the third limb in **Lau**, in which Lord Briggs said that if the two limbs of the test set out by him were satisfied, it would be for the respondent to demonstrate that the applicant has unreasonably failed to pursue some other available remedy instead of seeking winding up. However, as noted above, Lord Briggs also went on to say in his judgment, at [20], that while it was well established that winding up was a shareholders' remedy of last resort, this did “not mean that winding up [was] unavailable to members if they have any other remedy. The member retains a significant element of choice in the remedy to be sought, even though the court has the last word.”
- [73] FSE relies on two alternative remedies, which it claims the Applicants should have pursued.
- [74] The first alternative remedy is to continue with its unfair prejudice claim, which was stayed by Michael Green J, pending the decision of the Tribunal being issued.

[75] At paras. 80 and 81 of his skeleton argument, Mr. Hardwick expands on this as follows:

“The obvious course at the beginning of 2024 would have been for the Applicants to pick up where they had left off with the 2019 UP Proceedings: the stay had been lifted; they were free to continue with the 2019 Proceedings; and Award/271 even contained the express UP Declaration in terms: “271. ...declaration that the affairs of Decent have been, are being or are likely to be, conducted in a manner that is, or any act or acts of Decent have been, or are, likely to be unfairly prejudicial to the affairs of Decent and to the interests of CBRE within the meaning of section 1841 of the BVI Business Companies Act 2004.”

The standard s1841 remedy of a share buy out at a proper price is the clearly preferable remedy to the draconian “last resort” remedy of winding up (just as **Lord Cross observed in Westbourne Galleries at 385E–386A**) – and, with the benefit of the Tribunal’s UP Declaration, the Applicants would have faced minimal risk in taking that route.

However, and without explanation, in 2024 the Applicants decided upon the alternative, nuclear route, of the Liquidation Application – but did not explain (either in the POC, the Reply, Pierce 1 or Pierce 2) why.”

[76] I do not consider this contention to have any substance.

[77] In the first place, the Tribunal came to the clear conclusion that the Applicants had not unreasonably failed to pursue some other remedy instead of a liquidation order. That conclusion is binding on FSE.

[78] It follows that the assertion that “the Applicants [should have] picked up where they had left off with the 2019 UP Proceedings” is a generic statement that has little to commend it. The parties had negotiated extensively to reach a satisfactory conclusion on the Applicants’ exit from the Company. Those negotiations did not come to fruition, which was why the unfair prejudice claim was issued. It is not for the Applicants to continue with the unfair prejudice claim in circumstances where the Tribunal has made findings which form the subject of several of the allegations in the unfair prejudice claim against FSE. On the basis that the Court would usually allow those findings to be carried through to the unfair prejudice claim, the Court’s enquiry would largely be directed at whether FSE should be required to purchase the Applicants’ shares (assuming

that the Applicants were not willing to purchase FSE's shares in the Company) in the Company, and the basis upon which those shares should be valued¹⁵. This is, of course, on the basis that the position of the Applicants continues to be that they wish to exit the Company.

[79] But importantly, in relying on the making of an offer for the sale of the Applicants' shares in the Company, it is for FSE to demonstrate that: (a) it made a reasonable offer for the purchase of those shares; (b) the offer was capable of being accepted in the terms in which it was formulated by FSE; and (c) the Applicants had unreasonably failed to accept that offer.

[80] I do not know whether any formal offer of the type referred to in the preceding paragraph was made by FSE before the FPA. However, what is necessary for FSE to show is that following the FPA, such an offer was made and was unreasonably refused by the Applicants.

[81] In this jurisdiction, the reasonableness of the offer and the manner of its formulation are of the utmost importance: see, by way of examples, **Kandy & Kandy Ltd v Harjeev Singh Kandhari**¹⁶ and **Jin Yao Holdings Ltd v Forever Winner International Ltd and another**.¹⁷

[82] I have seen no evidence of an offer complying with the above requirements having been made by FSE.

[83] For the above reasons, I cannot see any basis upon which the first suggested alternative proposal either a reasonable proposal made or unreasonably refused by the Applicants.

FSE's proposal for a voluntary liquidation under the BCA 2004

¹⁵ I should make it clear that I have not seen any of the documentation in the unfair prejudice claim. I do not believe that those documents were included in any of the bundles. If they were, I was not referred to them and have not considered them. I am assuming that the primary relief sought by the Applicants in that claim was an order for the sale of their shares, though it seems to me to be immaterial whether that was the case.

¹⁶ BVIHC (Com) 2014/127, 2014/128 and 2014/129 (13 May 2016).

¹⁷ BVIHC(COM) 0641 of 2024 (14 May 2025).

- [84] The other suggested alternative by FSE is that the Applicants have unreasonably refused the offer made by the Applicants to place the Company into voluntary liquidation.
- [85] This suggestion does not even get off the ground. There are many reasons for this. They include the following.
- [86] First, it is difficult to understand how it can be said, as a matter of principle, that the suggested alternative of a voluntary liquidation can be a suitable alternative remedy to the making of a liquidation order, the effect of which is substantially the same as a voluntary liquidation. It seems to me to be entirely absurd.
- [87] Second, while appreciating that the suggestion of a voluntary liquidation is an alternative to the primary submission made by FSE that the Applicants have failed to pursue their unfair prejudice claim, I see no basis for the submission made by FSE that the voluntary liquidation would be more beneficial to the parties than a liquidation order. There is no evidence to support that.
- [88] I am not aware of any authority, in this jurisdiction or in the UK, in which a court has had to consider the availability of a voluntary liquidation as an alternative to the making of an application by a member for a liquidation order against a company.
- [89] There have, however, been several cases in England and Wales in which a creditor of a company has sought to wind up a company that is in voluntary liquidation because he considers it desirable to replace the voluntary liquidator with the Official Receiver. These so-called “conversion” cases include **Re Medisco Equipment Ltd**,¹⁸ a case under English & Welsh Law, in which¹⁹, the English High Court refused to make a winding up order in relation to a company which was already in voluntary liquidation because it could not see any benefit from doing so, and good reason not to do so²⁰. Harman J observed, at 308:

¹⁸ [1983] BCLC 305.

¹⁹ There is no equivalent of this procedure in the BVI.

²⁰ While the remedy to wind up a company that is in voluntary liquidation is still available in England & Wales because it is enshrined in statute, that remedy has fallen largely into disuse (other than in public interest petitions under s. 124 of the UK Insolvency Act 1986) by the power of a majority of creditors to

“The principle which I believe is the correct and modern principle which should be applied in all cases is, in my judgment, aptly and elegantly stated by **Diplock LJ** in **Re J D Swain Ltd [1965] 2 All ER 761 at 765**: ‘The difference or the distinction seems to me to be an obvious one, namely, in the former case, what is being resisted is any winding up at all, so that the petitioning creditor, if he fails, will be denied the class remedy which he would otherwise have if the winding up took place; whereas, in the latter case he will obtain the class remedy anyway under the voluntary winding up, and the matter then turns up on his being able to show some reason why the remedy under the voluntary winding up is not an adequate remedy for him.’”

[90] Harman J went on to say, at 309:

“Thus, far from **Diplock LJ's** test being satisfied, that there should be reasons ‘why the remedy under the voluntary winding up is not an adequate remedy’ ... on the contrary, there is plain evidence properly put before the court by the voluntary liquidator showing that the remedy under the voluntary winding up will be a better remedy for all the creditors. Upon that ground, I exercise my undoubted discretion to dismiss this petition.”

[91] The contrary view was taken by Hoffmann J (as he then was), on the facts in **Re Palmer Marine Surveys Ltd**,²¹ another “conversion” case. In that case, the court exercised its discretion to wind up the company because, *inter alia*, the majority of creditors in value supported the making of the winding up order, and the continuation of the voluntary liquidation would have left them with a legitimate sense of grievance that the insolvency affairs of the company were being conducted by a liquidator who, though he might have acted scrupulously fairly, might not be seen to be independent.

[92] In the present case, there is not the slightest evidence that a voluntary liquidation would be more beneficial than a liquidation order. Mr. Hardwick’s contrary submission, supported by the examples specified in his skeleton argument, is without substance. I deal with them below.

remove a liquidator under s. 171 of the UK Insolvency Act 1986, as it applies to England & Wales and Scotland: see the decision of Lightman J in *Re Inside Sport Ltd (in liquidation)* [2000] 1 BCLC 302 in which he stated that a creditor or contributory who was dissatisfied with a liquidator appointed under a voluntary liquidation should resort to s. 171, rather than seek the winding up of the company.

²¹ [1986] BCLC 106.

- [93] The process for implementing a members' resolution to place the Company into voluntary liquidation has not been invoked. If it had been, there might have been some slight basis for suggesting that the process should be allowed to take its proper course and that a liquidation order should not be made until the outcome of that process was known. But that is not the case here, so whether the Company enters into a voluntary liquidation or is made subject to a liquidation order does not seem to be material.
- [94] The position here is that the Application was made well before the proposal made by FSE to place the Company into voluntary liquidation. On that basis alone, it is difficult to see how FSE can contend that the proposal should have been accepted.
- [95] Accordingly, the suggestion that there was an unreasonable delay in responding to FSE's proposal, even if correct, which I do not believe it is, does not advance FSE's case at all.
- [96] Nor, in the present context, is there any substance in the assertion that the powers of a voluntary liquidator are greater than those of a liquidator appointed under a liquidation order. Even if the statutory powers of a voluntary liquidator (under s. 207 of the **BCA 2004**) are wider than those of a liquidator appointed by the Court (under s. 185 of the **BVIA 2003**), for the purpose of the present case, that point seems to me to be immaterial. That is because the order of the Court appointing a liquidator will usually give him wide powers, almost akin to those that he would if he had been appointed in a voluntary liquidation. In addition, the Court could always add to those powers if the functions of the liquidator warranted that addition.
- [97] Third, I am not sure that it is for any member or creditor to have a say on how the powers of a liquidator should be exercised or to supervise or monitor the exercise of that power. The provisions of the **BVIA 2003** and the **BCA 2004**, and case law on the subject, set out how those powers are to be exercised. The suggestion that a voluntary liquidator might be more amenable to the "control" of the members or to be "monitored" than a court-appointed liquidator seems to

be misconceived. Members (and creditors) in a solvent liquidation are entitled to expect that liquidators of a company will not go on a “frolic of their own” and will obtain their views as and when they are required. However, it is inconsistent with the **BVIA 2003** and the **BCA 2004** for this Court to set out how those powers should be exercised. If some practice has grown up that makes it possible for a voluntary liquidator’s power to be limited in such a way, then I wholly deprecate it. The law is sufficient to determine whether a liquidator has carried out his functions properly and exercised his power for the benefit of the company.

[98] Finally, in the course of his oral submissions, Mr. Hardwick said that if the Company were made subject to a liquidation order, it would have some sort of denunciatory effect on its standing and the standing of its members. I do not see that at all.

[99] The denunciatory effect (if there is any) alluded to by Mr. Hardwick does not come from the making of a liquidation order over a company, but the fact that the company is in liquidation, whether voluntary or by an order of the Court. In other words, it is the fact of the liquidation, as opposed to the procedure invoked to place the company into liquidation, that is likely to have the effect contended for by Mr. Hardwick. In this jurisdiction, there is no evidence whatsoever that third parties will associate a liquidation order with a failure and a voluntary liquidation with something less.

[100] For all those reasons, the assertion of FSE that the Applicants have failed to pursue an adequate alternative remedy is rejected.

[101] It also needs to be pointed out that though not entirely free from doubt, several cases establish that the need for an investigation may, on its own, warrant the making of a liquidation order on the just and equitable ground: see, by way of examples, **Re ICP Strategic Credit Income Fund Ltd**,²² **Re Seahawk China Dynamic Fund**²³ and **Re L&A International Holdings Ltd**.²⁴ I am clear (based

²² Unreported 10 August 2010.

²³ Unreported 9 August 2022.

²⁴ [2021] HKCFI 3095.

on the material I have considered) that there is strong justification for such an investigation to be undertaken into the conduct of the affairs of the Company on account of the conduct of FSE. In my judgment, that by itself, on the facts in this case, warrants the making of a liquidation order.

Residual jurisdiction of the Court to refuse to make a liquidation order.

[102] For the sake of completeness, I should mention that even where the three-fold test in **Lau** is satisfied, the Court is not obliged to make a liquidation order. In **Whitehall Partnership**, I refused to make a winding up order because several other factors militated against my making such an order, such as the motive of the petitioner.

[103] There are no such factors here.

[104] It must follow, therefore, that despite the skill with which FSE's arguments were presented, the case for the Liquidation Order is compelling, indeed the only viable option for this Court.

Conclusion

[105] I will, therefore, make the Liquidation Order. The order will need to be pronounced in open court.

[106] Matters arising from this Judgment may be dealt with when the judgment is handed down. I suggest that a 30-minute time estimate will be sufficient to deal with those matters. The hearing should be listed before the Long Vacation. However, if that is not possible, it may be listed during the vacation. The hearing may be by Zoom.

[107] The parties should endeavour to agree any issues that are likely to arise from this Judgment. It would be helpful to receive a draft of the Liquidation Order before the hearing.

[108] I again express my deep and sincere gratitude to counsel, both for the manner of the presentation of their clients' cases and for their cooperation throughout the hearing.

[109] Once this judgment is finalised and handed down, it will be uploaded onto the ECSC website in the usual way.

Postscript

[110] Following the circulation of the draft of this Judgment, I was informed by the legal practitioners acting for FSE that, before the circulation of the draft judgment, the Application was deemed dismissed by effluxion of time as a result of the operation of s.168(3) of the **BVIA 2003**. The Applicant's legal practitioners had not applied to extend the period for the determination of the Application, which expired on 12 July 2025.

[111] I heard submissions from the parties on this issue. I decided that I would not make a liquidation order on the Application but would be prepared to make such an order on paper on a fresh application ("Fresh Application") for a liquidation order, with no order as to costs. I also indicated that, so far as it was necessary, I would be prepared to relax any requirement with regard to the service of any document in the Fresh Application, including, if necessary, dispense with any requirement for service of both the application and any other document in that application.

[112] The Fresh Application has now been issued. The papers are in order, and I have not received any opposition or objection from FSE to the proposed liquidation order, other than that it does not agree with the making of the liquidation order. The parties agreed that I could deal with the matter on paper, and I have done so.

[113] I make the liquidation order on the Fresh Application. The liquidation order was made on 8 August 2025.

[114] This Judgment is to be treated as having been issued and handed down in the fresh application and must be read accordingly. I make no order as to costs on the Fresh Application.

Abbas Mithani KC
High Court Judge (Ag)

By the Court

Registrar