

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 2015/0065

BETWEEN:

CHU KONG

Applicant

and

[1] OCEAN SINO LIMITED (IN LIQUIDATION)
[2] DAVID YEN
[3] CHAN PUI SZE (NICOLE)
[4] ROY BAILEY
[5] JOHN GREENWOOD
[6] LAU WING YAN

Respondents

Appearances:

Mr. John Carrington, QC, with him Mr. Richard Hacker, QC, and Ms. Reisa Singh for the Applicant

Mr. Mark Phillips, QC, with him Mr. Peter Ferrer, Ms. Marcia McFarlane, Ms. Megan Elms and Mr. Richard Parchment for the Fourth and Fifth Respondents

Mr. Philip Jones, QC, with him Miss Rosalind Nicholson, Mr. Daniel Warents and Mr. Renell Benjamin for the Sixth Respondent

The Second and Third Respondents not appearing

2021: May 27;
November 24.

JUDGMENT

[1] **WALLBANK, J. (Ag.):** This is the Court's judgment in respect of an application filed on 15th March 2021 by Mr. Chu Kong ('Mr. Chu') as Applicant ('the Application'). By this application, Mr. Chu seeks orders that the liquidators of a company called Ocean Sino Limited (in Liquidation) ('OSL') be removed from office and replaced with other liquidators. Mr. Chu also seeks an order that the liquidators should pay his costs of this application personally. Those liquidators are Respondents to the application, as is Mr. Lau Wing Yan ('Mr. Lau'), who was the original petitioner in these long running proceedings.

[2] The grounds for Mr. Chu's application were stated in his Notice of Application as being that:

"The Liquidators have displayed a total disregard of Mr. Chu's interests as: (i) a creditor (through his company CK Assets Limited) and (ii) an equal 50% contributory of OSL (and an indirect shareholder of PBM), by:

- (1) Damaging his interest in the joint venture business of Beibu Gulf, which represents the only investment of PBM, by issuing the Statutory Demand against Beibu Gulf, and later commencing the Hong Kong Petition;
- (2) Using his resources to deal with any unmeritorious accusations raised by Mr. Lau but objected by him, such as launching the Hong Kong Petition on the basis of Mr. Lau's preferred account of the treatment of the PBM Loan, even though it is directly contradicted by the 15/16 Dec 2015 Resolutions which Mr. Lau signed;
- (3) Refusing to consider or pursue the Summary Disposal Proposal without any good reason, which would have brought the winding up of OSL to an immediate close without the need for further litigation and with a significant saving of time and cost.

Accordingly, the Liquidators have failed to act independently or properly discharge their duties as Liquidators and/or that their conduct is below the standard that may be expected of a reasonably competent liquidator; that they are unable to act independently given their siding with Mr. Lau's interests; and that as a result Mr. Chu as 50% contributory has completely lost [sic] trust and confidence in the Liquidators."

[3] The Application was brought pursuant to section 187 of the **Insolvency Act, 2003**¹ ('the Act'). This provides:

"187. Removal of liquidator.

(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

¹ No. 5 of 2003.

(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.

(2) An application to the Court to remove the liquidator of a company may be made by

(a) the creditors' committee;

(b) a creditor or member of the company; or

(c) the Official Receiver.

(3) Where the Court removes a liquidator from office under this section

(a) if, following his removal, there is at least one liquidator remaining in office, the Court may appoint an eligible insolvency practitioner as liquidator in his place; or

(b) if the liquidator removed was the sole liquidator of the company, the Court shall appoint the Official Receiver or an eligible insolvency practitioner as liquidator in his place.

(4) On the hearing of an application under this section, the Court may make any interim or other order it considers fit."

[4] In this case, Mr. Chu asserts standing to make this Application on the basis that he is a member of OSL, in accordance with to section 187(2)(b). All the Respondents accept that Mr. Chu has such standing. Mr. Chu appears to have dropped his initial reliance upon CK Assets Limited, which he appears to have done to be able to assert that he is a creditor.

[5] Mr. Chu relies upon sections 187(1)(a)(ii) and 187(1)(b) to assert that the liquidators have breached their duties and that the liquidators' conduct of the liquidation is below the standard that may be expected of reasonably competent liquidators, and/or that the liquidators have an

interest that conflicts with their role as liquidators, and/or that there is some other reason they should be removed as liquidators.

- [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.
- [7] Before considering the basis of Mr. Chu's Application, and the opposition thereto, it is apt to set out some of the background. At risk of including some repetition, I can do no better than refer to narrative explanations given in previous judgments, first of this Court, which made certain findings of fact after a plenary trial, and of the Judicial Committee of the Privy Council (the 'Privy Council') which reviewed and upheld that decision.
- [8] OSL was put into liquidation by an order of this Court dated 28th July 2017, upon the application of Mr. Lau. Mr. Chu strongly resisted the winding up petition. The winding up petition was heard over six days in May and June 2017 before Justice Roger Kaye, QC (Ag.). Justice Kaye, QC (Ag.) introduced the Court's judgment as follows:

"[1] ... OSL was incorporated as a BVI company on 6 November 2009 with an authorised share capital of 50,000 US\$1.00 shares. The shares were allotted to the two individual parties to these proceedings, Mr. Lau Wing Yan ("Mr. Lau") and Mr. Chu Kong ("Mr. Chu") who were the sole shareholders and directors. The principal ground on which the application is based is that the company is deadlocked (as is common ground) at both shareholder and director level. Mr. Jones QC, on behalf of Mr. Lau, also however, relies on additional grounds of loss of trust and confidence in Mr. Chu. Dr Wong SC, on behalf of Mr. Chu opposes the application.

[2] The case has become a cause célèbre between these two individuals. OSL is the sole shareholder of PBM Asset Management Limited ("PBM"), a Hong Kong company incorporated in December 2009. Mr. Lau and Mr. Chu again are its sole directors. It is common ground that apart from owning PBM, and apart from PBM owning 49% of the shares in a ship operating group, as described below, neither company carries on any separate corporate activities or operations.

[3] The fundamental complaint of Mr. Lau is that he and Mr. Chu have fallen out, in the words of Mr. Jones QC on his behalf, "in a pretty spectacular way", with the result that OSL (and consequently PBM) is deadlocked between him and Mr. Chu at both board and shareholder level. The two cannot possibly get on and the only reasonable outcome is to wind up the affairs of OSL.

[4] Dr Wong SC, on behalf of Mr. Chu, resists and actively opposes the application for a liquidation order. He (on behalf of Mr. Chu) blames Mr. Lau for the fall-out and, in any event, says no liquidation should be ordered on the grounds that alternative remedies exist (such as buy-out as well as other possibilities) which Mr. Lau is unreasonably refusing to pursue. Further he argues that the effects of a liquidation of OSL would filter down to and cause irreparable damage to an otherwise solvent operating large group of ship owning companies. (By the same token he submits it is not permissible either to look at the affairs of the subsidiaries or to take post application events into consideration, leastways not those adverse to the making of a liquidation order since that is a remedy of last resort.)

[5] Mr. Jones's riposte is that it is Mr. Chu who is guilty of misconduct and who ultimately caused the deadlock which is, in any event, amply demonstrated by the fact that by the time proceedings had commenced in May 2015 there were already 7 sets of proceedings between the parties (5 commenced by Mr. Chu, 2 by Mr. Lau) in either Hong Kong or the BVI. By the time of the hearing these appear to have increased to 15 (see below). The suggested alternative remedies are simply, in the circumstances, unreal, unreasonable, and impractical. Moreover, there is no proven likelihood of damage from the liquidation that is not experienced also by Mr. Lau as an equal shareholder in OSL. In any event, Mr. Chu's motive for resisting the liquidation of OSL is obvious: since these proceedings commenced Mr. Chu and, it appears, members of his family, have, since the commencement of proceedings, secured control of the ship operating group and excluded Mr. Lau. Attempts by the parties historically to resolve their differences by restructuring their affairs (all dealt with below) have also come to naught, due to Mr. Chu's obstructive tactics and refusal to provide information."²

[9] Justice Kaye, QC (Ag.) found:³

"I have no hesitation in finding that OSL (and thereby PBM) is in a completely hopeless state of irretrievable deadlock at board and shareholder level. Having seen and heard the two of them in the witness box and having regard to the evidence as a whole I can see absolutely no real prospect of Mr. Lau and Mr. Chu ever getting on together again in the future. They are hardly on speaking terms. (save perhaps with a grimace). It is a true irretrievable breakdown. All trust and confidence between them has gone."

The learned judge ordered OSL to be wound up.

[10] To give effect to the judgment, four liquidators were appointed to act on a joint (but not several) basis. Two were based in this jurisdiction, the Territory of the Virgin Islands (the 'BVI'), and two were based in Hong Kong, to reflect the anticipated two centres of gravity of the liquidation work. To adopt an even-handed approach, each of Mr. Lau and Mr. Chu was given the opportunity to nominate two liquidators (one from the BVI and another from Hong Kong). They

² BVIHCM2015/0065 Lau Wing Yang v (1) Ocean Sino Limited, (2) Chu Kong (unreported, delivered 29th June 2017) (Kaye, QC J (Ag.)).

³ At paragraph [86].

did so. Mr. Lau nominated Mr. Bailey and Mr. Yen and Mr. Chu nominated Mr. Greenwood and Ms. Chan.

[11] Mr. Chu appealed the winding up order. On 17th January 2020 the Court of Appeal overturned this Court's judgment and discharged the winding up order. Mr. Lau appealed to the Privy Council. On 12th October 2020 the Privy Council unanimously upheld Mr. Lau's appeal⁴ (the 'PC Winding-Up Appeal'). The winding up order was reinstated.

[12] These appeals concerned mainly interpretation of points of law, but, as we shall see, certain observations of fact by the Privy Council have a bearing on matters before the Court here.

[13] The first such observation, by Lord Briggs JSC,⁵ was that Mr. Chu and Mr. Lau were the only directors of both OSL and PBM.

[14] Lord Briggs JSC also remarked:

"OSL and PBM were Mr. Lau's and Mr. Chu's corporate vehicles for a joint venture with a state-owned entity of the Peoples Republic of China (PRC). The joint venture company was Beibu Gulf Ocean Shipping (Group) Ltd (Beibu Gulf), in which PBM held 49% of the shares. The remaining, and controlling, 51% was held by the PRC's corporate vehicle Beibu Gulf Holding (Hong Kong) Co Ltd (PRC Holdco). Both Mr. Lau and Mr. Chu were executive directors of Beibu Gulf, but a majority of the directors were appointees of PRC Holdco. Both Beibu Gulf and PRC Holdco were Hong Kong companies, and the intended business of Beibu Gulf was ship-owning, commodity trading and supply chain services all for dry bulk commodities."⁶

[15] At paragraph 27 Lord Briggs JSC remarked that Mr. Chu was Beibu Gulf's managing director and that:

"An important plank in Mr. Lau's case about loss of trust and confidence in Mr. Chu arose from Mr. Chu's alleged failure to make that financial information available to Mr. Lau and his advisers, an allegation which the judge [Justice Kaye, QC (Ag.)] upheld."

[16] At paragraph 29, Lord Briggs JSC stated further:

"In January 2016 PRC Holdco sold its interest in Beibu Gulf to Bright Good (Asia) Ltd (BGAL) which in February 2016 sub-sold a 6% stake in Beibu Gulf to Polyrise Team Ltd

⁴ Lau v Chu (PC) [2020] 1 WLR 4656.

⁵ At paragraph 1.

⁶ At paragraph 2.

(Polyrise). Mr. Lau claimed, and the judge found, that Mr. Chu and associates beneficially owned both BGAL and Polyrise, which then combined at shareholder level in Beibu Gulf to remove Mr. Lau as a director, and then to sell its ship chartering and commodity trading businesses to Cosmic Glory Ltd, a company beneficially owned by Mr. Chu's son. The judge held that the acquisition of control of Beibu Gulf by BGAL and Polyrise, without disclosure of his interest, may arguably have amounted to a breach by Mr. Chu of his fiduciary duty to PBM and OSL."

This is an important passage, as it suggests the possibility of a motive on the part of Mr. Chu to obstruct further investigations and any procedures that could result in Mr. Chu having to account and eventually possibly restore value ultimately to OSL, in respect of assets appropriated to his own and his own family's benefit to the exclusion of Mr. Lau. As we shall see, that is precisely the motivation the liquidators say lies behind Mr. Chu's present application.

- [17] Then at paragraph 67 Lord Briggs JSC observed, in a passage upon which the liquidator Respondents place particular reliance:

"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 it) pursued by a liquidator."

I pause here to note that the share split proposal mentioned in this passage is not necessarily identical to Mr. Chu's 'Summary Disposal Proposal', although it certainly is a very similar forerunner to it. It bears noting that Mr. Chu has, from an early point, advocated a simple division of shareholding interests between himself and Mr. Lau at an intermediate level in the relevant corporate structure, as a resolution of the differences between Mr. Lau and himself. The effect of such a split would be to leave out of further consideration and investigation the allegations against Mr. Chu of misfeasance and breach of duty referred to by Lord Briggs JSC. It would allow Mr. Chu to draw a veil over any such wrongdoing and move on with the proceeds of any such misfeasance and breach of duty.

- [18] At paragraph 75 of the Privy Council's judgment, in a separate but concurring judgment delivered by Lady Arden JSC, some further pertinent background was relayed:

“OSL, a 50:50 company of which Mr. Lau and Mr. Chu were the sole directors and shareholders, had been established on the basis that they would both participate in the management of OSLs business ventures. OSL had a wholly owned subsidiary, PBM. This company made loans of approximately \$36.34m (and a capital contribution of approximately \$9.8m) to Beibu Gulf Ocean Shipping (Group) Ltd (BGL) in which it held 49% of the shares, to buy ships but the orders for the ships were cancelled and the money was not used for this purpose. Mr. Lau wanted the loans to be repaid, but Mr. Chu wanted to leave the money in BGL. The parties tried to agree terms for separation of their interests, but the negotiations failed. Mr. Chu refused to give Mr. Lau financial information about BGL to evaluate any proposal for separation of his interest from that of Mr. Chu. Mr. Chu, without consulting Mr. Lau, approved the making by BGL of loans to its parent company, Beibu Gulf Holding (Hong Kong) Co Ltd. Mr. Chu claimed that he was in charge of PBM. He had also been appointed managing director of BGL. Mr. Chu extracted monies from PBM without any explanation to Mr. Lau. He procured the removal of Mr. Lau as a director of subsidiaries of BGL. He appeared to be interested in businesses which competed with BGL or which should have been acquired for its benefit.”

[19] Lady Arden JSC thus too was attuned to the relevance of possible impropriety by or at the behest of Mr. Chu in the corporate structure below OSL.

[20] The Board (of the Privy Council) in this case consisted of Lord Hodge DPSC, Lord Briggs, Lady Arden, Lord Leggatt, Lord Burrows JJSC. Their decision was unanimous.

Mr. Chu's position

[21] The gravamen of Mr. Chu's present complaint is as follows.

- (1) Mr. Chu is one of two 50% shareholders in OSL, with Mr. Lau being the other 50% shareholder. The four liquidator Respondents to this Application were Mr. Yen, Ms. Chan, Mr. Bailey and Mr. Greenwood.
- (2) OSL is a single asset holding company which has never carried on business operations of any kind. It merely holds the single issued share in a Hong Kong company named PBM Asset Management Limited ('PBM'). PBM in turn holds a 49% shareholding in a Hong Kong joint venture company named BGA Holdings Limited, which can be referred to for convenience as 'Beibu Gulf'.
- (3) Despite making his concerns clear, Mr. Chu says the liquidators have persistently taken a wholly partisan approach against him, favouring Mr. Lau as the funder of the liquidation, including to commence proceedings in Hong Kong by relying entirely on Mr.

Lau's instructions and that the liquidators have simply increased the costs involved in the present liquidation.

- (4) Mr. Chu says he believes Mr. Yen is (or was at the time Mr. Chu made his application) taking a lead role in the liquidation and that Mr. Yen's conduct here resonates with his conduct in other, unrelated, liquidation proceedings in Hong Kong which attracted criticism from a Hong Kong judge. The nub of that criticism was that the judge considered that Mr. Yen, and one or more other liquidators up to then holding office with him, had created work and profits for themselves and had shown bias, such that the Hong Kong court had lost confidence in them.
- (5) The first concrete example of conduct Mr. Chu criticizes in the present case is one he has raised previously in these proceedings. Indeed, he adopts what he said in three previous affidavits he had filed, a seventh, a ninth and a twelfth affidavit. It is that the liquidators have failed to consider or pursue what he has called the 'Summary Distribution Proposal' without good reason. Mr. Chu urges that this is the simplest and most cost-effective solution which would bring the liquidation to an immediate close, avoiding further litigation, and a significant saving in time and costs. The essence of this is that the liquidators of OSL should simply split OSL's shareholding in PBM and allocate equal parts to each of Mr. Chu and Mr. Lau. Mr. Chu proposed this as far back as 8th September 2017. Mr. Chu says that an obvious benefit of this would be that when he and Mr. Lau should become direct shareholders in PBM, they can split the 49% shareholding in Beibu Gulf amongst themselves, so that Mr. Lau can take whatever actions he sees fit in his own name. Instead, says Mr. Chu, the liquidators chose to cause PBM to call in a loan allegedly payable by Beibu Gulf to PBM and for PBM to issue a statutory demand to Beibu Gulf and if the demand should not be paid in full, to petition the Hong Kong court to wind up Beibu Gulf. Mr. Chu points out that the liquidators had shortly before then entered into a funding agreement with Mr. Lau, dated 27th September 2017. Mr. Chu also contends that the liquidators had determined to have PBM issue the statutory demand and subsequent petition proceedings, furthering Mr. Lau's agenda, without investigating Mr. Chu's account of the PBM loan and the circumstances. Mr. Chu contends that the liquidators took the position that they did not have sufficient information to evaluate the realisable value of PBM and thus would not at that stage be in a position to pursue the Summary Distribution Proposal. Mr. Chu contends that there are various fundamental difficulties with the liquidators' intended course of action to pursue Beibu Gulf for payment of the alleged debt. These include

that it ignores the terms of an 'Acquisition Agreement' which Mr. Chu says had been entered into to resolve disputes, with the full participation and consent of Mr. Lau, which would see the PBM loan set off against a purchase price in respect of two vessels, as also evidenced by a board of directors' resolution of Beibu Gulf, signed by Mr. Lau, dated 15th and 16th December 2015.

- (6) The second accusation Mr. Chu makes is that the liquidators have been damaging his interest in Beibu Gulf by causing PBM to issue the statutory demand against Beibu Gulf and later commencing the Hong Kong winding up petition against it. Mr. Chu says that Beibu Gulf is resisting the petition. This has served to rack up fees and expenses, which the liquidators have been treating as fees of the liquidation, although these costs have in large part been incurred outside the scope of the liquidators' functions as liquidators of OSL. The liquidators have claimed more than US\$3.2 million so far in fees, costs and expenses, with extremely limited progress in the liquidation of OSL itself. Most of these fees could have been avoided if only the liquidators had adopted Mr. Chu's Summary Distribution Proposal.
- (7) The third accusation of Mr. Chu is that 'there is a strong inference, if not the only reasonable inference', that the liquidators have been unduly influenced by or have been favouring Mr. Lau. Mr. Chu seeks to derive such inferences from the following:
 - (i) The liquidators applied *ex parte* without notice to Mr. Chu for the Court's approval of their funding agreement with Mr. Lau, resorting to what Mr. Chu calls 'various mischaracterisations' in their application;
 - (ii) The liquidators consistently overlooked illogical aspects or inconsistencies in Mr. Lau's case;
 - (iii) The liquidators rushed to commence the Hong Kong winding up petition against Beibu Gulf while Mr. Chu's appeal against the OSL winding up order was pending before our Court of Appeal, without informing the Hong Kong court of this;
 - (iv) In stark contrast with the liquidators' treatment of Mr. Lau, the liquidators have not shared proper information with Mr. Chu on the progress or expenses of the liquidators, apart from, at most, documents in the court files;
 - (v) Mr. Chu has been 'kept in the dark' as to the strategy or progress of the liquidation, whilst his resources were being used to deal with any unmeritorious accusation raised by Mr. Lau but objected to by Mr. Chu.

- [22] In support of his application, Mr. Chu relies upon his Thirteenth Affirmation and Fourteenth Affirmation, filed in response to the First Witness Statement of Mr. Greenwood, as well as evidence he filed previously, being his Seventh, Ninth and Twelfth Affidavits and an Affidavit dated 27th November 2019 in support of a previous application he filed seeking a stay of Mr. Lau's winding up petition.
- [23] At this point it is appropriate to mention that by the time the application was heard, two of the named Respondent liquidators had already resigned. These were the two Hong Kong based liquidators, Mr. Yen and Ms. Chan, leaving Mr. Bailey and Mr. Greenwood in place. Ms. Chan resigned on 13th November 2020 and Mr. Yen resigned on 4th December 2020, with effect from 7th January 2021. Mr. Chu does not accept that they resigned effectively and complains that this Court's prior permission had not been sought for them to do so, nor had he been consulted. Nonetheless, upon the hearing of the present application, Mr. Chu, through his Counsel, treated Ms. Chan and Mr. Yen as no longer liquidators of OSL. I will do so too.
- [24] Mr. Chu *referred* to certain other procedural and factual matters. He submitted, through Counsel (these are not to be taken as findings of the Court) that:
- (1) On 5th December 2017, Mr. Chu filed an Application for directions concerning the conduct of the liquidation ('First Directions Application'). This was dismissed by the High Court on 26th March 2018 on (Mr. Chu contends) purely procedural grounds, and that decision was upheld on appeal by the Court of Appeal on 11th December 2018. Mr. Chu was granted conditional leave to appeal this decision to the Privy Council ('PC Directions Appeal'). As was made clear to the Privy Council on the hearing of the PC Winding-Up Appeal, the PC Directions Appeal remained in abeyance pending a final decision on whether the winding-up order would stand, and Mr. Chu reserved the right to proceed with it if the Privy Council decided to restore the winding-up order. The Privy Council did not express any criticism of this approach.
 - (2) In April 2018, the liquidators filed an application for approval of their remuneration. Upon Mr. Chu's submission that the Court should not approve remuneration without being aware of the state of the liquidation, the Court ordered that the liquidators should provide a report on the progress of the liquidation by 6th July 2018. This report was not made

available to Mr. Chu by Order of this Court on the Application of the liquidators, and Mr. Chu has never seen the report.

- (3) Mr. Chu filed a section 273 Application on 27th November 2019 challenging the manner in which the liquidators were conducting the liquidation ('Second Directions Application'). On the same date he filed an application for a stay of the winding-up pending the delivery of the decision of the Court of Appeal on his appeal against the winding-up order. In the event, the hearing of both applications was overtaken by the delivery of the Court of Appeal judgment which set aside the winding-up order. As the winding-up was at an end, neither application could be (or was) heard, and the Second Directions Application was formally withdrawn by Mr. Chu.
- (4) It is important to note the circumstances surrounding the appointment of the four Joint Liquidators. This was very much a compromise position arrived at by the High Court so as to allow each of the interested stakeholders in OSL (i.e. its two shareholders) to have two of their nominees appointed as liquidators. However, the current position is that there are only two liquidators, both based in the British Virgin Islands; notwithstanding that the true centre of the liquidation is clearly Hong Kong. It is of considerable concern to Mr. Chu that the remaining BVI liquidators have simply sat back following the purported resignation of their Hong Kong co-liquidators and taken no steps to approach the Court for directions as to whether or how the resulting vacancies should be filled. The reasons for this are wholly unexplained by Mr. Greenwood.
- (5) Subsequent to their appointment, the liquidators caused themselves (apart from Mr. Bailey) to be appointed as directors of PBM, and then removed Mr. Chu and Mr. Lau as the directors of that company. Within months of their appointment, in December 2017, they caused PBM to issue a statutory demand against Beibu Gulf, in respect of non-payment of an allegedly outstanding shareholder loan. They then, two years later in August 2019, caused PBM to commence proceedings for the winding up of Beibu Gulf in Hong Kong based in part on that statutory demand. Beibu Gulf is actively defending those winding-up proceedings. These steps were taken notwithstanding the provision by Mr. Chu of information to the liquidators that shows that the alleged debt had, *inter alia*, in fact been compromised since December 2015 and that Mr. Lau had already commenced other proceedings asserting a different claim which is wholly inconsistent

and irreconcilable with a claim that the loan was outstanding. It is surely no coincidence that these actions suit the strategy of Mr. Lau who funds the liquidators and have been undertaken in the face of frequently expressed concerns by Mr. Chu. The timing of the commencement of the Hong Kong winding up proceedings against Beibu Gulf (i) immediately after the hearing of the appeal against the winding-up order and at a time when judgment on the appeal was awaited and (ii) after almost 2 years of inactivity, was in itself highly troubling and remains completely unexplained although this point has been made four square by Mr. Chu a number of times.

- (6) Mr. Chu actually proposed an alternative strategy for the liquidation which would be more efficient and cost effective and would maintain neutrality between him and Mr. Lau (who have multiple ongoing court matters in Hong Kong concerning the separation of their previously jointly run and owned businesses), which he refers to in evidence as the 'Summary Distribution Proposal'. The liquidators have not only failed to give proper consideration to this proposal, but they have also refused to explain properly why they have not done so. Instead, they have 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 winding up petition were to be dismissed. All this has been done deliberately without the sanction of the BVI Court and without, to the knowledge of Mr. Chu, even informing the BVI Court.
- (7) Almost four years and over US\$3.2million in remuneration into the solvent liquidation of OSL as of January 2020, Mr. Chu is not aware of anything else that the liquidators have done to justify their very substantial time costs. The liquidators themselves cannot even say whether OSL, a one asset company, is solvent.
- (8) Mr. Chu has justifiably criticized the liquidators for being under a misapprehension as to the limits of their powers and 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.
- (9) The evident animosity of the liquidators towards Mr. Chu can be observed clearly from the terminology used in Mr. Greenwood's First Witness Statement. At paragraphs 13 and 23 he describes Mr. Chu's challenges to the liquidators' actions and inactions made

in the High Court as vexatious and abuses of process although no such finding has been made by any court. It is difficult to see how he could make 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 matter was worthy of 'serious consideration'; (ii) the Second Directions Application was withdrawn by Mr. Chu after the decision of the Court of Appeal setting aside the appointment of the liquidators; (iii) the Court of Appeal upheld Mr. Chu's appeal (even though this decision was then overturned by the Privy Council, the Privy Council nevertheless indicated that Mr. Chu's submissions raised an arguable case⁷); and (iv) Mr. Chu's Stay Application was simply never heard by the Court of Appeal as it was overtaken by delivery of the judgment.

- (10) At paragraph 14 of his First Witness Statement, Mr. Greenwood refers to Mr. Chu placing 'obstacles' in the path of the liquidators in carrying out their tasks. No particulars are provided. The liquidators seem to think that Mr. Chu's demanding information from the liquidators (information that they have refused to provide despite Mr. Chu having a legitimate interest in the liquidation) amounts to placing 'obstacles'.
- (11) Mr. Greenwood, at paragraphs 43-47 of his First Witness Statement, seeks to answer Mr. Chu's complaint that the liquidators have not properly considered his Summary Distribution Proposal by saying that they have not been provided with sufficient information by Mr. Chu. Mr. Chu offers two irrefutable responses to this. First, the logical inference is that they have been heavily dependent on Mr. Lau's version of events while Mr. Lau has been funding them (no details of any objective investigation by the liquidators have been provided and Mr. Chu is not aware of any having been undertaken). However, Mr. Chu references a recent (April 2021) very damning finding by the Hong Kong courts that Mr. Lau had fabricated evidence to further his own ends. This, it is submitted, should be a red warning flag where the liquidators have chosen to place such heavy reliance on Mr. Lau as their primary source of information. Secondly, the deliberate pursuit of the Hong Kong winding-up proceedings is fundamentally inconsistent with Mr. Chu's proposal and is effectively a rejection of this proposal. In so doing, they have acted perversely and contrary to their duties under section 185 of the

⁷ Lau v Chu (PC) [2020] 1 WLR 4656 at paragraph 65 (Lord Briggs JSC).

Act and contrary to their duty to exercise reasonable skill and care in the conduct of the liquidation.

- (12) Mr. Chu in any event denies Mr. Greenwood's statements about the lack of provision of information.
- (13) Mr. Greenwood's First Witness Statement at paragraphs 48-55 purport to answer Mr. Chu's complaints about the liquidators' conduct of the liquidation. Notably, however, Mr. Greenwood is silent about whether any sanction was sought from the BVI Court for the commencement of the Beibu Gulf winding-up proceedings in Hong Kong and, as Mr. Chu points out, the liquidators have never provided to the Court (or to him) a copy of the Instructions to the Hong Kong Counsel on whose advice they have purported to act in bringing the Hong Kong petition. Mr. Chu previously pointed out that the liquidators had refused his request before the appointment of legal advisers, that they should 'formulate the outline of the scope of work for the legal advice, seek fee quotations from different law firms or counsel and submit to the board of directors the qualifications and due diligence information of such law firms and counsel for consideration and discussion before the board of directors resolve on an appointment.' It is submitted that these steps were a sensible – indeed necessary – part of the process of instructing lawyers, but rather than taking this course, the liquidators chose to adopt a stratagem of appointing PBM's legal advisor directly *qua* liquidators of OSL, thereby bypassing the Board of PBM.
- (14) Mr. Greenwood seeks to argue that Mr. Chu conflates the role of the liquidators and that of directors of PBM. However, these are indistinguishable where the liquidators were only able to act as directors of PBM by virtue of their appointment as liquidators of OSL and have purported to conduct the liquidation of OSL through the exercise of the powers conferred on them as directors of PBM. They have concentrated their actions exclusively at the level of the subsidiary, whilst ignoring the affairs of the company that was actually placed in liquidation by the Court and of which they were appointed liquidators. Indeed, as Mr. Chu points out the liquidators themselves claim time costs and disbursements e.g. for legal advice spent in undertaking activities as directors of PBM as remuneration under the liquidation of OSL. This point is made four-square in Mr. Chu's evidence but has never been answered by the liquidators.

- (15) The very manner of appointment of the directors of PBM highlights Mr. Chu's concerns as to how the liquidation has been conducted to date. Mr. Yen, apparently acting alone, passed a resolution in the name of OSL for the appointment Ms. Chan and Golden Flame Limited as additional directors of PBM. The relevant statutory entries in Hong Kong were then signed by Mr. Lau. All this was done without the knowledge of Mr. Chu.
- (16) So too do the circumstances of the conclusion of the funding agreement with Mr. Lau. The Liquidators signed the funding agreement with Mr. Lau without informing Mr. Chu, even though there was a meeting of two of the liquidators, Mr. Lau and Mr. Chu in their capacities as directors of PBM on that same day, 27th September 2017. The Liquidators then sought approval of the funding agreement *ex parte* in January 2018. Notwithstanding the above, Mr. Yen complained that Mr. Chu failed to agree to provide funding on 9th October 2017. The strategy upon which the liquidators have embarked (of seeking to investigate the 'directors [of OSL] and the wider group structure'⁸ suggests that the liquidators have discussed their wider strategy and funding requirements with Mr. Lau alone, while keeping Mr. Chu in the dark. This lack of even-handed treatment has also been manifested in the fact that the liquidators have shared with Mr. Lau the information provided by Mr. Chu but not *vice versa*.
- (17) Mr. Greenwood is equally reticent about the circumstances under which two of the liquidators appointed by the Court, moreover the two who actually operate out of Hong Kong, resigned as of January 2021, abruptly and without prior warning to Mr. Chu., and without informing the BVI Court which had made the Order for the appointment of four liquidators, of whom two were to be from Hong Kong.

[25] The following is a summary of Mr. Chu's legal submissions.

[26] Mr. Chu's Counsel submitted the following as the applicable legal principles:

- (1) The jurisdiction to remove the liquidator is found in section 187 of the Act, which (together with Insolvency Rule 175) gives the Court the discretion to remove a liquidator upon the application of an eligible person (within the categories in s.187(2)) upon the grounds stated in either section 187(1)(a) or (b).

⁸ Twelfth Affidavit of Mr. Chu at paragraph 34.

- (2) Under rule 175(4), the liquidators were supposed to send to the Official Receiver a statement providing details of the remaining assets of the company in liquidation. There is no evidence that this was done.
- (3) Under section 187(4), where the Court exercises its discretion to remove all current liquidators, it shall appoint the Official Receiver or another insolvency practitioner as liquidator.
- (4) The corresponding section in the English Insolvency Act 1986 is section 108(1), under which the Court has the discretion to remove a liquidator 'for cause shown'. In light of the width of the reasons stated in section 187(1), especially section 187(1)(b)(iii), 'that for some other reason he should be removed as liquidator', there is no real difference in the substance of the English and BVI provisions.
- (5) In **Brilla Capital Investment Master Fund SPC Limited et al. v John Greenwood et al.**,⁹ the Court of Appeal considered the application for removal of liquidators under the Court's inherent jurisdiction and applied a three-step process:
 - (i) Whether the applicant has standing to apply for the removal of the liquidator;
 - (ii) Whether due cause has been shown for the removal of the liquidator; and
 - (iii) Even if (i) and (ii) are proven, whether the Court should exercise its discretion and remove the liquidator.

A similar process should also be applied in the exercise of the statutory jurisdiction under section 187.

- (6) Section 187(2) deals with standing. An application for removal may be made by either a creditor or a member under section 187(2)(b). In **Deloitte & Touche A.G. v Johnson et al.**,¹⁰ the Privy Council held that standing was a matter of (i) jurisdiction, as determined by the statutory formulation of persons entitled to make the application; and (ii) judicial

⁹ AXAHCVP2013/007 (unreported, delivered 24th November 2014).

¹⁰ [1999] 1 WLR 1605 at page 1611B-D (Millet LJ).

restraint, a consideration of whether the Applicant is a proper person to so do, and stated that:

“[w]here the court is asked to exercise a statutory power, therefore, the applicant must show that he is a person qualified to make the application. But this does not conclude the question. He must also show that he is a proper person to make the application.”

- (7) In **Deloitte**,¹¹ the Privy Council further held the cases show that ‘the Court has consistently regarded the creditors (in the case of an insolvent liquidation) and the contributories (in the case of a solvent liquidation) as the proper persons to make the application ...’.
- (8) At the second stage, the Court should in the context of the BVI legislation, substitute section 187(2) for the expression ‘due cause’ although this is not likely to make much difference in practical terms. The jurisdiction is deliberately made wide due to the role and function of liquidators. In **Deloitte**,¹² the Privy Council stated ‘[The cases] show that impropriety is not necessary; that it is sufficient to satisfy the court that the removal of the liquidator will be for the general advantage of the persons interested in the liquidation.’ In the context of the BVI Insolvency Act, the first part of this statement must be read as being in relation to section 187(2)(b)(iii) as personal misconduct may be relied on in the context of the other grounds for removal under section 187(2).
- (9) In **Nam Tai Electronics Inc. v. David Hague et al.**¹³ Matthew, JA. at paragraph [40] of the unanimous judgment of the Court, stated the test conversely: ‘The governing principle to be gleaned from the authorities is that the Court must satisfy itself on the evidence that the retention of the liquidator would be against the interest of the liquidation.’ Interests of the liquidation mean the ‘real, substantial, honest interests of the liquidation and the purpose for which the liquidator was appointed’: **Re Adam Eyton, Limited**.¹⁴ Although this decision pre-dated the enactment of section 187, it is likely that the same overarching test will be applied to the exercise of the Court’s discretion under that section.

¹¹ [1999] 1 WLR 1605 at page 1610E (Millet LJ).

¹² [1999] 1 WLR 1605 at page 1610D (Millet LJ).

¹³ BVIHCVAP2000/0021 (unreported, delivered 26th March 2001).

¹⁴ (1887) 36 Ch D 299, 306 (Bowen LJ).

- (10) Apart from the specific statutory grounds for removal under section 187(2), the determination whether there is 'some other reason'/'due cause' for removal is fact sensitive: **AMP Enterprises Ltd v Hoffman et al.**¹⁵ The Court will consider all the circumstances, including the fact that liquidators act jointly¹⁶ in coming to a conclusion whether retention of the liquidators is against the interest of the liquidation.
- (11) Among these considerations are:
- (i) Whether the liquidators have complied with their duty to proceed with the liquidation in an expeditious and efficient manner: **Brilla**,¹⁷ which states that

“[t]he authorities establish that a liquidator is required to proceed with the liquidation of the company in an expeditious and efficient manner. It is not enough to adopt a complacent attitude and wait for things to happen. He must do all that is reasonably possible to make things happen. In short, he must carry out his duties with vigour”;
 - (ii) Whether the liquidators have failed to conduct reasonable independent investigations into the company's affairs: **Independent Cement and Lime Pty Limited v Brick and Block Company Ltd (in Liquidation)**;¹⁸
 - (iii) Whether there has been loss of impartiality on the part of the liquidators: **Fielding v Seery et al.**;¹⁹
 - (iv) Whether there has been a reasonable loss of confidence in the liquidators: **Brilla**;²⁰
 - (v) Whether there are circumstances, even through no fault of the liquidator, by which he is perceived to be biased: **Re Gordon & Breach Science Publisher Ltd.**²¹

¹⁵ [2003] BCLC 319 at paragraph [21] (Neuberger J).

¹⁶ *Re Metropolitan Bank v Jones* (1876) 2 Ch D 366 at 368 (Jessel, MR.).

¹⁷ AXAHCVAP2013/007 (unreported, delivered 24th November 2014) at paragraph [53] (Webster JA (Ag)) applying *Re Keyapak Homecare Ltd* [1987] BCLC 409.

¹⁸ [2010] FCA 352 at paragraphs 49-50 (Finkelstein J).

¹⁹ [2004] BCC 315 at paragraph 33 (HHJ Maddocks).

²⁰ AXAHCVAP2013/007 (unreported, delivered 24th November 2014) at paragraph [61] (Webster JA (Ag)) citing *Re Edenote Ltd* [1996] 2 BCLC 389.

²¹ [1995] BCC 261.

- (12) The test for bias was stated by the Court of Appeal in **Amory v Sharpe et al**,²² as whether a fair minded and informed observer in possession of all the facts would conclude that there is a real possibility of that the [liquidators] were biased. In the New South Wales case of **Re Home Holdings Pty Ltd**,²³ Street J. gave particular warning in the context of liquidations:

“I have already stated my view that in no degree or in no respect is the conduct of the petitioner in the present windings up open to legitimate criticism. It has, quite justifiably, urged on the official liquidator and made funds available to him. This involves, however, the ever-present risk that the liquidator may either yield to partisan considerations in submitting to the urgings of a creditor in conjunction with accepting financial assistance from a creditor. A liquidator is bound to be on guard lest he compromise his position of independence and impartiality in all respects in the discharge of his functions as an officer of the court administering the winding up of a company. Not only is it his prerogative to decide what steps should be taken, it is his duty to exercise himself, according to the dictates of his own opinions, what should and what should not be done in the course of any given winding up. It is for him to decide what steps are to be taken, and when, how and by what means such steps are to be taken. Where he draws upon financial assistance from a creditor, 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.*” (Italics added.)

- (13) Once any of the statutory grounds under section 187(2) has been made out, the Court must then at stage 3 conduct the difficult balancing exercise, weighing its finding that the grounds for removal have been made out on the facts against the considerations that the court does not lightly remove its own officer and the impact of the removal on his professional standing: **Brilla**.²⁴ The Court will also consider the consequences of costs and delay attendant upon the removal and the duty of the Court to send a clear message to liquidators that they have an important function which they should perform in a vigorous, effective and independent manner: **AMP Enterprises Ltd**.²⁵ (I pause here to note that the word ‘unbiased’ and not ‘independent’ is used in the passage in question in this authority – they are not necessarily the same thing, as a liquidator can be perfectly

²² HCVAP2009/013 (Nevis) (unpublished, delivered 27th August 2012) at paragraphs [8] and [9] (Baptiste, JA).

²³ [1971] 1 NSWLR 24.

²⁴ AXAHCVP2013/007 (unreported, delivered 24th November 2014) at paragraph [63] (Webster JA (Ag)).

²⁵ 2003] BCLC 319 at paragraph [23] (Neuberger J).

unbiased whilst practically required to depend upon information and indeed funding from a contributory or creditor.)

[27] In his submissions to this Court, Mr. Chu contends that these principles are to be applied as follows -

- (1) On standing, as (a) standing has been placed on a statutory basis under the BVI legislation by section 187(2) (unlike under the English or Cayman Islands legislation) and (b) OSL was wound up as a solvent company and there has been no subsequent determination that OSL is insolvent, Mr. Chu, as an undoubted contributory, has the standing to make the application.
- (2) The liquidators owe statutory duties under section 185(1)(b) and (c) *inter alia* to distribute the assets or surplus assets or the proceeds of realization thereof in accordance with the Act, i.e. to the members. OSL held one asset at the date of going into liquidation, namely one share in PBM. There is no evidence that any proof of claim by a creditor of OSL has been accepted by the liquidators. Their clear statutory duty was therefore to distribute this asset to the shareholders. They have failed to do so, after almost 4 years into the liquidation.
- (3) The liquidators seek to justify their strategy by saying (in the 6th Affidavit of Mr. Greenwood at paragraph 48) that the pursuit of the Hong Kong petition 'will assist them in ascertaining the value of PBM and hereby serve the bests interests of OSL and its members as a whole'. This statement lacks logic. If OSL is solvent, and there is no evidence to the contrary, then the value of the assets is not relevant. In this case OSL has a single asset: OSL's single share in PBM. The single share can easily be divided into two shares for distribution to Messrs. Chu and Lau, by an appropriate PBM resolution. It belongs to and should be distributed to the members expeditiously, irrespective of what its underlying value is.
- (4) Paragraphs 4 and 5 of the Order appointing the liquidators confer powers on the liquidators *inter alia* to commence proceedings in court but only with the sanction of the Court. Deliberately without seeking any such sanction, the liquidators have commenced heavily defended proceedings in Hong Kong, in the name of PBM but at the expense of

OSL. It is wrong for the liquidators to hide behind the technicality that the proceedings were commenced by PBM. The OSL liquidation estate has been billed for all the fees and legal costs associated with the proceedings and the distinction drawn by Mr. Greenwood is an artificial and deeply unattractive one for an officer of the Court to be taking, as well as being without any merit.

- (5) Justice Adderley in delivering his ruling on the Directions Application directed that Mr. Chu's 'Summary Distribution Proposal' was worthy of 'serious consideration'. Although this may have been couched in informal language, the liquidators as officers of the Court should have heeded this direction but there is no evidence that they have done so.
- (6) While Justice Kaye, QC (Ag.) may have made criticisms of Mr. Chu, he made no Order that the liquidators were to investigate his findings. Indeed, so far as he made findings of fact, there would be no need for investigation. So far as he did not, it is for the liquidators to show how the interests of the liquidation of a solvent company are advanced by the investigation of such matters. They have not done so, or even tried to do so. Simply put, they have not shown that substantial (or any) expenditure is needed merely to distribute to the shareholders what they already own.
- (7) The duty of the liquidators is to pursue the liquidation with vigour. They have not done so in this case. They were appointed in August 2017 and to date Mr. Greenwood is not able to say whether OSL is solvent or insolvent even though it appears undisputed that OSL has always been a pure asset holding company that never transacted any other business. The liquidators have done very little. Their only achievement appears to have been to rack up extraordinarily high fees.
- (8) The decision was taken almost immediately to change the directors of PBM and apparently to pursue the alleged outstanding shareholder loan due to PBM by Beibu Gulf. Even this was not done with vigour as the statutory demand was served in November 2017 and the winding up petition not filed until August 2019, almost 2 years later. A year and half since then, it is not clear what progress has been made on that petition. No evidence has been given of the financial state of PBM so as to justify whether pursuing the alleged shareholder loan is worthwhile especially as PBM was financed by loans from third parties.

- (9) Mr. Lau purports to cast blame on Mr. Chu for this delay. However, there was never a stay of the liquidation so that there was no prohibition against the liquidators progressing their petition and, in any event, the petition was being pursued through PBM; which the liquidators maintain is not subject to the supervisory jurisdiction of this Court under the Act.
- (10) There has been no evidence of examinations of the directors of OSL (Mr. Chu deposes to the fact that no attempt has been made to examine him and there has been just one report to the Court since 2018 (and ordered by the court in the context of the claim for remuneration by the liquidators)). There has been no report by the liquidators to the contributories/members who, if the liquidation is solvent, have the sole interest in the liquidation. The liquidation is being run as one of the liquidators, by the liquidators, and for the liquidators.
- (11) The liquidators have therefore spent over \$3million in fees and disbursements (as of January 2020) and seem to have accomplished nothing concrete to date with respect to a determination as to whether there are surplus assets, or the realization or distribution of assets to the contributories.
- (12) It is of concern that the liquidators have chosen to describe the actions of a contributory in a solvent liquidation as vexatious and abusive in the absence of any finding or even comment from a court in that regard, and where the person, for whose benefit the liquidation is being conducted, is simply seeking to ensure that they carry out their duties.
- (13) From the outset, the liquidators have wrongly approached the liquidation as being an invitation to investigate the findings or comments made by the Court in support of its ruling that there was deadlock in the management of OSL and/or to achieve the resolution of all conflicts between Mr. Lau and Mr. Chu. There was no direction for them to so do.
- (14) They have provided no analysis of the costs/benefits of the course of action that they have adopted in preference to the course proposed by Mr. Chu.

- (15) They have refused to share with Mr. Chu information provided to them by Mr. Lau but share with Mr. Lau information provided to them by Mr. Chu.
- (16) On any objective review of the entire liquidation, they have chosen to sidestep Mr. Chu. It was Mr. Lau who assisted them with the appointment of the directors of PBM. It was Mr. Lau with whom they negotiated and signed a Funding Agreement without informing Mr. Chu. It could be no coincidence that immediately after the 2-day appeal against the winding up Order and pending delivery of the reserved judgment, they caused PBM to file the Winding-Up Petition after almost 2 years of inactivity. The entire strategy of the liquidation has been targeted at investigating Mr. Chu's alleged interest in Beibu Gulf. Their jointly held vehicle is thus being used as a vehicle to pursue proceedings that can be of no benefit to Mr. Chu.
- (17) The costly alleged investigations into the affairs of Beibu Gulf benefit only the liquidators and Mr. Lau. They certainly cannot be said to be for the benefit of OSL, a solvent company, whose surplus assets are being expended for this purpose.
- (18) Mr. Chu was not even informed of the resignation of Mr. Yen and Ms. Chan (either before or after the fact) by the liquidators themselves but only found out about the resignations indirectly months after. No reports of the progress of the liquidation as at the date of their resignation or at all have been made available to Mr. Chu. Similarly, no information has been given to Mr. Chu as to how Messrs. Greenwood and Bailey, who both reside in the BVI, propose to direct what appears will be extremely hard-fought litigation, possibly in a foreign language, half way across the world. It is reasonable for the Court to infer that as Mr. Lau, an experienced businessman with a team of legal advisers, is financing the liquidation, the liquidators will have made all relevant information concerning the proceedings available to him, and that he is playing a role in determining PBM's litigation strategy.
- (19) The liquidators have not even communicated a clear decision to Mr. Chu on his Summary Distribution Proposal, notwithstanding that it appears clear that it has in fact been rejected. It is inferred that the liquidators' pretence that no decision has yet been taken, is to forestall a Section 273 challenge to such a decision.

- (20) It is submitted that where it is undisputed that Mr. Lau is the liquidators' paymaster, it is incumbent on the liquidators to avoid any appearance that they maybe favouring his interests over those of Mr. Chu, and that when their conduct is challenged, the onus lies on them to demonstrate that they are not acting as Mr. Lau's instrument to further his own agenda. The importance of avoiding any appearance of bias is emphasised in the **FSC Insolvency Code of Practice** at Ch. IV para 5.3

"The licensee must not only be satisfied as to the actual objectivity which he or she can bring to his or her judgments, decisions and conduct, but also must be mindful of how his or her objectivity will be perceived by others. Sometimes, the mere perception of risk or conflict will tend to undermine confidence in the licensee's objectivity, and so make acceptance or continuation of an appointment unwise."

- (21) In the present case Mr. Chu has a legitimate complaint of bias on the part of the liquidators; or at the very least a case of apparent bias calling for a detailed justification by the liquidators of their conduct. However, no such justification has been forthcoming. It is part of the duty of the liquidators to act even-handedly between Mr. Lau and Mr. Chu as the persons interested in the liquidation. Notwithstanding this, they have repeatedly demonstrated their animosity towards Mr. Chu. When this is coupled with the fact that they are funded by Mr. Lau, the real possibility of bias emerges. Mr. Greenwood, in casting aspersions against Mr. Chu for asserting his rights, has not shown that he has retained his independence but only the real possibility that he has surrendered this independence. This is to a large extent corroborated by all the other matters raised by Mr. Chu.
- (22) All of the above matters have led to Mr. Chu's reasonable loss of confidence in the liquidators being able or willing to carry out their duties in accordance with the legislation and general principles of fairness.
- (23) The decision to bring winding up proceedings against Beibu Gulf notwithstanding both his advice that there was at least an arguable defence and Beibu Gulf's response to the statutory demand, have, *inter alia*, reasonably caused Mr. Chu to be concerned that the liquidators have more interest in prolonging the liquidation, supporting one side only and earning fees than conducting their statutory duties.

- (24) The fact that Mr. Yen (since resigned) has been found to have been guilty of precisely this conduct (albeit in a different liquidation, in a decision upheld in April 2021 by the Hong Kong Court of Appeal) gives grave cause for concern as to the remaining liquidators' approach, where they have worked together with him on the OSL winding-up over an extended period; particularly in circumstances where he has billed for more time costs than any of the other liquidators. As liquidators must act jointly, the remaining liquidators cannot seek to disassociate themselves from the actions of any of the others of them such as Mr. Yen.
- (25) Ms. Chan's reasons for resigning as a liquidator remain unexplained. Neither she nor Mr. Greenwood have had any communication with Mr. Chu regarding her sudden and unexplained departure. This is a matter of real concern to Mr. Chu, as she is the only one of the 4 liquidators who has ever actively taken a step to prevent a serious breach of duty on the liquidators' part: see the letter from her lawyer Mr. Michael J Fay QC dated 4th March 2018. In the absence of an alternative explanation, one reasonable inference is that she felt unable to continue working with the remaining liquidators. In light of the past incident mentioned in the said letter, there must be at least a real possibility that this was because she did not agree with the strategy which they have adopted but, being in a minority, could not influence that strategy.
- (26) There are matters of real concern to Mr. Chu as to the manner in which the liquidators have conducted themselves in relation to the winding-up. These include the device of bypassing the board of directors of PBM to have Messrs Dentons appointed as solicitors for PBM; Mr. Yen and Ms. Chan's resignations without regard to the careful consideration by the Court that led to the appointment of liquidators based both in the BVI and Hong Kong; or Mr. Greenwood's use of prejudicial terms against Mr. Chu in relation to the quite reasonable exercise of his undoubted right to have the courts adjudicate on any disputes between him and the liquidators.
- (27) The basis on which the liquidators are making decisions remains unclear as they have not chosen to share the legal advice they have received with Mr. Chu, or even to justify why they have not done so. Mr. Greenwood complains that Mr. Chu has not provided information (which Mr. Chu strenuously denies) and that the company's records are insufficient but since the liquidators have not chosen to use their statutory powers to

compel the production of information, it must follow that they are getting their information to make decisions from another source, this could only be Mr. Lau. This is the same Mr. Lau that a Hong Kong court in April 2021 has found to lack probity and willing to concoct evidence and mislead the court in support of his case against Mr. Chu. The damning findings of the Hong Kong Court as to Mr. Lau's want of probity, and the fact that Mr. Chu has not been given access to any information that Mr. Lau has provided to the liquidators, reasonably leads to a lack of confidence in the liquidators.

- (28) Additionally, the fact that the liquidators have continuously bypassed this Court's supervision of their activities by conducting their strategy through PBM, while claiming remuneration through the liquidation of OSL is a matter of real and legitimate concern.
- (29) For the foregoing reasons, the Court should be satisfied that the liquidators have breached their duty under section 185; that their conduct of the liquidation to date has been below the standard that may be expected of a reasonably competent liquidator and their retention as liquidators is against the interests of the liquidation.
- (30) Mr. Chu accepts that the Court will not lightly remove its officers from their office as liquidators. However, a serious case has been made out that their retention is against the interest of the proper ordinary liquidation of the affairs of this solvent company, i.e. against the interests of the liquidation.
- (31) The Court must have regard to the impact of removal on the liquidators on their professional standing. However, this is not a factor to which overwhelming weight is given as seen on the facts of **Brilla** and other cases.
- (32) The more relevant considerations would be the costs and delay associated with any removal. The liquidators have failed to address this issue in their evidence so the Court must infer that no extraordinary costs or delay will be thereby incurred. It is expected that the liquidators will be ordered to provide a disclosable report of their activities to the Court upon their departure. This should suffice to bring incoming liquidators up to speed.
- (33) The majority of work in the liquidation appears to be in relation to the bringing of the Hong Kong winding up petition by PBM which is still in the stage of an application for

strike out, which would be primarily on legal grounds and so require no significant input from the liquidators themselves by way of instructions on fact. The Court can expect that incoming liquidators will take an independent view as to the merit of pursuing these proceedings and the entire liquidation strategy which may ultimately result in the saving of considerable expenses of the liquidation.

- (34) As limited investigation appears to have been carried out in respect of OSL's direct affairs (and this can primarily be attributed to the fact that there were none), little cost or delay can be expected in relation to this.
- (35) The Hong Kong courts in the **Luen Tat** decision²⁶ have sent a clear message to liquidators as to the standards expected of their performance. Our Court of Appeal has done similarly in its findings in **Brilla**. This Court should not be diffident about reminding BVI liquidators about the need to keep the interests of the liquidation in focus while exercising their powers. This is primarily where these liquidators have gone wrong and fallen short of expectations of the persons interested in the liquidation, i.e. the members. In **AMP Enterprises Ltd**,²⁷ the Court stated:

“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.” (Emphasis added).

Nothing in the evidence of Mr. Greenwood suggests that any positive change of attitude or conduct of the liquidation can be expected in the future.

- (36) For the foregoing reasons, the statutory discretion should be exercised by removal of Mr. Greenwood and Mr. Bailey as liquidators. The Court may, under section 187(3), appoint replacement liquidators who are eligible insolvency practitioners. Mr. Chu suggests that a short hearing can be held for the purpose once the Court has had the opportunity to review the CVs of any proposed replacement liquidators.

²⁶ Unreported, HCCW 497/2009, 27th November 2017); upheld by the Hong Kong Court of Appeal in [2021] HKCA 577.

²⁷ 2003] BCLC 319 at paragraph [23] (Neuberger J).

The liquidator Respondents' position

[28] It was Mr. Bailey and Mr. Greenwood who responded to the application as liquidators. The Liquidator Respondents explained that Mr. Yen and Ms. Chan were no longer liquidators as they had resigned as liquidators with effect from 7th January 2021, before the application was filed in March 2021. In this part of the judgment their position is summarised. Nothing in this part of the judgment is to be treated as a finding of fact or law by the Court.

[29] Messrs. Bailey and Greenwood, as the joint liquidators (or 'JLs') t that if the Court is minded to remove them, that is a matter for Court and they, as the Court's officers, will assist in any transition. However, their position is that, having regard to the interests of the estate, the application ought to be dismissed for the following reasons:

- (1) The complaint does not reach the necessary legal threshold for the removal of liquidators pursuant to section 187 of the Act and the applicable three stage test;
- (2) Their conduct has been unimpeachable and there is no proper challenge which can be made. They have faced considerable opposition and lack of cooperation from Mr. Chu throughout the course of the liquidation;
- (3) This application is a continuation of Mr. Chu's attempts to derail the investigation of the liquidation in order to avoid any scrutiny of the matters which were identified by Justice Kaye QC (Ag) and confirmed by the Privy Council. It is not an attempt by a creditor to regulate the liquidation but to disrupt.
- (4) The affairs of OSL require an investigation and there is no justification at the present time for a share split as proposed by Mr. Chu, or any proper basis to object to the winding up petition which has been advanced in Hong Kong by PBM. The JLs have at all times acted properly, in accordance with their duties and in the interests of the estate.

[30] The JLs explain that the nomination of four liquidators was due to Mr. Chu having concerns about a firm of accountants (Ernst & Young) being nominated by Mr. Lau and the potential for bias. The Court therefore acceded to Mr. Chu's request that Mr. Greenwood and Ms. Chan be nominated by Mr. Chu. Mr. Greenwood was, at the time of his appointment, of CVR (BVI)

Limited. Ms. Chan was of Briscoe Wong Advisory Limited. Mr. Bailey and Mr. Yen were both of Ernst & Young. The JLs could only act jointly and not severally. The JLs entered into a memorandum of understanding which provided for 75% majority voting on any issues.

[31] Following the Privy Council decision, Ms. Chan and Mr. Yen resigned from office on 13th November 2020 and 4th December 2020 respectively, with effect from 7th January 2021. The resignations were approved at a meeting of the company's creditors on 21st December 2020. Mr. Chu complains that he was not aware of the resignations, but that is because he has not submitted a proof of debt that has been admitted and so is not a creditor. The complaints made against them by Mr. Chu are of no consequence in the context of the current application. However, they will be addressed in any event. The JLs are the two remaining liquidators, one nominated by each of Mr. Chu and Mr. Lau.

[32] The JLs submit the following findings made by Justice Kaye, QC (Ag.) are particularly relevant:

- (1) The establishment of OSL was a joint venture and quasi-partnership and it went beyond the commercial relationship founded on OSL's corporate constitution (at paragraph [29]).
- (2) Mr. Chu and Mr. Lau's investment via OSL and PBM in the Beibu Gulf companies represented a quasi-partnership and to the extent that matters invested on their investments through PBM, Mr. Chu and Mr. Lau continued to owe each other loyalty, good faith, trust and confidence (at paragraph [33]).
- (3) In or about 2010 Mr. Chu became the managing director of the Beibu Gulf Group. In August 2010 PBM, in effect Mr. Lau and Mr. Chu, agreed to invest funds for the purchase of, in the event, 8 dry bulk carriers.
- (4) To that end large sums (in the 10s of millions of US Dollars) were advanced by PBM to Beibu Gulf Ocean Shipping Group Limited (defined in the judgment as Beibu Gulf).
- (5) The terms of the payment were that in the event of the purchases not going ahead, the funds would be returned to PBM.
- (6) The vessel purchases were cancelled and by early 2014, Beibu Gulf received or became entitled to nearly US\$57million in refunds (at paragraph [37]).

- (7) Differences arose between Mr. Lau and Mr. Chu as to what the refunded money would be used for with Mr. Chu asserting that the PBM loans were contributions to capital and not loans (at paragraph [50]).
 - (8) Mr. Lau and Mr. Chu's relationship deteriorated. In the course of his judgment Justice Kaye QC (Ag) noted that Mr. Lau had discovered, among other things, significant payments by Mr. Chu to himself from their joint business, possibly as much as US\$70million (at paragraph [52]).
 - (9) Mr. Chu had consistently delayed, obstructed or refused to provide Mr. Lau with financial information (at paragraphs [45], [47], [63], [81E]).
 - (10) It was at least arguable that Mr. Chu was connected to Bright Good Asia Ltd ('BGAL') to whom the 51% shareholding owned by Beibu Gulf Holding HK Co Limited was sold, without disclosing his interest, and that Mr. Chu and BGAL hold the 51% interest on trust for PBM (at paragraph [74]).
 - (11) To frustrate any order the court might make, BGAL sold the ship chartering business to Ausca Shipping Ltd, a company operated by Mr. Chu's son (at paragraph [79]).
 - (12) Mr. Chu had engineered a situation whereby he or his associates had seized effective control of Beibu Gulf by BGAL and Polyrise to exclude Mr. Lau (at paragraph [81C]).
 - (13) The judge found that Mr. Lau's version in relation to the repayment of the PBM loans was correct and that the money loaned to Beibu Gulf via PBM was a loan on the terms as alleged by Mr. Lau (at paragraph [98]).
- [33] Justice Kaye, QC referred to both Mr. Lau and Mr. Chu's 'unnecessarily repetitive, prolix and prolonged written evidence full of argumentative assertions, submissions and similar' (at paragraph [23]). That continues with the present application.
- [34] On 22nd August 2017, Mr. Chu filed a notice of appeal in respect of the OSL liquidation order.
- [35] On 5th December 2017, Mr. Chu filed an application seeking various declarations pursuant to sections 185 and 186 of the Act, including a declaration that the JLs have no power to

intervene in the affairs of PBM or commence litigation in its name ('the Directions Application'). This Directions Application was dismissed on 14th February 2018. The grounds of challenge contained in the Directions Application cover much the same ground as the present application, particularly the suggestion that the JLS should close their eyes to PBM and merely split the shares.

[36] On 28th November 2019, Mr. Chu filed an application challenging the JLS decision to cause a winding-up petition to be presented in the name of PBM against Beibu Gulf (the 's273 Application').

[37] By an order dated 17th January 2020, the Court of Appeal unanimously reversed the Liquidation Judgment and discharged the Liquidation Order. Following the decision, Mr. Chu withdrew the s273 Application.

[38] The Court of Appeal's decision was appealed by Mr. Lau to the Privy Council. Following a hearing in July 2020, on 12th October 2020 the Privy Council handed down judgment allowing the appeal, restoring the Liquidation Order and setting aside the Court of Appeal Order (the 'Privy Council Judgment').²⁸

[39] It is noteworthy that the Privy Council Judgment expressly acknowledged that a form of asset division had been proposed by Mr. Chu but that an important feature of the grounds for a just and equitable winding up was Mr. Chu's failure to provide financial information, a complaint which was upheld by the first instance judge (at paragraph 27 per Lord Briggs JSC).

[40] The Privy Council also noted that the acquisition of control of Beibu Gulf by BGAL and Polyrise without disclosure of Mr. Chu's interest may arguably have amounted to a breach of fiduciary duty owed by Mr. Chu to PBM and OSL (at paragraph 29 per Lord Briggs JSC).

[41] Lord Briggs also expressly stated at paragraph 67 that:

"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

²⁸ Chu v Lau [2020] UKPC 24.

Gulf, or its claims against Mr. Chu for misfeasance and breach of fiduciary duty, which would be better be investigated and (if thought fit) pursued by a liquidator.”

- [42] Since appointment, the JLs have attempted unsuccessfully to obtain adequate books and records and other financial information from Mr. Chu. As was noted by Justice Kaye, QC (Ag) and the Privy Council, Mr. Lau had been effectively excluded by Mr. Chu from the management of the group and therefore Mr. Chu is the only person able to provide a proper picture as to the finances of OSL.
- [43] He has repeatedly failed to do so and there is ample correspondence between the JLs and Mr. Chu to demonstrate this.
- [44] In compliance with the Court’s order dated 6th June 2018, the JLs filed their report with the Court on a confidential basis which outlined the JLs strategy for progressing the liquidation. That order restricted the availability of the report to the Court unless ordered otherwise.
- [45] The JLs have focused on taking control of the group with a view to realising the group’s value and maximising the returns to the estate. This is a complicated process that started with the JLs appointing directors over PBM.
- [46] The JLs have by their sealed report to the Court dated July 2018 outlined a three-pronged strategy, with cost projection, for the liquidation of OSL. Without waiving confidentiality given to the report, the 3 strategies have been: (i) the share splitting arrangement; (ii) the sale of assets and or (iii) the winding of BGAH.
- [47] 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.
- [48] Those winding up proceedings continue to be hard fought in Hong Kong.

[49] The JLs make the following submissions and observations about the application of Section 187(1)(b) of the Act.

- (1) In **Redhouse Holdings Limited et al. v Johnson et al.**,²⁹ this Court, applying the three stage test in **Brilla**³⁰ stated:

“[216] When considering the test, the Court of Appeal broke it down into three limbs:

(1) Whether the applicant has standing to apply for the removal of the liquidator;

(2) Whether due cause has been shown for the removal of the liquidator. Due cause does not necessarily mean that there is misconduct on the part of the liquidator or unfitness for purpose, but rather, the court should take all the circumstances into consideration and decide whether, on the whole, the liquidator should be removed; and

(3) Even if (1) and (2) are proven, whether the Court should exercise its discretion.”

- (2) The Court also considered the capacity of the above sections to draw in subjective considerations and warned:

“[248] Whilst the grounds set out at section 187(1)(a)(i) to (iii) are specific, those in section 187(1)(b)(i) to (iii) are general. These latter are also ‘unwieldy’ because they (and in particular subsections 187(1)(b)(i) and (iii)) are prone to a subjective interpretation and not anchored in misconduct. Yet it must be clear that these provisions are to be applied judiciously, in accordance with objective and rational standards.”

- (3) In considering whether the Court should exercise its discretion to remove the liquidator the judge in **Redhouse**, quoting **Re Edenote Ltd.**³¹ observed:

“[284] 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’.

[285] To determine whether it would be desirable to remove Mr. Johnson, I have to consider all the circumstances. I would have to be satisfied that retention of Mr.

²⁹ BVIHCM 2010/0138 (unreported, delivered 2nd December 2020) at paragraph [216] (Wallbank J(Ag.)).

³⁰ AXAHC VAP2013/007 (unreported, delivered 24th November 2014).

³¹ [1996] BCC 718 at page 725 (Nourse LJ).

Johnson would be against the interest of the liquidation, or conversely, that his removal is in the interest of the liquidation.

[286] I need to carry out a balancing exercise between the expectations that a liquidator is to be efficient, vigorous and unbiased and the impact of removal on the liquidator's professional standing. I also need to consider whether the Court can be reasonably confident Mr. Johnson will live up to the requirements of his office as liquidator in the future."³²

- (4) In **Allied Investment Fund Limited v Johnson and Jenkinson**,³³ Justice Murphy in the Grand Court of Cayman summarised the principles set out in the cases to that date at paragraph 40:

"Mr. Phillips submitted that the following principles could be gleaned from the case law on removal of liquidators. I believe they do reflect the current state of the law and I adopt them:

1. The discretion of the court is broad: see *Johnson v. Deloitte & Touche A.G.* (11) and *Keypak Homecare* (12).
2. The court will take all circumstances into consideration in considering whether to remove a liquidator: see *Marseilles Extension Ry. & Land Co.*(14).
3. Where a majority of creditors oppose the liquidator, their views will generally prevail: see *Marseilles Extension Ry. & Land Co.* (14), *Tavistock Ironworks* (19) and *Rubber & Produce Inv. Trust* (17).
4. A liquidator will be removed when to do so is in the general interests of the company: see *Adam Eyton Ltd.* (1) and *Rubber & Produce Inv. Trust* (17).
5. A liquidator may be removed where to pursue litigation would not be in the creditors' interests: see *Tavistock Ironworks* (19).
6. A liquidator may be removed where he fails to investigate claims: see *Keypak Homecare* (12) and *Sir John Moore Gold Mining Co.* (18)
7. A liquidator may be removed when he has an apparent conflict of interest: see *Sir John Moore Gold Mining Co.* (18), *Intercontinental Properties Pty.* (9) and *Corbenstoke* (6).

³² BVIHCM 2010/0138 (unreported, delivered 2nd December 2020) at paragraphs [284] to [286] (Wallbank J(Ag.)).

³³ [1999] CILR 237.

8. A showing of unfitness is not a necessary requirement: see *Adam Eytan Ltd.* (1), *Keypak Homecare* (12) and *Johnson v. Deloitte & Touche A.G.* (11).”

- (5) In **AMP Enterprise Ltd v Hoffman**,³⁴ Neuberger J highlighted the policy implications to be considered when determining whether to remove a liquidator as follows:

“...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. So to hold 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 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...Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay.”

- (6) In **Nam Tai Electronics, Inc. v David Hague et al**,³⁵ Matthew JA cited English authorities and observed as follows:

“The governing principle to be gleaned from the authorities is that the Court must satisfy itself on the evidence that the retention of the liquidator would be against the interest of the liquidation. In *Re Edenote Ltd* [1966] 2 BCLC 389 at page 398 Nourse L.J. restated the principles as follows:

“Sir John Vinelott said that the decision in *Re Keypak 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 confidence in his ability to realize the assets of the company to their best advantage and to pursue claims with due diligence...”

Again, I respectfully agree. But there is an important qualification... 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.””

³⁴ [2003] BCLC 319 at paragraph [27] (Neuberger J).

³⁵ BVIHCVAP2000/0021 (unreported, delivered 26th March 2001) at paragraph [40] (Matthew JA).

- (7) Insofar as the treatment of subsidiaries (that may or may not be in liquidation themselves) is concerned by a liquidator appointed over a parent company, as stated by Dillon LJ. in **Re Esal (Commodities) Ltd**:³⁶

“With a group structure, where the parent company of a group goes into liquidation, it is often the case that the liquidators of the parent company find that the de facto control of subsidiaries rests with directors of the subsidiaries who were appointed by the previous directors or shareholders of the parent company, in effect, and those directors may well be hostile to the liquidators. In such circumstances it is common form for the liquidators to remove the previous directors and appoint as directors representatives of the liquidators’ firm. ...”

[50] Addressing each of the three limbs of the applicable test, the JLs say as follows.

Standing

- (1) The JLs accepted that Mr. Chu has standing as a member of the Company. Mr. Chu has not had a claim *qua* creditor admitted to proof.

Due cause based on all the circumstances of the case

- (2) The JLs submitted that there is no proper basis on which the Court can find that there is due cause to remove the JLs. Mr. Chu relies on three points. First, that the JLs have not adopted his Summary Distribution Proposal. Second, that the JLs appointed directors over PBM who are pursuing PBM’s debt claim and third, that the JLs are favouring Mr. Lau because he has funded the liquidation. These three points lead Mr. Chu to assert that the JLs have acted in a ‘wholly partisan approach’. The allegation of being partisan is said to be ‘by favouring Mr. Lau as the funder of the liquidation including to commence proceeding in Hong Kong by relying entirely on Mr. Lau’s instructions and had [sic] simply increased the costs involved in the present liquidation’. Each of these points is unfounded.

(1) The Summary Distribution Proposal

- (3) The Privy Council noted that the Summary Distribution Proposal is no solution to the problems of the group. As noted by the Privy Council, a share split in any event does

³⁶ [1989] BCLC 59 at 64i -65b.

not address the serious issues relating to potential breaches of fiduciary duty by Mr. Chu owed to OSL which have been referred to by Justice Kaye, QC (Ag). Moreover, it appears that it would lock the shareholders into minority positions unable to control anything alone. It would avoid investigation into the potential misfeasance claims and would not realise value of the assets or wind them up.

- (4) In addition, the JLs' ability to consider the Share Distribution Proposal has been fettered by Mr. Chu's repeated failure to comply with their requests for information concerning the affairs of OSL and PBM. The JLs have repeatedly asked for documents and information that would demonstrate why such a proposal was equitable, but Mr. Chu has refused to supply any of the documents and information requested. The Court is referred specifically to letters from the JLs dated 20th March 2018, 16th January 2019 and 25th October 2019.

(2) Appointing Directors over PBM

- (5) It is usual for liquidators of a holding company to take control of companies in which the holding company has an investment. It is how the JLs can best realise the value of OSL's assets. Having been appointed, the directors act in accordance with their fiduciary duties to the company over which they are appointed and on the basis of legal advice. Practical deadlock existed at the PBM level (as it did at the OSL level) because the directors of PBM were Mr. Lau and Mr. Chu. To break the deadlock the JLs removed both Mr. Lau and Mr. Chu.
- (6) The directors of PBM, on legal advice of Messrs Dentons, (which is not waived and is not for the JLs to waive), are pursuing debts due to PBM. Realising the value of PBM's claims is what the directors should be doing.
- (7) Mr. Chu ignores the fact that following a trial, Justice Kaye, QC (Ag) found as a fact that there had been a loan by PBM to Beibu Gulf. As OSL's sole investment is in PBM, leaving aside any issues of a recovery action against Mr. Chu, the PBM loan is the main known source of significant realisation into the OSL liquidation (assuming the OSL share sale is not progressed, which, for the avoidance of doubt, the JLs have not discounted).

- (8) Accordingly, contrary to there being a conflict of interest between OSL and the directors of PBM, Mr. Greenwood's duties in his capacity as director of PBM and as a Joint Liquidator are aligned. In both capacities, Mr. Greenwood has ensured that he has obtained legal advice where appropriate, as expected of a reasonably prudent person holding such office;

(3) Bias

- (9) Much of Mr. Chu's argument appears to be a re-run of the winding up petition in circumstances where Justice Kaye, QC (Ag) has identified those matters which require investigation including the PBM loan issue and which has been upheld by the Privy Council. Mr. Chu's concerns about bias resulted in the nomination of liquidators by both Mr. Chu and Mr. Lau. The present position is that the two JLs are one a nominee of Mr. Chu, and one a nominee of Mr. Lau. They act jointly. Mr. Greenwood was Mr. Chu's nominee.
- (10) The JLs have at all times acted with independent judgment and have taken steps to ensure that the terms of the funding agreement with Mr. Lau includes express provision to that effect.
- (11) As for the allegation that Mr. Yen took the lead in the liquidation, it is wholly without basis. First, the appointment required the JLs to act jointly. Second, at the time when Mr. Yen acted as liquidator, the four JLs had a memorandum of understanding in place (as filed in Court under seal) which required a 75% voting majority to take action. Thirdly, and in any event, Mr. Yen is no longer a liquidator.
- (12) The Court is invited by the JLs to conclude that the above factors alone demonstrate that Mr. Chu has not demonstrated the JLs have acted unreasonably, nor do they have any conflicts of interests such that there is due cause to remove them.

Discretion

- (13) In any event, it would not be appropriate to remove the JLs on the facts of this case as a matter of the Court's discretion.

- (14) In particular, the Court should have regard to the wider circumstances of Mr. Chu's conduct in relation to the liquidation.
- (15) As explained at paragraphs 8 to 10 of the 6th Affidavit of Mr. Greenwood, Mr. Chu has made several applications to derail the JLs' conduct of the liquidation – none of which have been successful. This is the third such application. This is in addition to Mr. Chu's attempt to appeal the OSL liquidation order. Mr. Chu's actions have substantially contributed to increasing the costs of the liquidation, which he then complains of. The JLs submit that Mr. Chu has adopted a deliberate strategy after the commencement of the liquidation to obstruct the proceedings and ultimately any liquidator eventually appointed.
- (16) Mr. Chu's obstructive course of action appears to be an attempt to prevent any further investigation into the affairs of PBM, and in particular the potential misfeasance by Mr. Chu in his office as a director of PBM.
- (17) Specifically, Mr. Chu seeks to limit, or prevent altogether, the JLs' investigation into the circumstances surrounding Mr. Chu's extraction of monies from PBM (without Mr. Lau's involvement), the removal of Mr. Lau as a director of Beibu Gulf and Mr. Chu's association with business which appears to be in competition with Beibu Gulf.
- (18) Recoveries into PBM may be one of the sole means of obtaining realisations in the liquidation of OSL. The investigation into the matters outlined above is therefore fundamental to ensuring that the JLs discharge their duties to identify potential assets of value to OSL and take steps to realise them. Their removal would significantly set back the progress that has been made in this respect to date.

Future applications by Mr. Chu

- (19) Given the history, and in particular the number of applications made by Mr. Chu that re-hash the same arguments as those that were run in the winding up petition (that was dealt with after a week-long trial and went up to the Privy Council) leading Justice Kaye, QC (Ag) to remark 'Both tended to relive previous disputes ventilated in other proceedings' and 'provided details of their other disputes and affairs outside OSL', and

given the comments of Justice Kaye, QC (Ag) about the ‘unnecessarily repetitive, prolix and prolonged written evidence’, this is a matter in which the Court should take control of the number of times Mr. Chu can make what is, in effect, the same application. A great deal of time and money has been wasted dealing with these applications. Instead of obstructing the JLs, Mr. Chu should do what the Privy Council directed him to do, and assist the JLs. Accordingly, the Court is invited by the JLs to direct that Mr. Chu should not issue applications in the winding up without first getting the leave of the court.

Mr. Lau's position

[51] Mr. Lau's position is essentially similar to that of the JLs. Mr. Lau deprecates the present application as self-serving. He makes two further points

- (1) There is nothing in Mr. Chu's arguments that the resignation of Mr. Yen and Ms. Chan was ineffective, or somehow wrong if done without this Court's approval. This is because Section 188 of the Act makes detailed provision for the means by which a liquidator can resign from office, including (with relevance to this case) resignation with approval at a meeting of creditors (per subsections 188(4) and (5)).
- (2) Whilst Mr. Chu refers to a judgment of the Hong Kong Court in order to attack Mr. Lau, the Hong Kong 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, in circumstances where the Hong Kong judge expressly stated that the evidence had not been fully explored.

DISCUSSION

[52] As a starting point, I accept that the Court must apply the three-stage process laid down in **Brilla Capital Investment Master Fund SPC Limited et al v John Greenwood et al**:³⁷

- (1) Whether the applicant has standing to apply for the removal of the liquidator;
- (2) Whether due cause has been shown for the removal of the liquidator. and

³⁷ AXAHCVP2013/007 (unreported, delivered 24th November 2014) at paragraphs [22] and [23] (Webster, JA(Ag)).

(3) Even if (1) and (2) are proven, whether the Court should exercise its discretion and remove the liquidator.

[53] I accept that this process applies to the application of section 187 of the Act, as indeed this Court also did in **Redhouse Holdings Limited et al. v Johnson**.³⁸

[54] Here, the first stage is not difficult. There is no dispute that Mr. Chu has standing to bring this application. The first part of the process has been satisfied.

[55] The second part of the test requires the Court to consider whether due cause has been shown for the removal of the liquidator.

[56] This entails consideration of a number of factors, as summarised in paragraphs [284] to [286] in **Redhouse**, as set out above. I accept that the ‘governing principle’ is as it was stated in **Nam Tai Electronics Inc. v. David Hague et al.**³⁹ by Matthew, JA. at paragraph [40] ‘... that the Court must satisfy itself on the evidence that the retention of the liquidator would be against the interest of the liquidation.’ I also accept that the interests of the liquidation mean the ‘real, substantial, honest interests of the liquidation and the purpose for which the liquidator was appointed’: **Re Adam Eyton, Limited**.⁴⁰

[57] What the principles are is not so much in dispute between the parties here. It is how they are to be applied in the circumstances of this case.

[58] 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.⁴¹ 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

³⁸ BVIHCM 2010/0138 (unreported, delivered 2nd December 2020).

³⁹ BVIHCVAP2000/0021 (unreported, delivered 26th March 2001).

⁴⁰ (1887) 36 Ch D 299, 306 (Bowen LJ).

⁴¹ BVIHCM2015/0065 Lau v Ocean Sino Limited et al. (unreported, delivered 29th June 2017) at paragraph 101 and more generally.

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.

[59] Mr. Chu relied upon the case of **Redhouse** in support of his argument that the JLs should be removed. I would observe that the facts of the present case are far removed from those in **Redhouse**. That was an extreme case. The liquidator whose conduct had been impugned appeared to have developed a personal *animus* against the individual and his immediate family members thought to have been behind the corporate structure in question, and some aspects of the liquidator's conduct and behaviour fell considerably and obviously short of that expected of an officer of the Court. He was thus removed from office. The present case is not like that. Here, there is nothing obviously reproachable in the conduct of the JLs.

[60] 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.

[61] Mr. Chu claims that the timing of the commencement of the Hong Kong winding up proceedings against Beibu Gulf (i) immediately after the hearing of the appeal against the winding-up order and at a time when judgment on the appeal was awaited and (ii) after almost 2 years of inactivity, was in itself 'highly troubling'. I do not accept this. An appeal does not automatically operate as a stay, and that if every time a Court decision is pending upon one of Mr. Chu's challenges the JLs should suspend their work then progress would be slow indeed.

[62] The fact that there is nothing obviously reproachable in the JLs' conduct is borne out by the fact that Mr. Chu felt a need to devote the larger part of his reply evidence to teasing out adverse inferences from things the JLs have said and words used, exploiting them for all they might be worth. But the Court does not lightly remove its own officer and the Court does not seek for perfection in the conduct of a liquidation.

⁴² [2003] 1 BCLC 319 at paragraph [27].

[63] Mr. Chu contends that the JLs avoided seeking the sanction of the Court, or indeed informing the Court, of their decision to bring the proceedings by PBM against Beibu Gulf, with the insinuation that this was somehow underhand or in bad faith. The short answer is that the JLs did not have to.

[64] The same goes for the criticism that the JLs did not come back to the Court for directions following the resignation of Mr. Yen and Ms. Chan. They did not have to.

[65] In my judgment no 'due cause' has been shown for Mr. Bailey's and Mr. Greenwood's removal:

(1) Mr. Chu criticises the JLs (in what has become a constant refrain in these proceedings), that the JLs are refusing to consider or pursue his Summary Disposal Proposal without any good reason. I am satisfied and find that is not the case. The JLs have a good reason for not pursuing the so-called Summary Disposal Proposal at this point. I am also satisfied that they have considered it and that they do not think it appropriate at present. The JLs have an entirely reasonable belief that Mr. Chu has committed misfeasance in diverting considerable sums of money and business opportunities to himself and to his immediate family. Simply to split OSL's asset in half and distribute a half each to Mr. Chu and Mr. Lau would be patently 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.

(2) Nor, as the Privy Council observed, would this solve the deadlock between Mr. Chu and Mr. Lau.

(3) The Privy Council itself considered that it would in principle be proper and reasonable for liquidators to investigate Mr. Chu's possible misfeasance and recover any assets improperly diverted by him. I agree that it is perfectly proper, and indeed normal, for the JLs to carry out such investigations and attempt to recover possibly misappropriated assets. After all, this would be in the interests of all the contributories or members of the company in liquidation, including Mr. Chu. If there has been such misappropriation by Mr. Chu, the ultimate value of Mr. Lau's and Mr. Chu's respective share will have been depleted thereby. It is proper for liquidators to seek to restore such value before moving on to a distribution.

- (4) Counsel for Mr. Chu provided no authority to support a proposition that in a solvent liquidation (if indeed this is a solvent liquidation, which has not yet been established), liquidators should simply distribute the assets without further investigations or proceedings lower down in the corporate structure intended to recover greater value. That would indeed be a surprising proposition. Ultimately, whether such investigations and proceedings should properly be taken is a question of degree. A cost – benefit consideration comes into it. So do the merits on the law and the facts. Clearly, liquidators do not have a brief to reel in every last cent of misappropriated funds at disproportionate cost. In any reasonably complex commercial situation, the Court would expect its office holders to seek and follow professional legal advice from appropriately qualified and experienced lawyers. The JLs say they have done so here, including at an appropriate senior and/or high level. I have no reason to doubt that evidence.
- (5) Moreover, there is no requirement that in a solvent liquidation the assets of the company should be distributed *in specie*, which is what Mr. Chu says should happen here. It need hardly be said that the term ‘liquidate’ derives from the notion of turning assets into money (and indeed for the best price reasonably obtainable⁴³). This is normally what liquidators do in both solvent and insolvent liquidations. This enables them to pay themselves, creditors and any surplus to members. In the usual course, liquidators should ultimately be able to report to the Court and to the stakeholders in the liquidation how much the liquidation estate is worth. Right now, since it remains unknown how much money has been misappropriated from OSL’s asset base and how much can reasonably be recovered – both matters which the JLs are still working on – the JLs can only say ‘we do not yet know’. That itself strongly indicates that any distribution is premature.
- (6) Part of Mr. Chu’s complaint is that by charging to the liquidation estate costs properly attributable to PBM, the JLs are damaging his own financial interests. Instead, Mr. Chu considers that there should simply be a distribution (by way of a share split) and Mr. Lau will then be free to take whatever legal steps he wishes to take against Mr. Chu, at his own expense, not that of the liquidation estate. This argument ignores that it is, in general, perfectly proper for liquidators, as part of their work of liquidating a company, to take control of its subsidiaries and to ascertain and get in their assets, so that the

⁴³ Re Barings plc (No. 6) [2001] 2 BCLC 159 at pages 172 -173 (Sir Andrew Morritt V-C).

liquidators can proceed to an orderly distribution. Indeed, liquidators need to be able to account to the Court and to stakeholders in the liquidation for an eventual shortfall in the value of the company's assets. This is an important consideration. Liquidators can face significant monetary claims for errors, omissions and negligence if they are not able to do so.

- (7) Yet Mr. Chu urges, with much insistence, that the JLs should depart from this norm. The reason is not hard to see. Mr. Chu has a patent self-interest in having a veil drawn over his alleged misfeasance, or at least to obstruct and delay as much as possible the day of reckoning. This self-interest appears to be stronger than Mr. Chu's interest as a member of OSL in restoration of the value of OSL's asset base for the purposes of its liquidation. Mr. Chu pretends he does not have such a self-interest, or rather, he is careful to skirt around this 'elephant in the room', but I am satisfied that that is the real reason behind Mr. Chu's Summary Distribution Proposal (and indeed behind this application as a whole).
- (8) Mr. Chu's complaints that the JLs have not shared information with him, nor consulted him, carry no weight for the same reason. Since it is Mr. Chu's alleged misfeasance and misappropriations that the JLs 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.
- (9) Mr. Chu's allegations of bias ultimately fair no better. The picture Mr. Chu paints of the JLs acting partially towards Mr. Lau as their funder, to the exclusion of Mr. Chu, for the JLs' own mercenary benefit, is a simplistic caricature. The fact of the matter is that there are only two protagonists here: Mr. Lau and Mr. Chu, and there is a binary choice whether or not the JLs should investigate and attempt to recover assets possibly misappropriated by Mr. Chu. Clearly, Mr. Lau would want this, and Mr. Chu does not. Thus, if the JLs, as part of their duties as officers of the Court, see a need to investigate Mr. Chu's conduct and cause proceedings to be taken to recover assets as a result, it is all too easy to characterise – and perceive – the JLs to be siding with Mr. Lau against Mr. Chu, particularly where funds and information to pursue such steps derive from Mr. Lau. But what is missing in this characterisation is that the JLs have **sought and followed**

professional legal advice in respect of the legal proceedings they have caused PBM to bring. That is a crucial aspect which reduces the likelihood of actual bias.

- (10) On a more specific level, Mr. Chu contends that Beibu Gulf has an arguable defence to the winding up petition and that it is a result of the JLs' bias in Mr. Lau's favour and against Mr. Chu, and the JLs' desire to earn fees, that the JLs are causing this petition to be brought. But it would be perverse for liquidators to desist from taking any legal action where a counterparty so much as raises an 'arguable' defence. Liquidators of any reasonably complex liquidation can be expected to obtain the assistance of professional legal, and other, advisors to help them weigh the merits of an eventual cause of action. This includes assessing evidence which Mr. Chu says goes against such a case, including documents signed by Mr. Lau and arguments he may have run in other proceedings. It moreover includes assessing findings of another court, albeit qualified ones, not intended to be relied upon in courts of other jurisdictions, that Mr. Lau had fabricated evidence. It is not for the JLs to justify at this stage their legal decisions, nor to disclose the legal advice they have thus far received. Indeed, this could jeopardize their claims in respect of Mr. Chu's alleged misfeasance and misappropriations. It would be mistaken to proceed from a presumption that the JLs' decision-making and advice obtained was somehow wrong. Whilst of course legal advice from an internationally renowned commercial law firm such as Messrs. Dentons might be incorrect, or otherwise vitiated (one is dealing with human beings after all and dishonest professionals can sometimes be found at every level), absent reason to believe otherwise, there is no grounds for assuming the JLs' approach was anything other than competent and/or proper. Indeed, if PBM's case is so weak and so readily answered by the points Mr. Chu makes, one is bound to ask why it has not been dismissed on a summary basis but remains 'hard fought' as Mr. Chu says. There may come a time for the JLs to account for their decisions, but it is not now. Rather, Mr. Chu has the burden of showing that the liquidators' conduct is such that it warrants their removal and he has not discharged this burden. I do not accept that the JLs' conduct, seen as a whole, raises a sufficient doubt to place the burden on the JLs to disprove impropriety, as Mr. Chu argues.
- (11) In the present case, the interests of Mr. Lau appear to be aligned with the interests of the JLs in seeking to investigate and remedy alleged misfeasance and alleged misappropriation on the part of Mr. Chu. Such an alignment can be perfectly proper,

particularly where, as here, the JLs face a binary choice whether or not to pursue possible misappropriations by Mr. Chu. It does not mean the JLs are biased towards Mr. Lau against Mr. Chu. Bias entails being swayed in making a decision by reasons other than the merits of the matter requiring consideration. In the words of Lord Phillips MR. in **Re Medicaments and related Classes of Goods (No. 2)**,⁴⁴ ‘an attitude of mind which prevents the judge from making an objective determination of the issues that he has to resolve’. There is no indication of such an attitude here that I can see.

- (12) That Mr. Lau is the JLs’ funder does not take Mr. Chu’s allegations of bias much further. The JLs are professional insolvency practitioners. Whilst it does regrettably sometimes happen that professionals of every discipline make work for themselves in order to generate fees, this is not the rule. As with the sanctioning of liquidators’ costs, the Court should start from the basis that court appointed liquidators and their staff are honest, rather than dishonest.⁴⁵ Funding from a particular source does not necessarily make liquidators biased in favour of that source, in the same way that professionals do not as a rule conduct themselves in a manner that benefits themselves the most financially. In the present case, I am satisfied that a fair minded and informed observer in possession of all the facts⁴⁶ presently before the Court would have no reason to conclude that the JLs have compromised their integrity.
- (13) Moreover, the Court would expect JLs to go where the merits, commercial common sense and the advice of appropriately qualified professionals would lead them, without being swayed by what other people (including Mr. Chu) might think of them. There is no harm in the JLs saying what they really think about Mr. Chu’s position (including that it is vexatious and deliberately obstructive), as they have done, in a frank yet respectful manner. Indeed, that is entirely commendable. The JLs do not need to wait until a court of law has pronounced someone in Mr. Chu’s position as vexatious. Mr. Greenwood’s conduct here is a case in point. He was nominated by Mr. Chu, but this has not swayed Mr. Greenwood from criticising and taking steps adverse to Mr. Chu.

⁴⁴ [2001] 1 WLR 700 at paragraph 37, cited by Baptiste, JA in *Amory v Sharpe et al.* HCVAP 2009/013 (Nevis) (unpublished, delivered 27th August 2012) at paragraph 8.

⁴⁵ *In re Titan Group Investment Ltd (in Liquidation)* BVIHCM 2012/0056 (unreported, delivered 4th March 2014) at paragraph [17] (Bannister J).

⁴⁶ Cf. HCVAP2009/013 (Nevis) (unpublished, delivered 27th August 2012) at paragraphs [8] and [9] (Baptiste, JA).

- (14) Nothing in my view turns on the manner in which Messrs. Dentons were instructed. Mr. Chu asserts that the JLs side-stepped the board of directors of PBM to do so. That may (or may not) be right, but it is not necessarily improper for them to have done so, particularly if they were trying to avoid Mr. Chu being able to influence the PBM board of directors into rejecting lawyers the JLs repose confidence and trust in, or who are already somewhat familiar with the matter, in favour of lawyers who might side with Mr. Chu.
- (15) Mr. Chu says he has lost confidence in the JLs, including his own nominee Mr. Greenwood. That is easy for him to say, when he has an apparently strong self-interest in avoiding their scrutiny. 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. There is no sign that the creditors have lost confidence in the JLs, nor the other contributory and the JLs' funder Mr. Lau. The Court has no reason to have lost confidence in them either.
- (16) Mr. Chu complains that the JLs have done very little in respect of OSL's liquidation. At the same time, he relies upon the fact that OSL is simply a shareholding vehicle to hold the issued share capital of PBM and that OSL has never traded. On Mr. Chu's case, the only work a liquidator needs to do in respect of OSL is divide the share in PBM and distribute it to OSL's members, which would be a work of a few hours, if not minutes. It is reasonable, in the Court's view, however, for the JLs 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.

[66] 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.

[67] 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 the JLs in favour of Mr. Lau cannot be ruled out; in other words, that there could here be an appearance of bias.⁴⁷ If step three is engaged here, I would exercise the Court's discretion by not removing the JLs.

[68] 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.⁴⁸ 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 this.

[69] The principle that the Court does not lightly remove its own officer⁴⁹ means that there have to be substantial grounds for removal, or at least sufficiently strong reason to believe that the JLs stand compromised in the eyes of a fair minded and informed observer. No such substantial grounds or sufficiently strong reasons exist here.

[70] I must also pay due regard to the negative impact removal would have on the JLs professional standing and reputation.⁵⁰ I have to balance this with expectations that a liquidator is to be efficient, vigorous and unbiased.⁵¹ In my judgment, Mr. Chu has fallen short of his evidential burden to satisfy this Court on a balance of probabilities that the JLs have not been sufficiently efficient, vigorous and unbiased to continue in office. As matters thus stand, the Court is sufficiently confident that the JLs will live up to the requirements of their office as liquidators of OSL in the future.⁵²

⁴⁷ Cf the FSC Insolvency Code of Practice at Ch IV para 5.3, above and *Re Gordon & Breach Science Publisher Ltd.* [1995] BCC 261.

⁴⁸ Cf *Redhouse Holdings Limited et al. v Johnson BVIHCM 2010/0138* (unreported, delivered 2nd December 2020) at paragraph [285] (Wallbank J(Ag.)).

⁴⁹ Cf *Redhouse Holdings Limited et al. v Johnson BVIHCM 2010/0138* (unreported, delivered 2nd December 2020) at paragraph [284] (Wallbank J(Ag.)).

⁵⁰ Cf *Redhouse Holdings Limited et al. v Johnson BVIHCM 2010/0138* (unreported, delivered 2nd December 2020) at paragraph [284] (Wallbank J(Ag.)).

⁵¹ Cf *Redhouse Holdings Limited et al. v Johnson BVIHCM 2010/0138* (unreported, delivered 2nd December 2020) at paragraph [286] (Wallbank J(Ag.)).

⁵² Cf *Redhouse Holdings Limited et al. v Johnson BVIHCM 2010/0138* (unreported, delivered 2nd December 2020) at paragraph [286] (Wallbank J(Ag.)).

[71] I am persuaded that this application was indeed motivated by a desire on Mr. Chu's part to obstruct the work of the JLs in investigating possible misfeasance and misappropriation of assets by Mr. Chu from OSL's asset base.

DISPOSITION

[72] For these reasons, Mr. Chu's application fails. To the extent that it might be argued that it remains extant against the Second and Third Respondents Mr. Yen and Ms. Chan it stands dismissed. The JLs and Mr. Lau shall each have their costs of this application.

[73] I do not consider it appropriate to accede to the JLs' request that Mr. Chu should be required to seek the Court's prior leave before filing further applications. Whilst it appears to me that Mr. Chu has launched a number of applications, rehearsing iterations of his same complaints, with the clear goal of ending or stalling the liquidation and the JLs' investigations, and whilst this requires the JLs to expend finite resources of time and money to the detriment of their work in recovering value for the liquidation estate, the JLs and Mr. Lau are protected by the doctrine of res judicata/issue estoppel. Whether stronger active measures are required to prevent vexation can be reviewed going forward.

[74] I thank the parties' learned Counsel for the assistance they have given to the Court in this matter.

Gerhard Wallbank

High Court Judge

By the Court

Registrar