

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0048

BETWEEN:

Chu Kong

Appellant

and

[1] OCEAN SINO LIMITED (IN LIQUIDATION)

[2] DAVID YEN

[3] CHAN PUI SZE (NICHOLE)

[4] ROY BAILEY

[5] JOHN GREENWOOD

[6] LAU WING YAN

Respondents

Before:

The Hon. Mde. Vicki Ann Ellis

Justice of Appeal

The Hon. Mr. Trevor Ward

Justice of Appeal

The Hon. Mr. Gerard St. C Farara

Justice of Appeal [Ag.]

Appearances:

Mr. Richard Hacker, KC and Mr. John Carrington, KC with them Ms. Reisa Singh for the Appellant

Mr. Mark Phillips, KC with him Ms. Hilary Stonefrost and Mr. Peter Ferrer for the 1st, 4th and 5th Respondents

Mr. Philip Jones, KC with him Ms. Rosalind Nicholson and Mr. Renell Benjamin for the 6th Respondent

2022: October 3;

2023: July 3.

Commercial appeal – Removal of Liquidator – Voluntary Liquidation – Findings of Fact – Whether due cause shown - Exercise of discretion to remove the Liquidators – Costs – Successful party to be awarded costs – Whether the costs order made by the learned judge was reasonable – Application to adduce fresh evidence – Ladd v Marshall – Whether the application to adduce further evidence on the appeal should be granted.

Ocean Sino Limited (“OSL”) is an asset holding vehicle incorporated in the Territory of the Virgin Islands, (“BVI”) which held shares in a Hong Kong company named PBM Management Limited (“PBM”), which in turn held a minority stake in BGA Holdings Limited (“BGAH”). OSL’s shareholders were Mr. Chu Kong (“Mr. Chu”), the Appellant and Mr. Lau Wing Yan (“Mr. Lau”), the 6th respondent, who were also directors of the company. In May 2015, Mr. Lau initiated proceedings to have OSL wound up, and in July 2017 the 2nd, 3rd, 4th and 5th respondents were appointed as liquidators of OSL (“the Liquidators”). Both Mr. Chu and Mr. Lau had an equal say in the choice of liquidators, to ensure that the interests of both parties would be fairly protected. As such two liquidators from Hong Kong (“HK Liquidators”) and two liquidators from the BVI (“BVI Liquidators”) were appointed. In August 2017, Mr. Chu appealed the order to wind up OSL and in January 2020, the Court of Appeal discharged the said order. However, in October 2020, the winding up order was reinstated by the Judicial Committee of the Privy Council.

Throughout the legal proceedings disagreements arose regarding the conduct of the liquidation, and various challenges were raised and filed by Mr. Chu, including applications for directions to further the liquidation process. Mr. Chu argued that the liquidators exceeded their duties and acted in a biased manner, favoring Mr. Lau and that they pursued a course of action that prolonged the liquidation process. To assist with this, he proposed an alternative distribution proposal (“Summary Disposition Proposal”) which he believed would facilitate a more efficient and cost-effective liquidation process. However, this was not adopted. Mr. Chu also took issue with the purported resignation of the HK Liquidators as he claimed their resignation was not properly communicated to him or addressed by the HK Liquidators or remaining BVI liquidators. Mr. Chu claimed that the liquidators failed to keep him, and the court, informed of significant developments in the liquidation and have behaved perversely in certain instances.

Therefore, in March 2021, Mr. Chu filed an application for removal of the 2nd, 3rd, 4th and 5th respondents as liquidators of OSL (“Removal Application”). In the Removal Application Mr. Chu alleged that the liquidators acted beyond the scope of their duties and were biased against him, and the liquidators were intent on using the winding up of OSL as a means of investigating and pursuing potential claims against him in relation to historic events occurring in BGAH. He also criticised their delay in acting and their failure to consider his Summary Disposition Proposal.

The Removal Application was heard before the learned judge who, on 24th November 2021, dismissed it, finding that Mr. Chu failed to show due cause such as to engage the court’s discretion to remove the liquidators and as a result awarded costs on the application to Mr. Lau (“Dismissal Order”). Dissatisfied with paragraphs 1 and 2 of the Dismissal Order, Mr. Chu appealed to this Court, challenging the learned judge’s findings on due cause and the costs order by which the learned judge ordered Mr. Chu to pay Mr. Lau’s, costs of the Removal Application. The appeal was heard by this Court on 3rd October 2022 and on 26th April 2023, Mr. Chu filed an application in which he sought permission to adduce further evidence, relating to the liquidator’s conduct, on the appeal. The main issues to be determined before this Court are therefore: (i) whether the learned judge erred in law and/or in fact in holding that his discretion to remove the liquidators was not engaged because Mr.

Chu had failed to show any (or any sufficient) due cause; (ii) whether the costs order made by the learned judge was reasonable; and (iii) whether the application to adduce further evidence on the appeal should be granted.

Held: dismissing the appeal; affirming the judgment and order of the court below made on 24th November 2021; awarding costs to the respondents on this appeal to be assessed if not agreed within 21 days; and dismissing the application to adduce further evidence on appeal; that:

1. It is readily apparent that the appeal against the learned judge's decision that no due cause has been shown for the removal of the liquidators is a challenge to the learned judge's findings of primary fact and/or his evaluation of primary fact. As such, the Court is only empowered to interfere with such conclusions of the judge that (i) fail to take relevant evidence into account; (ii) rely on irrelevant evidence or (iii) are unreasonably or insensibly arrived at. Further, the Court cannot substitute its own decision for that of the court below but can determine whether the correct legal principles were applied and whether on the evidence, the decision of the judge can be justified.

Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA [2012] EWCA Civ 644 applied; **Assicurazioni Generali SpA v Arab Insurance Group (BSC)** [2003] 1 WLR 577 applied; **JSC BTA Bank v Ablyazov and another** [2018] EWCA Civ 1176 applied.

2. The court has a wide discretion as to the circumstances in which it may remove a liquidator and it is not confined to or dependent on proof of misconduct, personal unfitness or any breach of their statutory obligations. An applicant who seeks the removal of a liquidator must show sufficient good cause or due cause before a judge can consider and determine whether he can exercise his discretion to remove the liquidator. Whether good cause has been shown is to be determined on a case-by-case basis and measured by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed. The court is required to make an evaluative finding that there was due cause to remove the liquidators from office. In making that assessment the court is required to engage in a balancing exercise that is to (i) ensure that the liquidators carry out their duties competently and impartially, so that the liquidation achieves the purposes for which it was commenced; and (ii) is to discourage unmeritorious applications for the liquidator's removal by disgruntled creditors or members.

Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another [2018] 3 SLR 687 applied; **AMP Enterprises Ltd v Hoffman and another** [2003] 1 BCLC 319 applied; Andrew R Keay, **McPherson's Law of Company Liquidation** (Sweet & Maxwell, 3rd Ed., 2013) page 486 at paragraph 1–005 applied; **re Sir John Moore Gold Mining**

Company (1879) 12 Ch D 325 applied; **Re Edenote Ltd; Tottenham Hotspur plc and others v Ryman and another** [1996] 2 BCLC 389 applied.

3. In this case, it is clear that the learned judge fully considered the conduct of the liquidators, the question of the liquidators' apparent and perceived bias, loss of confidence, whether the liquidators failed to act jointly and all other matters raised in the Removal Application. The learned judge correctly applied the relevant legal principles and made appropriate findings that: given the liquidators' statutory duties, the liquidators were obliged to take reasonable steps to rehabilitate their value so that each of OSL's members could receive due value upon a distribution; that the liquidators' decision to investigate and Mr. Lau's funding of the liquidation in the circumstances cannot be regarded as evidence of bias and that their refusal to adopt his Summary Disposition Proposal was not unreasonable; and that there was doubt as to the authenticity or reasonableness of Mr. Chu's purported loss of confidence. The evidence advanced by Mr. Chu did not support nor constitute grounds for the removal of the liquidators and when taken together the learned judge was entitled to find that there was no due cause shown. The learned judge was therefore correct in not considering and determining whether he should exercise his discretion to remove the liquidators. The learned judge's decisions on due cause and whether to exercise his discretion are therefore not open to review by this Court.
4. Mr. Lau was rightfully joined as a party and had a direct interest in the proceedings, so it was appropriate for him to participate and have separate legal representation. Given that Mr. Lau successfully defended the proceedings, it was reasonable that the general rule be applied - that the unsuccessful party is ordered to pay the costs of the successful party. While the learned judge should have invited the parties to address the issue of costs before making the order, Mr. Chu had ample opportunity to raise the issue earlier but failed to do so. The learned judge's order was therefore well grounded considering the circumstances, and there is no basis for the Court to interfere with the costs order made by the learned judge.

Rampersad and another v Ramlal and others [2022] UKPC 50 applied; **English v Emery Reimbold & Strick Ltd** [2002] EWCA Civ 605 applied.

5. Appellate courts have a discretionary power under its inherent jurisdiction to permit a party to adduce further or fresh evidence that was not available at the hearing before the High Court. In order for such evidence to be adduced, an applicant must satisfy all three limbs of the **Ladd v Marshall** test. Firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible. In this case while the evidence sought to be adduced, evidence relating to the liquidator's conduct, is credible and thus satisfies the third limb of the **Ladd v Marshall** test, the evidence does not satisfy the first and second limbs of

the test as (i) it could have been obtained with reasonable diligence and should have been adduced prior to the appeal hearing; and (ii) it would not have had an important influence on the result of the court or in the appeal. Accordingly, the evidence sought cannot be admitted as fresh evidence on appeal.

Ladd and Marshall [1954] 3 AER 745 applied; **Premier Experts London Ltd and another v Rajwani** [2022] EWHC 1188 (QB) applied; **Swift Advances Plc v Ahmed and another** [2015] EWHC 3265 (Ch) applied; **Mulholland and another v Mitchell** [1971] AC 666 applied.

JUDGMENT

Introduction

- [1] **ELLIS JA:** This appeal is brought by Chu Kong (“the Appellant” or “Mr. Chu”), against the dismissal by the High Court Judge (“the Judge”) of Mr. Chu’s application for the removal of the 2nd to 5th respondents, Messrs. Yen, Chan, Bailey and Greenwood who are or were the joint liquidators appointed in respect of Ocean Sino Limited (“OSL”) by order of the High Court dated 28th July 2017 (“the Removal Application”).
- [2] The reasons for the dismissal of the Removal Application are set out in the Judge’s judgment dated 24th November 2021, which was delivered to the parties on 15th December 2021. The order dismissing the Removal Application (“the Dismissal Order”) is dated 24th November 2021. Paragraphs 1 and 2 of the Dismissal Order give effect to the judgment of the Judge and the Appellant appeals against these paragraphs. The Dismissal Order was subsequently corrected by the addition of a new paragraph 3 thereto, pursuant to a further order of the Judge dated 9th February 2022, but no appeal is made against that part of the Dismissal Order.
- [3] The Notice of Appeal relies on two main grounds of appeal. Ground 1 is a challenge to the substantive decision rejecting the Removal Application, on the basis that the Judge erred in law and/or in fact in holding that his discretion to remove the liquidators was not engaged because the Appellant had failed to show any (or any sufficient) due cause. In summarising the case, counsel submitted that Mr. Chu

challenges the Judge's finding that he (Mr. Chu) had failed to make out a case of due cause, such as to engage the court's discretion to remove the liquidators. The Appellant also contends that the Judge's indication of how he would – hypothetically - have exercised the discretion if he had found a case of due cause to have been established, is obiter and is not one by which this Court is in any way bound if it finds that the Judge erred in finding that a case of due cause had not been made out.

- [4] The Appellant further contends that the views expressed by the Judge on the way in which he would have exercised the discretion are inevitably tainted by the erroneous findings made by him in relation to due cause.
- [5] Ground 2 is a discrete challenge to one part of the costs order made by the Judge, by which he ordered Mr. Chu to pay Mr. Lau's, (also referred to herein as the sixth respondent) costs of the Removal Application. Mr. Chu does not challenge the proposition that if he ultimately fails on the application to remove the liquidators, he must pay their costs for successfully resisting the Removal Application. However, he submits that there was no warrant for ordering a second duplicative set of costs in Mr. Lau's favour; still less for doing so without hearing any submissions on the issue.
- [6] To understand the nature of the Appellant's application and the thrust of argument in this appeal it is appropriate to refer in some detail to the background to the Removal Application as it is relevant to the outcome of this appeal.

Background

- [7] OSL was incorporated in the Territory of the Virgin Islands ("BVI") as an asset holding vehicle. OSL's sole purpose prior to its liquidation was to hold one share in PBM Management Limited ("PBM"), a Hong Kong company, which in turn held a 49% minority stake in another Hong Kong company, Beibu Gulf Ocean Shipping (Group) Limited, which was subsequently re-named BGA Holdings Limited ("BGAH"). OSL is the sole shareholder of PBM.

- [8] OSL and PBM were corporate vehicles formed for the purpose of enabling Mr. Chu and Mr. Lau to participate in a joint venture with a state-owned entity of the People's Republic of China ("PRC"). The PRC entity held 51% of the shares in BGAH and the remaining 49% was held by PBM. Both Mr. Lau and Mr. Chu each hold 50% of the shares in, and were directors of, OSL.
- [9] On 27th May 2015, Mr. Lau commenced proceedings (which were opposed by Mr. Chu) to have OSL wound up on the basis that it was just and equitable to do so. During the course of those proceedings, Mr. Lau abandoned insolvency as a ground for winding up OSL and so Mr. Chu contends that there was therefore no judicial finding that OSL was insolvent.
- [10] On 28th July 2017, Kaye J appointed 4 persons (the 2nd – 5th named respondents) as liquidators of OSL. In order to allow each of the two stakeholders in OSL (Mr. Chu and Mr. Lau) to have an equal say in the choice of liquidators, the High Court allowed each to nominate one BVI and one Hong Kong liquidator. Undoubtedly, the intention was to ensure that the interests of the parties would be fairly protected and would lead to OSL's solvent liquidation being conducted with the close involvement of liquidators based in Hong Kong. Messrs. Yen and Chan (the 2nd and 3rd respondents) were based in Hong Kong ("the HK Liquidators") while Messrs. Bailey and Greenwood (the 4th and 5th respondents) were based in the BVI ("the BVI Liquidators").
- [11] On 22nd August 2017, Mr. Chu filed a notice appealing the order to wind up OSL. On 17th January 2020, the Court of Appeal discharged the winding up order. Mr. Lau appealed the discharge of the winding up order and on 12th October 2020, the Judicial Committee of the Privy Council reinstated the winding up order.
- [12] This was not the only legal challenge advanced by Mr. Chu concerning the liquidation. First, on 5th December 2017, Mr. Chu filed an application for directions

concerning the conduct of the liquidation (“the First Directions Application”), which was dismissed by the High Court on 26th March 2018 on procedural grounds. Mr. Chu thereafter filed an application under section 273 of the **Insolvency Act 2003**¹ (“**the Act**”) on 27th November 2019, challenging the manner in which the liquidators were conducting the liquidation (“the Second Directions Application”). That application was overtaken by the decision of this Court setting aside the winding up, and it was withdrawn before it was heard.

- [13] The legal challenges continued with the issuance of the Removal Application on 15th March 2021. This was dismissed by the Judge on 24th November 2021. Mr. Chu was thereafter given leave to appeal by the Court of Appeal on 4th March 2022.

The Liquidation

- [14] Counsel for the liquidators submitted that as both OSL and PBM are merely asset holding vehicles, the joint liquidators need to protect and preserve the value of the assets held by those entities. Counsel submitted that the joint liquidators need to investigate the affairs of PBM and the directors of PBM need to pursue the collection of any sums owed to PBM and pursue PBM’s rights of action. The key issues that have been and are continuing to be investigated by the joint liquidators are described in the judgment of the Judicial Committee of the Privy Council (“UKPC”) reinstating the winding-up of OSL and include, briefly:

- (a) The acquisition of the control of BGAH by Bright Good (Asia) Limited and the removal of Mr. Lau as a director from BGAH. No disclosure was made of Mr. Chu’s interest. The UKPC noted that this may arguably be a breach by Mr. Chu of his fiduciary duty to PBM and OSL.
- (b) The sale of the ship chartering and commodity trading businesses to Ausca Group Limited (formerly named Cosmic Glory Ltd), a company beneficially owned by Mr. Chu’s son.

¹ Insolvency Act No. 5 of 2003 of the laws of the Virgin Islands.

(c). The refinancing of two vessels held by the OSL group in the form of the 'Lohas Transaction', which involved dealing with an important underlying asset of PBM and which ought to have involved both Mr. Chu and Mr. Lau as PBM's directors. Mr. Chu chose to implement the transaction (and the consequences that followed) behind Mr. Lau's back.

[15] The Appellant on the other hand takes issue with the way in which the liquidators have chosen to conduct the liquidation. They point out that following their appointment, the liquidators (save for Mr. Bailey) caused themselves to be appointed as directors of PBM (OSL's direct wholly owned subsidiary), and then removed Mr. Chu and Mr. Lau as the directors of that company. In December 2017, the liquidators (now directors) caused PBM to serve a statutory demand on BGAH in respect of non-payment of an allegedly outstanding shareholder loan.

[16] The Appellant complains that the liquidators then did nothing for two years until August 2019, when the liquidators caused PBM to commence proceedings for the winding up of BGAH in Hong Kong, based in part on that statutory demand ("the HK Petition"). He asserts that the HK Petition was presented notwithstanding that he provided information to the liquidators that showed that the alleged petition debt had, *inter alia*, in fact been compromised since December 2015 and that Mr. Lau had already commenced other proceedings asserting a different claim wholly inconsistent and irreconcilable with a claim that the petition debt was due.

[17] During the Hong Kong proceedings, Mr. Chu contended before the Judge that it was surely no coincidence that it was a step which suited the broader litigation strategy of Mr. Lau (who funds the liquidators) and had been undertaken in the face of frequently expressed concerns by Mr. Chu. Mr. Chu has repeatedly asserted that the timing of the commencement of the HK Petition (i) immediately after the hearing by this Court of Appeal against the winding up order and at a time when judgment

on the appeal was awaited, and (ii) notwithstanding almost 2 years of prior inactivity, was in itself inexplicable and highly troubling.

The appellant's alternative distribution proposal

[18] Moreover, it appears that the Appellant proposed an alternative strategy for the liquidation which he asserted would be more efficient and cost effective and would maintain neutrality between himself and Mr. Lau, which he referred to in evidence as the 'Summary Distribution Proposal'. Mr. Chu asserts that the liquidators not only failed to give proper consideration to this proposal, but they also refused to explain properly why they have not done so. He submitted that instead, the liquidators pursued a course of action that prolongs the liquidation at considerable expense and at serious risk of an adverse costs order against PBM if the HK Petition is ultimately defeated.

[19] The Appellant argued that all of this was done without reference to, or with the sanction of, the BVI court and at some significant cost to this solvent liquidation. Counsel pointed out after four years and more than US\$ 3.2 million in remuneration and expenses into the solvent liquidation of OSL as of January 2020, the Appellant was not aware of anything that the liquidators had done to justify their very substantial time costs.

Resignation of the HK Liquidators

[20] Between the filing of the Removal Application and its hearing before the Judge, the Appellant learned that both HK Liquidators had purported to resign as liquidators of OSL in January 2021. The Appellant asserted that it is remarkable that neither the resigning HK Liquidators nor the remaining BVI Liquidators, the 4th and 5th respondents (hereinafter referred to as "the Liquidators") took any steps either to inform him of the resignations, or to bring the resignations to the attention of the High Court or seek its directions as to the appropriate way forward with the result that a liquidation when its center of main interests in Hong Kong has been conducted exclusively by the two BVI Liquidators for in excess of a year. The reasons for (i)

the resignation of the HK Liquidators, and/or (ii) for the BVI Liquidators' failure to address this issue (e.g. by seeking the directions of the High Court as to how to proceed following the resignations), have never been explained.

- [21] By way of contrast, Mr. Chu submitted that the Liquidators took steps to ensure that Mr. Lau was directly involved in approving the resignations. Counsel submitted that this is all part of a consistent pattern of conduct which resulted in the Appellant being largely sidelined in the liquidation.

The Removal Application

- [22] On 15th March 2021, the Appellant issued the Removal Application. It is contended that this was done once the Privy Council had restored the winding up order and it had become apparent that the Liquidators were intent on using the winding up of OSL as a means of investigating and pursuing potential claims against Mr. Chu in relation to historic events occurring in BGAH - a company in which OSL was only ever a minority shareholder - and thereby furthering the interests of their funder, Mr. Lau.

- [23] In written submissions, counsel for the Appellant helpfully summarised the grounds for the Removal Application in the following terms:

- “(a) The Liquidators are acting beyond the limits of their duties, in that they appear to consider that the true nature of their role is to resolve the many outstanding disputes between Mr Chu and Mr Lau, rather than to wind up OSL.
- (c) The Liquidators are not performing their functions in a timely and appropriate manner and have failed to keep Mr Chu and the Court apprised of significant developments in the liquidation, in circumstances where reference back to the Court was necessary and/or appropriate.
- (d) The Liquidators have exceeded their powers (alternatively improperly exercised them), by acting without the sanction (or approval) of the Court in circumstances where it was necessary (or at least appropriate) for sanction (or approval) to have been

obtained; and that they have thereby achieved a situation in which the performance of their functions, and the level of their remuneration, is not amenable to any (or any meaningful) control by the BVI courts.

- (e) The Liquidators are (i) actually, or (ii) apparently, biased against Mr Chu, in circumstances where they have been entirely dependent on funding provided by Mr Lau, who stands in a highly adversarial relationship to Mr Chu over a wide range of business matters extending well beyond the issues arising in OSL and its subsidiaries.
- (f) Mr Chu has justifiably lost confidence in the Liquidators.”

[24] The Appellant further relied on what are described as “a number of situations in which the Liquidators have behaved perversely, or have failed entirely to respond to justifiable criticisms of their conduct leveled by him against them.” He alleges as follows:

- “(a) That having caused a statutory demand to be served on BGAH shortly after their appointment, the Liquidators then did nothing until very shortly after the hearing of Mr. Chu’s appeal against the Winding-Up Order to this Court, at a time when judgment was awaited and it was clear (from the course of the hearing) that there was a real possibility that the Winding-Up Order would be set aside by this Court (as it was). Only at this point did they go on to issue the HK Petition against BGAH. To this day that timing remains unexplained.
- (a) That when the HK Liquidators resigned, the BVI Liquidators neither informed Mr. Chu of this fact nor approached the Court to seek its directions as to how matters were to proceed. In contrast, the Liquidators directly involved Mr. Lau in the process. Again, to this day the remaining BVI Liquidators have taken no steps to explain the resignations, nor have they addressed the issues caused by the loss of the HK Liquidators.
- (b) The manner of appointment of the directors of PBM: Taking control of PBM has been critical to the implementation of the Liquidators’ broader strategy. The Liquidators caused Mr. Chu (and Mr. Lau) to be replaced without consulting or informing him of their intentions. They did, in contrast, involve Mr. Lau in the process, as it was he who signed the relevant statutory entries in Hong Kong without Mr. Chu’s knowledge.

- (c) The Liquidators signed the funding agreement with Mr. Lau without informing Mr. Chu, even though there was a meeting of two of the Liquidators and Mr. Lau and Mr. Chu in their capacities as directors of PBM on that same day, 27th September 2017. The Liquidators then gave no notice to Mr. Chu when they sought approval of the funding agreement in January 2018.
- (d) The strategy upon which the Liquidators have embarked (of seeking to investigate the “directors [of OSL] and the wider group structure” suggests that the Liquidators have discussed their wider strategy and funding requirements with Mr. Lau alone, while keeping Mr. Chu in the dark.
- (e) The Liquidators have shared with Mr. Lau the information provided to them by Mr. Chu but not vice versa.
- (f) The evident animosity of the Liquidators towards him, as evidenced by the language used by Mr. Greenwood, one of the two remaining Liquidators. In his evidence, Mr. Greenwood describes Mr. Chu’s High Court challenges to the Liquidators’ conduct as vexatious and abuses of process, although no such finding has been made by any court. The Appellant contends that it is difficult to see how Mr. Greenwood – as an Officer of the Court with a duty to act impartially - could properly have made these comments in circumstances where (i) the First Directions Application was dismissed primarily on the basis that the wrong procedure was used, but the Court nonetheless felt that the issue raised by Mr. Chu was worthy of “serious consideration”, (ii) the Second Directions Application was withdrawn by Mr. Chu after the decision of this Court setting aside the appointment of the Liquidators, (iii) this Court upheld Mr. Chu’s appeal against the winding-up of OSL (even though that decision was thereafter overturned by the Privy Council), and (iv) Mr. Chu’s Stay Application was simply never heard by this Court as it was overtaken by delivery of its judgment setting aside the Winding-Up Order”.

Issues on appeal and appellate approach

- [25] Between the parties, there is no dispute that there are three stages for a court to consider on an application for the removal of liquidators. At stage 1 – the court must determine whether the applicant has standing to apply for the removal of the liquidator(s). In this appeal, there is no contention as to the correctness of the Judge’s disposal of this issue and this Court is not required to address it. At stage 2 – the court must consider and determine whether “due cause” has been shown for the removal of the liquidator(s). This issue is the gravamen of Ground 1 of this

appeal. Finally, at stage 3, even if (1) and (2) are proven, the court must then consider and determine whether it should exercise its discretion to remove the liquidator(s).

[26] The gravamen of the Appellant's challenge rests on the Judge's decision that due cause had not been shown for the removal of the Liquidators. The Appellant contends that in doing so the Judge (i) erred in law in his assessment of the duties and powers of the Liquidators and/or (ii) erred in his application of well-established legal principles as to the basis on which the court will exercise its power to remove liquidators (as to which there was no significant dispute) to the facts.

[27] Critical to the outcome of this appeal are the divergent approaches which each side has commended to this Court. In framing the Appellant's case on appeal, Counsel for the Appellants submitted that the appeal is an appeal against the Judge's finding that due cause had not been shown for the removal of the Liquidators and not an appeal against the exercise by the Judge of a discretion, as his finding as to the absence of due cause led him to conclude that he had no discretion to exercise. It is however clear that the learned Judge also expressed his view as to how he would have exercised the discretion had one been vested in him. Counsel for the Appellant countered describing this as obiter dicta which would not bind this Court in the event that this Court determines that the Judge erred in his stage 2 analysis.

[28] This approach is premised on the Appellant's contention that the learned Judge's finding of fact that due cause had not been shown involved mixed questions of fact and law. This is because the Appellant's case on due cause included allegations that the Liquidators had both (i) mis-appreciated the nature and extent of their duties and (ii) breached duties to which they were subject. Counsel submitted that the nature and extent of the duties of a liquidator of a solvent holding company ("the Duties Issue") is a question of law which was very much in issue and the Judge's conclusion that due cause had not been shown necessitated a prior decision as to the law on the Duties Issue.

[29] Counsel for the Appellant submitted that the Judge's decision on the Duties Issue was wrong in law (either in whole or in part) and is open to review by this Court. If this Court concludes that the Judge erred in law in his decision on the Duties Issue, his decision on due cause is plainly open to review by this Court as the legal substratum of the Judge's decision on the facts will have been removed.²

[30] Counsel further submitted that in any event, the finding by the Judge that due cause had not been established is not a finding of primary fact, but a finding of secondary fact dependent on the Judge's legal findings and his findings of primary fact. As such it is a finding which this Court should have less concern about disturbing than it would a finding of primary fact.³

[31] Counsel for the sixth respondent however, argued that the Judge's decision that no cause has been shown for the removal of the Liquidators was made as a result of a number of his findings of primary fact and/or his evaluation of primary fact. He noted that similar principles are applicable to an appellate review of both findings and he relied on the following statement of principle of Leggatt LJ in in **JSC BTA Bank v Ablyazov and another**:⁴

"It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts."

² See *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 and *Director of Public Prosecutions v Ziegler and others* [2022] AC 408.

³ See *Todd v Adams* [2002] CLC 1050, per Neuberger J at paras. [60]-[61].

⁴ [2018] EWCA Civ 1176 at para. 37.

[32] He also commended to the Court, the judgment of Clarke LJ (as he then was) in **Assicurazioni Generali SpA v Arab Insurance Group (BSC)**⁵ where he said that evaluative judgments:

“... involve an assessment of a number of different factors which have to be weighed against each other. This is sometimes called an evaluation of the facts and is often a matter of degree upon which different judges can legitimately differ. Such cases may be closely analogous to the exercise of a discretion and, in my opinion, appellate courts should approach them in a similar way.”

[33] Counsel for the Liquidators was equally adamant that the Appellant’s recommended approach is the wrong one. Counsel submitted that the Court should not rely on the Appellant’s submissions on the legal issues and should not approach this appeal on the basis that it can be decided “untrammelled” by the Judge’s findings of fact. Moreover, even if, the Court were to decide that the issues of law relied on in the Appellant’s submissions are relevant, Counsel argued that the submissions made on behalf of the Appellant to support overturning the decisions made by the Judge are in substance submissions that the Judge misconstrued the facts.

[34] Counsel for the Liquidators also commended to the Court, paragraph [63] of the judgment in **Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA**⁶ and concluded that this Court should interfere with the conclusions of the Judge only if it is shown that the Judge (i) failed to take relevant evidence into account, (ii) relied on irrelevant evidence or (iii) arrived at a conclusion which he could not reasonably or sensibly come to.

[35] I find much force in the respondents’ submissions. The Removal Application was brought pursuant to section 187 (1) of **the Act** which provides that:

“187. Removal of liquidator

⁵ [2003] 1 WLR 577 at [16]; the analysis in this passage was endorsed by the House of Lords in *Dattec Electronics Holdings Ltd v United Parcels Services Ltd* [2007] 1 WLR 1325 at para. [46] per Lord Mance and by the Privy Council in *Central Bank of Ecuador v Conticorp SA* [2016] 1 BCLC 26 at para. [5] per Lord Mance.

⁶ [2012] EWCA Civ 644.

(1) The Court may, on application by a person specified in subsection (2) or on its own motion, remove the liquidator of a company from office if

(a) the liquidator

(i) is not eligible to act as an insolvency practitioner in relation to the company,

(ii) breaches any duty or obligation imposed on him by or owed by him under this Act, the Rules or the Regulations made under section 486 or, in his capacity as liquidator, under 169 any other enactment or law in the Virgin Islands, or

(iii) fails to comply with any direction or order of the Court made in relation to the liquidation of the company; or

(b) the Court is satisfied that

(i) the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator,

(ii) the liquidator has an interest that conflicts with his role as liquidator, or

(iii) that for some other reason he should be removed as liquidator.”

[36] Although in his notice of appeal, the Appellant asserts that the appeal relates to findings of fact and law, it is readily apparent that at the heart of the appeal is a challenge to the finding of fact made by the learned Judge that the Appellant had failed to show due cause for the removal of the Liquidators. In arriving at this conclusion, the learned Judge would have had to consider what are now well-known principles concerning the removal of a liquidator.

[37] The Court has a wide discretion as to the circumstances in which it may remove a liquidator and it is not confined to or dependent on proof of misconduct, personal unfitness or any breach of their statutory obligations. Instead, it is now clear that whether good cause has been shown is to be measured by reference to the real and substantial interests of the liquidation and the purpose for which a liquidator is appointed. What will amount to good cause will depend upon the particular circumstances of each individual case. Failure on the part of a liquidator to conduct

the liquidation in a vigorous, efficient and cost-effective manner may provide good cause, as may a conflict of interest or loss of confidence in the liquidator on the part of one or more creditors. However, in the latter case the concerns must be real and reasonable.⁷

[38] The fact that a liquidator's conduct has been shown in one or possibly more than one respect to have fallen short of the ideal will not afford good grounds to support an application to remove a liquidator. The court must also bear in mind that in almost any case where an order to remove a liquidator is made the same will likely have undesirable consequences in terms of costs and delay. In seeking to strike a careful balance in each case the court should take into account whether, on the evidence before it, it could be confident that if left *in situ* the liquidator would not repeat matters complained of and could be relied upon to complete the liquidation in accordance with his obligations.⁸

[39] Throughout, the burden is fairly and squarely on the applicant who seeks the removal, to show sufficient good cause for the same and it is clear that the alleged failings of the Liquidator would need to be real, material and reasonable.

[40] It must also be borne in mind that the role of this appellate court is not to substitute its own judgment for that of the court below but to assess whether the correct legal principles were applied and whether on the evidence, the decision of the judge can be justified.

[41] The Appellant's grounds of appeal identify a number of errors in the Judge's analysis of the law and in his evaluation of the evidence and findings of fact.

⁷ Re Adam Eyton, Limited. ex parte Charlesworth (1887) 36 Ch D 299 per Bowen LJ; Andrew R Keay, McPherson's Law of Company Liquidation (Sweet & Maxwell, 3rd Ed., 2013) page 46 at para. 8 – 804.

⁸ AMP Enterprises Ltd v Hoffman and another [2003] 1 BCLC 319 at paras. 23 and 27.

Ground 1

Findings of Law

- [42] Mr. Chu takes issue with the learned judge's analysis of the role and functions of the liquidator of a solvent holding company; his finding that no distinction was to be drawn, in the context of the administration of the liquidation of a solvent pure holding company, between the affairs of the company over which the Liquidators were appointed and those of its subsidiaries (including those in which the company is only a minority shareholder) and his failure to hold that the Liquidators could not circumvent restrictions imposed on their powers by the order appointing them (specifically a requirement to obtain the court's sanction before commencing legal proceedings), by the device of appointing themselves as directors of a subsidiary and exercising such powers at the subsidiary level without seeking the sanction of the court.
- [43] Counsel for the Appellant argued that the Liquidators owe a statutory duty under section 185(1)(b) and (c) of **the Act** *inter alia* to distribute the assets or surplus assets or the proceeds of realisation thereof in accordance with **the Act** (to the members in the case of a solvent winding-up), that OSL held only one asset at the date of going into liquidation (the single issued share in PBM), and that in the absence of any evidence that any proof of debt by a creditor of OSL has been accepted by the Liquidators, their clear statutory duty was promptly to distribute this asset to the shareholders. In the court below, one of the principal grounds of complaint of the Liquidators' conduct was that they had failed to do so, almost 4 years into the liquidation and having incurred fees, costs and expenses in excess of US\$ 3 million.
- [44] In justifying their actions, the Liquidators argued that the pursuit of the Hong Kong Petition would "assist them in ascertaining the value of PBM and hereby serve the best interests of OSL and its members as a whole."⁹ The Appellant took issue with this contention and posited that if OSL is solvent, the value of its assets is of no relevance, and a time consuming and costly investigation into its value by the liquidators of OSL could not be justified.

⁹ Greenwood affidavit page 6 at para. 48.

[45] The Judge's conclusion on this issue is set out at paragraph 58 of the judgment where he stated:

"In this case the purpose for which the JLs were appointed was and is to wind up OSL, the affairs of which were hopelessly deadlocked as between Mr. Chu and Mr. Lau, and after Mr. Lau was not able to secure a negotiated buy-out of his interest, being obstructed therein, as Justice Kaye, QC (Ag.) found. Thus it is reasonable to infer, and indeed, in my judgment, readily apparent, that the purposes of the liquidation include the realisation of OSL's assets, including to take reasonable steps to rehabilitate their value, if so required, so that each of OSL's members can receive due value upon a distribution before OSL is dissolved (a negotiated buy-out having failed). The JLs would not be fulfilling the purpose of their appointment if they were to shut their eyes to the value (or rather to missing value) of OSL's asset, as Mr. Chu wants them to do."

[46] Having considered the relevant legislative framework, I am satisfied that this reflects a correct analysis of relevant legal principles.

[47] Section 185(1) of **the Act** makes plain that the principal duties of a liquidator of a company are:

"(a) to take possession of, protect and realise the assets of the company;
(b) to distribute the assets or the proceeds of realisation of the assets in accordance with this Act; and
(c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with this Act."

[48] Section 207 of **the Act** reads:

"(1) Unless and to the extent that this Act or any other enactment provides otherwise, the assets of a company in liquidation shall be applied
(a) in paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority³ ;
(b) after payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;
(c) after payment of the preferential claims, in paying all other claims admitted by the liquidator; and (d) after paying all admitted claims, in paying any interest payable under section 215.

(2) ...

(3) Any surplus assets remaining after payment of the costs, expenses and claims referred to in subsection (1) shall be distributed to the members in accordance with their rights and interests in the company.”

[49] When these two statutory provisions are read together, it is clear that the primary duty of a liquidator is to take possession of, protect and realise the assets of the company. The liquidator is then obliged to distribute the assets or the proceeds of realisation of the assets for the purpose of paying the costs and expenses properly incurred in the liquidation (even a simple solvent liquidation results in the incurring of costs and expenses, which must be paid first). Thereafter, the liquidator is obliged to then pay any creditors (a solvent liquidation will often have creditors). If there are no creditors, it is only then that there is a duty in respect of any surplus after the payment of the costs, but that duty is to distribute the assets or the proceeds of realisation of the assets to the contributories.

[50] In undertaking these duties, it is clear that the Liquidators have a broad statutory discretion¹⁰ as to whether to distribute assets to contributories or to realise the assets and distribute the proceeds of the realisation to the contributories. That would be a discretion to be exercised as they saw fit in what they considered to be the best interests of the contributories.

[51] Counsel for the sixth respondent has argued that whether to distribute the assets or to realise the assets is for the liquidator to determine using his own discretion in the best interests of those entitled to be paid, i.e. those entitled to the costs and expenses, the creditors and the contributories. He further pointed out that the power of a liquidator to realise assets is not limited to the sale of those assets for cash. By way of example, he noted that in the case of an asset such as a debt, the realisation can be effected either by assigning the debt for cash or demanding the payment of cash by the debtor (and the taking of enforcement proceedings to obtain payment if payment is not forthcoming voluntarily). If an asset consists of 100% of the

¹⁰ Section 185(2) Insolvency Act 2003.

shareholding in another company, the realisation can be effected by selling the shares or by procuring that the subsidiary company realises its assets and distributes the proceeds to the liquidator.

[52] Counsel further posited that in realising the assets of the subsidiary company, this may involve, as part of the realisation process, the bringing of proceedings against third parties for compensation for wrongdoing. This latter course is as much a realisation of the value of the shares as an outright sale to a third party.¹¹

[53] Ultimately, the liquidator is under a duty to obtain the best value reasonably obtainable. Thus, if the procuring of a wholly owned subsidiary to bring proceedings against wrongdoers for compensation will result in greater value than that offered for the shares by any third party, the liquidator is under a duty to procure that the subsidiary takes such proceedings, provided, of course, that the liquidator has funds available to do so and is not personally at risk.

[54] I cannot disagree with these general statements of principle.

[55] It is clear that the learned Judge was seized of the full remit of the general and specific duties of liquidators. Moreover, the learned judge would have had the benefit of the Privy Council judgment in **Chu v Lau**¹² in which the Board, fully seized of the relevant corporate structure, noted that the valuation of OSL critically depended upon financial information relative to the business of Beibu Gulf. The learned Judge fully appreciated that the purpose of the liquidation included the realisation of OSL's assets. However, this meant that the Liquidators were obliged to take reasonable steps to rehabilitate their value so that each of OSL's members can receive due value upon a distribution. I agree that it would be wholly inconsistent with the liquidator's duties if they were to fail to investigate or ignore the value of the OSL assets. Given their statutory obligations, the Liquidators were obliged to take

¹¹ Alexander Ward and Co Ltd v Samyang Navigation Co Ltd [1975] 2 All ER 424.

¹² [2020] UKPC 24.

reasonable steps to rehabilitate their value so that each of OSL's members can receive due value upon a distribution.

[56] Mr. Chu, however, holds a contrary view. During the course of this appeal, counsel for Mr. Chu stressed that this was a solvent and not insolvent liquidation. The contention is that the value of OSL's assets would be of no moment and should not delay distribution. Counsel for the Liquidators on the other hand has pointed to the learned Judge's observation that it remains to be seen whether this liquidation is solvent or not. Putting aside this issue for a moment, while there can be no doubt that solvent and insolvent liquidations are distinct legal creatures, it is also clear that they share critical similarities – in both cases a liquidator is appointed and he has similar powers to realise assets, settle the costs and expenses of the process and make distributions.

[57] In **Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another**,¹³ the Singapore High Court considered this issue in the context of an application seeking to remove liquidators for cause. The court's analysis started with the premise that the interest and purpose of a solvent liquidation (i.e., a members' voluntary liquidation) was distinct and different from the interest and purpose of an insolvent liquidation (i.e., a creditors' voluntary liquidation or a compulsory liquidation). Coomaraswamy J held that in deciding whether cause has been shown, a court must assess the allegations against the liquidator in the light of the purpose of the liquidation, which is co-extensive with the purpose for which he was appointed.

[58] As the purpose of a solvent liquidation is not entirely the same as that of an insolvent liquidation, the nature of the court's assessment in each context is also

¹³ [2018] 3 SLR 687.

not entirely the same. At paragraph 132 of the judgment Coomaraswamy J rationalised that:

“A solvent company is liquidated primarily in the members’ interest. The creditors have no real interest in the liquidation because it is obligatory to commence and conduct a solvent liquidation on the basis that the creditors will be paid in full and within one year: s 293(1) of the Act. The law protects the creditors by requiring the directors essentially to affirm that basis on penalty of perjury as a condition precedent to commencing the liquidation.”

[59] At paragraph 130 of the judgment, the learned Judge quoted the following excerpt from **McPherson’s Law of Company Liquidation**¹⁴ which helpfully explains the distinction:

“... With a solvent company there is no one aim for the winding up. The aim of winding up is often to allow the shareholders who decide that the company has completed the purposes for which it was established to have the assets distributed to them after paying out the creditors. The shareholders then can determine to make new investments if they wish with the funds received from the liquidation.

The purposes of the liquidation of insolvent companies are often seen as: first, providing a procedure that allows for an equitable and fair distribution of the assets of the debtor company amongst its creditors. This means that one or more creditors are not discriminated against and one or some creditors do not profit at the expense of other creditors ...; second, in providing for the winding up of a company which is hopelessly insolvent, liquidation serves the community at large as it is not good for society that companies who are insolvent are able to continue to trade; third, liquidation is designed to allow for an investigation of the company’s affairs by an independent and appropriately qualified person, with particular emphasis on the circumstances which precipitated the winding up. Such an investigation may reveal improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action. Further, the investigation may disclose the fact that there were unfair dispositions of property, which has reduced the ability of the company to pay its creditors.”

[60] Although the learned Judge frankly recognized that the interest and purpose of a solvent liquidation (i.e. a members’ voluntary liquidation) was distinct and different from the interest and purpose of an insolvent liquidation (i.e. a creditors’

¹⁴ Andrew R Keay, *McPherson’s Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed., 2013), page 486 at para. 1–005.

voluntary liquidation or a compulsory liquidation), when it came to the duty to investigate however, the learned Judge observed as follows:

“137. But as the passage from McPherson¹⁵ at [130] above shows, the content of a liquidator’s duty to investigate the company’s affairs is different as between a solvent and an insolvent liquidation. A liquidator of a solvent company has only a limited duty to investigate. The court, in assessing his conduct when deciding an application to remove him under s 302 of the Act, must bear in mind the limits of that duty.

138. Having said that, it is not the case that the liquidator of a solvent company has no duty whatsoever to investigate its affairs. Any such investigation has two objectives: (a) to maximise the return to those interested in the liquidation by increasing the company’s assets or reducing its debts; and (b) to uphold standards of commercial morality by identifying “improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action”: McPherson at para 1–005. Both objectives transcend the divide between solvent and insolvent liquidation. A member of a solvent company and a creditor of an insolvent company each have just as much interest in maximising the distribution he is to receive in the liquidation. And a failure by the management of a company, whether solvent or insolvent, to live up to the standards of commercial morality is a matter which goes beyond the members’ and the creditors’ private interests and is a matter of public interest: *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [52].”

[61] It follows that whether the liquidation proceeds on a solvent or insolvent basis, will not negate the liquidators’ obligation to thoroughly investigate and pursue and, where necessary, take such steps as are reasonable and necessary to ensure the maximization of the value of the company’s assets; and certainly, Mr. Chu has not advanced any convincing argument or legal authority to persuade this Court otherwise. Indeed, the sole legal authority referenced by the Appellant is that of **Brilla Capital Investment Master Fund SPC Limited et al v John Greenwood et al**¹⁶ where at paragraph [53] the Court noted that:

“[t]he authorities establish that a liquidator is required to proceed with the liquidation of the company in an expeditious and efficient manner.”

¹⁵ Andrew R Keay, *McPherson’s Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed., 2013).

¹⁶ AXAHCVAP2013/0007 (delivered 24th November 2014, unreported).

- [62] As a general statement of principle, I can find no fault with this submission. However, the obligation for expedition cannot be at the expense of a liquidator's duty to obtain the best value obtainable in realizing the relevant asset. So that, if the procuring of a wholly owned subsidiary to bring proceedings against wrongdoers for compensation will result in greater value than that offered for the shares by any third party, the liquidator is under a duty to procure that the subsidiary takes such proceedings, provided, of course, that the liquidator has funds available to do so such action is reasonable in all the circumstances.
- [63] The need for considered prudence is even more warranted on the facts of this case, where, as the learned Judge concluded, the Liquidators have "an entirely reasonable belief that Mr. Chu has committed misfeasance in diverting considerable sums of money and business opportunities to his immediate family," and that to simply divide the shares in two between Mr. Chu and Mr. Lau would be unfair "if it is that Mr. Chu has already helped himself to a significant part of the value which should be within the assets indirectly held through OSL but no longer is."
- [64] It seems to me that it would be entirely reasonable for the Liquidators to investigate this matter which may have significant impact on the liquidation and where necessary it is clear that a liquidator can take legal action against any party responsible and recover any misappropriated assets; see **Jetivia S.A. & Anor v Bilta (UK) Limited (in liquidation) & Ors.**¹⁷
- [65] The second limb of the Appellant's challenge arises from what counsel for Mr. Chu described as the learned Judge's holding that no distinction was to be drawn, in the context of the administration of the liquidation of a solvent pure holding company, between the affairs of the company over which the Liquidators were appointed and those of its subsidiaries (including those in which the company is only a minority shareholder). Counsel submitted that this holding (equating the

¹⁷ [2015] UKSC 23.

affairs of all the companies below the company in the group structure, even if not majority owned by OSL) was erroneous in principle and/or was in conflict with the decision of this Court in **Wang Zhongyong et al v Union Zone Management Limited et al.**¹⁸

- [66] In responding to this submission, counsel for Mr. Lau argued that this authority has no relevance to the present case. He submitted that **Wang Zhongyong** concerns the issue whether for the purpose of an unfair prejudice application in relation to a company, the court can take into account any mismanagement in the affairs of a company in which the respondent company has an interest. Counsel submitted that this is wholly different from the issue at hand.
- [67] Having reviewed that judgment in **Wang Zhongyong**, I am inclined to agree with that submission.
- [68] In **Wang Zhongyong** an offshore structure had been put in place to hold the shares in two valuable pharmaceutical companies based in the PRC. In 2011, the minority shareholders in the principal BVI company within the structure (Union Zone) brought a claim alleging that the affairs of Union Zone were being conducted in a manner which was unfairly prejudicial to them. The minority shareholders claimed that there had been a common understanding which led to the creation of a quasi-partnership between the shareholders and that the sole purpose for which Union Zone had been created, namely to obtain a public listing, had failed. Counsel for Union Zone sought to suggest that the Court of Appeal should look to the “business realities of the situation and must not be confined to a legalistic view, in circumstances where you have a holding company and a subsidiary. In an appropriate case, the conduct of the subsidiary or one of its directors who happens to be a director of the holding company may be regarded as the affairs or conduct of the holding company.”

¹⁸ BVIHCMAP2013/0024 (delivered 12th January 2015, unreported).

- [69] The Court of Appeal referred to the ratio in **Rackind and others v Gross and others**¹⁹ and considered that although this principle may be applied in certain situations, it was of no application on the facts of that case as Union Zone was not the holding company of the relevant entity and there was no conduct complained of at the level of Union Zone itself which was said to be prejudicial to the Appellants.
- [70] There is simply nothing in the ratio of **Wang Zhongyong** which suggests that when realising the value of shares held by a company in liquidation, a liquidator is precluded from using those shares to procure action to be taken by the subsidiary company in which the shares are held to maximise the value of the shares. In my judgement, on the facts of this case, there is no inherent conflict posed by the decision of this Court in **Wang Zhongyong**.
- [71] The final limb of the Appellant's challenge to the learned Judge's findings of law, concerns the Judge's refusal to hold that the Liquidators could not circumvent restrictions imposed on their powers by the order appointing them (specifically a requirement to obtain the court's sanction before commencing legal proceedings), through the device of appointing themselves as directors of a subsidiary and exercising such powers at the subsidiary level without seeking the sanction of the court. The Appellant contends that the Judge erred in law and/or in principle in holding that liquidators appointed by the court over a holding company (H) are not amenable to the same degree of control (including the need to obtain court sanction where required in relation to H) when acting as directors of a subsidiary (S) where they have procured their own appointment as directors of S, in the exercise of their powers as liquidators of H.
- [72] The Respondents have expressed their frank concerns about the genuineness of this complaint and have questioned why the Appellant now merely complains

¹⁹ [2005] 1 WLR 3505.

about the formality of not seeking the sanction of the court rather than engaging with the actual merits of serving the statutory demand and the bringing of the winding up proceedings. Such criticisms aside, ultimately, the Appellant takes issue with the Liquidators' failure to secure the sanction of the court prior to taking the decision to bring proceedings before the courts in Hong Kong by PBM against BGAH.

[73] The learned Judge's short answer to this is set out at paragraph 63 of his judgment where he determined that the Liquidators were not obliged to first seek the sanction of the court in that case.

[74] Again, I can find no fault in the learned Judge's reasoning. The evidence before the court²⁰ disclosed that prior to the appointment of the Liquidators, the only directors of PBM were Mr. Chu and Mr. Lau. They were replaced by Mr. Greenwood and the two joint liquidators who were based in Hong Kong. Following their resignation as liquidators, Mr. Greenwood has remained as the sole director of PBM. While it is clear that the Liquidators are subject to the supervision of the BVI Court, it is equally clear that conduct of the directors of PBM is governed by Hong Kong company law and that board is required to act in the interests of that company. This is a critical distinction because it was entirely open to the board of PBM, (no doubt with the benefit of independent legal advice) to decide it was in the interests of PBM to petition to wind-up BGAH.

[75] The Appellant has not advanced a sufficiently compelling argument which explains how the sanction of the BVI Court could be relevant to a decision of a Hong Kong company to serve its statutory demand to recover the moneys owed and subsequently to issue a winding up petition.

²⁰ Greenwood's evidence at [1/7/126] at paras. [48] to [54].

[76] In his written submissions, Counsel for the Appellant submitted that the alleged erroneous findings of law bedeviled much of the reasoning in the judgment and led the Judge on to an inevitable and fundamental error in his assessment of the propriety of the Liquidators' conduct. Counsel for the Appellant further submitted that if this Court concludes that the Judge erred in law in his decision, his decision on due cause is plainly open to review by this Court as the legal substratum of the Judge's decision on the facts will have been removed. I am not satisfied that the learned Judge's reasoning discloses any error of law as alleged by the Appellant.

[77] It follows that the Judge's decision on "due cause" is not undermined by the appellant's alleged errors of law and the appellant is left to contend with the judge's findings of fact and the appellate restraint with which such findings are reviewed.

Findings of Fact

[78] Counsel for Mr. Chu has quite rightly acknowledged the very limited circumstances in which an appellate court may interfere with a judge's finding of fact. However, he submitted that this is a case at the very bottom end of the spectrum of 'appellate restraint', and urged that this Court should have no hesitation in carrying out its own evaluation of the totality of the evidence if it is satisfied that the Judge failed to do so because this is not a case in which the Judge was uniquely well placed to weigh and/or assess the evidence as he only had the written evidence of the parties and did not have the benefit of seeing live witnesses.

[79] However, it is clear that a trial judge's advantage extends beyond having seen and heard witnesses.²¹ At paragraph 23 of the judgment in **Group Seven Ltd (s company incorporated under the laws of Malta) and another company v**

²¹ Per Ward LJ in *Assicurazioni Generali SpA v Arab Insurance Group (BSC)* [2003] 1 WLR 577.

Notable Services LLP and another and other cases,²² the English Court of Appeal relied on the following extracts from Leggatt LJ's judgment in **JSC Bank v Ablyazov** which perfectly explains the rationale for appellate restraint:

"40. It is convenient to distinguish – although the difference is really one of degree – between findings of primary fact and factual findings which involve evaluating and drawing inferences from such primary facts. The reasons for the reluctance of appellate courts to interfere with findings of fact made following a trial apply in both cases: indeed, the reasons for restraint are often stronger where the finding involves an evaluation of primary facts.

41. Those reasons are by no means limited to the advantage enjoyed by the trial judge in a case in which oral testimony plays a significant part of having seen and heard the witnesses give evidence. The reasons also include recognition that the judge who presides over the trial is immersed in the evidence in a way that an appeal court cannot replicate. As it was put in the majority judgment of the Supreme Court of Canada in *Housen v Nikolaisen* 2002 SCC 33; [2002] 2 SCR 235, para 14 (quoted by Lord Reed JSC in *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477 at para 33): "appeals are telescopic in nature, focusing narrowly on particular issues as opposed to viewing the case as a whole." In elaborating this point, the Canadian Supreme Court adopted the observations of a commentator that:

"The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged."²³

[80] It is with this dictum in mind that I will now consider the Appellant's challenge to the learned Judge's findings of fact. The Appellant contends that the Judge failed to address and/or accurately evaluate, the totality of the evidence before him with the consequence that he failed in his duty to give a "reasoned rebuttal" of the evidence, using "building blocks" which included "marshaling" the evidence and giving reasons for rejecting otherwise supportive evidence. He further submitted that there are also

²² [2019] EWCA Civ 614.

²³ See *Housen v Nikolaisen* [2002] 2 SCR 235 at para. 14 (quoted in *McGraddie v McGraddie* [2013] UKSC 58 at para. 4).

aspects of the Judge's decision which betray a mis-appreciation of significant facts. By way of example, counsel noted that in a key part of his consideration of the due cause issue, the Judge observed that "[t]here is no sign that the creditors have lost confidence in the [Liquidators]." Counsel submitted that this finding shows that the Judge had failed to appreciate that it was a central plank of the Appellant's case that OSL was being wound-up as a solvent holding company, with no outside creditors whose interests had to be taken into account.

[81] In my judgement, the Judge's task in assessing the evidence cannot be considered in a vacuum. The application before him required the Judge to make an evaluative finding that there was or was not due cause to remove the Liquidators from office. In making that assessment the judge has to balance two competing aims. The first is to ensure that the liquidators carry out their duties competently and impartially, so that the liquidation achieves the purposes for which it was commenced. The second is to discourage unmeritorious applications for the liquidator's removal by disgruntled creditors or members. Neuberger J (as Lord Neuberger then was) described this balancing exercise in **AMP Enterprises Ltd v Hoffman and another**²⁴ in the following terms:

"In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.

...

On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s 108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been

²⁴ [2003] 1 BCLC 319 at paras. [23] and [27].

conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds ...”

[82] In **Petroships Investment Pte Ltd** Coomaraswamy J at paragraph 114 also described this exercise as follows:

“It will be seen from the cases that the best way for the court to approach this balancing exercise is to focus on whether removal of the liquidator advances the interest of the liquidation and the purpose for which the liquidator was appointed. This is the approach also taken on an application under s 268 of the Act, which is the equivalent of s 302 in the compulsory winding up regime: *Hong Investment Pte Ltd v Tai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375 (“Hong Investment”) at [5].”

[83] In this appeal, Mr. Chu takes issue with several aspects of the Judge’s reasoning. I will treat with these in turn always bearing in mind the balancing exercise which would have to be undertaken by him.

Liquidators’ Conduct/ Delays

[84] First, Mr. Chu contends that the Liquidators were under a duty to pursue the liquidation with vigour but that they have failed to do so. Counsel for Mr. Chu pointed to the fact that the Liquidators were appointed in August 2017 and some 4 years later the Liquidators claimed that they were still not even in a position to confirm whether OSL was solvent. This is notwithstanding that it is undisputed that OSL has always been a purely holding company that never transacted any business.

[85] Counsel further pointed to the fact that as of January 2020, the Liquidators had spent over US\$ 3 million in fees and disbursements, and had, at the time of the hearing of the Removal Application before the Judge, accomplished nothing concrete with respect to the realisation or distribution of the company’s single asset

to the contributories. He argued that the Judgment does not address either the delay complained of by the Appellant or the gross imbalance between the costs and benefit resulting from the manner in which the Liquidators have chosen to conduct the liquidation. He concluded that the Judge should have been satisfied that the Liquidators have breached their duties under section 185 and/or that their conduct of the liquidation to date had been below the standard that may be expected of a reasonably competent liquidator, and that their retention as Liquidators was against the interests of the liquidation. Not surprisingly, the Respondents wholly disagree with these assertions.

- [86] It is absolutely clear from the reading of the judgment that the conduct of the Liquidators and the very obvious delays in completing the liquidation was fully considered by the Judge and that he fully accepted that there were failings. At paragraph 60, the Judge observed:

“I accept that certain aspects of the JLs’ work could, in an ideal world, and in ideal conditions, possibly have been done better, or earlier. As Neuberger J observed in *AMP Enterprises Ltd v Hoffman et al.*⁴² such criticism can ‘almost always’ be levelled. For instance, Mr. Chu cites a two-year interval between issuance of the statutory demand and the making of the subsequent winding up petition. But a time period does not speak for itself. Mr. Chu would need to show on a balance of probabilities that there was no good reason for such a delay in order to make good his criticism.”

- [87] However, at paragraph 65 (16) of the judgment, the Judge specifically considered the cogent arguments advanced by the Appellant and it is clear that he formed the view that the delay in completing the liquidation is consequential on the need for the Liquidators to take proportionate steps to recover assets that have possibly been wrongfully removed from the corporate structure before liquidating and distributing OSL’s directly held asset. The Judge clearly determined that such action was reasonable in all the circumstances and would not warrant their removal.

- [88] For the reasons already indicated, I accept that it is proper and reasonable for the Liquidators to investigate the Appellant’s possible misfeasance and recover any

assets improperly diverted by him because, if there has been alleged misappropriation, the value of OSL's shares will have been depleted. No doubt such investigations will take time. This is particularly so where the judge has found that the appellant/shareholder was motivated by "patent self-interest" and would have been less than cooperative.

[89] Moreover, and in any event, I agree with counsel for the Liquidators that the contention that delay alone can justify removing a liquidator whose conduct cannot otherwise be impeached, thereby necessitating the appointment of other liquidators, with the consequence of further delay and further costs, is simply not maintainable. Ultimately, the Judge did not consider that the Liquidator's conduct would warrant the respondent's removal as a liquidator, and it is also clear that the Judge did not consider in all the circumstances of the case that the Appellant had satisfied the onus of proving "good cause" for removal. In my view, this was a conclusion that was open to the Judge on the evidence that was before him, and in particular based on his finding of fact that it was reasonable for the Liquidators "to take proportionate steps to recover assets that have possibly been wrongfully removed from the corporate structure before liquidating and distributing OSL's directly held asset." This was quintessentially a judgment call for the Judge in the exercise of his discretion, and it is not one with which this Court should interfere.

Liquidators' Bias

[90] In the court below, Mr. Chu alleged that the Liquidators were guilty of both actual and apparent bias and counsel submitted that the learned Judge's treatment of this issue, failed to have regard to the arguments advanced to him and was perverse and/or otherwise wrong in the circumstances of the present case.

[91] Counsel for Mr. Chu submitted that that the Judge's finding of fact that no case of actual bias was made out is also contrary to the weight of the evidence. He submitted that any objective review of what little has occurred in the liquidation shows that the Liquidators have run the liquidation in a manner which favours the

sixth respondent's interests, whilst sidestepping the Appellant. He highlighted a number of complaints which were effectively ignored by the Judge or which were simply wrapped up in a more generalised dismissal of Mr. Chu's complaints. These included:

- (i) the failure to notify the Appellant that two of the liquidators had resigned;
- (ii) the failed application by the Liquidators to have the Appellant declared a vexatious litigant;
- (iii) the fact that the sixth respondent is funding the Liquidation.

[92] Counsel further submitted that the learned Judge's discussion of the allegations of apparent bias is internally inconsistent because he appeared to accept that a case of apparent bias had been made out by the Appellant but nevertheless determined that due cause for removal had not been made out. Counsel submitted that once a case of apparent bias had been made out, it was manifestly contrary to the interests of justice to leave the Liquidators in office especially when they had shown a wholesale unwillingness to subject themselves to any degree of control or scrutiny by the court when their actions had been questioned by the Appellant.

[93] Not surprisingly, the Liquidators denied each and every allegation of bias made by the Appellant, and they further deny that the judgment discloses any inconsistency or perversity.

[94] When a company is put in liquidation, control of the company is removed from the self-interested members and vested in a disinterested liquidator. Regardless of whether the liquidation was a solvent or an insolvent liquidation, the liquidator had a duty to act impartially in carrying out the liquidation. In **re Adam Eytan Ltd, Ex parte Charlesworth**,²⁵ Cotton LJ put the position this way:

“...[t]he liquidators ought not to consider themselves partisans either on one side or the other.”

²⁵ (1887) 36 Ch D 299 at 304.

It follows that the Liquidators have an obligation to discharge their duties and to exercise their powers competently and impartially, without fear or favour.

[95] In order to succeed in proving due cause on this ground the Appellant would have had to show that the Liquidators are either guilty of actual bias or have so conducted themselves as to give rise to a reasonable perception of bias. Of course, little weight, if at all, will be given to a mere suspicion or a baseless perception of bias. In order to demonstrate bias in respect of the Liquidators' decision or exercise of discretion, the Appellant is required to show that the Liquidators' decisions were taken without a rational basis or that their exercise of discretion was not exercised in good faith.

[96] This distinction between actual and perceived bias was drawn in broader terms by Jessel MR in **re Sir John Moore Gold Mining Company**.²⁶ An applicant may attempt to show cause by producing evidence of actual bias on the part of the liquidator. An applicant may also attempt to show cause by producing evidence of conduct by the liquidator which is capable of being perceived as evidence of bias. Where an applicant seeks to rely on a perception of bias, he must show that his perception is reasonable. The test is whether it would be perceived by a reasonable (and I would add there a fair-minded, disinterested and informed) observer that the liquidator has manifested a tendency to favour certain interests in the winding up at the expense of others.²⁷

²⁶ (1879) 12 Ch D 325.

²⁷ *Re Bipso Pty Ltd*; *Condon v Rodgers* (1995) 120 FLR 399 at pp 404 and 406; *Re Allebart Pty Ltd (in liq)* and *The Companies Act [1971]* 1 NSWLR 24 at pp 29E and 30G; and *re Ross Wood & Sons Pty Ltd (in liq)*, *Re; Wood v Targett* (1997) 23 ACSR 291 at pp 298-299).

- [97] In this appeal the Appellant has made several wide-ranging allegations of actual and apparent bias against the Liquidators. In regard to the claim of actual bias, the Appellant submitted that taking the Liquidators' conduct as a whole, it is quite clear that rather than treating Mr. Chu as an equal joint beneficiary of the statutory scheme to which OSL is subject under their stewardship, they have chosen to marginalise him and treat him as a stranger to the liquidation. This is in marked contrast to the way in which they have treated the sixth respondent and demonstrates clear bias on their part.
- [98] By way of illustration, the Appellant points to the way in which the Liquidators have chosen to treat with the Summary Distribution Proposal noting that they provided no analysis of the costs/benefits of the course of action that they have adopted. The Appellant further takes issue with the fact that while refusing to share with the Appellant, information provided to them by the sixth respondent, the Liquidators have shown no reluctance to share with the sixth respondent information provided to them by the Appellant. Counsel for the Appellant also cited several examples of important developments in the liquidation of which the Appellant (and the court) were not made aware by the Liquidators. This included the failure to advise the Appellant (or the court) of the resignation of the HK Liquidators (either before or after the fact), whilst the liquidators ensured that Mr. Lau had a direct involvement in the process.
- [99] I am unable to accept the Appellant's submission that the Judge's finding of fact (that no case of actual bias was made out) was perverse and contrary to the weight of the evidence. Where a liquidator's decision to investigate a company's affairs is presented as evidence of bias on his part, it is necessary for the court to examine whether he has a rational basis for choosing to investigate. Where it is clear that the liquidator has chosen to investigate because, in his judgment, the circumstances warrant an investigation, his decision to investigate can hardly be regarded as evidence of bias. By contrast, if his decision to investigate is shown to be arbitrary or without any proper basis, or if it was made to further his personal

interest or protect the interests of one faction of the members or creditors in preference to those of another, such a decision may indicate a lack of competence or a lack of impartiality on his part, depending on the facts of the case.

[100] When the rationale is tested objectively, it is clear that the Liquidators were of the view that there was a good case that Mr. Chu had engaged in misappropriation. For the reasons already indicated, the Liquidators' decision to pursue possible misappropriations by the appellant and refusal to adopt the Summary Disposition Proposal was not unreasonable. I am satisfied that it was rational and prudent for the Liquidators to proceed as they did.²⁸ No doubt the learned Judge would have been steered by the following guidance from the Board's judgment in **Chu v Lau**:²⁹

"Finally, the notion of a share split at the PBM or Beibu Gulf level does not appear on its face to be as suitable as a winding-up of OSL. It would not achieve a clean break between Mr Lau and Mr Chu, and it would not (if it operated at the Beibu Gulf level) do anything about those assets of PBM consisting of its claims in relation to its loan to Beibu Gulf, or its claims against Mr Chu for misfeasance and breach of fiduciary duty, which would better be investigated and (if thought fit) pursued by a liquidator."

The learned Judge would also no doubt have been guided by the general principle that a court should be reluctant to interfere with a liquidator's exercise of professional judgment in making decisions in the course of performing his duties.⁶⁸ I agree with the view expressed in **McPherson**³⁰ that the court will not intervene unless a liquidator has not exercised his discretion in good faith or has acted in a way in which no reasonable liquidator would have acted.

[101] Applying these principles and in view of my previous findings in favour of the Liquidators, I am unable to accept that the Liquidators' actions and exercise of

²⁸ City & Suburban Pty Ltd and others v Smith (as liquidator of Conpac (Aust) Pty Ltd (in liquidation)) and another (1998) 28 ACSR 328.

²⁹ Chu v Lau [2020] UKPC 24 at para. 67.

³⁰ Supra n. 14 at para. 8–027.

discretion were made without a rational basis or not made in good faith. It is therefore not surprising that the Judge would have determined that the allegations did not support a finding of actual bias.

[102] The Appellant also takes issue with the timing of the filing of the Hong Kong Petition. He submitted that the timing coincided with the point in time when PBM was under the Liquidators' control which suited and directly benefitted the sixth respondent's litigation agenda. He also pointed to the fact that the Appellant was sidestepped when the sixth respondent assisted the Liquidators with the appointment of the directors of PBM, and once again when he negotiated and signed a funding agreement for the liquidation without informing the Appellant.

[103] Counsel for the Appellant contended that these matters were effectively ignored by the Judge. However, the Judgment records that the legal proceedings brought by PBM against BGAH were brought after obtaining legal advice.³¹ Moreover, it seems imprudent for the Liquidators to disclose such advice to the Appellant when it may well jeopardize their claims in respect of his alleged misfeasance and misappropriations. The Liquidators took a decision to bring legal proceedings. It was a decision with which the Appellant is entitled to disagree. However, the Liquidators have acted with the benefit of independent legal advice. In doing so, they would have acted properly and without bias and it was open to the learned Judge to so find.

[104] The Judge also determined that the fact that a person is funding the liquidation does not necessarily make those liquidators biased in favour of that person. This is especially when there was evidence before the Judge which indicated that the Appellant was invited, but declined, to provide any funding for the liquidation. The Judge could also not have ignored the fact that the funding agreement was

³¹ See para. 65(10) of the Judgment.

ultimately approved and sanctioned by the court. Accordingly, in my view there is no merit in this point.

[105] The Liquidators' evidence is that it was necessary to remove Mr. Chu from the board of PBM to make progress towards realising PBM's assets. They contend that Mr. Chu had a position with BGAH that gave rise to a conflict of interest because PBM's Hong Kong legal advisers had advised that PBM might have claims against BGAH and the Appellant. The Liquidators' evidence also indicated that the Appellant was given opportunities to explain why he should not be removed from the board of PBM. Further, mindful of the need to be seen to be fair, the Liquidators also removed Mr. Lau from the board. Given the evidence before him, it was also open for the Judge to conclude that the way in which the appointment of the directors of PBM proceeded could not ground a finding of actual bias.

[106] The real gravamen of the Appellant's case appears to be that he was not made aware of a number of important developments in the liquidation. I do not doubt that this is a genuine issue of concern. However, the learned Judge was obliged to consider all of the circumstances in making a determination of actual bias. In doing so it would have been clear that the resolution approving their resignation was a resolution passed at a meeting of creditors and filed with the Court. The sixth respondent's knowledge of the resignation would have come about as a result of his position *qua* creditor and not *qua* shareholder as the shareholders would not have been involved in the process.

[107] In the event that the Judge determined that the Appellant had no legitimate complaint of actual bias on the part of the Liquidators, the Appellant submitted that the matters relied upon in support of his case of actual bias – coupled with the Liquidators' failed attempt to have the Appellant declared (in substance) a vexatious litigant - would give rise to a legitimate complaint of apparent bias, calling for a detailed justification by the Liquidators of their conduct. According

to counsel for the Appellant, no such justification has been forthcoming. When this is coupled with the fact that the Liquidators are funded by Mr. Lau, Mr. Chu submitted that the evidence before the learned Judge was such that he should properly have found that “a fair minded and informed observer in possession of all the facts” would conclude that “there is a real possibility” that the Liquidators are biased.

[108] I reiterate that the fact that Mr. Lau has entered in a funding agreement in this liquidation would not in and of itself give rise to a finding of bias. However, a liquidator who has the benefit of such an agreement must recognise that:

“...it is incumbent upon him to ensure that he does not place in jeopardy his independence in the discharge of his duties. It is indispensable that in point of substance the liquidator’s independence should be preserved; and it is undesirable that a liquidator should permit a situation to develop in which it might appear that he has yielded up in any degree whatever his exclusive independent control in the decision-making processes and administration of a winding up.”³²

[109] In this case, it is clear that the terms of the funding agreement expressly preserve the liquidator’s right to act as they see fit in a manner consistent with their legal and statutory duties in compliance with their professional obligations. It is also the case that the funding agreement has the imprimatur of the court. I therefore find that the judge correctly rejected this as a basis for a finding of bias.

[110] In order to present a decision by the liquidator as evidence of the liquidator’s bias, the burden rests on the Appellant to show that the liquidator took a decision without a rational basis. Based on the cases presented in the court below, the learned judge felt unable to conclude that the Liquidators conducted themselves in a manner which would create a reasonable perception of bias in the mind of a rational creditor or contributory. I find that is a finding of fact which the learned Judge was entitled to make given the weight of the evidence.

³² Re Allebart Pty Limited (in liquidation) [1971] 1 NSWLR 24 per Street J.

[111] It is clear, that the Judge in his judgment and analysis was aware of and kept in mind the depth of the breakdown between the company's principals: the Appellant and the sixth respondent. The Judge was also satisfied that the Liquidators had "an entirely reasonable belief that Mr. Chu has committed misfeasance in diverting considerable sums of money and business opportunities to his immediate family." It is therefore not surprising that he would be troubled by Mr. Chu's numerous attempts to derail their investigations and to avoid scrutiny of the matters identified by Kaye J and confirmed by the UKPC in the UKPC judgment.

[112] The liquidators would therefore have viewed with suspicion the multiplicity of legal proceedings (largely unsuccessful) initiated by the appellant with the intention to terminate or otherwise disrupt the conduct of the liquidation. The Liquidators may well have formed the view that the Appellant's actions were vexatious and amounted to an abuse of process.³³ It was a view which was shared by the Judge who concluded that the Removal Application was "motivated by a desire on the Appellant's part to obstruct the work of the joint liquidators in investigating possible misfeasance and misappropriation of assets by the appellant from OSL's asset base."

[113] In my view, the Judge was entitled to take this critical view and ultimately to decide that the Appellant had not shown good cause. Ultimately, the Appellant would not have discharged his burden of establishing that the Liquidators' decisions in the Liquidation were taken without a rational or objectively reasonable basis or that they conducted themselves in a manner which would create a reasonable perception of bias in the mind of a fair minded and informed observer in possession of the facts before the court.

³³ Ultimately the application to have Mr. Chu declared a vexatious litigant failed. Moreover, it was not argued before the Judge that the Liquidators application was evidence of bias.

[114] Finally, having reviewed the full text of the Judgment, I am compelled to agree with the Respondents that the Appellant's portrayal of the learned Judge's findings on apparent bias is erroneous. The Appellant relies on paragraphs [66]-[67] of the Judgment for the proposition that the judge made a finding of apparent bias. The relevant excerpts are set out as follows:

"Turning then to the third step as laid down in Brilla, namely whether, even if standing and due cause for removal are proven, the Court should exercise its discretion and remove the liquidator, the first observation to make is that I do not need to exercise any discretion in this regard. This is because no due cause for removal has been proven. In other words, we do not get to step three.

The only reason why step three might conceivably be engaged here is that a fair minded and informed observer in possession of all the facts might, perhaps, be inclined to think that the possibility of bias on the part of JLs in favour of Mr Lau cannot be ruled out; in other words, that there could here be an appearance of bias. If step three is engaged here, I would exercise the Court's discretion by not removing."

[115] In these paragraphs, the Judge is merely saying that all the contentions advanced by the Appellant are unarguable except his allegation of bias. Although the judge has rejected the allegation of bias, he considers it is arguable in that it might conceivably be engaged. What he then goes on to do is consider, if he is wrong in his rejection of bias (which he obviously does not consider that he is), how would he exercise his discretion under the third stage, i.e. how he would exercise his discretion if the Appellant had made out his case on bias. It is clear that the Judge made no finding of bias but in fact expressly rejected the allegation of bias at paragraph 65 of the judgment.

[116] I therefore do not accept that this reasoning discloses any confusion or inconsistency.

Failure to act collectively

[117] The Appellant pointed out that the initial order appointing the 4 liquidators provided for a balanced representation of the interests of both parties, with a structure which ensured that there were Liquidators appointed who fully understood the issues

which might arise, and who would take collective collegiate decisions. The Appellant therefore takes issue with the fact that when the two HK Liquidators resigned unilaterally no steps were taken by the remaining BVI Liquidators:- (a) to inform the Appellant or the court of this fact (despite directly involving the sixth respondent in the process); and/or (b) to explain the circumstances in which it had occurred either to the Appellant or the court; and/or (c) to seek the directions of the court (or the Appellant's agreement) as to how to proceed in the absence of any Hong Kong based office-holders.

- [118] Counsel for the Appellant submitted that the Judge's failure to attach any weight at all to the loss to the Appellant of the protection of the checks and balances of having four liquidators, including two in Hong Kong, who must act in a collegiate manner, is perverse; particularly in circumstances where the resignations remain unexplained by the remaining BVI Liquidators, and it is clear that they intend to continue in office without filling the vacancies in their number, or even seeking a direction from the Court as to whether this is the appropriate way forward.
- [119] Counsel submitted that whatever the true explanation, it is a matter of legitimate concern that the remaining BVI Liquidators have not been open about the reasons for the resignations. As officers of the court, they must surely have been under a duty to inform the Judge of relevant information touching on the merits of the Removal Application and yet they plainly failed to do so.
- [120] The learned Judge found no merit in this submission and I am compelled to agree with his assessment. There is no doubt that joint liquidators must act collectively. The evidence advanced in the Removal Application does not disclose any breach of this principle. Currently, there are two liquidators, one is a nominee of the Appellant and one is a nominee of sixth respondent.³⁴ The Appellant has not advanced that they have failed to act jointly. Moreover, the Appellant has provided no basis for his suggestion that the resignations of the HK Liquidators had an impact on "balanced

³⁴ The Appellant nominated Mr. Greenwood and the sixth respondent nominated Mr. Bailey.

representation” in circumstances where both he and the sixth respondent still had one of their nominated liquidators in office.

[121] The Judge rejected the suggestion that the Liquidators should have informed the Appellant and the court and should have sought directions from the court when Mr. Yen and Ms. Chan resigned because the Liquidators did not have to do so. The resignations were approved by a resolution of creditors and not by the sixth respondent although I have no doubt that he would have approved the consequential reduction in the cost of this liquidation.

[122] If the Appellant had any genuine concerns about resignation of the HK Liquidators, (and the consequential impact on the collective or collegiate decision making) then it seems to me that the correct way to remedy this is not to remove the two existing liquidators, but for the Appellant to make an application for the court to appoint two additional liquidators. I am therefore not satisfied that the Appellant’s complaints can possibly lead to due cause being shown for the removal of the remaining Liquidators. It cannot be said that the Judge’s finding on this issue was plainly wrong.

Reasonable loss of confidence in the Liquidators

[123] The Appellant submitted that all of the above matters have led to a reasonable loss of confidence in the ability and/or willingness of the remaining BVI Liquidators to carry out their duties in accordance with the legislation and general principles of fairness. He concluded that the Judge’s contrary finding is perverse and contrary to the weight of the evidence. He contends that his concerns are compounded by two other matters:

- (a) In April 2021, the Hong Kong Court of Appeal in *Re Luen Tat Watch Bank Manufacturer Limited* upheld a decision which found Mr. Yen (one of the four Liquidators in the present case) to be guilty of having unnecessarily prolonged another liquidation, in which he had supported one side only and charged substantial and unjustified fees, and went on to remove him for

cause. Counsel for the Appellant submitted that although Mr. Yen has now resigned as a liquidator of OSL, these findings give rise to a legitimate concern as to the approach of the remaining Liquidators in the present case, in circumstances in which they have worked together with Mr. Yen on the OSL winding-up over an extended period and he has billed for more time costs than any of the other Liquidators and;

- (b) The Liquidators are plainly heavily influenced by information being provided to them by the sixth respondent. However, in April 2021 a Hong Kong court found the sixth respondent to be guilty of concocting evidence and misleading the court in support of his case against the Appellant in other litigation. The obvious concern to which this finding of dishonesty gives rise is compounded by the fact that the Liquidators have been unwilling to share with the Appellant the information provided to them by the sixth respondent.

[124] The requirement for a reasonable loss of confidence was explained in **Re Edenote Ltd; Tottenham Hotspur plc and others v Ryman and another**³⁵ That case involved a company in compulsory liquidation. The liquidator sold the sole shareholder of the company the company's right of action against a debtor in order to obtain funds to carry out the liquidation. At first instance, the judge removed the liquidator on the basis that the liquidator had failed to negotiate a better price for the sale. The Court of Appeal reversed the judge's decision. It held that while the liquidator made a "serious mistake", he was nevertheless honest and did not exercise his power of sale in willful disregard of the creditors' interests. Accordingly, it was held (at 398h) that "no adequate grounds for a reasonable loss of confidence [had] been shown." On the criterion of reasonableness, Nourse LJ, with whom Millett LJ agreed, said (at 398e–f):

"[The judge below] said that the decision in *Re Keyapak Homecare Ltd* was founded on and usefully illustrated the general principle that a liquidator must act in the interests of the general body of creditors and should not continue in office if in the circumstances the creditors no longer had

³⁵ [1996] 2 BCLC 389.

confidence in his ability to realise the assets of the company to their best advantage and to pursue claims with due diligence (see [1995] 2 BCLC 248 at 268). Again, I respectfully agree. But there is an important qualification, which is indeed accepted by [counsel for the applicants]. The creditors' loss of confidence must be reasonable. Moreover, the court does not lightly remove its own officer and will, amongst other considerations, pay a due regard to the impact of a removal on his professional standing and reputation."

[125] In the case at bar, it is confidence of the shareholder rather than creditors which is in issue. However, I am satisfied that the legal principles adumbrated by Nourse LJ are equally applicable to this case. The Appellant's purported loss of confidence must have a reasonable foundation or basis.

[126] Mr. Yen may well have ceased to be a liquidator, but it is hard to see how it would be reasonable for the Appellant to have lost confidence in the remaining liquidators who continued to act, one of whom was his appointee. Moreover, in circumstances where no misconduct or dishonesty has been proved as against the remaining liquidators, it can hardly justify their removal from office. Similarly, it is not understood how the Appellant could be said to have reasonably lost confidence in the Liquidators on the basis of the Hong Kong Court's criticisms concerning the sixth respondent's conduct in the Hong Kong litigation. This is particularly so when that court made it very clear that it was not making any findings which could be used by the parties against each other in ongoing litigation and in circumstances where the Hong Kong judge expressly stated that the evidence had not been fully explored.

[127] It was important that the learned judge consider whether the Appellant's loss of confidence must be reasonable. It appears that the Judge doubted the authenticity or the reasonableness of the Appellant's purported loss of confidence. At paragraph 82 the Judge concluded:

"Seen objectively, the picture is different. It is that the JLs appear to be coming steadily closer to concluding their efforts to recover monies for the liquidation estate, which is an outcome that Mr Chu desperately seeks to avoid and forestall."

[128] The Judge concluded that it was easy for the Appellant to say that he has lost confidence in the Liquidators when he has an apparently strong self-interest in avoiding scrutiny. In my view the judge was entitled to take this critical view of this issue, and ultimately to decide that the Appellant had not shown good cause.

[129] Having considered the concerns raised by the Appellant, I am satisfied that there is a credible basis for the Judge's rejection of his arguments. The judgment reflects that he was fully aware of each of the Appellant's complaints and it is clear that he obviously felt there was little merit in them. Having considered the Appellant's submissions, I am not satisfied that he was plainly wrong.

The Exercise of Discretion

[130] There can be no doubt that the Judge's final determination was not based on the exercise of his discretion but rather because the Judge concluded that the Appellant had not established "due cause" such as to justify the removal of the Liquidators. However, the Judge did go on to consider how he would have exercised his discretion, if "due cause" had in fact been shown. At paragraph [68] of the judgment he explains why he would not have exercised his discretion to remove the Liquidators in the following terms:

"That is because I am not satisfied that retention of the JLs would be against the interests of the liquidation, or conversely, that their removal is in the interests of the liquidation. It would, in my judgment, be contrary to the interests of the liquidation for the inevitable additional time and expense to be incurred for the present JLs to be discharged and hand over to new liquidators, and indeed for liquidators (be it the present JLs or new liquidators) to be put to the task of finding funding from a source other than Mr Lau. This could well stall and indeed paralyze the liquidation. I am under no illusion that Mr Chu knows this and indeed wants it."

[131] Counsel for the Appellant has invited this Court to consider whether that exercise of discretion was outside the ambit of discretion afforded to the judge, and where the court has so determined, to go on to exercise its discretion de novo. This submission is premised on what the Appellant described as "[t]he inescapable link between the findings of primary fact which have led to a secondary finding of due cause (which

must have been made for the discretion to become exercisable), and the court's decision whether and if so how to exercise the discretion, exists not only as a matter of logic but also as a matter of authority.”

[132] Counsel argued that once the premise on which purported exercise of discretion is founded is shown to be flawed or incomplete, it becomes clear that it would be unsafe and inappropriate to attach any weight to it, because the posited hypothetical discretion would have been exercised on the basis of a misapprehension of the true factual position and/or on the basis of an erroneous application of the law to the facts. In those circumstances, Counsel submitted that this is a case in which the discretionary nature of the relief sought on the Removal Application should not be a bar to a review of the Judge's decision by this Court, and that it would be appropriate if due cause is found to be established, for this Court to disregard the court's observations regarding the exercise of discretion and itself to exercise the discretion originally vested in the Judge in favour of removing the Liquidators for all the reasons advanced on the Appellant's behalf.

[133] Ultimately, I am not satisfied that the Judge's determination that no good or sufficient ground was made out for removing the Liquidators from their office was plainly wrong on the evidential material before him. Taken together, the matters raised in the Removal Application and the evidence advanced in support did not constitute a ground for their removal. There was no solid evidence that the replacement of the fourth and fifth respondents by another liquidator or liquidators was in the real, substantial and honest interest of the liquidation and would likely advance the purposes for which the liquidators were appointed.

[134] Only then could the court properly proceed to consider the exercise of its discretion by having regard to all the relevant factors for and against an order for removal, such as the beneficial consequences of success in possible legal proceedings. Having arrived at these findings, the Judge was therefore not obliged to treat with the third

stage of the analysis. Given the findings herein, I can find no useful purpose in reviewing the learned Judge's superfluous observations on this issue. Moreover, I find no merit in the challenge to the Judge's findings which would warrant this court exercising its own discretion in favour of removing the Liquidators.

Ground 2 - Costs

[135] The Appellant has submitted that the costs order in Mr. Lau's favour was wrongly made and should be set aside. He submitted that Mr. Lau was named as a respondent to the Removal Application as a pure formality and so in order to have a cost order made in his favour, it was incumbent on Mr. Lau to show (and for the Judge to have found) that separate representation was necessary or of benefit to the Court.³⁶ Counsel for the Appellant pointed to the fact that the sixth respondent submitted no evidence in opposition to the application and he submitted that the two short points made on his behalf did not justify the cost of preparing a 14 page skeleton argument and representation by both leading counsel and junior counsel.

[136] Moreover, counsel submitted that the costs order in the sixth respondent's favour was not only wrong in principle and devoid of any justification in the circumstances of the case, but was made without either inviting or receiving any submissions from the Appellant as to the appropriate costs order, and therefore plainly infringed the basic common law rule that the Appellant was entitled to be heard on the appropriate order (the principle of *audi alteram partem*).

[137] The liquidators chose to make no submissions in response to this ground of appeal. However, in brief submissions, counsel for Mr. Lau argued that the only real issue to be determined is whether the costs order was one which no reasonable judge could have made. He noted that following the circulation of the draft judgment on 24th November 2021 (2:28pm), the order was not sealed and entered until 29th December 2021. Although counsel for Mr. Lau agrees that that draft judgment gave

³⁶ Bagshaw v Pimm [1900] P 148 and SEB Trygg Liv Holding AB v Manches & Others [2006] 1 WLR 2276.

no reason for awarding his costs, counsel submitted that the Appellant would have had more than ample time prior to the sealing and the entering of the judgment to ask the judge to consider any submissions that he wished to make as to the payment of the sixth respondent's costs and to request a reasoned judgment in respect thereof. As the Appellant took no such steps, counsel submitted that he cannot now complain in this regard.

[138] Counsel for Mr. Lau points to the fact that it was the Appellant who joined Mr. Lau as the sixth respondent. It was quite correct of the Appellant to do so because Mr. Lau was of course a necessary party, and the judge would not have allowed the application to go ahead without the sixth respondent. Apart from the Appellant, the sixth respondent was the only other member of the company. It follows that he has an interest in the conduct and outcome of the liquidation. It further follows that if Liquidators were to be replaced by other liquidators, the costs thrown away and the new increased costs would likely fall on him as the person financing the liquidation.

[139] Moreover, as the application was likely to raise issues as to the past and future conduct of the liquidation and the judge could well have given directions for the future conduct of the liquidation. It follows that Mr. Lau's views were plainly important and he was entitled to take an active part to ensure the Liquidators covered all relevant grounds and that his interests were looked after.

[140] Counsel for the Appellant has argued that before a costs order can be made in his favour, it is necessary for the sixth respondent to establish that separate representation was necessary or of benefit to the court. However, Counsel for Mr. Lau submitted that he could hardly have had the same representation as the Liquidators. It was clearly necessary for him to have separate representation because while it is correct that Mr. Lau's position was essentially similar to that the Liquidators, the judge correctly identified the different stances of the Liquidators and Mr. Lau at [6]:

“The Respondents oppose the Application. In the case of the liquidator Respondents, whilst they deny there are any grounds for their removal, they place themselves in the discretionary hands of the Court. Mr Lau opposes the Application with no such impartial reserve.”

[141] Counsel for Mr. Lau further noted the active role taken by Mr. Lau in the proceedings before the learned Judge. He noted that the Judge was taken through the Hong Kong petition in detail so as to demonstrate why that was a proper step for the Liquidators to take and made submissions on the matters which are the subject matter of the counter-notice. The Judge also recorded two additional submissions advanced by Counsel for Mr. Lau. Moreover, the application made serious criticisms of Mr. Lau which he was compelled to address.

[142] In light of these factors, counsel for Mr. Lau submitted that he was entitled to attend and to make submissions and it is appropriate that he retain legal representation to do so. Counsel further submitted that it is obvious that the reason that the sixth respondent obtained a costs order in his favour is that costs followed the event.

Analysis and Conclusion

[143] It is not disputed that prior to making the costs order, the parties were not invited to provide any written or oral submissions regarding the question of costs. Consequently, the learned Judge would have made his order without having heard submissions as to costs liability. It is also evident that no reasons were reflected in the Judgment which would explain the basis upon which the order would have been made.

[144] A similar factual scenario obtained in the recent Privy Council judgment in **Rampersad and another v Ramlal and others**.³⁷ In that case, the appellants filed a claim against the respondents seeking, amongst other things, an injunction restraining the fourth respondent from dealing with the land, an order setting aside the deed between the appellants and respondents and rescission of the sale

³⁷ [2022] UKPC 50.

agreement, as well as damages and costs. The claim was heard in March and April 2015. In May 2016, the judge dismissed the appellants' claim and ordered that the appellants pay the respondents' costs as quantified by the Registrar of the Supreme Court of Trinidad and Tobago. The appellants appealed the judge's order. The appellants subsequently discontinued their appeal so far as it related to the judge's substantive decision but sought to continue the appeal in respect of the judge's costs order. The Court of Appeal held that the appellants' costs appeal was an abuse of process and should be dismissed with costs. This was because the appellants' appeal notice did not include a ground of challenge against the costs order. Any appeal against costs would therefore have to been brought with a substantive appeal, however the appellants' substantive appeal was hopeless and not genuine. The Court of Appeal declined to rule on the correctness of the Judge's costs order. The appellants then appealed to the Judicial Committee of the Privy Council.

[145] The Board took the opportunity to consider the general rules governing the award of costs after a trial in the Republic of Trinidad and Tobago; the rules which apply to any party seeking to appeal against any costs order with which it does not agree; and the jurisdiction of an appeal court to allow an appeal against a final costs order which the trial judge has made. At paragraph 38 of the Judgment, the Board noted as follows:

"The Board also accepts that parties should generally be given an opportunity to be heard or make representations before the court makes an order for costs, for fairness and justice demand no less, as the Court of Appeal of Trinidad and Tobago explained in *Pan Trinbago Inc v Simpson* CA Civ App No S-027 of 2013 (23 February 2015) at para 74. The Court of Appeal also explained in *Pan Trinbago*, at para 75, that the court has a discretion to vary costs orders prescribed by the CPR, but where the court intends to move away from the CPR guidelines, it is generally appropriate and indeed necessary to give a reason for doing so."

[146] The Board had no hesitation in approving these principles noting that they are entirely in accordance with those explained and applied by the Court of Appeal of

England and Wales in **English v Emery Reimbold & Strick Ltd.**³⁸ Nevertheless, notwithstanding that the parties in that case were not given an opportunity to make representations and the trial judge provided no reasons for her decision, the Board dismissed the appeal. The relevant ratio begins at paragraph 42 of the judgment:

“If no express explanation is available for a costs order, however, the appellate court will approach the material facts on the assumption that the judge will have had a good reason for making the order she did. Indeed, as the Court of Appeal went on to explain in *English v Emery Reimbold & Strick*, at para 30, where there is a perfectly rational explanation for the order made, the court is likely to draw the inference that this is what motivated the judge in making it. Further, in practice, it is only in those cases where a costs order is made with neither reasons nor any obvious explanation for the order that it is likely to be appropriate to give permission to appeal on the ground of lack of reasons.”

[147] At paragraphs 43-45 the Board went on to find that:

“In this case the judge had ample justification for making her order for costs in light of her dismissal of the Appellants’ allegations and her findings concerning the Appellants’ lack of integrity. But more than that, these were matters of which the Appellants were or ought to have been well aware at the latest from the moment the judge gave her judgment orally and in summary form on 31 May 2016. Further, any doubt the Appellants may have harboured as to the justification for the order must surely have been dispelled when, on 25 May 2017, the judge gave her reasons for dismissing the claim in writing.

It is true that the judge gave no specific reason for making her costs order in the form that she did. It must also be borne in mind, however, that the Appellants never asked the judge to explain why she had made her costs order; nor did they ask the judge for permission to appeal against that order. If the Appellants had adopted either course, the judge would have been alerted to the issue and would have had an opportunity to give her reasons expressly, and it is deeply unattractive for the Appellants to complain now that she did not.

³⁸ [2002] EWCA Civ 605; [2022] 1 WLR 2409 per Lord Phillips of Worth Matravers MR, giving the judgment of the court, explained, at paragraph 16, that the need for reasons is, at its simplest, that justice will not be done if it is not apparent to the parties why one has lost and the other has won.

As it is, however, the Board has no difficulty inferring that the judge's reason for making her order, following her dismissal of the claim, was soundly based upon the nature of the allegations made and the lack of probity with which they were pursued....What is more, although the judge failed to give the Appellants any opportunity to make submissions as to the appropriate costs order, the Board has no doubt that they have suffered no prejudice. Indeed, had the Appellants made submissions, the Board considers it is highly likely the judge would have ordered them to pay costs to be assessed on the indemnity as opposed to the standard basis for this would have given an opportunity for the respondents and the judge to focus on the misconceived allegations of fraudulent misrepresentation on which the claim depended." Emphasis added.

[148] I agree that the appropriate course would indeed have been for the learned Judge to invite the parties to specifically address the issue of costs prior to making his order. However, the factual matrix of this case reveals that the Appellant had ample opportunity prior to the finalisation of the judgment and the consequential order to raise this issue, to request that the Judge permit the parties to make written submissions on it, and to require the Judge to provide a reasoned ruling on the question of costs. None of these steps were taken by the Appellant prior to the judgment being perfected. This would no doubt have prompted more fulsome submissions from all sides which would have directly addressed the appropriateness of an order made in favour of the sixth respondent. Rather than take advantage of that opportunity, they have instead lodged this appeal.

[149] This Court is therefore obliged to consider what, if any, disadvantage or prejudice has been suffered by the Appellant. In that regard, I note that the learned Judge's order adheres to the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party. The sixth respondent was joined as a party in High Court proceedings by the Appellant and quite rightly so. Given the subject matter of these proceedings, the fact that the sixth respondent's interest would have been directly impacted by a successful application for removal of the Liquidators and having regard to the allegations levied against him, it was entirely appropriate that he not only participate in these proceedings but that he secure separate legal representation to do so. In these premises, I have no difficulty

inferring that the Judge's reason for making his order, following his dismissal of the Removal Application, was properly grounded.

[150] It is certainly the case that a court has a discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid. The court may therefore make a different order where the particular circumstances warrant. However, having considered the Appellant's submissions on this ground of appeal, I am not satisfied that the learned judge would have made any different order. It is clear that the sixth respondent would have successfully defended the proceedings. Ultimately, whether it was reasonable for the sixth respondent to have incurred the cost of preparing a 14-page Skeleton Argument, and representation by both leading and junior counsel from London (together with local counsel), are matters for determination on assessment/quantification. They would not without more justify a departure from the general rule which governs costs liability.

Fresh Evidence Application

[151] On 26th April 2023 and pursuant to the **Civil Procedure Rules 2000** ("CPR") part 62.20 and the inherent jurisdiction of this Court, the appellant, Mr. Chu filed an application in which he seeks permission to adduce further evidence on the appeal which was heard by the Court of Appeal on 3rd October 2022, namely:

(a.) the fact that Messrs. Greenwood and Bailey after the appeal was heard on 3rd October 2022 caused OSL to enter into a facility agreement to lend a substantial amount of money to PBM Asset Management Limited ("PBM"), OSL's subsidiary, upon security of the assignment of PBM's receivables in the liquidation of BGA Holdings Limited (in liquidation) ("BGA") and caused a charge to be created and registered ("Charge"). BGA was placed into liquidation by Order of the Hong Kong Court of First Instance and BGA has appealed against that Order.

(b.) the fact that PBM (controlled by its sole director Mr. Greenwood), through its solicitors, Dentons, has refused to provide Mr. Chu with a copy of the facility letter, notwithstanding that Mr. Chu is a 50% shareholder in OSL and so has a direct interest in the liquidation and have not provided any explanation of the transaction to Mr. Chu.

(c.) the fact that Mr. Greenwood has admitted to making a false statement on oath to the Hong Kong court, bringing into question his probity.

(d.) the fact that Messrs. Greenwood and Bailey made an ex parte application for examination of Mr. Chu to the BVI High Court which was set aside on 18th May 2022 for inter alia material non-disclosure. Immediately after the hearing of the appeal herein, Greenwood and Bailey withdrew their appeal against such decision. (“the Fresh Evidence”).

[152] This application was supported by the affidavit of Mr. Chu, in which he asserted that the evidence is highly material to the matters arising for determination on this appeal including whether the conduct by the liquidators is below the standard that may be expected of a reasonably competent liquidator and should therefore be removed. He further asserts that the Fresh Evidence is also material to his loss of confidence in the Liquidators.

[153] The Appellant contends that the Liquidators have deliberately caused the First Respondent to (i) incur an unnecessary liability to obtain funds to on-lend to PBM; and (ii) lent those funds in circumstances where it is highly probable that PBM will not be in a position to repay them and the security provided by PBM is worthless.

[154] Counsel for Mr. contends that it is in the interests of justice and in accordance with principle to permit him to lead such evidence before the Court of Appeal as:

- (i) such evidence could not have been obtained with reasonable diligence for use at the hearing of the appeal or of the application in the court below;

- (ii) would have had an important influence on the result of the proceedings below as it contains matters highly relevant to the exercise of the court's discretion to remove the liquidators and equally on the appeal;
- (iii) and the evidence is apparently credible being based on documents filed in the Hong Kong companies registry.

[155] The 1st 4th and 5th Respondents on the other hand say that the Fresh Evidence Application should be dismissed *in limine* for the following reasons:

- (a) That the **Ladd v Marshall** criteria are not satisfied;
- (b) The Fresh Evidence will not have a probable important influence on the result of the case. This Court therefore has no basis for exercising its discretion to admit the Fresh Evidence; and
- (c) Even if this Court were to apply the **Ladd v Marshall** criteria on a relaxed basis, there are no special circumstances or interests of justice that warrant the admission of the Fresh Evidence. The Fresh Evidence will not influence the relevant legal principles that this Court should apply when determining the Appellant's appeal.

[156] The appellant filed legal submissions in support of the application while the 1st 4th and 5th Respondents have filed joint legal submissions in opposition to the application. The 6th Respondent declined to file legal submissions and has represented that there is nothing further that it would need to address by way of evidence or submissions.

[157] It is settled law that that appellate courts have a discretionary power under its an inherent jurisdiction to permit a party to adduce further or fresh evidence that was not available at the hearing before the High Court. Both sides have agreed that the

applicable legal principles are those adumbrated by the seminal judgment in **Ladd v Marshall**³⁹ which prescribes the following criteria:

- (i) The evidence could not have been obtained by reasonable diligence for use at the trial.
- (ii) The evidence must be such that, if given, it would probably have had an important influence on the result of the case, though it need not be decisive.
- (iii) The evidence must be such that as is presumably to be believed; it must be apparently credible though it need not be incontrovertible.

[158] I have reviewed the applicant's written legal submissions together with the authorities filed in support thereof and I am satisfied that this application to adduce fresh evidence should fail for the following reasons:

Criteria 1 - Evidence could not be obtained with reasonable diligence at the time of the trial

[159] The Fresh Evidence relates to matters that arose only after the hearing before the High Court on 27th May 2021 and its decision on 24th November 2021. The Appellant contends that Messrs. Greenwood and Bailey made an ex parte application for examination of Mr. Chu to the BVI High Court which was set aside on 18th May 2022 for, *inter alia*, material non-disclosure and that immediately after the hearing of the appeal herein, Greenwood and Bailey withdrew their appeal against such decision. However, what is clear is that this judgment had been handed down 18th May 2022. It is apparent therefore that the Appellant could have obtained this with reasonable diligence and should have adduced this prior to the appeal hearing if it carried the weight and materiality which is now represented.

[160] With respect of Mr. Greenwood's false statement on oath the Appellant contends that it was made in June 2022 and the withdrawal of the appeal against findings of

³⁹ [1954] 3 AER 745.

material nondisclosure was first communicated to Mr. Chu's legal practitioners on 7th October 2022 (shortly after the appeal hearing on 3rd October 2022).

[161] However, it is apparent that the Appellant would have been aware of this alleged false statement since June 2022 and raised this as an issue in an affidavit that he filed in the Hong Kong proceedings in July 2022. It is apparent therefore that the Appellant has known about this alleged false statement by Mr. Greenwood for several months prior. It is apparent that this evidence did not carry the import and weight which is now ascribed because if he had considered that this was material or important evidence that would have supported his application for the removal of the Liquidators then he could clearly have provided this evidence with reasonable diligence and should have adduced it at the earliest possible opportunity.

Criteria 2 - Evidence would probably have an important influence on the result

[162] Although the evidence in respect of the Charge (filed in Hong Kong companies' registry further to the facility letter that was dated 21st October 2022, eventually discovered by Mr. Chu in early 2023)⁴⁰ may have well have arisen only after the hearing before the High Court on 27th May 2021 and its decision on 24th November 2021, I am not satisfied that there is any reasonable probability that this evidence would have had an important influence on the result of the lower Court or in this appeal for the following reasons:

- i. The appellant has advanced a number of bases which he contends give rise to his dire concerns about this transaction. First he says that, OSL had no assets other than its shareholding in PBM and it has never been a creditor of PBM. This means that it would have had to borrow monies

⁴⁰ The request to provide a copy of the facility was made on 1st March 2023 which was refused on 3rd April 2023.

to on-lend to PBM, thereby creating a liability that did not exist at the commencement of the liquidation to the detriment of the shareholders. He further says that the Liquidators have not disclosed the terms of such borrowing nor have they sought sanction for such lending. He expressed serious doubt that lending by OSL of money that it had to borrow itself would advance its liquidation or that BVI liquidators of a BVI company (OSL) should be allowed or empowered to borrow on behalf of a Hong Kong company (PBM) when it is clearly not an arm's length transaction and that PBM (as a Hong Kong company) is subject to Hong Kong jurisdiction.

- ii. The appellant further reiterated that the liquidators (as officers of the BVI Court) may have acted beyond the power and authority that may be granted or allowed by the BVI Court and he takes issue with the fact that the liquidators have acted in a way which takes advantage of PBM and which is intended to deprive him of his personal interest in an illegal, unfair and unreasonable manner.
- iii. However, the Liquidators submitted that the subject loan and security arrangements are an extension of an existing loan facility arrangement between OSL and PBM which was entered into on 30th November 2020. They further contend that this facility was previously sanctioned by the BVI Court which consequentially granted an order under seal. That application for sanction was apparently made on an *ex parte* basis and the Appellant was not a respondent.
- iv. Given that the Judge in the court below would have been fully aware of the underlying financing arrangements and was prepared to sanction the same on an *ex parte* basis the

Liquidators argue that it is incongruous that the court considering an extension of that existing loan facility would have come to any different conclusion. Moreover, the Liquidators have represented that these financing arrangements were put in place by the Liquidators to allow for PBM to pursue litigation against its 49% investee, BGA Holdings Limited (BGAH), namely by way of a petition to wind up BGAH (the HK Petition) conduct in facilitating the pursuit of the HK Petition was considered by the lower Court (and raised again in submissions before this Court) in reaching its decision not to remove them from office. The HK Petition resulted in a winding up order being made in Hong Kong against BGAH, which is currently subject to appeal.

v. The Appellant has taken issue with these submissions asserting in reply that the liquidators have themselves given “no evidence, but their lawyers have purported to give so-called evidence by way of submissions that the High Court had previously considered and sanctioned the Loan & Security issue on an ex parte basis. However, no Application, evidence or Order from the High Court has been produced in support of such bare assertion. Further, it is far from clear from the assertion itself what exactly and to what extent was actually sanctioned.”

vi. However, at paragraph 47 of the learned Judge’s Judgment he observed:

“What is clear from the judgment of Justice Kaye, QC (Ag) is that there was a finding that the PBM loans were in fact loans to BGA Holdings Limited. Based on the fact that substantial sums of money are owed to PBM and exercising their obligations as director of PBM, a petition was issued on 23rd August 2019 in

the Hong Kong Special Administrative Court seeking the winding up of that entity. The Court had been informed by the JLs when seeking sanction for funding of potential litigation by OSL's subsidiary. Emphasis added.

- vii. Given the way the court below considered and opined on these matters (see paragraph 63 of the Judgment) and given the findings herein, I am not satisfied that the appellant has advanced any basis upon which this court can conclude that the Liquidators have acted improperly and should be removed from office. In fact, at paragraph 10 of his submissions in reply, the appellant now contends that “[t]he issue before the Court is not whether there has been sanction of the actions of the liquidators but whether the circumstances and their conduct justify Mr. Chu’s lack of confidence in them.” The Appellant complains that this conduct is part of their modus operandi, to keep him in the dark notwithstanding that he is a 50% ultimate beneficial owner of OSL and PBM and would clearly be an interested party and further evidences the inequality of treatment by the liquidators of himself and Mr. Lau. He contends that the unreasonable refusal to provide him with a copy of the facility letter between OSL and PBM would probably add to the finding of bias or hostility against Mr. Chu, strengthening the basis for this finding and making it more probable that it would make a satisfactory ground for removal.
- viii. Looking at the factual context in the round, I am not satisfied that adducing of this evidence in the appeal could have any likelihood of influencing the decision of the lower court or indeed this Court. The matter in respect of which this fresh evidence is sought to be adduced was essentially an issue

litigated before the judge. Ultimately at the end of the financing arrangement tunnel is the HK Litigation in which the Liquidators seek to recover monies for the liquidation estate, which are alleged to have been misappropriated by the appellant. The Judge was satisfied that this was an outcome that the appellant would desperately wish to avoid and forestall. He clearly formed the view that the appellant's complaints that the Liquidators failure to consult with or share information relevant to that endeavor carried no weight since it is Mr. Chu's alleged misfeasance and misappropriations that the Liquidators are ultimately seeking to investigate and make financial recoveries in respect of, it stands to reason that the JLs do not want to give Mr. Chu knowledge and opportunities with which to frustrate the process. The judge therefore formed the view his purported loss of confidence was not reasonable.

- ix. Applying the dicta in **Mulholland and another v Mitchell**⁴¹ this fresh evidence is clearly not effectively decisive of the issue to which it is adduced and in fact "bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made" and ought not to be admitted on that basis.

[163] With respect to Mr. Greenwood's false statement on oath, the Appellant contends that this can be used to buttress his argument for the removal of the Liquidators. This may well be but that is not the test. When viewed against the full background of this appeal, I am also not satisfied this is evidence that would carry sufficient weight to support an argument that Mr. Greenwood or indeed the remaining Liquidators should be removed from office. It does not appear to be disputed that once Mr. Greenwood was informed was alerted to the false averment set out in his

⁴¹ [1971] AC 666.

affidavit filed in June 2022 in the Hong Kong proceedings, a further affidavit was filed in August 2022 in which he attempted to clarify his error. Moreover, and in any event, the lack of import of this erroneous statement is reflected in the fact that notwithstanding that the Appellant attempted to raise this issue in the Hong Kong proceedings, it is apparent that the Hong Kong Courts nevertheless made the order for Mr. Greenwood to be appointed as one of the liquidators of BGAH. I therefore cannot conclude that this is evidence which would have had any significant or material impact on the lower court's decision or indeed this Court's determination on the appeal.

- [164] I am similarly not persuaded that the discontinuance of the appeal against the order setting aside the order to examine the Appellant would likely have had an important influence on the result of the case. When viewed within the full contextual background, this minor matter could ultimately have little relevance. Indeed, I have some difficulty drawing the adverse inference which the appellant invites. It simply calls upon the court to speculate. In light of evolving legal landscape, the mere fact that the Liquidators have withdrawn their application for examination of the Appellant does not strengthen or reinforce their case on appeal.

Criteria 3 - Evidence must be credible

- [165] While I have no doubt that the material which is sought to be adduced satisfies this third limb it is not enough. The courts have consistently made it clear (as recently as 2022 in **Premier Experts London Ltd and another v Rajwani**⁴² that the **Ladd v Marshall** criteria are cumulative. They have all to be satisfied. It is fatal to the application to rely on fresh evidence if even one cannot be passed.
- [166] For the avoidance of doubt, I have considered whether in light of the overriding objective and in the interest of justice, the fresh evidence should be admitted, even though the **Ladd v Marshall** criteria cannot be satisfied. In my judgment it should not. Although the discretion to admit the evidence is wide and this court has the

⁴² [2022] EWHC 1188 (QB).

jurisdiction to admit the evidence even after the conclusion of the hearing and before the delivery of its judgment, I am guided by the dicta in **Mulholland v Mitchell**⁴³ which prescribes that in considering such an application an appellate court must and should have regard to the general undesirability of allowing that to be done. It is an exceptional order on appeal, because an appeal normally involves only a review of the judge's decision on the evidence given at the trial (a partial retrial with further evidence added is not a normal function of the Court of Appeal) and there ought to be finality in litigation.⁴⁴

[167] At page 680 of the judgment in **Mulholland v Mitchell**, Lord Wilberforce provided the following guidance:

“Negatively, fresh evidence ought not to be admitted when it bears upon matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted if some basic assumptions, common to both sides, have clearly been falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice. All these are only non-exhaustive indications; the application of them, and their like, must be left to the Court of Appeal. The exceptional character of cases in which fresh evidence is allowed is fully recognised by that court.” Emphasis added.

[168] Ultimately, the matter is one of discretion and degree.⁴⁵ I am not satisfied that refusing this application would be an affront to common sense or a sense of justice.⁴⁶ This is not a case where it can be argued that there was any deliberate falsification which formed the basis of the high court judgment. Neither is this a case where the Court of Appeal would be restrained from dealing with the reality of the case before if this purported fresh evidence were not admitted. Ultimately, the application advances no dramatic development or change in circumstances which

⁴³ [1971] AC 666.

⁴⁴ *Curwen v James and others* [1963] 1 W.L.R. 748, 755; *Jenkins v Richard Thomas & Baldwins Ltd.* [1966] 1 W.L.R. 476, 479, per Salmon L.J.; *Murphy v. Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023, 1027, 1028, 1030, 1031, 1035-6.

⁴⁵ See: *Murphy v. Stone-Wallwork (Charlton) Ltd.* [1969] 1 W.L.R. 1023 at 1036.

⁴⁶ See: *Swift Advances Plc v Ahmed and another* [2015] EWHC 3265 (Ch) at para. 26, per Norris J.

could change on the result of the case. Even if weighed in the balance, this evidence would ultimately not have impacted the final determination of this appeal.

[169] Rather it is clear that in the case of the discontinued appeal and Mr. Greenwood's erroneous affidavit evidence, there has been delay in furnishing this evidence for examination and consideration. The appellant had an opportunity to canvass these matters prior to the hearing of this appeal and they declined to do so. Moreover, the Appellant has provided no persuasive explanation as to why these particular issues are sought to be raised at this point, when judgment was to be handed down.

[170] It is clearly not in the interests of justice to adduce any further evidence at this late stage in the proceedings particularly in circumstances where the application had been heard months ago and judgment was pending. This appeal has already been fully and properly heard and having considered the evidence advanced, I am not satisfied that it is sufficiently significant or persuasive to have any influence on this Court's judgment.

[171] In my opinion, the situation in the present case cannot be regarded as exceptional and for these reasons set out herein, I am satisfied that this Application should be dismissed.

[172] Accordingly, I would make the following orders:

1. The appeal is dismissed.
2. The judgment and order of the court below dismissing the Removal Application and ordering costs in favour of the sixth respondent are affirmed.
3. The Respondents will have their costs of this appeal to be assessed, if not agreed by the parties within 21 days of this judgment.

4. The application to adduce further evidence is dismissed.

I concur.

Trevor Ward

Justice of Appeal

I concur.

Gerard Farara

Justice of Appeal

By the Court

Chief Registrar