

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0020

BETWEEN:

**[1] TREEHOUSE INVESTMENTS LIMITED
[2] GAC HOLDINGS LIMITED**

Appellants

and

**[1] CARL STUART JACKSON
[2] ANDREW HOSKING
[3] SIMON BONNEY
[4] GREIG MITCHELL**

(In their Capacity as Joint Liquidators of Glen Moar Properties Limited (In Liquidation), Unicorn Worldwide Holdings Limited (In Liquidation), Ballaugh Holdings Limited (In Liquidation) and Sulby Investment Holdings Limited (In Liquidation))

Respondents

Before:

The Hon. Mde. Gertel Thom, Justice of Appeal
The Hon. Mr. Gerard St. C Farara, Justice of Appeal [Ag.]
The Hon. Mr. Trevor Ward, Justice of Appeal [Ag.]

Appearances:

Mr. John McCarroll, SC for the Appellants
Mr. Andrew Willins for the Respondents

2022: May 10;
June 23.

Interlocutory appeal – Joinder of parties – Section 273 of the Insolvency Act, 2003 – Whether the court had jurisdiction to make an order for joinder of parties in insolvency proceedings – Whether the judge erred on the hearing of the joinder application in proceeding to consider and to determine the merits of the section 273 application – Whether the judge erred in holding that the appellants were making the application to join in the section 273 Application not as aggrieved persons but for the ulterior motive and improper purpose of attempting to prevent the respondents from proceeding with the claim in the Isle of Man against Mr. Simon McNally – Whether the judge erred in holding that the section 273 application faces an uphill battle and was bound to fail on the basis that the joint liquidators were exercising their commercial assessment in bring the Isle of Man proceedings

and the Court will only interfere if a high degree of unreasonability can be shown in their decision – Whether the judge erred in concluding that the more appropriate remedy in the circumstances was for the appellants to bring an application seeking the removal of the respondents as joint liquidators – Whether the judge erred in failing to order joinder having heard submissions as to the effect and scope of the rule in Cherry v. Boulton – Whether the judge erred in refusing to join Treehouse Investments Limited on the ground that it was not a creditor because it had failed to produce a copy of its proof of debt in the liquidation

On 26th May 2021, the appellants, Treehouse Investments Limited (“Treehouse”) and GAC Holdings Limited (“GACH”) made an application in the Commercial Division of the High Court to be joined as co-applicants (the “Joinder Application”) to an application filed on 19th March 2021 by two directors, Simon John McNally, (“S McNally”) and Simon Nicholas Hope Cooper (“S Cooper”) (collectively “Messrs. McNally and Cooper”), of four companies in the Territory of the Virgin Islands (“BVI”), namely, Glen Moar Properties Limited, Unicorn Worldwide Holdings Limited (“Unicorn”), Ballaugh Holdings Limited and Sulby Investment Holdings Limited (collectively “the BVI Companies”), pursuant to section 273 of the Insolvency Act, 2003 (the “section 273 Application”).

The section 273 Application was brought against the respondents who are the joint liquidators (“the JLs”) of the BVI Companies and sought certain relief challenging the decision of the JLs to commence an action in the Isle of Man against Messrs. McNally and Cooper as defendants (“the Isle of Man Proceedings”). In the Isle of Man Proceedings, the Manx Claimants allege breaches, by Messrs. McNally and Cooper, of fiduciary duties which they owed as directors to each of the Manx Claimants. The reliefs sought include orders for the return of certain payments and/or distributions improperly made or their traceable proceeds (on the basis of a constructive trust); an account of any profits received by Messrs. McNally and Cooper in respect of such improper payments; equitable compensation and/or damages and/or restoration of payments against the first defendant S McNally in the aggregate sum of approximately £77.6 million, and against the second defendant S Cooper in the sum of approximately £11.6 million. A judgment in default was entered against the first defendant, S McNally, on 28th September 2020, and is the subject of a set aside application.

By the Joinder Application, the appellants sought to be joined as co-applicants in the section 273 Application on the grounds that: (i) the appellants are both significant creditors in the liquidation of Unicorn and as such, have standing to bring an application pursuant to section 273 of the Insolvency Act; (ii) the grounds upon which the appellants seek to bring a section 273 Application “are the same as those asserted by [Messrs. McNally and Cooper] in the 273 Application”; (iii) in the interest of the appellants’ claim and the Messrs. McNally and Cooper claim being dealt with expeditiously “it is appropriate for [the appellants] to be joined in the 273 Application”; and (iv) despite the appellants’ joinder application having been prepared as expeditiously as possible it was not proper to serve the said application on the respondents ahead of the directions hearing scheduled for 26th May 2021 and, accordingly, the court was requested to abridge time for service of the said application.

On 15th June 2021, the learned judge heard an application previously filed by the JLs, seeking the court’s sanction of their fees and remuneration in the Liquidation Proceedings (collectively “the Remuneration Application”). The appellants were given notice of the

hearing of the Remuneration Application. At the said hearing, the judge agreed to hear, *de bene esse*, three “knock-out points” raised by counsel on behalf of the respondents and gave an *ex tempore* judgment (“the 15th June 2021 judgment”). On the issue of whether Treehouse had standing to appear at the hearing of the Remuneration Application, the judge found that Treehouse had not only had the opportunity to submit a proof of debt in the liquidation of Unicorn, as they were required to do, but to produce or to file evidence that it had indeed done so. Accordingly, the learned judge, made the declaration that Treehouse does not have standing to appear at the hearing of the Remuneration Application, and directed that the said order not to be sealed for 7 days to enable Treehouse to file any evidence which establishes that it made a timeous claim in the liquidation of the Companies. Treehouse did not file any such evidence within the stipulated period in the 15th June 2021 Order; and they had not done so by the hearing of the Joinder Application or up to the hearing of this appeal.

On 6th July 2021, the judge heard the Joinder Application and found, in relation to Treehouse, that despite the period afforded to it by his 15th June 2021 order to provide evidence of its proof of debt submitted in the liquidation of Unicorn, it had not done so, and it is, accordingly, debarred from making a claim in the liquidation of Unicorn. Accordingly, the judge concluded that Treehouse is not a creditor and has no locus standi to make an application under section 273 of the **Insolvency Act, 2003**. He therefore dismissed Treehouses’ application to be joined as a co-claimant in the section 273 Application, it not being ‘a person aggrieved’ having standing to bring such an application against the JLs of the BVI Companies. The learned judge concluded that the application by GACH to be joined in the section 273 Application, was done for an ulterior and improper motive in seeking to join the section 273 Application and, in any event, the section 273 Application was hopeless. The judge, accordingly, directed that his order made on 15th June 2021 be sealed.

Being dissatisfied, the appellants appealed against the order dated 6th July 2021 dismissing the appellant’s Joinder Application. The following issues arise for this Court’s determination: (i) whether the judge erred in proceeding to seek to consider and to determine the merits of the section 273 Application on a procedural joinder application; (ii) whether the judge erred in holding that the appellants were making the application to join in the section 273 Application, not as aggrieved persons, but for the ulterior purpose of attempting to prevent the respondents from proceeding with the claim in the Isle of Man against Mr. Simon McNally; (iii) whether the judge erred in concluding that the section 273 Application was bound to fail as the appropriate remedy, having regard to the allegations of lack of bona fides made therein against the JLs, was not to invoke the court’s supervisory powers under section 273, but to bring an application pursuant to section 187 of the **Insolvency Act** to remove the JLs.; (iv) whether GACH had satisfied the learned judge that its interest in joining the section 273 Application is aligned with the interests of the creditors of Unicorn, and is not adverse to such interest; and (v) whether Treehouse is a creditor in the liquidation of Unicorn. A preliminary issue also arises on the respondents’ counter appeal as to whether the court had jurisdiction to make an order for joinder of parties in insolvency proceedings.

Held: dismissing the appeal, with costs to the respondents of no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days, and dismissing the respondents’ counter notice with no order as to costs, that:

1. Insolvency proceedings are not 'civil proceedings'. They are a specific type of legal proceedings governed by a discrete statutory regime under the **Insolvency Act** and the **Insolvency Rules, 2005** in the BVI. There is no specific provision in the **Insolvency Act** or in the **Insolvency Rules** which addresses, concerns or confers on the court, whether substantively or procedurally, jurisdiction to order a joinder of parties in existing insolvency proceedings. Further, while by Rule 1 of the **Insolvency Rules** the provisions of the **Civil Procedure Rules 2000** ("CPR") are generally made applicable to insolvency proceedings, Part 19 of the CPR enabling the court to add or substitute parties in civil proceedings, has been expressly disappplied to insolvency proceedings by the provisions of Rule 4(2) and Schedule 1 to the **Insolvency Rules, 2005**. While by the provisions of Rule 4(1) and Schedule 1 to the **Insolvency Rules** only certain parts of the court's case management powers under Part 26 of the CPR, namely, rule 26(1)(a) and (b), are disappplied in insolvency proceedings, the express disapplication of Part 19 of CPR dealing with joinder to insolvency proceedings, means that no reliance can be placed on the court's general case management powers under Part 26 of CPR, including rule 26.1(2)(w), in order to ground jurisdiction to join parties to existing insolvency proceedings. That leaves the question as to whether the court has under its inherent jurisdiction the power to make an order for joinder of parties in insolvency proceedings. However, this issue has not been fully argued before this Court, including what effect, if any, would the provisions of sections 6, 7 and 11 of the **Eastern Caribbean Supreme Court (Virgin Islands) Act** Cap. 68 have to its determination. Accordingly, without deciding this preliminary issue, the Court will proceed on the assumption that the power to join third parties, in certain circumstances, to existing applications in insolvency proceedings may exist and, if so, is vested in the Commercial Division of the High Court.

Part 19 and rule 26 of the **Civil Procedure Rules 2000** considered; Rule 4 and Schedule 1 of the **Insolvency Rules 2005** considered.

2. The general principle is that a judge must, in deciding a joinder application, consider whether the joinder is necessary or desirable in the interest of justice, and the efficient and proper determination of an existing application or claim. It follows that where the court is called upon to determine whether the appellants ought properly to be joined in the existing section 273 Application, as co-claimant, the judge was required to conduct an evaluative exercise to be satisfied, on a prima facie basis, whether the appellants, as applicants for joinder, have a legitimate interest in the relief being sought. If the evidence before the court in the joinder application is clear one way or the other, then the judge must reach the appropriate conclusion, either that the parties have standing to bring a section 273 application, or they do not. If they do not, then that is the end of the matter, and the application for joinder must be dismissed. Where the judge hearing the joinder application is satisfied, on a prima facie basis, that the interest of the applicants for joinder is aligned with that of the general body of creditors, he ought to grant joinder, unless there is some other good and compelling reason why he ought not to do so in the particular circumstances of the matter before him. It follows therefore that the

learned judge was entitled to assess whether the appellants had standing to make, and hence to join in the making, of the section 273 Application.

Molavi v Hibbert and others [2020] EWHC 121 (Ch) considered; **In re Pablo Star Ltd** [2018] 1 WLR 738 at [47] considered; **Deloitte & Touche AG v Johnson** [2000] 1 BCLC 485 applied; **ABM AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and others v Kenneth Kryss and others** BVIHCMAP2016/0011 –BVIHCMAP2016/0015, BVIHCMAP2016/0023 –BVIHCMAP2016/0028 (delivered 20th November 2017, unreported) considered.

3. A person cannot be recognised as a creditor in the liquidation of a company unless and until that person makes a claim in the liquidation by submitting a proof of debt in Form R184 to the **Insolvency Rules**. It follows that, a person who may have a good case or solid proof of a debt owed to them by a company in liquidation, who fails to submit a written claim in the liquidation, is not a creditor in the liquidation entitled to share in the distribution of surplus. In this case, no proof of debt or evidence of having submitted or sent in a proof of debt to the JLs, has been provided by Treehouse, despite written requests from the JLs themselves, the several opportunities afforded by the court for it to do so, and the consequences of a failure to comply timeously having been stipulated in an order of the court. Accordingly, there is no basis on which this Court can or ought to set aside the declaration and order made by the learned judge on 15th June 2021 (confirmed on 6th July 2021), that Treehouse has no standing to bring a section 273 application or to be joined in the section 273 Application. The learned judge therefore committed no discernable error of law or fact in reaching that conclusion.

Rule 184 of the **Insolvency Rules, 2005** considered; Sections 209(1) and 273 of the **Insolvency Act, 2003** No.5 of 2003, Laws of the Virgin Islands considered.

4. The application of the rule in **Cherry v Boulton** was not a basis or reason for the learned judge's dismissal of the Joinder Application. It is clear that there is no decision or ruling by the judge below on this issue in his 6th July 2021 judgment, such as would inform a consideration by this Court of it in the appeal. The only apparent conclusion reached by the judge with regard to the application of the rule in **Cherry v Boulton** is in the 15th June 2021 judgment, which is not the subject of an appeal to this Court, and which decision concerned the judge's refusal to permit the appellants to be heard in opposition to a part of the fees and disbursements claimed by the JLs in the Remuneration Application. It follows therefore that the appellant's challenge, by its appeal of the 6th July 2021 judgment, to the decision to dismiss the Joinder Application on the basis of the judge's conclusion in his 15th June 2021 judgment on the application of the rule in **Cherry v Boulton**, fails.

Cherry v Boulton [1839] 41 ER 171 considered.

5. It was open to the appellants to file their own section 273 application. However, by taking the route of applying to be joined to the existing section 273 Application, the appellants opened themselves to the additional argument that they do not and

cannot add anything to the existing section 273 challenge, having expressly stated that the grounds upon which they intend to rely are the same as the grounds being relied on by Messrs. McNally and Cooper in the section 273 Application. It follows therefore, that the judge was entitled to consider the underlying merits of the section 273 Application in determining which way to exercise the court's discretion on the Joinder Application. The learned judge rightly considered that anyone applying under section 273 for an order that the court set aside the decision of the JLs to commence proceedings before a court of competent jurisdiction in the Isle of Man, against two former directors of the Manx Claimants, in circumstances where the underlying claims had been foreshadowed in a letter before action some 2 years before, and where a default judgment has been obtained against one of the defendants, subject to an application to set it aside, and where a forum challenge brought by both defendants have subsequently been dismissed by the Manx Court, faces 'an uphill battle'.

6. In exercise of the court's discretion whether to permit the joinder of Treehouse and/or GACH, the judge was entitled to consider and to be satisfied that they both had standing not only in the technical sense, but whether, based on the evidence before him, they had a sufficient interest in the reliefs being sought by the creditors. This led necessarily to a consideration also of their perceived motive for making the Joinder Application to join the section 273 Application, especially in circumstances where they do not seek to rely on any new or additional grounds. The judge was therefore entitled to consider whether Treehouse and/or GACH's interest were aligned with that of the creditors or were adverse to those interests in seeking to join in the section 273 Application. There was sufficient evidence before the learned judge for him to reach the findings of illegitimate purpose and ulterior motive on the part of GACH in seeking to join the section 273 Application. It follows that the judge was therefore entitled to conclude, having found that Treehouse had no standing as a creditor of Unicorn, that GACH's interest were not aligned with that of the creditors or were adverse to those interests in seeking to join in the section 273 Application. Accordingly, the learned judge adopted the correct approach to the Joinder Application in rendering his decision.

Ming Siu Hung and others v J F Ming Inc and another [2021] UKPC 1 considered; **Deripaska v Cherney** [2009] EWCA Civ 849; [2009] 2 CLC 408 considered.

7. It is not the function of the Court of Appeal to conduct its own evaluation of the evidence and in a spurt of appellate activism to come to its own conclusions. While the judge stated in strong terms his views on the merits of the section 273 Application, he was entitled to do so in deciding whether it was necessary or desirable to join Treehouse and/or GACH in that application as co-applicants. The judge's views expressed as to the merits of the section 273 Application were and remain preliminary views. They do not rise to the level of conclusive findings or a disposition of the said application without a full hearing on its merits and all that may entail. There was sufficient evidence before the learned judge for him to reach the

findings of illegitimate purpose and ulterior motive on the part of GACH in seeking to join the section 273 Application. It follows that the learned judge's conclusion on the issues going to the merits of the section 273 Application and to the motives, purpose and interest of the appellants in seeking the joinder, ought not be disturbed.

8. It cannot be said that the learned judge erred in concluding that the section 273 Application was bound to fail as not being an appropriate remedy because, having regard to the kind of allegations of lack of bona fides made therein against the JLs, it would be more appropriate to bring an application pursuant to section 187 of the **Insolvency Act** to remove the JLs. Section 273 applications ought to be confined to the unreasonableness or perversity of the act, omission or decision of liquidators. It is clear that while a court's review of an act or decision or omission by a liquidator may properly involve an allegation of bad faith in relation to the act, decision or omission sought to be impugned. In this case, the allegations made against the JLs in the section 273 Application go beyond bad faith or the reasonableness of the decision sought to be impugned. They are very serious and weighty allegations of impropriety and wrongdoing, made against officers of the court and the purpose for the liquidation itself. These allegations are wholly unsuitable to be canvassed and dealt with in a section 273 application. Accordingly, the allegations made in the section 273 Application against the JLs ought, more properly, to be the subject of an application for the removal of the JLs pursuant to section 187 of the **Insolvency Act**. It follows that the judge did not incorrectly interpret section 273 of the **Insolvency Act** or placed an inappropriate limit on the section 273 jurisdiction. Accordingly, there is no merit in this ground of appeal given that judge was within his power to reach the preliminary conclusion which he did, as a matter of principle and prudent case management.

Sections 187 and 273 of the **Insolvency Act, 2003**, No.5 of 2003, Laws of the Virgin Islands considered.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal brought by the appellants, Treehouse Investments Limited ("Treehouse") and GAC Holdings Limited ("GACH"), against an order made by the learned judge Jack J [Ag.] dated 6th July 2021 confirming his judgment and orders made on 15th June 2021, directing that the said orders be sealed forthwith, dismissing the appellants' ordinary application dated 25th May 2021 to be joined as co-applicants in claim BVIHC(COM) No. 49 of 2021 ("the Joinder Application"), and ordering the appellants (as applicants) to pay the respondents costs of and incidental to the Joinder Application.

- [2] The respondents are the joint liquidators (“the JLs”) of four companies in the Territory of the Virgin Islands (“BVI”), namely, Glen Moar Properties Limited (“Glen Moar”), Unicorn Worldwide Holdings Limited (“Unicorn”), Ballaugh Holdings Limited (“Ballaugh”) and Sulby Investment Holdings Limited (“Sulby”) – referred to as “the BVI Companies”. Each of the BVI Companies went into liquidation under the provisions of the **Insolvency Act, 2003**¹ (the “Insolvency Act”) by a qualifying resolution of its members. Unicorn went into liquidation on 5th March 2015, and Glen Moar, Ballaugh and Sulby each on 13th March 2015.²

The Section 273 Application

- [3] Claim No. 49 of 2021 was commenced by amended originating application filed on 19th March 2021 by Simon John McNally (“S McNally”) and Simon Nicholas Hope Cooper (“S Cooper”) (collectively “Messrs. McNally and Cooper”), against the respondents, the JLs (“the section 273 Application”). Messrs. McNally and Cooper seeking certain relief pursuant to section 273 of the **Insolvency Act** challenging the decision of the JLs to commence Action ORD20/0025 in the Isle of Man on 4th August 2020 against S McNally and S Cooper as defendants (“the IoM Claim” or “the Isle of Man Proceedings” or “the Manx Claim”).
- [4] By the section 273 Application, Messrs. McNally and Cooper sought orders pursuant to section 273 of the **Insolvency Act**: (i) requiring the respondents to give effect to an indemnity to which they claim to be entitled as former directors of three BVI companies in liquidation, namely, Glen Moar, Unicorn and Ballaugh; (ii) that the action commenced by the respondents in the High Court in the Isle of Man (the IoM Claim) be discontinued; (iii) a declaration that they (Messrs. McNally and Cooper) are entitled to an indemnity as former directors of the BVI Companies pursuant to section 136 of the **Business Companies Act, 2004**;³ and (iv) a declaration that all

¹ No.5 of 2003, Laws of the Virgin Islands.

² Para.1 of the Twelfth Witness Statement of Carl Stuart Jackson filed in No. 120/2017; and First Witness Statement of Carl Stuart Jackson filed in No. 49 of 2021 – Vol. 3A/13/2 and 15/481 respectively.

³ Act No. 16 of 2004, Laws of the Virgin Islands (as amended by the BVI Business Companies (Amendment) Act, 2005, Act No. 26 of 2005, Laws of the Virgin Islands).

and any claims brought or threatened against them by the BVI Companies have been released. In the section 273 Application Messrs. McNally and Cooper assert, inter alia, that:

1. They acted properly and in accordance with their duties as directors [of the BVI Companies] at all times and are entitled to be indemnified accordingly.
2. The appointment of the JLs of the BVI Companies was part of a wider litigation strategy to wind up the companies and to distribute the assets to the beneficial owner of the shares (Beneficial Shareholder). At all material times there was no issue over the solvency of the companies.
3. The Beneficial Shareholder and the Companies indemnified them (Messrs. McNally and Cooper) against any loss arising and that the respondents knew and approved such indemnities and are bound by them.
4. The JLs brought claims against the Beneficial Shareholder in the BVI Commercial Court in 2016 seeking recovery of the same sums which are now sought against them (Messrs. McNally and Cooper) but did not join them in that action.
5. Certain of the sums claimed by the respondents were sums paid to the respondents by way of fees.
6. The IoM Proceedings were brought after the cut-off date for proprietary claims to be brought in proceedings before the Commercial Court in London (the PC Proceedings). Those claims arise out of the settlement of the wider and complex dispute which is referred to in detail in the affidavit (filed in support). The applicants [Messrs. McNally and Cooper] were therefore denied the opportunity to raise their claims to be indemnified out of the assets of the companies in those proceedings.

7. The respondents failed to disclose the matters at 2 and 3 above to the other settling parties (referred to and defined in the affidavit).
8. The IoM Proceedings are, by virtue of the indemnity and the matters set out above, circular and will serve only to diminish the assets of the BVI Companies and therefore the assets for distribution amongst the parties to the PC Proceedings.
9. The IoM Proceedings are not being brought for a proper purpose.

[5] In support of the section 273 Application, the applicants filed the affidavit of S McNally on 19th March 2021 (“McNally 1”) together with the documents exhibited thereto as “SJM-1”; the witness statement of Dawna M. Stickler filed on 17th March 2021 and the documents exhibited thereto as “DMS-1”. On 14th June 2021, the respondents filed in the Liquidation Proceedings (No. 120 of 2017) the Twelfth Witness Statement of Carl Stuart Jackson (“Jackson 12”) together with the documents exhibited thereto as “CSJ-13”.⁴ Jackson 12 was in response to the Second Affidavit of Anthony McNally (“A McNally 2”), the brother of S McNally (one of the applicants to the section 273 Application), filed 9th June 2021 in No. 120 of 2017 (“the Liquidation Proceedings”) together with the documents at exhibit “AM-2”.⁵ A McNally 2, was in response to the fourth and fifth remuneration applications brought by the JLs and dealt with by the learned judge at the 15th June 2021 hearing. However, in A McNally 2 certain issues were raised concerning, inter alia, the IoM Proceedings, the alleged circularity and lack of merit of the IoM Claim, the conduct of the JLs, and the section 273 Application. In opposition to the section 273 Application, the respondents filed the First Witness Statement of Carl Stuart Jackson (one of the JLs’) on 1st July 2021, together with the documents exhibited thereto as “CSJ-1” (“Jackson 1”).⁶

⁴ Record of Appeal Vol. 3A, Tabs 13 & 14.

⁵ Record of Appeal Vol. 2, Tabs 4, 5, 6, 7, 10 & 11.

⁶ Record of Appeal Vol. 3A, Tab 15 and Vol. 3B Tab 16.

The Isle of Man Proceedings

- [6] The IoM Proceedings were commenced against Messrs. McNally and Cooper on 4th August 2020 by the respondents in their capacity as joint liquidators of three BVI Companies in liquidation, namely, Glen Moar, Unicorn and Ballaugh, and by Bridge Properties (Arena Central) Ltd (“BPAC”) and Specialty Finance Limited (“Specialty”) – both of which are direct and indirect subsidiaries of Ballaugh.⁷ The claimants in the IoM Proceedings are collectively referred to in other connected proceedings as “the Manx Claimants”, and the IoM Proceedings as “the Manx Proceedings” or “the Manx Claim”.
- [7] In the IoM Proceedings, the Manx Claimants allege breaches, by Messrs. McNally and Cooper, of fiduciary duties which they owed as directors to each of the Manx Claimants. The reliefs sought include orders for the return of certain payments and/or distributions improperly made or their traceable proceeds (on the basis of a constructive trust); an account of any profits received by Messrs. McNally and Cooper in respect of such improper payments; equitable compensation and/or damages and/or restoration of payments against the first defendant S McNally in the aggregate sum of approximately £77.6 million, and against the second defendant S Cooper in the sum of approximately £11.6 million.⁸ A judgment in default was entered against the first defendant, S McNally, on 28th September 2020. An application to set aside the default judgment was filed on 6th November 2020.⁹ Both S McNally and S Cooper, on 29th January 2021, filed separately, a forum challenge in the IoM Proceedings (collectively “the Manx Forum Challenge”).¹⁰ It is the Court’s understanding, that the Manx Forum Challenge has been heard and subsequently dismissed by the Manx Court in the Isle of Man.¹¹

⁷ Record of Appeal Vol. 3B, Tab 16, pg. 477.

⁸ Record of Appeal Vol.3B, Tab16, pgs. 477-519.

⁹ Record of Appeal Vol. 3B, Tab 16, pg. 521.

¹⁰ Record of Appeal Vol. 3B, Tab 16, pg. 535.

¹¹ Record of Appeal Vol. 5, Tab 4 pg. 136, see respondents’ Written Submissions at 141 para. 12(viii) fn. 5; and oral argument of counsel for the respondents during the hearing of the appeal.

[8] Prior to the commencement of the IoM Claim, the JLs lawyers from the United Kingdom, HFW, sent a letter before action dated 27th November 2018 (“the HFW letter before action”) to Messrs. McNally and Cooper in their individual capacities.¹² In the HFW letter before action it was asserted that Messrs. McNally and Cooper, in their capacity as directors, owed fiduciary duties to the BVI companies Glen Moar, Unicorn and Ballaugh (the holding companies), and to BPAC and Specialty (the subsidiaries) – collectively referred to in the said letter as “the Companies”. The three BVI companies were said to be “insolvent or of doubtful solvency or at risk of insolvency or on the verge of insolvency”.¹³ It was stated specifically in the HFW letter before action, that “Glen Moar was insolvent as of (at the latest) May 2013”; and “Unicorn and Ballaugh were insolvent from (at the latest) June 2014”. This led to all three BVI Companies entering into creditors’ voluntary liquidation in the BVI in March 2015, and to the appointment of the JLs.¹⁴

[9] At paragraph 6 of the HFW letter before action, it is alleged that 19 payments were made totaling approximately £77.5 million between 21st June 2013 and 5th March 2015 (“the Payments”), seven of which totaling approximately £12.2 million were paid into a bank account in the joint names of S McNally and S Cooper, and the remainder of the payments totaling approximately £65.3 million were “made to or for the benefit of Dr. Gail Cochrane and/or her associates”.¹⁵ The HFW letter before action goes on to state that the JLs have, in accordance with their statutory duties, been investigating the affairs of the three BVI Holding Companies, including the circumstances surrounding the Payments;¹⁶ and, as a result of their investigations, the JLs have concluded that “from November 2013, Dr. Cochrane, with [Messrs. McNally and Cooper’s] assistance, began a campaign to strip the Arena Group [defined in the said letter to be six holding companies, including the three BVI Companies in liquidation] of all its liquid assets as quickly as possible before Mr.

¹² Record of Appeal Vol. 3B, Tab 16, pgs. 449-473.

¹³ Para. 29 of the HFW letter before action.

¹⁴ Para. 30 of the HFW letter before action.

¹⁵ Para. 6 of the HFW letter before action.

¹⁶ Para. 30 of the HFW letter before action.

Ruhan and/or the English Courts took away her control of the group.¹⁷ A clear pattern of dealing with the Arena Group's assets was identified,¹⁸ which pattern showed that in almost every instance money received from third parties "were paid out immediately to or for the benefit of the Proposed Defendants [Messrs. McNally and Cooper] and/or Dr. Cochrane and her associates".

[10] The HFW letter before action goes on to list, identify and quantify the respective claims of Glen Moar and Unicorn against Messrs. McNally and Cooper; and, also, their breach of duty claims against Messrs. McNally and Cooper.¹⁹ Details of the various Unicorn payments and claims were given at paragraphs 49 to 62 and are summarised at paragraph 85 of the HFW letter before action. The payments from Unicorn are said to amount to approximately £6.7 million. The letter concludes with a request for a substantive response setting out the reasons why the claims (or any particular claim) are disputed.²⁰

[11] To put the IoM Proceedings in proper context, it is noted that Messrs. McNally and Cooper, who were formerly the principals of a Manx law firm, Bridgehouse Partners LLP, have been described by Mostyn J in **Ruhan v Ruhan**²¹ as the "treacherous former front men" of Mr. Andrew Ruhan who claims to have had his entire fortune stolen from him by Dr. Gerald Smith, as a convicted fraudster. Moreover, Foxton J, in the English proceedings, found the Manx Defendants, that is Messrs. McNally and Cooper, acted in "fraudulent breach of trust" in relation to what is known as "the Isle of Man Settlement". They have also been found by an arbitral tribunal to have fraudulently misappropriated and/or misdirected monies that was due to or being held for another party, Mr. Franek Sodzawiczny, in breach of fiduciary duty. These are some of the facts upon which the respondent relies to demonstrate why the learned judge was correct to conclude in his 15th June 2021 judgment, that the

¹⁷ Para. 31 of the HFW letter before action.

¹⁸ Paras. 40 to 62 of the HFW letter before action.

¹⁹ Paras. 63 to 71 of the HFW letter before action.

²⁰ Para. 87 of the HFW letter before action.

²¹ [2017] EWHC 2739 (Fam).

Joinder Application was “redolent with bad faith”, and the section 273 Application not brought for a proper purpose to achieve the maximum return in the liquidations, but instead for an ulterior motive, and any movers of the section 273 Application faces an up-hill battle to overturn what is essentially the commercial judgment of the JLs in bringing the IoM Claim. I shall return to these aspects in due course.

Joinder Application

[12] The appellants’ Joinder Application was filed on 26th May 2021.²² The grounds upon which the appellants sought to be joined as co-applicants in the section 273 Application are:

- (i) The appellants are both significant creditors in the liquidation of Unicorn and as such, have standing to bring an application pursuant to section 273 of the **Insolvency Act**;
- (ii) the grounds upon which the appellants seek to bring a section 273 application “are the same as those asserted by [Messrs. McNally and Cooper] in the 273 Application”;
- (iii) in the interest of the appellants’ claim and the Messrs. McNally and Cooper claim being dealt with expeditiously “it is appropriate for [the appellants] to be joined in the 273 application”; and
- (iv) despite the appellants’ joinder application having been prepared as expeditiously as possible it was not proper to serve the said application on the respondents ahead of the directions hearing scheduled for 26th May 2021 and, accordingly, the court was requested to abridge time for service of the said application.

[13] The Joinder Application was supported by the First Affidavit of Anthony McNally filed 27th May 2021 (“A McNally 1”) together with the documents exhibited thereto as

²² Record of Appeal Vol. 5, Tab 8, pg.165.

“AM-1”.²³ Mr. Anthony McNally (“A McNally”) avers that he is a director of both Treehouse and Bosons Limited (“Bosons”), and that Bosons is the sole corporate director of GACH.²⁴

15th June 2021 hearing and decision

- [14] The hearing before Jack J on 15th June 2021 was to consider the respondents’ fourth and fifth applications filed on 29th April 2021 as joint liquidators seeking the court’s sanction of their fees and remuneration for the period 1st August 2020 to 31st January 2021 in the Liquidation Proceedings BVIHC(COM)2017/120 (collectively “the Remuneration Application”). By 15th June 2021, the appellants had filed the Joinder Application, the hearing of which was subsequently fixed for 6th July 2021.
- [15] The appellants were given notice of the hearing of the Remuneration Application. This was pursuant to the requirement to do so set forth in an order dated 21st November 2019 made by Wallbank J [Ag.] in Claim No. 120 of 2017.²⁵ On 9th June 2021, S McNally, as a director of Treehouse and Bosons (the sole corporate director of GACH) filed his second affidavit (“McNally 2”). He requested that the court adjourn the hearing of the Remuneration Application until after its determination of the Joinder Application, and if the Joinder Application was successful, until after the hearing and determination of the section 273 Application. Also, filed (in the Liquidation Claim No. 120 of 2017) by the respondents on 14th June 2021 (a day before the 15th June 2021 hearing) in response to McNally 2, is Jackson 12.²⁶
- [16] At the hearing on 15th June 2021, Mr. McCarroll SC, learned counsel for the appellants, requested that the court “carve out” that portion of the joint liquidators’ fees relating to the IoM Proceedings and adjourn consideration of those fees as well as the “knock-out points” raised by counsel for the JLs, to the hearing of the section

²³ Record of Appeal Vol. 2, Tab 8, pgs. 510-517.

²⁴ See para. 1 of A McNally 1.

²⁵ Jackson 12 at paras. 5 & 6.

²⁶ Record of Appeal Vol. 3A, Tab 13.

273 Application itself.²⁷ However, the learned judge, having considered the competing positions of counsel as to how he ought to proceed at the hearing, and over the objections of counsel for the respondents, agreed to hear, *de bene esse*, three so-called “knock-out points” raised by counsel Mr. Willins on behalf of the respondents.²⁸

[17] The first and third ‘knock out points’ had been foreshadowed in Jackson 12 and, to some extent, in earlier correspondence from counsel (Appleby) on behalf of the JLS to Mr. McCarroll on behalf of the appellants. The second ‘knock out point’, the **Cherry v Boulton**²⁹ point, was raised for the first time by counsel for the respondents during oral submissions at the 15th June 2021 hearing. The first knock out point relates to Treehouse and the other two to GACH. They are:

“(1) Treehouse has no standing as a creditor in the liquidation of Unicorn having not submitted a proof of debt Form 184 in the liquidation of the said company;³⁰

(2) GACH, as the purported assignee of certain claims from Messrs. McNally and Cooper, cannot stand in a better position than the said assignors who, on the application of the rule in **Cherry v Boulton**, could not bring claims in the liquidation of Unicorn until they have accounted to the company for the monies that they have allegedly stolen or fraudulently and in breach of trust removed from the Manx Claimant companies, which amount to some £70 million; and

(3) from the relevant documents: (i) Bosons is not a director of GACH, and (ii) Litigation Capital Limited is the sole shareholder of GACH. Accordingly, neither Bosons or A McNally (or their BVI lawyers, Harneys) have the right or authority to litigate in the name of or on behalf of GACH. In brief, that authority is said to be vested in Mr. David Standish and Mr. John Milson (“the Enforcement Receivers”) who were, by virtue of order of Owen J dated 7th April 2008 in the English Proceedings,³¹ appointing receivers over the realisable property and assets of Dr. Gerald Martin Smith (“the Receivership Order”), as varied on 16th March 2009 and further varied on 29th May 2013. Further, by the order of Popplewell J made on 7th December 2017 in the Commercial Court in London, England,³² the Enforcement Receivers were

²⁷ Record of Appeal Vol. 4, Tab 19, pgs. 34-36.

²⁸ Record of Appeal Vol. 4, Tab 19, pg. 43, lines 7-24.

²⁹ [1839] 41 ER 171.

³⁰ Paras. 5 to 10 Jackson 12.

³¹ CL-2017-000323.

³² Record of Appeal Vol. 3A, Tab 14, pgs. 50-59.

authorised “to take possession of and are appointed to manage and deal with the property set out in Schedule 1” to the said order, which property includes GACH (a company incorporated in the Marshall Islands). The Enforcement Receivers powers include expressly the power “to take possession of, collect, get in, receive, preserve and manage “the said property, to exercise ownership rights and voting rights over all the property, the subject of the said order and to register themselves or their nominees as the registered holders of any shares included in the property”.³³

- [18] At the conclusion of the 15th June 2021 hearing, the learned judge gave an *ex tempore* judgment (“the 15th June 2021 judgment”). On the issue of whether Treehouse had standing to appear at the hearing of the Remuneration Application, the judge did not accede to Mr. McCarroll’s request that the appellants be permitted a short time to put in evidence as to whether Treehouse was a creditor which had submitted a claim in the liquidation of Unicorn. The judge considered the evidence from the JLs that Treehouse had not put in a proof of debt in the liquidation of Unicorn. He also gave due consideration to the Barring Order of Wallbank J dated 21st November 2019 in Claim BVIHCM2017/120 (which order has not been appealed). This Barring Order stipulates a cut-off date (21 days of service of the said order) by which any person (other than a person who had already submitted a claim in the liquidation of each or any of the four BVI Companies) must submit their proof of debt Form R184 to the JLs’ legal representatives (Appleby) failing which they:

“[S]hall stand forever excluded from participation in the assets of the Companies, and from any distributions which the Joint Liquidators might make, and the Joint Liquidators have the permission of the Court to deal with the assets of the Companies without reference to those persons, who shall thereafter have no claim against the Companies or their Joint Liquidators in respect of those assets, or the value of them.”³⁴

- [19] Accordingly, the judge considered that Treehouse had not only had the opportunity to submit a proof of debt in the liquidation of Unicorn, as they were required to do, but to produce or to file evidence that it had indeed done so; this issue having

³³ Record of Appeal Vol. 4, Tab 19 pgs. 40-41 and 58-64.

³⁴ Paras. 2, 3 and 6 order 21/11/2021; Record of Appeal Vol. 5, Tab 6, pgs. 155-158.

previously been mentioned at the hearing on 26th May 2021 when directions for the 15th June and 6th July hearings were given. The judge stated:

“So from that date, Treehouse should have been on notice that the Liquidators were raising an issue as regards their standing and that was reinforced by a letter from Appleby of the 9th of June of this year, addressed to Mr. MaCarroll at Harneys....”³⁵

[20] No evidence having been provided by Treehouse that it had made a claim in the liquidation of Unicorn, the judge considered that he ought to make a declaration to the effect that it had no standing in the Remuneration Application. However, the learned judge went on, prudently, to stay, for a limited period, the sealing of that limb of his 15th June 2021 order, in the event that there had been some miscommunication or other difficulty as to why Treehouse had not been able to produce evidence that it had in fact submitted a proof of debt in the liquidation of Unicorn, and was therefore a creditor. Accordingly, the learned judge, in the 15th June 2021 order, made the declaration that Treehouse “does not have standing to appear at the hearing of [the Remuneration Application]”, and directed that the said order “not to be sealed for 7 days to enable Treehouse to file any evidence which establishes that it made a timeous claim in the liquidation of the Companies”.³⁶ Treehouse did not file any such evidence within the stipulated period in the 15th June 2021 Order, by the hearing of the Joinder Application or up to the hearing of this appeal. It has not even filed evidence seeking to explain why it is unable to produce some documentary evidence of it having submitted a claim as a creditor in the liquidation of Unicorn.

[21] As to the second ‘knock-out point, (the **Cherry v Boulton** point) the learned judge concluded:

“In my judgment, Mr. Willins is correct that only once those monies are taken into consideration does GAC[H] acquire the status of a creditor. So that at present, they are not a creditor entitled to bring any application under section 273 or to raise issues regarding the Liquidators’ fees.”³⁷

³⁵ Record of Appeal Vol.4, Tab 19, pg. 52 lines 23-25 and pg. 53 lines 1-12.

³⁶ Record of Appeal Vol. 4, Tab 19, pg. 53 lines 16-25; see order at p. 133-138.

³⁷ Record of Appeal Vol 4, Tab 19, pg. 107 lines 19-24.

[22] As to the third ‘knock-out point’ (who has the authority to act for GACH), the learned judge considered the two issues raised by GACH in opposing this point at paragraphs 14 and 16 respectively of McNally 2.³⁸ The paragraph 14 issue is the “circularity” of the IoM Claim. The paragraph 16 issue addresses the prospects of a successful recovery in the IoM Proceedings. As to the latter, the learned judge rejected the appellants’ contention. He opined that the commencement of the IoM Claim was a matter “for the commercial judgment” of the JLs. With regard to the allegations of lack of bona fides of the JLs, the judge opined that these were not matters appropriate to be considered on an application of this sort – a section 273 application. He was of the clear view that “the appropriate course is to seek the removal of the Liquidators”.³⁹

[23] As regards the first issue (the circularity point) raised by the appellants in opposition to the third knock-out point, the learned judge considered that this was “adequately answered” by paragraph 23(a) to (f) of Jackson 12 addressing S McNally’s assertion that the indemnity in clause 2.2(a) and in the SFO Settlement Agreement are fatal to the IoM Claim. The learned judge concluded on this issue in these terms:

“In my judgment, two things follow from that. The first is that GACH will potentially benefit from any recoveries made in the Isle of Man proceedings. It is therefore difficult to see that they’ve got any complaints they could make about that, except obviously to the fact that Anthony McNally is not a neutral party. He is the brother of one of the major debtors.

The other issue which it seems to me I can determine properly on the paper is that the purpose for which the section 273 Application is made by GACH is for an illegitimate purpose. It’s simply to stop the pursuit of Mr. Simon McNally and Mr. Simon Cooper. It’s not for the legitimate purpose of ensuring that the liquidation of the four companies in respect of which the Liquidators have been appointed can maximize the recoveries for the benefit of the creditors as a whole.

So on that basis, I refuse to entertain the application for the adjournment of part of the Liquidators’ application which concerns the Isle of Man fees.”⁴⁰

³⁸ Record of Appeal Vol. 2, Tab 10, pgs. 556-563.

³⁹ Record of Appeal Vol. 4, Tab 19, pg. 109 lines 11-25.

⁴⁰ Record of Appeal Vol. 4, Tab 19 pg. 112; lines 17-25 and pg.113 lines 1-13.

[24] In summary, at the conclusion of the 15th June 2021 hearing, the learned judge (in addition to the orders relating to the determination of the Remuneration Application) made the following orders:

- (i) It is declared that [Treehouse] does not have standing to appear at the hearing of the Fifth Fee approval Application, but that this order is not to be sealed for 7 days to enable Treehouse to file any evidence which established that it made a timeous claim in the liquidation of the Companies.
- (ii) The application of the Joinder Applicants to adjourn that part of the Joint Liquidators application for the approval of their remuneration and expenses associated with claim number ORD 20/0025 commenced in the Isle of Man against [S Messrs. Cooper and S McNally] (the Adjournment Application) is refused.
- (iii) GACH's application for permission to appeal against the dismissal of the Adjournment Application is refused.

The judge also made an order for costs against the Joinder Applicants arising from their opposition to the Fifth Fee Approval Application and of their Adjournment Application, such costs to be assessed if not agreed within 14 days ("the 15th June 2021 Order").

Jackson 1

[25] By 6th July 2021 when the Joinder Application was heard by the learned judge, the respondents had filed and served Jackson 1 in response to the amended originating application filed on 19th March 2021 by Messrs. McNally and Cooper (the section 273 Application), and to the First Affidavit of S McNally filed in support thereof.⁴¹ Jackson 1 is therefore the respondents' substantive response to the section 273 Application, to which the appellants have applied to be joined as co-applicants.

⁴¹ Record of Appeal Vol. 3A, Tab 15, pgs. 481-482.

Paragraph 10 of Jackson 1 also addresses the Joinder Application filed by the appellants as “two purported creditors”. Mr. Jackson continues:

“10. ... I understand that the Court has already considered questions of standing, and I have addressed the position of Treehouse and GACH in my Twelfth Witness Statement in support of the JLs’ fee approval application in BVIHCM 120/2017 (the Liquidation Proceedings), and I therefore do not address their applications further except to the extent necessary to address certain of the arguments advanced by the Applicants [Messrs. McNally and Cooper] relating to alleged circularity.”

[26] At paragraph 11 of Jackson 1, it is averred that A McNally is the brother of S McNally, and that he is a director of Treehouse and a director of Bosons, a Hong Kong company, which purports to be the sole director of GACH. Mr. Jackson continues:

“It bears emphasis that Treehouse and GACH, two entities purportedly under the control of [A McNally] appear to be acting in the interests of the Applicants [Messrs. McNally and Cooper] in an effort to derail litigation which the JLs have commenced against the Applicants in relation to their dishonest misapplication of the assets of the Manx Claimants. It follows that I do not believe that the Applicants, nor Treehouse or GACH, are acting bona fide in the best interest of the creditors; rather, in the case of the Applicants they are acting in the interest of themselves, and in the case of Treehouse and GACH in the interest of [A McNally’s] brother [S McNally].”

[27] Also, at paragraph 12 of Jackson 1, it is averred: “I should make it clear that I do not believe that the Applicants [Messrs. McNally and Cooper] (or Treehouse or GACH) have any genuine belief in their entitlement to the relief sought, but rather have brought this application as part of an abusive strategy to delay the determination of the Manx Proceedings, and that there is no merit to the [section 273 Application] at all”. Mr. Jackson avers that he and his co-liquidator Simon Bonney, are directors of both BPAC and Specialty. In Jackson 1, Mr. Jackson also observes (at paragraph 9) that, on the question of standing, the Applicants [Messrs McNally and Cooper] appear to bring the section 273 Application “in their capacity as Defendants to the Manx Proceedings, and not in their capacity as alleged creditors of any of the (four) BVI Companies (in liquidation)”.

[28] The reliance by Messrs. McNally and Cooper in McNally 1 on releases and an indemnity was addressed (in some detail) at paragraphs 45 to 56 of Jackson 1. Suffice it to be said that the JLs do not accept that there are any valid releases or indemnities.⁴² It is also stated categorically (at paragraph 56) that the JLs “have not authorised any waiver or indemnity in respect of the matters the subject of the Manx Proceedings, and did not appoint Dr. Cochrane to be their agent”. The issue of ‘circularity’ raised by Messrs. McNally and Cooper in the section 273 Application, which is said by the JLs to be incorrect for the reasons they gave in Jackson 12 in No. 120/2017, was also addressed, in some detail, in Jackson 1 at paragraphs 57 to 75. They do not require repeating here. Finally, the issues raised by Messrs. McNally and Cooper that: (i) the four BVI Companies were placed into liquidation as part of litigation strategy in a dispute in England, and not because of any issue as to their solvency; and (ii) the IoM Proceedings were brought by the JLs as a means of keeping the JLs in place, which allegation is based (in part, if not wholly) on the “hearsay evidence from Dr. Gerald Smith, a twice convicted fraudster”, were also addressed and strongly denied at paragraphs 76 to 81 of Jackson 1. These allegations go to the assertion of improper purpose on the part of the JLs in bringing the IoM Claim. In contradistinction, the JLs aver that they “are bringing claims in accordance with their statutory obligations for the benefit of creditors as a whole so as to recover assets that have been misappropriated from the BVI Companies by the applicants [Messrs. McNally and Cooper]”.⁴³

6th July 2021 hearing and decision

[29] The appellants’ Joinder Application was fully argued at the hearing before the learned judge on 6th July 2021. Counsel for the appellants and the respondents filed detailed written submissions and made extensive oral submissions. At the conclusion of the hearing on 6th July 2021, the learned judge gave an *ex tempore* judgment.⁴⁴ This decision was reduced to a written judgment published on 13th

⁴² Para. 55 of Jackson 1.

⁴³ Para. 79 of Jackson 1.

⁴⁴ Record of Appeal Vol. 1, Tab 2.

September 2021 (“the 6th July 2021 judgment”).⁴⁵ The formal order of the court was entered on 8th July 2021 (“the 6th July 2021 Order”).⁴⁶ The learned judge made the following orders:

- “1. The Court refuses to exercise its inherent jurisdiction in **Re Barrell Enterprises**⁴⁷ to rescind or revoke its order and judgment of 15 June 2021.
2. The orders dated 15 June 2021 are to be sealed forthwith.
3. The Joinder Application is dismissed.
4. The Joinder Applicants’ application for leave to appeal is refused.
5. The Joinder Applicants are to pay the Respondents costs of and incidental to the Joinder Application within 14 days to be assessed if not agreed.”

[30] In rendering his decision on the Joinder Application, the learned judge considered separately the position in law of Treehouse and GACH, as alleged creditors of Unicorn. In relation to Treehouse, he observed that, despite the period afforded to it by his 15th June 2021 order to provide evidence of its proof of debt submitted in the liquidation of Unicorn, it had not done so, and it is, accordingly, debarred from making a claim in the liquidation of Unicorn. The only evidence before the learned judge from Treehouse as to it being a creditor of Unicorn and it having submitted a proof of debt in the liquidation, is to be found at paragraph 8 of McNally 1.⁴⁸ There it is averred that Treehouse “is recognized as a creditor of Unicorn having submitted a proof of debt to the JLs in the sum of £452,000. The relevant debt arose from a loan advance(sic) made by Treehouse to Unicorn on 6th October 2014. Treehouse’s position as a creditor was recognised in the court’s order dated 28 July 2018, where it is listed in the list of ‘Relevant Creditors’ at Schedule 2 (page 10)”. This is a bald statement which has not been substantiated by any documentary evidence whatsoever that a proof of debt had actually been submitted by or on behalf of Treehouse in the liquidation of Unicorn.

⁴⁵ Record of Appeal Vol.1, Tab 2, pg. 96.

⁴⁶ Record of Appeal Vol. 1, Tab 3, pgs. 102-104.

⁴⁷ [1973] 1 WLR 19.

⁴⁸ Record of Appeal Vol. 2, Tab 8, pg. 512.

- [31] Treehouse, having not produced a copy of a proof of debt which A McNally averred had been filed in the liquidation, and for the other reasons given by the learned judge in both his 15th June and 6th July 2021 judgments, he concluded that Treehouse is not a creditor, and has no locus standi to make an application under section 273 of the **Insolvency Act**. The effect of this ruling was to dismiss Treehouses' application to be joined as a co-claimant in the section 273 Application, it being not 'a person aggrieved' having standing to bring such an application against the JLS of the BVI Companies.
- [32] The learned judge considered the position of GACH as a creditor of Unicorn to be "more complicated". He considered the two points ('knock-out points') raised by Mr. Willins, learned counsel for the respondents, in relation to GACH. On the first, the **Cherry v Boulton** point, the learned judge, recorded the counter-points and arguments made by Mr. McCarroll, SC in his written and oral submissions on behalf of GACH. These were to the effect that the rule in **Cherry v Boulton** cannot or ought not to be applied to GACH so as to render it not a creditor of Unicorn. The reasons advanced in support of this submission are of mixed fact and law. It was submitted that the rule in **Cherry v Boulton** is essentially a simple set-off rule, and the evidence discloses that since Unicorn's claim in the IoM Proceedings is for the sum of £6 million, whereas the claim which GACH seeks to prove in the liquidations as the assignee of the benefit of the claims which both S McNally and S Cooper had in the liquidations of Unicorn and Glen Moar, amounted to some £24.7 million, there is, on any reasonable interpretation, still a substantial sum owing to GACH by Unicorn, entitling it to be classified as a creditor of the said company. Therefore, the appellants submitted, on any generous basis of set-off, GACH has clearly demonstrated that it is a creditor, with standing, to apply for relief under section 273 itself and, accordingly, to be joined as a co-claimant in the section 273 Application.
- [33] For completeness, the assignment alluded to as grounding GACH's claim to be a creditor of Unicorn is said to have arisen pursuant to the terms of a settlement

agreement dated 14th September 2015 between: (i) Gail A Cochrane, (ii) S McNally, (iii) S Cooper, and (iv) GACH (“the GACH Settlement Agreement”).⁴⁹

[34] In the 6th July 2021 judgment, the learned judge did not reach a conclusion one way or the other on the **Cherry v Boulton** issue, and the applicability of that rule to GACH. This is unlike the judge’s decision on 15th June 2021, where he concluded that Mr. Willins submission was correct that “only once those monies are taken into consideration does GAC[H] acquire the status of creditor. So at present, they are not a creditor entitled to bring any application under section 273 or to raise any issues regarding the Liquidators’ fees”.⁵⁰

[35] As to the second ‘knock-out issue’ with regard to GACH – the prospects of success on the section 273 Application – the learned judge, having considered the submissions of Mr. McCarroll, SC that there were very serious questions raised over the liquidators and their bona fides; the passages from McNally 1 on which Mr. McCarroll relied;⁵¹ and the various other documents upon which he also relied to show the improper circumstances under which the JLs were appointed and they were pursuing an entirely improper approach to the liquidation of the BVI Companies including bringing and pursuing the IoM Proceedings, the learned judge concluded:

“[9] First of all, it is unfair to the liquidators to allow these matters to be raised in these types of applications and secondly, on case management grounds, it is improper to try and raise matters in this way. As I say, if a broad allegation that there is some conspiracy to act improperly to which the liquidators are a party, then that is a matter which needs to be brought to the Court’s attention by way of an application for removal of the liquidators.

[10] The Court will not proceed in applications of this sort on the basis that the liquidators are people who are potentially liable to behave mala fides, and, in effect, completely dishonestly. That is simply not a basis on which the Court can proceed unless and until there is a properly made application for removal of liquidators on the grounds of misbehaviour; the Court will proceed on the basis that the liquidators are behaving in good faith. **Now that is not to say that the liquidators will be presumed to be acting**

⁴⁹ See para. 9 of McNally 1, Vol. 2/8/512.

⁵⁰ Record of Appeal Vol. 4, Tab 19, pg. 107 at lines 19-24.

⁵¹ See paras. 44 and 46 of McNally 1.

correctly. They may or may not be. The Court exercises its supervisory power under section 273 to ensure liquidators are acting correctly. The power under section 273 is something which the Court will use focusing on the particular matters which are raised".
(emphasis added)

[36] At paragraph 12 of the 6th July 2021 judgment, the learned judge addressed head on what he saw as the challenge faced by the claimants in the section 273 Application, and which would likewise be faced by the appellants (if they were joined thereto) in seeking the have the IoM Proceedings discontinued. He stated:

"[12] ... The position here is that anybody applying under section 273 faces an uphill battle. That is because the liquidators are entitled to exercise their commercial assessment of the steps which they can best take in the liquidation to achieve the maximum return. And although there is some argument about precisely how one should formulate the perversity test, the Court will only interfere if a high degree of unreasonability can be shown on the part of the liquidators. For the reasons which I gave in my judgment on 15th June, GACH, in my judgment, comes nowhere near that. There are very good reasons for the liquidators to be pursuing the Isle of Man proceedings, and thus far, they have actually recovered judgment in default. There is going to be a hearing in October as to whether that should be set aside. But in my judgment, for the reasons I gave in June, there is no proper basis for attacking the liquidators' decision to proceed with the Isle of Man action. The application by GACH, in my judgment, is redolent with bad faith on the part of the movers. I do not accept that it is done for the proper purpose of achieving the maximum return in the liquidation".

[37] The learned judge concluded that the application by GACH to be joined in the section 273 Application was done for an: "ulterior motive, namely that [A McNally], who is the guiding force behind GACH, wishes to assist his brother, [S McNally], in the Isle of Man proceedings. In those circumstances, the application to join in a section 273 application is, in my judgment, hopeless. So, for those reasons I refuse to open the decision which I made on 15th June".⁵² He accordingly directed that his order made on 15th June 2021 be sealed.

⁵² See para. 13 of the 15th June 2021 judgment.

Appeal and Counter-Notice

[38] The appellants, with the leave of a single judge of this Court granted on 28th September 2021, commenced an appeal by notice of appeal filed 4th October 2021 against the order dated 6th July 2021 dismissing the appellant's Joinder Application. This was the appellants' second application for leave to appeal, the first being leave to appeal the 15th June 2021 Order. Leave to appeal the 6th July 2021 Order having been granted, the appellants withdrew their prior application for leave to appeal against the 15th June 2021 Order. They did so at a hearing on 4th October 2021, on the basis that the leave granted to appeal the 6th July 2021 Order covered the issues raised in the first leave to appeal application.⁵³

[39] In their notice of appeal, the appellants rely on five grounds of appeal. Grounds 1, 2 and 3 are general grounds. Ground 4 relates to GACH only; and ground 5 only to Treehouse. These grounds are:

i. **Ground 1 – Determination of merits on procedural application**

The learned judge erred in law, or alternatively mixed fact and law, in proceeding to seek to determine the merits of the section 273 Application on a procedural joinder application.

ii. **Ground 2 – Determination of ulterior purpose without considering substantive evidence**

The learned judge erred in law, or alternatively in mixed fact and law, in holding, as he appeared to do, that the appellants were making the application under section 273 not as aggrieved persons, but in an attempt to prevent the respondents from proceeding with the IoM Claim for an ulterior purpose in circumstances where:

(a) The application was a procedural joinder application and not the hearing of the 273 Claim; and

⁵³ See paras. 2.14 to 2.16 of the Appellants' Written Submissions; Record of Appeal Vol. 5, Tab 3, pgs.122-123; and Certificate of Result of Application dated 4th October 2021 at Record of Appeal Vol. 4, Tab 21, pg. 140.

(b) The court had insufficient evidence and heard insufficient evidence to enable it to reach that conclusion and/or exercise its discretion in so far as it did so.

iii. **Ground 3 – Restrictions on use of section 273**

The learned judge erred in law, or alternatively in mixed fact and law, in holding that the 273 Claim was bound to fail on the basis that the appropriate remedy in the circumstances was for the appellants to bring an application seeking the removal of the respondents from their office as joint liquidators.

iv. **Ground 4 – The legal effect of *Cherry v Boulton* (GACH)**

The learned judge erred in law, or alternatively in mixed fact and law, in failing to order joinder having heard submissions as to the true effect and scope of the rule in **Cherry v Boulton** and the statutory set-off pursuant to section 150 of the Act (the judge having fallen into error in giving judgment on 15th June 2021 in No. 120/2017) on the question as to whether GACH was a creditor.

v. **Ground 5 – Failure to resolve conflict of fact (Treehouse)**

The learned judge erred in law, or alternatively mixed fact and law, in refusing to join Treehouse on the grounds that it was not a creditor because it had failed to produce a copy of the proof of debt in circumstances where there was a factual dispute as to whether a proof of debt had been filed; where Treehouse had been named as a “Relevant Creditor” in the order of Adderley J dated 28th July 2018 and where Treehouse had been given notice by the JLs of its right to appear at the hearing 15th June 2021 and treated as a creditor at all material times until the appellants instigated the Joinder Application.

[40] The respondents filed a counter notice of appeal.⁵⁴ They cross-appealed on some three additional or alternative grounds upon which they say the judge ought also to have dismissed the Joinder Application on 6th July 2021 and upheld his 6th July 2021 judgment. In substance these grounds are:

- (1) The rule in **Cherry v Boulton** was such that the appellants were unlikely to be creditors with an admissible claim in the liquidation of the BVI Companies.
- (2) The receivers appointed by the English Court over GACH and the shares in GACH's parent company had not authorised the pursuit of the Joinder Application.
- (3) The judge ought to have dismissed the Joinder application as a matter of discretion for the several reasons set out at paragraph 2.4 (i) to (viii) of the Counter Notice.

[41] I will consider the appellants' grounds of appeal in the following order. First ground 5, which deals with the standing of Treehouse as a creditor of Unicorn and whether it is 'a person aggrieved' within the meaning of that term in section 273 of the **Insolvency Act**. Second, ground 4 which concerns the rule in **Cherry v Boulton**. Third, grounds 1 and 2 together, which challenges the judge's conclusions that the appellants were making their application to join the section 273 Application for an ulterior purpose, and that their interest does not align with the interests of the general body of creditors. Lastly, ground 3 which challenges the judge's conclusion that the allegations made against the JLs in the section 273 Application was an improper use of the section 273 jurisdiction, and ought properly to be made in an application for the removal of the JLs.

[42] However, before addressing the appellants specific grounds of appeal, I will consider the preliminary issue raised by the respondents in their counter notice

⁵⁴ Record of Appeal Vol. 5, Tab 2, pg. 114.

(para. 2.4 (ii)) that the court lacks jurisdiction to order joinder in insolvency proceedings, and specifically, section 273 applications. I will also consider the approach to and application of the two-stage test formulated by Lord Millett in **Deloitte & Touche AG v Johnson**⁵⁵ when determining an applicant's standing in a section 273 application, and how the court ought to approach those stages when dealing with an application to join a pending section 273 application.

Joinder Jurisdiction and standing under section 273

Respondents' Submissions

- [43] In the counter-notice, this preliminary issue is set out in this way: "[t]here is no power to order joinder, and there was no reason why the appellants could not have brought their own [section 273] application". This ground was not developed much by the respondents in their written submissions, save as to state: "[t]he apparently wide powers in CPR 19, even had they applied, are to be exercised judicially".⁵⁶ It was certainly open to the appellants to file a section 273 application, and to seek to have it heard by the court below at the same time as the section 273 Application brought by Messrs. McNally and Cooper. However, that is not the way in which they elected to proceed.
- [44] Before this Court, counsel for the respondents submitted that the court below had no jurisdiction to order joinder in the instant proceedings. There is no provision under the **Insolvency Act** or the **Insolvency Rules, 2005**⁵⁷ ("Insolvency Rules" or "Rules") for the court to permit a joinder of third parties to an existing application. Moreover, it is submitted that Part 19 of the **Civil Procedure Rules 2000** ("CPR") has no application to insolvency proceedings which are not 'civil proceedings' within the definition of that term in rule 2.2(2) of the CPR; and, more importantly, by rule 2.2(3)(b) the CPR is expressly excluded from application to insolvency proceedings (including the winding up of companies).

⁵⁵ [2000] 1 BCLC 485 at 491-492.

⁵⁶ See para. 47 of the respondents' skeleton arguments.

⁵⁷ S.I No. 45 of 2005.

[45] More broadly, as to *locus standi* and the test to be applied when considering a section 273 application (or its equivalent), the respondents rely on the formulation by Lord Millet of the two-stage test in **Deloitte**, as further elucidated and explained by this Court in **ABM AMRO Fund Services (Isle of Man) Nominees Limited (formerly Fortis (Isle of Man) Nominees Limited) and others v Kenneth Kryss and others**.⁵⁸ The first stage is whether the applicant qualifies as “a person aggrieved” by an act, omission or decision of the liquidator. This is said to refer to standing in the technical sense. The second stage, which is also of considerable importance particularly in liquidations, is whether the applicant has a legitimate interest in obtaining the relief sought. The respondents submit that even if the court had jurisdiction to make an order for joinder in insolvency proceedings, on the facts, both limbs of the ‘standing test’ have not been satisfied by the appellants. Neither of them is a creditor of Unicorn and, in any event, their interests are not aligned with that of the general body of creditors, but are in fact adverse to such interests, as the learned judge found. Accordingly, for these and the other reasons relied on by the respondents in their counter notice and submissions, they submit that the judge was correct to dismiss the Joinder Application.

[46] Learned counsel for the respondents also relied on the very recent decision of the English Court of Appeal in **Adele Lock v Paul Stanley and another**.⁵⁹ In **Lock**, Males LJ, delivering the judgment of the court, endorsed and further explained Lord Millett’s two stage test or approach to be applied in cases where the issue of standing arises where an outsider to the liquidation applies to have the court exercise its supervisory powers over an office holder, including the power to review and to ‘confirm, reverse or modify the act, omission or decision’ of a liquidator. At paragraph 29 of the judgment it is stated:

“The first stage is to consider whether the applicant is “a person aggrieved” by an act or decision of the liquidator within the meaning of the section. The second stage is to consider whether the applicant has a legitimate interest in obtaining the relief sought. It will not have such interest if its interests “are

⁵⁸ BVIHCMAP2016/0011 –BVIHCMAP2016/0015, BVIHCMAP2016/0023 –BVIHCMAP2016/0028 (delivered 20th November 2017, unreported).

⁵⁹ [2022] EWCA Civ 626.

adverse to the liquidation and the interests of the creditors”. Thus an applicant may qualify as “a person aggrieved” by virtue of being a creditor, but will not have a “legitimate interest” if its interest in obtaining the relief is contrary to the interests of creditors generally. Lord Millett had been a party to the decision in *Re Edennote*, which was cited in argument although not in the judgment. He cannot have thought that there was any conflict between the decision in *Re Edennote* and the two-stage approach which he described.”

- [47] In **Lock**, Males LJ opined that there was no conflict between the two-stage test of Lord Millet in **Deloitte**, and the prior decision of the English Court of Appeal in **Re Edennote Ltd**.⁶⁰ The latter concerned a challenge under section 168(5) of English Insolvency Act 1986 (the equivalent of the BVI's section 273) to the decision of the liquidator to assign Edennote's claim in litigation brought by the company Edennote against Tottenham Plc, to Mr. Terry Venables, who had been the manager of Tottenham Hotspur Football Club. Males LJ opined that **Re Edennote**: “stands as authority for the proposition that an outsider to the liquidation has no standing to make an application under section 168(5) to set aside an assignment by the liquidator of a claim against him. ... However, the case is not authority for the proposition that a creditor has standing under section 168(5) regardless of whether, in seeking to set aside the assignment, he is acting in the interests of the creditors as a class. That point did not arise for decision”.

Appellants' Submissions

- [48] Counsel for the appellants first submitted that this is a simple CPR Part 19 case. However, in his reply he (correctly) abandoned any reliance on Part 19 and resorted, instead, to grounding jurisdiction on the Joinder Application in the court's inherent jurisdiction. Counsel also countered that this preliminary issue was not raised by the respondents before the court below. Counsel also mused that it was certainly open to the appellants to have brought their own section 273 application and, had they done so, the sensible approach would have been for the two section 273 applications to be heard together, in which scenario these matters would not have

⁶⁰ [1966] 2 BCLC 389.

arisen in the way they did and the parties would not be before the court arguing a preliminary issue of jurisdiction. It was submitted before this Court that the test to be applied by the judge below on the Joinder Application, was whether the appellants are creditors of Unicorn (the threshold test) and whether, on the evidence adduced, they have made out that they have a 'particular interest' in the outcome of the section 273 Application. In support of these submissions, the appellants also rely on the decision of this Court in **ABN AMRO** and the two-stage test formulated by Lord Millett in **Deloitte**. I would simply observe at this stage, that the second stage test is one of 'legitimate' and not 'particular' interest in the relief sought.

[49] The appellants case is that they are clearly creditors of Unicorn, entitled to be joined in the section 273 Application as persons aggrieved by the decision of the JJs to commence and to prosecute the IoM Claim. Accordingly, the court below ought to have granted the Joinder Application and joined them as co-applicants in the section 273 Application. They submit that the issue of whether the appellants have a legitimate interest in the reliefs being sought in the section 273 Application, and whether their interest is aligned with that of the other creditors in the liquidation (as the appellants contend) or is adverse to such interest (as contended by the respondents), are matters not appropriate to be determined by the judge on the Joinder Application, but to be interrogated and decided when at the hearing to determine the section 273 Application. In short, the court ought not to put 'the cart before the horse' at the joinder stage.

[50] Mr. McCarroll further argued that this being the correct approach, which ought to have been adopted by the judge, is borne out by the various cases cited where, in each of them, the decision on whether the applicant had the requisite standing, in the sense of having a sufficient interest in the relief to be granted (the second stage), were all made after a full hearing of the section 273 (or its equivalent) application. Moreover, the 'perversity test' referred to by the learned judge had nothing to do with the question of joinder or the second stage of the test, as an appellants' resort to the supervisory powers of the court under section 273 has, at its core, to do with

an allegation of bad faith on the part of the JLs, and not whether their decision to commence the IoM Action was an unreasonable or perverse one.

Conclusions on joinder jurisdiction and application of the two-stage test

[51] It is not correct that the respondents did not raise before the court below the preliminary issue of the lack of jurisdiction with respect to joinder applications in insolvency proceedings. As Mr. Willins was quick to point out, this issue was raised in the respondents' skeleton argument filed on 2nd July 2021 in No. 49 of 2021.⁶¹ There it was stressed that none of the rules relied on by the appellants upon which to ground the Joinder Application, namely, rules 19.3 and 26.1 of the CPR and rule 4 of the **Insolvency Rules**, are available to them to found jurisdiction in the court. It was also stressed that rule 4 of the **Insolvency Rules** provides for the applicability of the CPR to insolvency proceedings, except so far as inconsistent with the **Insolvency Act** or the **Insolvency Rules**. However, CPR Part 19, which deals with joinder and addition of parties is specifically disapplied by Schedule 1 (in error schedule 2 was stated) to the **Insolvency Rules**, as are certain of the court's case management powers under Part 26. However, Mr. Willins pointed out that the learned judge did not rule on this preliminary issue in his 6th July 2021 judgment. He seems to have proceeded on the assumption of jurisdiction to make a joinder order in the proceedings, electing to focus his decision on an assessment of whether the appellants had met, at least *prima facie*, the two-stage test in **Deloitte**, and whether granting the joinder would be an exercise of prudent management powers.

[52] It is clear from Schedule 1 to the **Insolvency Rules**, that the entirety of Part 19 of the CPR dealing with the addition and substitution of parties, has no application to insolvency proceedings. It is also clear that only certain specific parts of Part 26 have been disapplied in insolvency proceedings, and not the entirety of Part 26. This position is reached by the application of the provisions of rule 4 and Schedule 1 of the **Insolvency Rules**. The effect of this disapplication, is that the appellants' reliance on CPR 19.3 to found jurisdiction in the court to determine the Joinder

⁶¹ Record of Appeal Vol.4, Tab 18, pg.18 at para. 14.

Application, was entirely misplaced and incorrect. However, does the matter rest there and the correct conclusion ought to be that the learned judge had no jurisdiction to entertain the Joinder Application, or does the court have jurisdiction to do so under and pursuant to its inherent jurisdiction, as the appellants now contend?

[53] There is no specific provision in the **Insolvency Act** or in the **Insolvency Rules** which addresses, concerns or confers on the court, whether substantively or procedurally, jurisdiction to order a joinder of parties in existing insolvency proceedings – (section 354(1) of the **Insolvency Act** relating to bankruptcy - not applicable in the instant matter – confers on the court “full power to decide all questions of priorities and all other questions, whether of law or fact, arising in any bankruptcy”). Provision is made, however, in the **Insolvency Rules** that unless the **Insolvency Act** or the Rules themselves provide otherwise, for “any person” who have been served with or given notice of an application in insolvency proceedings, to be “entitled to appear or be represented at the hearing of the application”.⁶² Another such example is rule 162, where a person who intends to appear on the hearing of an application for the appointment of liquidators of a company shall send a written notice of intention to appear to the applicant for the winding up order, which then gives rise to an entitlement to appear at such hearing without the leave of the court. These provisions speak to the entitlement to appear and to be heard on an application, including to appoint liquidators, in insolvency proceedings. They do not address the court’s power to permit a person who is an outsider to the liquidation, to be joined as a party to an existing application in the insolvency proceedings.

[54] The provisions of the **Eastern Caribbean Supreme Court (Virgin Islands) Act**⁶³ (“the Supreme Court Act”) apply to all courts of the Eastern Caribbean Supreme Court in the BVI, including the Commercial Division, which is a High Court of Justice. By section 6 of the **Supreme Court Act**, all jurisdiction vested in the former

⁶² Rule 20(6) of the Insolvency Rules, 2005.

⁶³ Cap. 68 of the Laws of the Virgin Islands.

Supreme Court by the Supreme Court Act or by any statute in the BVI or any other law for the time being in force in the BVI, shall be vested in the High Court. By section 7, the High Court has “all such jurisdiction (save and except the jurisdiction in Admiralty) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940 was vested in the High Court of Justice in England.” Also, by section 11, the jurisdiction in civil proceedings (not defined in the said Act) vested in the High Court, “shall be exercised in accordance with the provisions of this [Act] and any other law in operation in the [Virgin Islands] and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England.”

[55] It cannot be gainsaid that insolvency proceedings are not civil proceedings. Insolvency proceedings are not ‘civil proceedings’. They are a specific type of legal proceedings governed by a discrete statutory regime under the **Insolvency Act** and the **Insolvency Rules** in the BVI. These laws provide, inter alia, for the winding up of incorporated companies, whether on the ground of insolvency or otherwise, the appointment by the court, statutory powers and duties of liquidators and other office holders, bankruptcy, receivership and for the licensing of insolvency practitioners. While by rule 4(1) of the **Insolvency Rules**, the CPR and the practice directions and guidelines made thereunder are made applicable to insolvency proceedings (with any necessary modifications and provided they are not inconsistent with the Act and the Rules themselves), by Schedule 1 a draft of the provisions in the CPR are expressly disappplied to insolvency proceedings.

[56] Importantly, rule 19 of the CPR is disapplied in its entirety; and rule 26.1 to the extent of the courts’ case management powers at paragraph 2(a) and 2(b) only, namely the court’s power to: (a) adjourn or bring forward a hearing to a specific date; and (b) consolidate proceedings. All the other case management powers of the court listed at sub-paragraphs (c) to (d) and the remainder of the Part 26, apply to insolvency proceedings by virtue of rule 4 (1) of the **Insolvency Rules**. These

'saved' provisions in Part 26, includes, at 26.1(2)(w), the power to "take any other step, give any other direction, or make any other order for the purpose of managing the case and furthering the overriding objective". Accordingly, to a very large extent the case management powers of the court in CPR Part 26, not including joinder, apply to insolvency proceedings. Also, importantly, the overriding objective principles and the manner and extent to which they are to be applied in rule 1 of the CPR have not been disapplied by Schedule 1 to the **Insolvency Rules**, and are of general application in insolvency proceedings.

[57] Having given due consideration to these provisions, certain matters are clear. The first is that while by Rule 1 of the **Insolvency Rules 2005** the provisions of the **Civil Procedure Rules 2000** ("CPR") are generally made applicable to insolvency proceedings, Part 19 of the CPR enabling the court to add or substitute parties in civil proceedings, has been expressly disappplied to insolvency proceedings by the provisions of Rule 4 and Schedule 1 to the **Insolvency Rules 2005**. Secondly, the express exclusion or disapplication of CPR Part 19 means that no reliance can be placed on the court's general case management powers under Part 26 which are made applicable to insolvency proceedings, including rule 26.1(2)(w), in order to ground jurisdiction to join parties to existing insolvency proceedings. What is not so clear is whether, by the operation of sections 6 and 7 of the Supreme Court Act, the Commercial Court, which has jurisdiction in relation to insolvency matters, would have, like other High Courts in the BVI, received the jurisdiction vested in either the former Supreme Court by virtue of the old Supreme Court Act or the jurisdiction, powers and authorities that were vested as of 1st January 1940 in the High Court of Justice in England; and whether, in either instance, that jurisdiction and powers included the power to make orders joining parties to existing proceedings. I say this is 'not so clear' because these provisions were not alluded to or relied upon by either counsel during the hearing of the appeal (or before the judge below).

[58] The appellants now seek to rely on the court's inherent jurisdiction in answer to this point. No authority was cited by counsel for the appellants in support of this

proposition. Counsel for the respondents, on the other hand, cited the case of **Molavi v Hibbert and others**.⁶⁴ However, this case concerns the provisions of the English CPR Part 19, and the application of the overriding objective to the exercise of what is essentially a case management decision.⁶⁵ It does not concern insolvency proceedings per se, and the existence or non-existence of a power, inherent or otherwise, in the court to add or join a new party to an existing application or proceedings under the statutory insolvency regime. Accordingly, while **Molavi** is authority for the principle that, in considering an application to add or join a party in civil proceedings, the court is exercising its case management powers, and “the order will be made if it would further the overriding objective in the concrete circumstances of the case”,⁶⁶ it is not authority for the position in insolvency proceedings.

[59] In light of all this, I hesitate, as I must, in reaching a definitive conclusion on this preliminary issue of jurisdiction in insolvency proceedings to join persons aggrieved by an act or decision of a liquidator to an existing section 273 application. My own preliminary view at this stage, is that the jurisdiction to make such an order in insolvency proceedings is one of the jurisdictions and plentitude of powers received by the High Courts in the BVI, including the Commercial Division, pursuant to section 6 or 7 of the **Supreme Court Act**. This power and discretion must necessarily be part of the wide powers of a High Court to control the processes and procedures before it. However, as stated, I hesitate to render a final or conclusive pronouncement on this issue, not least because of the express exclusion of Part 19 of the CPR from its application to insolvency proceedings, and the absence of any provision in either the **Insolvency Act** or the **Insolvency Rules** dealing with joinder. Furthermore, I also hesitate, as this issue, while canvassed before this Court and developed to some extent by counsel in their respective submissions, the effect, if any, of the provisions of sections 6, 7 and 11 of the **Supreme Court Act** to its proper determination was not addressed by counsel and, as mentioned above, no authority

⁶⁴ [2020] EWHC 121 (Ch).

⁶⁵ See paras. 49 and 50 *Molavi v Hibbert and others*.

⁶⁶ At para. 50 in *Molavi v Hibbert and others*, citing a passage from *In re Pablo Star*.

was cited to this Court by counsel for the appellants in support of his submission on inherent jurisdiction.

[60] I will therefore proceed in this judgment on the assumption that the power to join third parties, in certain circumstances, to existing applications in insolvency proceedings, may exist and, if so, is vested in the Commercial Division of the High Court. In doing so, I am mindful that there are no provisions in the **Insolvency Act** or the **Insolvency Rules** concerning joinder. Accordingly, nowhere stated is the test or principles to be applied by the court when exercising such jurisdiction to determine a joinder application in insolvency proceedings. What is clear is that the court must consider the two-stage test in **Deloitte**. In my opinion, a judge must, in deciding a joinder application, also consider whether the joinder is necessary or desirable in the interest of justice, and the efficient and proper determination of an existing application or claim. As was said in **In re Pablo Star Ltd**⁶⁷ (cited with approval in **Molavi**), the lodestars (leading or guiding principle) “are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case ...”.⁶⁸ However, neither of these cases concern joinder in insolvency proceedings.

[61] Accordingly, while I provisionally lean towards the conclusion that the Commercial Court has jurisdiction to order the joinder of a person aggrieved to an existing section 273 application in insolvency proceedings, there remains the question of the judge’s approach to and his consideration and determination of the Joinder Application, and whether in reaching his decision thereon he was entitled to consider at all the second-stage of the test in **Deloitte** on standing, and the underlying merits of the section 273 Application.

[62] In my considered view, on the assumption that the court has the inherent jurisdiction to order a joinder of parties in insolvency proceedings, the first threshold is whether

⁶⁷ [2018] 1 WLR 738 at para. 47.

⁶⁸ See para. 50 citing a passage from *In re Pablo Star*.

the applicant for joinder has standing in the technical sense of the term at the first stage of the two-stage test formulated by Lord Millett in **Deloitte**. In the instant matter, that first stage concerned an assessment of the evidence to determine whether the appellants are creditors in the liquidation of Unicorn. If they are not, then they do not qualify as 'a person aggrieved' by an act, decision or omission of the JLs, such as to give them standing to invoke the court's supervisory jurisdiction under section 273 of the **Insolvency Act**. It follows that if they were unable to satisfy this first stage, the application for joinder to the section 273 Application must fail at that threshold.

[63] The second stage of the **Deloitte** test involves the court conducting an evaluative exercise to determine whether an applicant for joinder to a section 273 application has a legitimate interest in the relief being sought. That necessarily means whether the applicant's interest, in seeking to be joined to the section 273 Application as a co-claimant or co-applicant, is aligned or substantially aligned with and not adverse to that of the general body of creditors in the liquidation. In some matters the answer to this second-stage question may be patently obvious, in others it may not be and may require the court to conduct a more forensic examination of the evidence before it to reach a satisfactory conclusion on this issue.

[64] In cases where the court is considering and determining a section 273 application (and not a joinder application to become a party to the section 273 Application), the judge, in hearing the section 273 application, must embark upon this second evaluative exercise in order to be satisfied that the applicant has the requisite standing to apply to the court to challenge an act, decision or omission of a liquidator. In the instant matter, where the court is called upon to determine whether the appellants ought properly to be joined in the existing section 273 Application as co-claimant, the judge was required to conduct an evaluative exercise to be satisfied, on a prima facie basis, whether the appellants, as applicants for joinder, have a legitimate interest in the relief being sought. . If the evidence before the court in the joinder application is clear one way or the other, then the judge must reach the

appropriate conclusion, either that the appellants have standing to bring a section 273 application, or they do not. If they do not, then that is the end of the matter, and the application for joinder must be dismissed.

[65] Where the judge hearing the joinder application is satisfied, at least on a *prima facie* basis, that the interest of the applicants for joinder is aligned with that of the general body of creditors, he ought to grant joinder, unless there is some other good and compelling reason why he ought not to do so in the particular circumstances of the matter before him.

[66] It is at this point that the general principles relative to joinder set out in **In Re Pablo Star** cited with approval in **Molavi**, may be of some assistance, that is, whether, standing back, joinder is necessary or desirable in the interest of doing justice between the parties who have a legitimate interest in the relief being sought. This leads also to a consideration of whether the learned judge was correct to conclude, on lack of standing, lack of merit and case and management grounds, that the Joinder Application ought to be dismissed.

Ground 5 – Is Treehouse a creditor of Unicorn

[67] By this ground of appeal, the appellants challenge the finding of the learned judge in both the 15th June and 6th July 2021 judgments, that Treehouse is not a creditor in the liquidations. In mounting this challenge, it is submitted that, on the documentary and other evidence before the judge at the hearing of the Joinder Application, Treehouse is, and was treated as, a creditor in the liquidation of Unicorn. Alternatively, there was, on the evidence before the judge, a genuine factual dispute as to the status of Treehouse as a creditor in the liquidation of Unicorn, which factual dispute the judge ought not to have resolved on the evidence before him. It is also submitted that the learned judge was wrong to resolve this issue in a summary way by requiring Treehouse, in his order dated 15th June 2021, to submit, within 7 days, a copy of its proof of debt in the liquidation of Unicorn failing which it has no standing as a creditor or a person aggrieved.

[68] The appellants point to a number of documents in evidence before the judge. First, they rely on the fact that Treehouse was named as a “Relevant Creditor” in the order dated 28th July 2018 made by Adderley J,⁶⁹ which fact the JLs have not in their evidence filed, explained or adequately explained. Moreover, Treehouse was informed of the hearing on 15th June 2021 and served with the remuneration application papers, “thereby clearly implying [it] had a right to appear”,⁷⁰ (and that its status as a creditor was not in dispute. Additionally, the appellants contend that it is clear from the order dated 28th July 2018 and the JLs’ previous conduct before they did a *volte face* at the hearing on 15th June 2021, that they had prior notice of the debt owed by Unicorn to Treehouse.⁷¹ In short, it is only after Treehouse indicated its intention to join the section 273 Application as a co-claimant, that the JLs ceased to treat it as a creditor of Unicorn. In these circumstances, the JLs ought not to be heard to deny Treehouse’s status as a creditor and, in any event, the judge ought not to have decided this issue in a summary way, which was a wholly inappropriate way to do so.

[69] In A McNally 1, the position of Treehouse as a creditor of Unicorn is addressed in this way:

“8. Treehouse is a recognized creditor of Unicorn, having submitted a proof of debt to the Joint Liquidators in the sum of £452,000. The relevant debt arose from a loan advance(sic) made by Treehouse to Unicorn on 6th October 2014. Treehouse’s position as a creditor was recognised in the court’s order dated 28 July 2018, where it is listed in the list of ‘Relevant Creditors’ at Schedule 2 (page 10).”

[70] No proof of debt filed by Treehouse in the liquidation of Unicorn was exhibited to A McNally 1. This is in contradistinction to the position posited by the deponent in McNally 1 relating to Messrs. McNally and Cooper, and by extension GACH, where the completed proof of debt forms for S McNally and S Cooper (separately and jointly) were exhibited. It is these claims by Messrs. McNally and Cooper in the liquidation of Unicorn that are said by the appellants to have been assigned to

⁶⁹ Record of Appeal Vol. 3A, Tab 14, pg. 20.

⁷⁰ Record of Appeal Vol. 3A, Tab14, pg. 25.

⁷¹ See paras. 8.2 and 8.3 of the appellants’ written submissions.

GACH on the basis of an alleged assignment pursuant to the terms of the Settlement Agreement dated 14th September 2015⁷² by which Messrs. McNally and Cooper agreed to “assign and transfer all rights, title and interest and benefit in the shares of LMC [Legion Management Corporation Inc, a Panamanian corporation in which the appellants were joint shareholders) to GACH”. The proof of debts submitted by both S McNally and S Cooper (individually and jointly) in the liquidation of Unicorn were exhibited as part of exhibit AM-1.⁷³

[71] The order dated 28th July 2018⁷⁴ by which Adderley J in the Commercial Court approved and fixed certain remuneration and disbursements of the JLs in the liquidation of the four BVI Companies, lists at Schedule 2, the persons and entities who are identified in the order as “Relevant Creditors”. These include Treehouse (as No. 17). At paragraphs 12 and 14⁷⁵ of the order, Adderley J ordered the JLs to provide the Relevant Creditors (in addition to the Nominated Interested Parties – “NIP”) with a copy of the application notice and supporting evidence for the Second Approval Application within a specified time; granted liberty to the Relevant Creditors (and NIP) “to apply to the Court in relation to any decision taken by the Joint Liquidators regarding the redaction and withholding of information;” and for the Relevant Parties (and NIP) to be entitled to make written submissions or appear at the hearing of the Second Approval Application.

[72] Mr. McCarroll for the appellants, accepted that the listing of Treehouse as a Relevant Creditor in the 28th July 2018 order does not by itself answer the question as to whether it is a creditor in the liquidation of Unicorn. This is so for the simple but profound reason that, unless and until a person makes a claim in the liquidation by submitting a proof of debt in Form R184 to the **Insolvency Rules**, no claim shall be recognised by the liquidator and, accordingly, that person cannot be recognised as a creditor in the liquidation of a company. Section 209(1) of the **Insolvency Act**

⁷² Exhibit AM-1; Record of Appeal Vol. 2, Tab 9, pgs. 534-547 at clause 2.1.

⁷³ Record of Appeal Vol. 4, Tab 9, pgs. 548-550.

⁷⁴ Record of Appeal Vol.3A, Tab 14, pgs. 11-22.

⁷⁵ Incorrect - should be 13.

provides that an unsecured creditor may make a claim against a company in liquidation “by submitting to the liquidator a written claim, signed by him or on his behalf”. Thereupon, the liquidator “shall either admit or reject the claim in whole or in part.” Importantly, section 209(6) stipulates: “[t]he liquidator shall not admit a claim against a company unless it has been made in accordance with this section”. By rule 184 of the **Insolvency Rules**, a claim in the liquidation made by an unsecured creditor “shall be in the prescribed form” and shall specify the matters listed in the said rule. The prescribed form in Form R184.

[73] Counsel for the appellants also took us to two letters sent by one of the JLs, Mr. Carl Jackson, to Treehouse dated respectively 27th September 2016 and 18th October 2016.⁷⁶ In the first letter, Mr. Jackson points out to Treehouse that from the investigations conducted by the JLs “it has become apparent that [Treehouse] **may be a creditor** of Unicorn in the sum of £454,035.07”. He encloses a proof of debt form “for completion **should you wish to make a claim**”. (my emphasis) There was no response or certainly no evidence of a response to this letter. The second Jackson letter refers to the first, notes that there has been no reply thereto, encloses a copy of the first letter, and concludes in these terms: “If you do not submit a claim within the next 7 days the Joint Liquidators will assume that you do not have a claim or that you have decided not to claim within the liquidation [of Unicorn]”. Again, there is no evidence of a reply to this second letter and no documentary evidence whatsoever of a Treehouse proof of debt form being completed and submitted to the JLs.

[74] However, a further opportunity for Treehouse to submit a claim in the liquidation of Unicorn materialised some 2 years later. This is a factor of much evidential value and legal significance in relation to this issue. It is the order made by Wallbank J on 21st November 2019 in the Liquidation Proceedings BVIHCM 120 of 2017.⁷⁷ Paragraph 3 of the said order required any person having a claim in the liquidation

⁷⁶ Record of Appeal Vol.3A, Tab 14, pgs. 31&32.

⁷⁷ Record of Appeal Vol.3A, Tab14, pgs. 33-39.

of any of the four BVI Companies, (other than those who have already submitted a written claim) to deliver a claim in Form R184 to the Legal Practitioners (Appleby) for the JLs within 21 days of service of notification of the said order. Further, by paragraph 6, it was declared:

“6. Any persons notified of this Order under paragraph 4(i) above, or deemed to have been notified of this Order under paragraph 4(ii) above, that have not been notified by the Joint Liquidators in writing that this paragraph 6 does not apply to them, that fail to comply with paragraphs 2 and 3 of this Order, shall stand forever excluded from participation in the assets of the Companies, and from any distributions which the Joint Liquidators might make, and the Joint Liquidators have the permission of the Court to deal with the assets of the companies without reference to those persons, who shall thereafter have no claim against the Companies or their Joint Liquidators in respect of those assets, or the value of them.”

[75] Another opportunity to present documentary proof that Treehouse had either complied with paragraph 3 the order of Wallbank J dated 21st November 2019 or that Treehouse fell within the stated exception at paragraph 3 having prior thereto submitted to the JLs or to their lawyers Appleby a proof of debt in the liquidation of Unicorn, was accorded by Jack J at paragraph 1 of his order dated 15th June 2021. This stayed, for 7 days, the sealing of the declaration made in the said paragraph of the order that Treehouse does not have standing to appear at the hearing of the Fifth Fee Approval Application (on the basis that it was not a creditor of Unicorn for the reasons given by the judge in his *ex tempore* judgment of even date), “to enable Treehouse to file any evidence which establishes that it made a timeous claim in the liquidation of the Companies”. As Mr. McCarroll accepts, Treehouse has not provided any documentary proof in these proceedings of a completed proof of debt form or of the dispatch or delivery of such proof of debt to either the JLs or their lawyers in BVI. Indeed, no such proof was provided even up to the hearing of this appeal, and no explanatory evidence of why such proof has not or could not be produced. On the other hand, the evidence from the JLs is that no proof of debt has been received from Treehouse in the liquidations.⁷⁸ This evidence remains

⁷⁸ Record of Appeal Vol. 3A, Tab 13, pg. 5; Jackson 12 at paras. 8 to 10.

substantially uncontradicted, except for the bald and wholly unsupported statement at paragraph 8 of McNally 2.

- [76] The learned judge in the 6th July 2021 judgment, made short thrift of the position of Treehouse. He opined, that in order for Treehouse to be joined in the section 273 Application it has to show that it is a creditor of Unicorn. Having examined the documentary evidence (set out above), the learned judge concluded that Treehouse has not provided any evidence that it submitted a proof of debt in the liquidation of Unicorn. Accordingly, they have no locus standi to make an application under section 273; and their application to be joined must be dismissed. Mr. McCarroll submitted, perhaps as his final stance, that the issue of whether Treehouse is a creditor in the liquidation of Unicorn is a more involved question than the judge gave it credit for.

Conclusion on ground 5

- [77] With respect, I do not accept Mr. McCarroll's position on this issue. There is no merit in his submissions. The evidence is clear and compelling. Moreover, the relevant statutory provisions and requirements do not assist Treehouse. In order to qualify as a creditor in the liquidation of a company, one must submit a proof of debt to the liquidator. This is so irrespective of the person being listed, at some earlier stage in the liquidation, as a 'Relevant Creditor', for the purpose of the service of documents and being entitled to be heard on JLs' application for approval of their fees and disbursements. The short point is that a person who may have a good case or solid proof of a debt owed to them by a company in liquidation, who fails to submit a written claim in the liquidation, is not a creditor in the liquidation entitled to share in the distribution of surplus. No proof of debt or evidence of having submitted or sent in a proof of debt to the JLs has been provided by Treehouse, despite written requests from the JLs themselves, the several opportunities afforded by the court for it to do so, and the consequences of a failure to comply timeously having been stipulated in the order of the court.⁷⁹

⁷⁹ At paragraph 6 of the order of Wallbank J dated 21st November 2019.

[78] Accordingly, there is no basis on which this Court can or ought to set aside the declaration and order made by the learned judge on 15th June 2021 (confirmed on 6th July 2021), that Treehouse has no standing to bring a section 273 application or to be joined in the section 273 Application. . The learned judge committed no discernable error of law or fact. Ground 5 accordingly fails.

Ground 4 – The rule in *Cherry v Boulton*

[79] This rule first rose during the course of the 15th June 2021 hearing before the court below. It was raised by counsel for the respondents as one of his 'knock-out points'. It was deployed specifically in relation to the second appellant, GACH, and for the purpose of having the court determine that GACH was not to be considered a creditor of Unicorn entitled to join in the section 273 Application, unless and until, on an application of the rule in ***Cherry v Boulton***⁸⁰ (a rule of much vintage), GACH accounts for the monies said to have been fraudulently taken by Messrs. McNally and Cooper from Unicorn are accounted for in the liquidation. As mentioned above, this submission made by Mr. Willins on behalf of the respondents seems to have found favour with the learned judge at the 15th June 2021 hearing, who, in his *ex tempore* decision, accepted its correctness.⁸¹

[80] Mr. McCarroll SC devoted several pages in the appellants' written appeal submissions to what he submitted was the non-applicability of this rule to GACH such as to lead to a conclusion that GACH is not or is not to be considered a creditor of Unicorn and, therefore, not an 'aggrieved person' entitled to bring a section 273 application or to be joined in the section 273 Application. However, the learned judge in the 6th July 2021 judgment, side-stepped this issue and did not come to any definitive conclusion as to its applicability to GACH. At paragraph 12 of the written version of his 6th July 2021 judgment, the learned judge, having recounted Mr. McCarroll's counter-points against the application of the rule, commented: "I have not heard Mr. Willins on that, because the other point which is put forward by Mr.

⁸⁰ (1839) 4 My & C 442, 41 ER 171.

⁸¹ Record of Appeal Vol. 4, Tab 19, pg. 107 at lines 19-24.

McCarroll, is that the liquidators are behaving improperly in relation to the Isle of Man proceedings”.

- [81] In his oral submissions before this Court, as was foreshadowed at paragraph 43 of the respondents’ written appeal submissions, Mr. Willins commented that the judge below has “sensibly side-stepped” the **Cherry v Boulton** point. He submitted, accordingly, that it is not an issue in the appeal as the judge deliberately did not decide the Joinder Application on that issue. Accordingly, it was not necessary for himself and this Court to deal with it.⁸²

Conclusion on rule in Cherry v Boulton

- [82] I am in agreement with Mr. Willins on the way to treat this point and ground 4 of the appellants’ appeal. While the appellants have made the **Cherry v Boulton** issue a ground of appeal, there is no decision or ruling by the judge below on this issue in his 6th July 2021 judgment, such as would inform a consideration by this Court of it in the appeal. I do not consider that what the learned judge said in relation to the point in his 15th June 2021 *ex tempore* decision was determinative of that issue such as to be binding or potentially binding on either the second appellant GACH or the JLs. Accordingly, without addressing the merits and applicability of the rule in **Cherry v Boulton** to the position of GACH as a creditor in the liquidation of Unicorn, I am led to conclude that ground 4, which seeks to challenge the decision to dismiss the Joinder Application on the basis of the judge’s conclusion in his 15th June 2021 judgment, on the application of the rule in **Cherry v Boulton**, fails since the application of this rule was not a basis or reason for his dismissal of the Joinder Application on 6th July 2021. As stated above, the only apparent conclusion reached by the judge with regard to the application of the rule in **Cherry v Boulton** is in the 15th June 2021 judgment, which is not the subject of an appeal to this Court, and which decision concerned the judge’s refusal to permit the appellants to be heard in opposition to a part of the fees and disbursements claimed by the JLs in the

⁸² See also para. 43 of the respondents’ written submissions.

Remuneration Application. That the rule in **Cherry v Boulton** was not a basis for the judge's dismissal of the Joinder Application was realised (at least implicitly) by the appellants in their written appeal submissions where, at paragraph 7.1, it is stated: "[f]or this reason, it is necessary to revisit the learned judge's finding of 15 June as to the status of the Appellants as creditors of Unicorn". In my judgment, that is not only wholly unnecessary and inappropriate, but clearly wrong, as a matter of principle. For these reasons ground 4 fails and is dismissed.

- [83] The result is that it must be assumed that GACH has, on a prima facie basis, satisfied the first stage of the **Deloitte** test, that it is a creditor of Unicorn, and qualifies as "an aggrieved person" for the purposes of invoking section 273 of the **Insolvency Act**. Accordingly, the remaining issue of importance in relation GACH, is whether it has satisfied, on a prima facie basis, the second stage; that its interest in joining the section 273 Application is aligned with the interests of the creditors of Unicorn, and is not adverse to such interest, as the learned judge found.

Grounds 1 and 2 – Judge's approach to determination of Joinder Application

- [84] These two grounds may conveniently be dealt with together (as did counsel for the appellants). They both concern the judge's approach to dealing with the Joinder Application in the 6th July 2021 judgment and, to some extent, in the 15th June 2021 judgment. Before considering the points, counter-points and arguments raised or relied on by counsel for both sides in relation to grounds 1 and 2, I will first address, to the extent necessary, certain of the general or overarching issues raised by counsel for the appellants in their written and oral submissions before the Court.

The appellants' general points

- [85] Mr. McCarroll SC, learned counsel for the appellants, at the commencement of his oral presentation before this Court, stated that this is a 'narrow appeal'; the simple question to be answered is whether the learned judge was correct on 6th July 2021 in refusing the Joinder Application to join the appellants as co-applicants (co-claimants) in the section 273 Application. He mused, somewhat rhetorically, that

had the appellants filed their own section 273 application, much of the issues raised in opposition to the Joinder Application would not be before this court, as the proper course would have been to join both section 273 applications and have them heard together. Alternatively, the respondents could have applied to strike the appellants' section 273 application. In my view, while this musing may be indicative of some of the procedural issues being contended with, the fact is that in how this matter has unfolded having regard to the way in which the appellants have chosen to proceed. It is certainly not an answer to the substantive issues raised by the respondents in the court below and in this appeal and counter-appeal. Certainly, the judge's decision on the fundamental issues of standing, if upheld would be fatal to the Joinder Application and, by extension, the appellants' appeal from the 6th July 2021 judgment and order.

[86] Mr. McCarroll, spent some time criticising the lack of fairness in the way in which the learned judge opted to proceed at the 15th June 2021 hearing. The gravamen of his submissions is that the so-called 'knock-out points' raised by Mr. Willins for the respondents in his oral submissions at that hearing, was effectively an 'ambush' of the appellants and their counsel. The hearing was not concerned with either the Joinder Application or the section 273 Application, but with the Remuneration Application and the appellants' application to have a part of those fees only adjourned until, at least, after the hearing of the Joinder Application fixed for 6th July 2021. It is submitted that the judge's decision to allow Mr. Willins to make his 'knock-out points' *de bene esse*, was inherently unfair to the appellants and wrong as a matter of principle, the overriding objective, and proper and efficient case management.

[87] While I have some measure of sympathy with this submission, in my view, it does not advance the matter in any material way since: (i) at the 15th June 2021 hearing, the learned judge, in any event, only determined the appellants' Adjournment Application and the appellants' standing to be heard on the JLs Remuneration Application, deciding both matters against the appellants; and (ii) in any event, the

judge, prudently, held off on the sealing of his declaratory order with regard to the lack of standing of Treehouse as a creditor in the liquidation of Unicorn, for a period of 7 days to afford Treehouse another opportunity to produce clear proof that it had made a timeous claim in the liquidation of the said company. Additionally, and most importantly, the Joinder Application was heard fully on 6th July 2021 by the learned judge who then proceeded to render his decision and judgment thereon. It is that judgment which is the subject of this appeal and counter-appeal. This notwithstanding, Mr. McCarroll made clear, in considering the merits of the various grounds of appeal against the 6th July 2021 judgment and order, this Court ought to consider the judgments of both 15th June and 6th July 2021. I regard this as the correct approach to the extent that the learned judge in his order made on 6th July 2021: (i) refused to rescind or revoke his order and judgment of 15th June 2021; and (ii) ordered the sealing forthwith of his orders dated 15th June 2021.

- [88] The appellants also address, at section 3 of their written submissions ('Issues of General Importance'), quite a number of points.⁸³ As many, if not all, of these issues and points fall for consideration under the specific grounds of appeal themselves, I will deal with them there, and not in this section of the judgment. For example, certain of these 'general' issues go to standing, the rule in **Cherry v Boulton**, the motive of the appellants in bringing the Joinder Application, the allegations of improper purpose and lack of bona fides being made against the JLs, and the reliance placed by the appellants on releases and on an indemnity. I would add that these include the 'serious issues' listed at paragraph 3.4 of the appellant's written submissions.

Appellants' submissions on grounds 1 and 2

- [89] By grounds 1 and 2 of their appeal, the appellants take issue with the judge's approach when determining the Joinder Application. They contend that the learned incorrectly and impermissibly made findings as to the motivations behind, and the substantive merits, of the section 273 Application, which said application was not

⁸³ See paragraphs 3.1 to 3.10 of the appellant's written submissions.

listed for hearing on 6th July 2021 (or 15th June 2021), and was therefore not before him for his consideration. Moreover, it is submitted, that the movers of the section 273 Application, Messrs. McNally and Cooper, were not before the judge at the hearing on 6th July 2021. They did not have the opportunity to respond to the JLs' evidence (Jackson 12) filed a mere 2 days before the 6th July 2021 hearing in answer to the section 273 Application. And in any event, at the said hearing the judge was not taken by counsel for the parties in any detail to the evidence filed in the section 273 Application by both sides.⁸⁴

[90] The appellants also submit that the Joinder Application, which was before the learned judge on 6th July 2021, is a simple procedural application under Part 19 of the CPR. Accordingly, the 'principal question' which fell for the judge's determination at that hearing, was whether the appellants had made out a *prima facie* case that they were creditors of Unicorn entitling them to standing to join as co-applicants in the section 273 Application, which was to be heard at some future date. Once the court was satisfied on a *prima facie* basis as to the status of the appellants (or either of them) as a creditor of Unicorn, it followed that they had standing to join as co-applicants in the section 273 Application. Accordingly, issues as to whether the appellants had a substantive (or legitimate) interest in the relief sought, were matters of mixed fact and law which required a thorough interrogation before the judge, which kind of interrogation did not take place on 6th July 2021.

[91] Instead, the appellants assert that the learned judge improperly went on, at paragraph 12 of the 6th July 2021 judgment, to make findings on the merits of the section 273 Application, and findings as to the motives of GACH in bringing the Joinder Application. As to the merits of the section 273 Application, the appellants take issue with the judge's findings that its movers face "an uphill battle"; "it came nowhere near" to satisfying the perversity test of a high degree of unreasonability which is required before the court can interfere with the JLs decision to bring the IoM Claim; "there were very good reasons for the liquidators to be pursuing the Isle

⁸⁴ Record of Appeal Vol. 5, Tab 3, pg. 127, see para. 5.1 of the appellants' written submissions.

of Man proceedings”; and “there is no proper basis for attacking the liquidators’ decision to proceed with the Isle of Man action”.

[92] With respect to the Joinder Application, the appellants also take issue with the judge’s findings on 6th July that the application by the appellants is “redolent with bad faith on the part of the movers”; that he “did not accept that it is done for the proper purpose of achieving the maximum return in the liquidation”; and that “it is quite clear that it [the Joinder Application] is done for an ulterior motive, namely that Mr. Anthony McNally, who is the guiding force behind GACH, wishes to assist his brother, Mr. Simon McNally in the Isle of Man proceedings”. In this context, it was stressed that the judge has wrongly concluded that the Joinder Application was “hopeless”; and, for these reasons, refused to open his decision made on 15th June 2021 and dismissed the Joinder Application.⁸⁵

[93] Much reliance was also placed by counsel for the appellants on certain of the statements and findings made by the learned judge in his *ex-tempore* judgment made on 15th June 2021. It was submitted that on that occasion the learned judge proceeded to deal with both the Joinder Application and the section 273 Application and to decide them both, when neither of these applications were before him on that day.

[94] Moreover, it is submitted that the judge did not have before him the evidence upon which to make the findings as to the motives of the movers of the Joinder Application and the merits of the section 273 Application. He did not have before him, and did not consider at all or in sufficient detail, the evidence on both sides in the section 273 Application. Accordingly, it was not open to him, and it was impermissible for him to make such findings. To do so would require a detailed consideration of the IoM Action, which consideration the judge did not do and did not embark upon. A proper assessment and consideration of the evidence in the section 273 Application would involve, it was said, cross-examination of the witnesses who have provided

⁸⁵ Record of Appeal Vol. 1, Tab 2, pg. 100; see para. 13 of the 6th July 2021 judgment.

either affidavit evidence or witness statements in the section 273 Application proceedings.

- [95] Finally, on these two grounds, the appellants submit that had the learned judge adopted the correct approach to his consideration of the Joinder Application before him, and had he not made the errors set out in grounds 4 and 5 of their appeal, he would and ought to have concluded that the proper course was to grant the Joinder Application to join Treehouse and GACH as co-applicants with Messrs. McNally and Cooper in the section 273 Application.

Respondents' submissions – grounds 1 and 2

- [96] In response to grounds 1 and 2, the respondents submit that the appellants primary contention that the learned judge erred as a matter of principle, when determining the Joinder Application, by considering the underlying merits of the section 273 Application, is unsustainable for two reasons. The first is, a court does not act in vain or make an order which will not achieve its intended purpose. The second is that, as a matter of principle, the merits of the claim to which a party seeks to be joined are plainly relevant to the court's consideration of a joinder application. This is significant because, where the underlying claim in the proceedings with respect to which joinder is being sought is without merit, then nothing will be achieved by permitting joinder. The respondents also submit that the burden was on the appellants, as the applicants to the Joinder Application, to satisfy the judge that there was some utility in joining them as parties to the section 273 Application and, on case management grounds, it was desirable to do so.
- [97] In support of these submissions, the respondents rely on the dicta of John Kimbell, QC (sitting as a Deputy Judge of the High Court of England) at paragraph 50 of his judgment in **Molavi**.⁸⁶ He opined: “[t]he power to add a party to existing proceedings is essentially a case management decision. An order will only be made if it would further the overriding objective in the concrete circumstances of the case”. The

⁸⁶ Supra.

Deputy Judge considered that these principles were clear from the passage at paragraph 60 of the judgment in **In re Pablo Star** where it is stated: “In considering whether or not it is desirable to add a new party pursuant to CPR r 19.2(2) the lodestars are the policy objective of enabling parties to be heard if their rights may be affected by a decision in the case and the overriding objective in CPR Pt 1.” The respondents also relied on the judgment of this Court in **Mr. Fok Hei Yu et al v Ba Sab Inc. et al**⁸⁷ for the principle that the wide discretion given to the court in Part 19 of the CPR must be exercised judicially. They list a number of factors which they say the court should take into account in the exercise of its discretion on a joinder application. I need not set out all the factors at paragraph 47 of the respondents’ written submissions. Of particular note are the factors listed at (v) and (vi) which state:

“(v) Whether the applicant has anything to add to the proceedings. Especially in complex proceedings, the court is normally reluctant to increase the overall burden of the proceedings by adding persons who have the same perspective or legal interest as an existing party: see **LB Holdings Intermediate 2 Ltd** [2018] EWHC 2017, MannJ.

“(vi) Whether the claims would satisfy the test for striking them out.”

[98] The respondents also submit that the judge, in determining the Joinder Application on 6th July 2021, was not only entitled to consider the underlying merits of the section 273 Application and its chances of success, but to conclude for the reasons he gave, that the said application was “hopeless”. It is submitted that these findings were entirely open to the judge and were clearly correct, for all the reasons which the judge gave at paragraph 12 of the 6th July 2021 written judgment.⁸⁸ This is especially so where, in the instant matter, the appellants have stated clearly that they will be relying on the same grounds being relied on by Messrs. McNally and Cooper in the section 273 Application.⁸⁹

⁸⁷ BVIHCP2014/0010 (delivered 28th May 2014).

⁸⁸ Record of Appeal Vol. 1, Tab 2, pg. 100.

⁸⁹ Joinder Application – ground 2; see Record of Appeal Vol. 5, Tab, 8, pg. 167.

- [99] The appellants also submit that the judge was correct when he declared that any claimant applying under section 273 “faces an uphill battle”. The reasons relied on by the judge are that the JLs “are entitled to exercise their commercial assessment of the steps which they can best take in the liquidation to achieve the maximum return”; and the court will only interfere where, in applying the perversity test, “a high degree of unreasonability can be shown on the part of the liquidators” in coming to the decision sought to be impugned. The respondents submit that it was open to the judge to so conclude. The section 273 Application is hopeless as the said application seeks to impeach the decision of the JLs to bring the IoM Claim against Messrs. McNally and Cooper in relation to alleged breaches of their fiduciary duties as directors of the BVI Companies. This is clearly a commercial decision within the prerogative and duties of the JLs. The claims in the IoM Action relate, in part, to the payment out of monies from Unicorn into an account in the joint names of Messrs. McNally and Cooper. Further, as former directors, the English court has recently found them to have acted in “fraudulent breach of trust”. In the face of these findings, “it would be quite remarkable if the [JLs] chose not to pursue [the IoM] litigation”.⁹⁰
- [100] As to the allegations in the section 273 Application of bad motives and lack of good faith on the part of the JLs, that issue is dealt with at ground 3 in so far as it relates to the judge’s finding of an improper use of the section 273 jurisdiction.
- [101] The judge also found that the purpose for which the section 273 Application is [to be] made by GACH, was an “illegitimate purpose. It was simply to stop the pursuit of Simon McNally and Simon Cooper. It is not for the legitimate purpose of ensuring that the liquidation of thefour companies in respect of which the liquidators have been appointed can maximise the recoveries for the benefit of the creditors as a whole”. He concluded that GACH’s application was “redolent with bad faith” on the part of the movers. He did not accept that it had been brought “for the proper purpose of achieving the maximum return in the liquidation”; but, instead, “it is done for an ulterior motive, which is that Mr. Anthony McNally, who is the guiding force

⁹⁰ Para. 50 of the respondents’ written submissions, Record of Appeal Vol. 5, Tab 4, pg. 150.

behind GACH, wishes to assist his brother Mr. Simon McNally, in the Isle of Man proceedings”. The respondents submit that when the judge made these findings, he made it clear that they were for the purpose of the application before him only, and that question remained at large on the hearing of the section 273 Application.⁹¹

[102] The respondents also contend that it is not enough for GACH to suggest that it is a creditor of Unicorn. It must establish that it has a legitimate interest in the relief sought, and that its interest in seeking to be joined to the existing section 273 Application is aligned with the interest of the general body of creditors. However, the finding by the judge that GACH did not seek to pursue the section 273 Application in the interest of the creditors of Unicorn but for an ulterior and illegitimate purpose, was an obvious one and open to the judge to make. In the event that the Manx Claimants are successful in the IoM Action, “the outcome should be that the Manx Defendants [Messrs. McNally and Cooper] are found liable to reconstitute monies which were fraudulently misapplied. That would produce a benefit to the BVI Companies represented by the JLs.⁹²

[103] The respondents also submit that this Court ought to be slow to set aside findings of fact made by the judge on the affidavit and other evidence before him. They cite, in support of this principle, the decision of the Judicial Committee in **Ming Siu Hung and others v J F Ming Inc and another**;⁹³ and the decision of the English Court of Appeal in **Deripaska v Cherney**⁹⁴ as to the principles applicable to an evaluation of affidavit evidence by a judge before trial. At paragraph 10 Waller LJ states:

“[10] ... evaluation of evidence is very much the province of a judge exercising the discretion under the leave to serve out provisions. It is not the function of the Court of Appeal to go through the whole exercise again unless it can be shown that the judge has misdirected himself in some way. ... [b]ut in conducting that exercise the Court of Appeal should be slow to interfere with the judge’s assessment of the affidavit evidence.”

⁹¹ Para. 28 of the respondents’ written submissions.

⁹² Para. 23 of the respondents’ written submissions.

⁹³ [2021] UKPC 1, at paras. 20 to 24.

⁹⁴ [2009] EWCA Civ 849; [2009] 2 CLC 408 at paras. 10 and 59.

[104] The respondents submit that the appellants are unable to show that the judge's finding on the issue of the improper motive by GACH was erroneous and ought to be set aside. GACH did not have a legitimate purpose in seeking to be joined in the section 273 Application, which application is hopeless and bound to fail. Accordingly, GACH is not a person aggrieved for the purposes of section 273 of the **Insolvency Act**, and its Joinder Application was bound to fail.

Conclusion on grounds 1 and 2

[105] To put these issues in context, it is notable that the section 273 Application seeks to have the court review and set aside the decision made by the JLs in or around early August 2020 (some 7 plus months prior) to commence the IoM Action against Messrs. McNally and Cooper. It is also notable that the assertion by the JLs of the claims, the subject of the IoM Action against Messrs. McNally and Cooper, and the likelihood of legal action to recover the alleged losses or payments out of the accounts of the Companies, including the four BVI Companies in liquidation, had been foreshadowed to Messrs. McNally and Cooper by the HFW letter before action dated 27th November 2018. This letter was sent some 27 months before the section 273 Application, and 8 months prior to the commencement of the IoM Proceedings against Messrs. McNally and Cooper for breaches of fiduciary duties as directors of the BVI Companies, and other companies making up the Arena Group. It is also notable that the section 273 Application seeks to have the BVI court order the JLs to discontinue the IoM Proceedings, on the principal basis that those proceedings were commenced by the JLs against Messrs. McNally and Cooper for an improper purpose and in bad faith. In the IoM Proceedings, a default judgment has been entered against S McNally (subject to the determination by the Manx Court of his set aside application). Further, the forum challenges brought in the IoM Proceedings by both defendants have now been dismissed.

[106] It is manifest that the core basis upon which Messrs. McNally and Cooper seek to have the JLs decision to commence and to prosecute the IoM Claim against them reviewed and set aside, is improper purpose and a lack of bona fides on the part of

the JLs. However, Messrs. McNally and Cooper also make allegations of a broader nature against the liquidations and the JLs. These concern the alleged improper motive and purpose for the Companies being out into liquidation, and the JLs being appointed liquidators. Messrs. McNally and Cooper also rely on certain waivers and indemnities.

[107] The appellants themselves, who seek to be joined as co-claimants in the section 273 Application, put it this way in their written submissions: “[i]n short the decision to bring the IoM Action was not a decision made in good faith or for a proper purpose”;⁹⁵ and that: “the claims being pursued against [Messrs. McNally and Cooper] in the IoM Action have not been brought for a proper purpose and are not accordingly bona fide proceedings, but instead are being brought in order to ensure that the JLs’ appointments were continued and perpetuated”.⁹⁶ In support of these serious contentions against the JLs and their conduct of the liquidations, the appellants rely on paragraphs 46 and 50 of McNally 1. There, S McNally sets out, in expansive form, the allegations which he and S Cooper (and by extension the appellants) make against the conduct and bona fides of the JLs:

“46. The [JLs] were instructed by GAC[H] [Dr. Cochrane] and her team in relation to their activity and the steps that they took. It was clear that their appointment was made as part of a litigation strategy in the continuing fight with Mr. Ruhan, and to protect the assets further from any claims that Mr. Ruhan or the RS Parties were making or indeed may make in relation to the same. ...

...

50. I believe that the principal reason for the bringing of the claim against GAC[H] in 2016, and now against [Messrs. McNally and Cooper] in the Isle of Man in 2020 is to perpetuate the Joint Liquidators continued involvement in the matters, and to ensure further fees are paid to them, from the sums held in the Companies as a consequence of this continuing involvement. Mr. Jackson specifically stated to Dr. Smith and Ms. Stickler post the Geneva Settlement arrangements and upon the proceedings being issued against Dr. Cochrane in July 2016, this was to ensure that the Liquidators “stayed in the game”, and to ensure that their appointments were continued and perpetuated. The length of time in which the Liquidators have been in post without any real progress as to the liquidation and bringing these

⁹⁵ Para. 2.4 of the appellant’s written submissions.

⁹⁶ At para. 3.4(a) of the appellant’s written submissions.

matters to an end demonstrate this, along with the specific confirmations that were provided by Mr. Jackson to Dr. Smith”.

- [108] I have already concluded that in considering the Joinder Application, the court below was entitled to assess whether the appellants had standing, in both the technical and substantive sense, to make and hence to join in the making of the section 273 Application; and whether, in all the circumstances, in the exercise of its discretion, it is necessary or desirable, in the interest of justice, to add Treehouse and/or GACH as co-applicants in the section 273 Application.
- [109] The appellants, Treehouse and GACH, elected to make a joinder application and not to file their own section 273 application, which they were entitled to do. Such an application, if filed, would have been subject to the same objections deployed by the respondents in relation to the Joinder Application concerning standing, motive, lack of sufficient interest in the relief being sought, and lack of merit. In my judgment, by taking the route of applying to be joined to the existing section 273 Application, the appellants opened themselves to the additional argument that they do not and cannot add anything to the existing section 273 challenge having expressly stated that the grounds upon which they intend to rely are the same as the grounds being relied on by Messrs. McNally and Cooper in the section 273 Application.
- [110] The judge was, in my judgment, entitled to consider the underlying merits of the section 273 Application in determining which way to exercise the court’s discretion on the Joinder Application. In doing so, the judge was entitled to take a robust approach in relation to what he saw as an “uphill battle”. A section 273 application which seeks to have the court set aside a decision of the JLs to commence proceedings before a court of competent jurisdiction in the Isle of Man, against two former directors of the Manx Claimants, in circumstances where the underlying claims had been foreshadowed in the HFW letter before action some 2 years before, and where a default judgment has been obtained against one of the defendants (subject to an application to set it aside) and where forum challenge brought by both defendants have subsequently been dismissed by the Manx Court, is an ‘uphill

battle'. This difficulty exists for the very reasons which the learned judge articulated and relied on at paragraph 12 of his written judgment of 6th July 2021. Essentially, the movers of the section 273 Application (and now those who control or claim to control GACH) seek to have upended and set-aside, the decision of the JLs made in or about August 2020 to bring the IoM Claim against Messrs. McNally and Cooper based on breaches of fiduciary duty and fraud in relation to the monies and assets of the Companies, including Unicorn.

[111] Further, in exercise of the court's discretion whether to permit the joinder of Treehouse and GACH, the judge was entitled to consider and to be satisfied that they both had standing not only in the technical sense, but whether, based on the evidence before him, they had a sufficient interest in the reliefs being sought by the creditors. This led necessarily to a consideration also of their perceived motive for making the Joinder Application to join the section 273 Application, especially in circumstances where they do not seek to rely on any new or additional grounds. The judge was therefore entitled to consider whether Treehouse and/or GACH's interest were aligned with that of the creditors or were adverse to those interests in seeking to join in the section 273 Application.

[112] In my judgment, the learned judge adopted the correct approach to the Joinder Application on 6th July 2021 in rendering his *ex tempore* decision. While the judge stated in strong terms his views on the merits of the section 273 Application, he was entitled to do so in deciding whether it was necessary or desirable to join Treehouse and/or GACH in that application as co-applicants. In doing so, he did not determine the section 273 Application. The judge's views expressed as to the merits of the section 273 Application were and remain preliminary views. They do not raise to the level of conclusive findings or a disposition of the said application without a full hearing on its merits and all that may entail.

[113] I am satisfied that there was sufficient evidence before the learned judge for him to reach the findings of illegitimate purpose and ulterior motive on the part of GACH in

seeking to join the section 273 Application. I can see no basis, on the authorities cited including **Deripaska**, to set aside these findings made in the context of an interlocutory application. It is not the function of the Court of Appeal to conduct its own evaluation of the evidence and, in a spurt of appellate activism, to come to its own conclusions. In this regard, and for what it is worth, I am of the opinion that the learned judge's conclusion on these issues going to the merits of the section 273 Application and to the motives, purpose and interest of the appellants in seeking the joinder, ought not to be disturbed. Moreover, it must be noted that this is a complex and long-running insolvency. It is a high bar to set aside what is essentially a decision or act of commercial judgment and practicality, in seeking to recover monies from the estate of Unicorn which allegedly found its way, in part, into the joint account of Messrs. McNally and Cooper and, to do so, for the benefit of the general body of creditors. Furthermore, Unicorn is but one of five Manx Claimants in the IoM Proceedings, and neither of the appellants would have standing to have those proceedings discontinued as it related to the other four Manx Claimants who are represented by the JLs. This adds the futility of a joinder of the appellants as there is no evidence before the learned judge to demonstrate that they will add or bring anything new of substance to the prosecution of the section 273 Application.

[114] Accordingly, grounds 1 and 2 also fail.

Ground 3 – Restrictions of use of section 273 jurisdiction

[115] The gravamen of this ground of appeal is that the learned judge erred in concluding that the section 273 Application was bound to fail as not being an appropriate remedy, having regard to the allegations of lack of bona fides made therein against the JLs, was not to invoke the court's supervisory powers under section 273, but to bring an application pursuant to section 187 of the **Insolvency Act** to remove the JLs.

[116] The appellants submit that the effect of the judge's *ex tempore* judgment on 6th July 2021 was that "evidence as to improper motives of office holders will not be

considered by the Court in the context of an application pursuant to section 273 of the IA 2003”.⁹⁷ They argue that section 273 contains no limitation which prevents such a claim being brought in respect of matters where bad faith is being alleged. They say the converse is true and cite this passage from the text **Sealy and Milman: Annotated Guide to the Insolvency Legislation**⁹⁸ relating to section 168(5) of the English Insolvency Act 1986 (the equivalent to section 273 of the **Insolvency Act** of the BVI): “... The court will only interfere with a decision of a liquidator if it was taken in bad faith or it was so perverse as to demonstrate that no liquidator properly advised could have taken it”.

[117] The appellants submit that bad faith is one of the precise circumstances in which the court’s supervisory powers under section 273 of the **Insolvency Act** ought to be engaged. To proscribe otherwise would be an unwelcomed development in the law and one which is not sanctioned by any interpretation of section 273 itself or in the decided cases. In any event, a removal application coming at this late stage in the liquidations which commenced since 2015, “may well ...not be in the best interest of creditors as a whole”.⁹⁹

[118] The respondents consider this to be an inappropriate and baseless attack on the judge’s judgment. They submit that the judge, having considered the allegations of improper purpose and mala fides on the part of the JLs made in the section 273 Application, which he properly considered went to the purpose and conduct of the liquidations broadly as well as the JLs’ decision to commence the IoM Action, he was correct and within his case management powers to opine and to conclude that allegations of such gravity which, in effect, allege fraud against the JLs, should be made by way of a removal application pursuant to section 187 of the **Insolvency Act**; and were not appropriate for determination in section 273 Application.¹⁰⁰

⁹⁷ Para. 6.2 of the appellants’ written submissions.

⁹⁸ 24th edn. Sweet & Maxwell 2021.

⁹⁹ Para. 6.4 of the appellants’ written submissions.

¹⁰⁰ Para. 57 respondents’ written submissions.

Conclusion on ground 3

[119] In my view there is no merit in this ground of appeal for the simple reason that judge was within his power to reach the preliminary conclusion which he did, as a matter of principle and prudent case management. In doing so, the judge did not incorrectly interpret section 273 or placed an inappropriate limit on the section 273 jurisdiction. The passage from **Sealy and Milman** (above), relied on by counsel for the appellants, speaks to 'bad faith'. However, the allegations made against the JLs in the section 273 Application (as amplified upon in the appellants' written submissions and McNally 1 at paragraph 50), go well beyond 'bad faith'. They are very serious and weighty allegations made against the JLs. They concern allegations of some form of conspiracy to have these companies put into liquidation to which it is alleged that the JLs are a part and have used their office and authority to implement and to facilitate over the length and breadth of these liquidations. They assert that the JLs continue to act improperly and in bad faith by bringing the IoM Action against them, Messrs. McNally and Cooper, for the purpose of perpetuating the liquidations and their time in office so as to continue to siphon further monies in fees and disbursements from the estates in the Companies. The judge put it this way: "As I say, if a broad allegation that there is some conspiracy to act improperly to which the liquidators are a party, then that is a matter which needs to be brought to the Court's attention by way of an application for removal of the liquidators".¹⁰¹

[120] What the learned judge stated at paragraph 9 and 10 of his written judgment of 6th July 2021, is that it would be "unfair to the liquidators to allow these matters to be raised in a section 273 application and, secondly, on case management grounds it is improper to try and raise matters in this way". The learned judge did not conclude that, on a proper interpretation of section 273, it did not permit of or preclude allegations of bad faith being raised against a liquidator. In this respect, I agree with the submission by counsel for the appellant that any such interpretation would be not only strained but incorrect. The learned judge gave the section no such perverse or incorrect interpretation.

¹⁰¹Para. 9 of the 6th July 2021 judgment.

[121] A consideration of section 187 of the **Insolvency Act** demonstrates the correctness of the learned judge's approach to these matters. By that section the court may, on the application by a person specified in subsection (2), which includes a creditor, remove the liquidator of a company from office for several reasons or classes of reasons therein specified. For example, the section provides for removal if the liquidator: "(ii) breaches any duty or obligation imposed on him by or owed by him under this Act". Or where 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;
the liquidator has an interest that conflicts with his role as liquidator; or
that for some other reason he should be removed as liquidator.”

[122] In my view, the learned judge was foreshadowing the difficulties which he had with the grounds upon which the section 273 Application had been brought (and upon which the appellants also intend to rely) relative to the challenge to the JLs decision to commence the IoM Action. The judge was deliberately not addressing or reaching any conclusion, preliminarily or otherwise, on the other ground of waiver and indemnity.

[123] The judge also made clear that the court cannot proceed and will not proceed on the basis that liquidators are “potentially liable to behave *mala fides*, and in effect, completely dishonestly”. The court will proceed “on the basis that liquidators are behaving in good faith. Now that is not to say that the liquidators will be presumed to be acting correctly. They may or may not be. The Court exercises its supervisory power under section 273 to ensure liquidators are acting correctly. The power under section 273 is something which the Court will use focusing on the particular matters which are raised”.¹⁰²

[124] With those pronouncements, the judge decided to “put aside that broad-brush attack on the liquidators and focus on the narrow issues which are raised by GACH”.¹⁰³

¹⁰² Para. 10 of the 6th July 2021 judgment.

¹⁰³ See para. 11 of the 6th July 2021 judgment.

[125] I am in full agreement with the learned judge as to the inappropriateness in putting such broad and serious allegations before the court in a section 273 application. I share the view that such serious and broad allegations of some sort of conspiracy involving the JLs with regard to the liquidations of the Companies, and mala fides on their part, made in the section 273 Application, and on which GACH and Treehouse seek to rely if they are joined in said application, ought not properly to be canvassed in a section 273 application. Section 273 applications ought to be confined to the unreasonableness or perversity of the act, omission or decision of liquidators. It is not to be used as leave and license for persons aggrieved to make a broad and sweeping attack on the fides, improper purpose or motive of the liquidation itself.

[126] I agree wholeheartedly with the judge's statement that such broad and serious allegations made against the JLs and their conduct of the liquidations and their decision to commence the IoM Action, ought not properly to be the subject of a section 273 application, which seeks to invoke the court's supervisory powers to review a specific act or decision of liquidators, with the objective of having them modified or reversed. To be clear, while I accept as a matter of principle, that a court's review of an act or decision or omission by a liquidator may properly involve an allegation of bad faith in relation to the act, decision or omission sought to be impugned, in this case, the allegations made against the JLs in the section 273 Application go beyond bad faith or the reasonableness of the decision sought to be impugned. They are very serious and weighty allegations of impropriety and wrongdoing, made against officers of the court and in relation to the purpose for the liquidation itself. These allegations are wholly unsuitable to be canvassed and dealt with in a section 273 application. The allegations made in the section 273 Application against the JLs ought, more properly, to be the subject of an application for the removal of the JLs pursuant to section 187 of the **Insolvency Act**. Accordingly, the learned judge was correct to conclude on case management grounds that it is improper to try and raise such matters in a section 273 Application. In my view, there is no merit in this ground of appeal which, accordingly, fails.

Counter Appeal

- [127] Having regard to the conclusions reached on the appellants' appeal, I do not need to consider the additional grounds relied on by the respondents in their counter-notice.

Disposition

- [128] For the reasons given above, the appellants' appeal fails and is accordingly dismissed, with costs to the respondents of no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court if not agreed by the parties within 21 days. The respondents' counter notice is, for the reason given above, accordingly dismissed with no order as to costs.
- [129] I express the appreciation of the Court to counsel for the parties for their helpful submissions.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal [Ag.]

By the Court

Chief Registrar