EASTERN CARIBBEAN COURT OF APPEAL
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0019
(Formerly BVIHCMAP2020/0012)

BETWEEN:

[1] PHOENIX GROUP FOUNDATION
[2] MINARDI INVESTMENTS LIMITED

Appellants

and

[1] CARL STUART JACKSON
[2] GREIG MITCHELL
[3] SIMON BONNEY
[3] ANDREW HOSKING
(as Joint Liquidators of Unicorn Worldwide Holdings Limited, Ballaugh Holdings Limited, Glen Moar Properties Limited and Sulby Investment Holdings Limited)

Respondents

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Gerard St. C Farara, QC	Justice of Appeal [Ag.]

Appearances:

Mr. David Lord, QC with Mr. Sebastian Kokelaar and Mr. Iain Tucker for the Appellants
Mr. Martin Pascoe, QC and Ms. Blair Leahy, QC with Mr. Andrew Willins for the Respondents

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2020: September 24;
November 17.

Commercial appeal — Application by joint liquidators to court for directions in relation to matter arising in liquidation — Application for court sanction to enter into *settlement agreement — Section 186(5) of Insolvency Act, 2003 — Application of principles in Re Nortel Networks UK Ltd and Other Companies [2016] EWHC 2769 (Ch)*

Interpretation of contractual document — Intention of parties to contract — Whether distribution of surplus provisions in clauses 5 and 47 of the Settlement Agreement contrary to sections 185(1)(c) and 207(3) of Insolvency Act, 2003 — Whether learned judge erred in interpretation of clauses 5 and 47 and consequently in his decision to sanction the Settlement Agreement

Whether joint liquidators breached express written assurances given to appellants prior to entering into the Settlement Agreement — Whether learned judge should have found that joint liquidators could not have formed the view that the Settlement Agreement was in best interest of liquidations — Whether evidence before the judge was sufficient to ground judge's conclusions on the application of Nortel test

Whether joint liquidators had a duty to place before judge contents of legal advice received in support of section 186(5) application — Whether learned judge erred in attaching too much weight to the possibility of costs savings or reductions if parties were to enter into the Settlement Agreement

Whether learned judge erred in failing to take into account that no creditor was supporting the section 186(5) application — Whether learned judge applied the correct test in determining sanction application — Whether learned judge erred in granting a stay and releasing the joint liquidators from liability arising from their entry into and performance of the Settlement Agreement pending the determination of an appeal

On 10th September 2019, the respondents, the joint liquidators (or "JLs") of four holding companies in liquidation in the Territory of the Virgin Islands ("the BVI Companies"), applied to the Commercial Court in the Territory of the Virgin Islands pursuant to section 186(5) of the Insolvency Act, 2003 for the sanction of the court to enter into and implement the terms of a written settlement agreement and to be released from any liability arising out of their entry into and performance of the Settlement Agreement ("the Sanction Application"). The written settlement agreement was entered into on 5th September 2019 ("the Settlement Agreement") between the respondents and five other parties ("the Settlement Parties") who are parties to certain ongoing, very complex and highly contentious legal proceedings in England ("the English Proceedings"). Also, in July 2016, the JLs on behalf of the BVI Companies (in liquidation) and two subsidiary companies, commenced against Gail Anderson Cochrane before the Commercial Court, certain tracing claims in relation to assets of the BVI Companies and subsidiaries ("the BVI Claim").

The Settlement Agreement, which is not a global settlement of the ongoing litigations, purports to finally settle, as between the Settlement Parties only, certain proprietary claims to assets and property in the ongoing proceedings in the BVI and in England, and for one of the Settlement Parties, Harbour Fund II, L.P., take the lead on behalf of itself and the other Settlement Parties in their representation in the English Proceedings, in which proceedings the first directed trial is scheduled to commence in January 2021. The implementation of the Settlement Agreement is made expressly conditional upon the sanction of the courts in Jersey and in the BVI being obtained.

The appellants, Phoenix Group Foundation and Minardi Investments Limited, who claim to be entitled to any surplus in the liquidations of the BVI Companies and their subsidiaries, objected to the Sanction Application along with four other persons/entities.

By an oral judgment and subsequent written order ("the Sanction Order"), the learned judge granted the Sanction Application and sanctioned the JLs' entering into and implementing the terms of the Settlement Agreement. At paragraph 5 of the Sanction Order, the learned judge granted a short stay of the order to permit the appellants to file an appeal and to seek a stay from the Court of Appeal, and released the JLs from any liability arising from or out of their entry into and performance of the terms of the Settlement Agreement during that period.

The appellants, being dissatisfied with the judge's decision and order, appealed. The JLs counter-appealed on several additional grounds upon which they say the judge's decision ought to be upheld.

The issues considered by the Court of Appeal were: (i) whether the terms of clauses 5 and 47 of the Settlement Agreement relating to the distribution of any surplus in the liquidations were contrary to and would result in breaches of sections 185(1)(c) and 207(3) of the Insolvency Act; (ii) whether the learned judge ought to have found that the JLs entered into the Settlement Agreement in breach of express written assurances given by them to the appellants; (iii) whether the learned judge ought to have found that the JLs could not rationally have formed the view that the Settlement Agreement was in the best interest of those interested in the liquidations, or alternatively, that there was real doubt as to the propriety of the Settlement Agreement; (iv) whether the learned judge was wrong to attach the weight he did to the costs savings or reductions under the Settlement Agreement in relation to the BVI Companies' continued participation in and prosecution of their claims in ongoing proceedings brought by the Serious Fraud Office in the UK ("the SFO Proceedings"); (v) whether the learned judge failed to take into account that no creditor was supporting the Sanction Application; (vi) whether the learned judge in granting the Sanction Application asked himself the wrong question, that is, whether the Settlement Agreement represented the 'best deal'; and (vii) whether the learned judge, at paragraph 5 of the Sanction Order, was wrong to absolve the JLs from any liability for taking steps to implement the Settlement Agreement pending final determination of an appeal.

Held: dismissing the appeal, awarding costs in the appeal to the respondents/joint liquidators to be assessed by a judge of the Commercial Court if not agreed within

21 days; dismissing (consequentially) the counterappeal with no order as to costs, that:

1. The principles applicable to an application by liquidators to obtain the court's approval or sanction of a course of action in the liquidation of a company, which course of action they have, in the exercise of their statutory powers and discretion, decided to embark upon ("second category sanction applications") were set out by Snowden J in **Re Nortel Networks UK Ltd and related companies** [2016] EWHC 2769 (Ch). The court must be concerned to ensure that the proposed course of action is within the liquidator's power, that the liquidator genuinely holds the view that what he proposes to do will be for the benefit of the company, its creditors and contributories, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. However, the court should not withhold its approval merely because it would not itself have exercised the power in the way proposed by the liquidator. Moreover, because the effect of the court's approval will be to prevent any subsequent challenge to the liquidator's decision, the applicant-liquidator must put before the court all relevant material, including a statement of his reasons for entering upon the proposed course of action, be it a compromise or a settlement; and the court will withhold its approval if it is left in any doubt as to the propriety of the proposed course of action. In this matter, the learned judge correctly identified and relied on the test in **Nortel** when determining whether the JLs had satisfied the requirements necessary for the court to sanction them entering into and implementing the Settlement Agreement.

   Re Nortel Networks UK Ltd and related companies [2016] EWHC 2769 (Ch) applied; Paragraph 2-299 of **Lewin on Trusts**, 18th Edn., Sweet and Maxwell (2008) considered; **Re Greenhaven Motors Ltd (in liquidation)** [1999] 1 BCLC 635 applied.

2. In considering whether to grant the Sanction Application, the learned judge was required to determine whether each limb of the **Nortel** test had been satisfied on the evidence. In the true sense, therefore, this was not an appeal from the exercise of the judge's discretion, and the principles applicable to such an appeal do not apply in this case. However, given the nature of the Sanction Application and the qualitative assessment of the evidence which the judge was required to make under the second and third limbs of the **Nortel** test, this Court ought to be slow to disturb the assessments and conclusions reached by the judge on those limbs, and ought to do so only where it can be shown that the judge committed an error of law or principle or his decision on the Sanction Application was perverse or wholly unsustainable.

3. By sections 185(1)(c) and 207(3) of the Insolvency Act, a liquidator shall, where there are surplus assets remaining after payment of liquidation expenses and creditor claims, distribute that surplus to the members of

the company in accordance with their rights and interests in the company. Clauses 5 and 47 of the Settlement Agreement provide that the Settlement Assets, Arena Surplus and Additional Settlement Assets (as defined therein) are to be distributed among the parties to the Settlement Agreement in the proportions stipulated in the table at clause 5, except where the Settlement Agreement provides otherwise. When the Settlement Agreement is read as a whole, including clauses 4.3 and 42 thereof, it is clear that the JLs are required to discharge their obligations under the said agreement in full compliance with their duties and obligations under the Insolvency Act. Accordingly, by the terms of the Settlement Agreement, the JLs are not required to distribute the Arena Surplus otherwise than in accordance with the provisions of section 207(3) of the Insolvency Act. Clauses 5 and 47 are therefore not in breach of the Act, and the learned judge's conclusion to this effect was correct.

Sections 185(1)(c) and 207(3) of the **Insolvency Act, Act No. 5 of 2003** considered; **Arnold v Britton** [2015] AC 1619 applied; **Wood Capita Insurance Services** [2017] AC 1173 applied.

4. The letter dated 1st May 2018 from the JLs' English lawyers to the appellants' English lawyers, contained an assurance that the JLs would only enter into a settlement 'on the prior approval of the BVI court'. There was no express assurance made to not do so without first consulting with the appellants and other proprietary claimants in the English Proceedings. In all the circumstances, there was no breach by the JLs of any assurances given in the 1st May 2018 letter. To the contrary, there has been substantial compliance with the assurances made, and the appellants have no sound basis upon which to complain.

5. Under the second and third limbs of the test in **Nortel**, the judge was required to be satisfied that the JLs genuinely held the view that the Settlement Agreement was in the best interest of the companies in liquidation and their respective creditors and contributories, and that their decision to enter into the Settlement Agreement was a rational one. On the evidence before the learned judge, and notwithstanding the failure by the JLs to put before the judge any legal advice which they had obtained as to the merits of the Settlement Agreement and whose offer to do so by way of a confidential annex had been objected to by the appellants, the judge was entitled to arrive at the conclusions that he did that the JLs' decision was both genuinely held and rational, and there is no basis upon which this Court can or ought to conclude that the learned judge erred in so finding or, that he ought to have entertained some doubt as to the propriety of the Settlement Agreement.

   Mahomed v Morris (No 2) [2001] BCC 223 considered; **Re Moritz** [1959] 3 All ER 767 considered.

6. In determining whether the JLs acted rationally in deciding to enter into the Settlement Agreement against the objections or lack of support from certain putative creditors of the BVI Companies, the judge's task was not to mechanically measure the support or lack thereof by the interested parties to the liquidation and give effect to the wishes of the majority. The judge was required to examine the reasons given by the appellants and the other interested parties for objecting to the Sanction Application, and to weigh these against the terms of the Settlement Agreement and the reasons given by the JLs for deciding to enter into it, in satisfying himself that the JLs decision was a rational one. In this case, the judge carefully considered the objections made by the appellants and the other opposing interested parties and rejected them. The judge did not commit any error of principle in conducting his assessment of these objections and the JLs' response to them, and the judge's reasoning and conclusions on this aspect were not perverse or unsustainable. There is therefore no basis upon which to upset the findings of the judge on this ground of appeal.

   Re Greenhaven Motors Ltd (in liquidation) [1999] 1 BCLC 635 considered.

7. Notwithstanding the judge's remarks that the Settlement Agreement represented the 'best deal available', there can be no doubt that the learned judge identified, considered and applied the correct test in determining the Sanction Application. It is clear from a full reading of the judge's oral decision, that the judge's 'best deal' remark was merely a loosely made remark which, to him, may have summed up the terms and advantages of the Settlement Agreement, having already applied the correct legal test to the Sanction Application. Accordingly, the judge's decision on the Sanction Application was not impugned by his 'best deal' remark.

8. Paragraph 5 of the judge's order on the Sanction Application does not provide any greater advantage to the JLs over those usually applicable to other successful litigants pending the determination of an appeal filed by the losing party. Furthermore, paragraph 5 of the order in no way seeks to, nor does it, tie the hands of the Court of Appeal upon its consideration of an appeal from the Sanction Order, as the Court of Appeal has the jurisdiction and power in determining an appeal to make such consequential orders as it deems appropriate, including discharging any orders made by the judge below in granting the Sanction Application. The challenge to paragraph 5 of the order, therefore, is misconceived.

   Rule 62.19 of the **Civil Procedure Rules 2000** considered.

9. In light of the conclusions reached on the appellants' grounds of appeal, it is unnecessary to consider the counter-notice of appeal by which the

respondents sought to uphold the decision of the judge on the further grounds stated therein.

JUDGMENT

[1] **FARARA JA [AG.]**: This is an appeal against the judgment of Jack J [Ag.][1] delivered orally on 22nd June 2020 in the Commercial Division of the High Court ("the Oral Judgment") and the order made by the learned judge dated 15th July 2020 ("the Sanction Order"), by which the judge sanctioned the respondents, the joint liquidators ("JLs") of four holding companies incorporated in the Territory of the Virgin Islands ("the BVI"), entering into and implementing the terms of a written settlement agreement dated 5th September 2019 ("the Settlement Agreement"). The four BVI holding companies in liquidation under the control of the JLs ("the BVI Companies") are: Unicorn Worldwide Holdings Limited ("Unicorn"), Ballaugh Holdings Limited ("Ballaugh"), Glen Moar Properties Limited ("Glen Moar"), and Sulby Investments Holdings Limited ("Sulby"). They are four of a group of ten companies referred to as "the Arena Companies", listed at Appendix 5 to the Settlement Agreement, and who are themselves parties to the Settlement Agreement.

[2] The parties to the Settlement Agreement are: the Serious Fraud Office and the Director of the Serious Fraud Office (together "the SFO"), Harbour Fund II L.P. ("Harbour") – a limited partnership established under the laws of the Cayman Islands, Stewarts Law LLP ("Stewarts") a UK law firm, the respondents in their capacity as Joint Liquidators of the four BVI Companies in liquidation, the companies listed in Appendix 5 to the Settlement Agreement ("the Arena Companies"), and the Viscount of the Royal Court of Jersey ("the Royal Court") in her capacity as the administrator of the *en désastres* of Gail Alison Cochrane and Orb a.r.l. respectively ("the Viscount"). The parties to the Settlement Agreement are collectively referred to therein as "the Distribution Settlement Parties".

[1] I refer to Jack J [Ag.] as "the learned judge" in this judgment.

[3] All parties to the Settlement Agreement are parties or interested parties to very complex and highly contested ongoing litigation before the Commercial Court in London, England involving a multiplicity of parties and issues ("the English Proceedings"). The Settlement Agreement is not a global settlement of the English Proceedings. It is, at its core, a partial settlement between the Settlement Parties *inter se*, of certain claims, including proprietary claims in the English Proceedings. It in no way binds the non-settlement parties in the English Proceedings.

[4] The Settlement Agreement was executed by the JLs on 5th September 2019, in advance of their application to the Commercial Division of the High Court in the Territory of the Virgin Islands ("the BVI court") for the Sanction Order. In doing so, the JLs' have taken the decision, in exercise of their undoubted statutory powers, to enter into the Settlement Agreement on behalf of the BVI Companies (and their subsidiaries) after some 18 months of negotiations. By clause 2 of the Settlement Agreement, the Settlement Parties agree, inter alia, to:

> "…fully and finally settle all of the Claims amongst themselves, including intergroup claims by or on behalf of companies over which the [JLs] have been appointed (or any of their subsidiaries (whether direct or indirect), affiliates, or connected companies) against companies over whose shares the Enforcement Receivers have been appointed (and their subsidiaries, whether direct or indirect) but not vice versa…".

[5] The terms "Claims" is defined at clause 1.11 to mean:

> "…the claims of any of the Distribution Parties, or any of their subsidiaries (whether direct or indirect), affiliates, or connected companies and the Enforcement Receivers against one another in respect of (i) the Settlement Assets, (ii) the Jersey Settlement Assets, (iii) the Arena Property, (iv) the Relevant Property, (v) the Additional Settlement Assets, (vi) assets or any distributions from the realisation of assets which are held by companies whose shares are relevant Property and/or the Settlement Assets and/or the Jersey Settlement Assets and/or the Arena Property and/or the Additional Settlement Assets and/or their subsidiaries (whether direct or indirect) affiliates or connected companies, (vii) any property derived from the Relevant Property, and/or the Settlement Assets

and/or the Jersey Settlement Assets and/or the Arena Property and/or the Additional Settlement Assets, (viii) any other property that falls to be determined in, arises out of, or is otherwise connected to the Commercial Court Proceedings (including any and all legal costs thereof), and/or (ix) any dispute related to, or connected with the subject matter of, the Commercial Court Proceedings (whether past, present or future, whether reported or unreported and whether known or unknown), including for the avoidance of doubt any claim or right which any of the said Settlement Parties have in the *en désastres* of Gail Cochrane and Orb ARL, save for [the matters specified in subparagraphs 1.11.1, 1.11.2 and 1.11.3 of the said Agreement]."

This Appeal and the Prior Appeal (No. 12 of 2020)

[6] This appeal, No. 19 of 2020, was commenced by notice of appeal filed electronically on 16th September 2020. The notice of appeal was filed in compliance with an order of this Court made 15th September 2020 in Civil Appeal No. 12 of 2020 involving the same parties and issues. On 15th September 2020, this Court (i) struck out the notice of appeal filed by the appellants ("Phoenix" and "Minardi") in Appeal No. 12 against the Sanction Order on the ground that it was filed without leave and was therefore a nullity; (ii) granted the appellants leave to appeal the Sanction Order; (iii) ordered that the appellants file their notice of appeal by 4:00pm on 15th September 2020; and (iv) ordered, further, that the parties refile electronically by 17th September 2020, all documents necessary for the hearing of the appeal. All documents previously filed in Appeal No. 12 of 2020 were refiled as ordered, including the respondents' counternotice of appeal. The appeal was heard by the Court on 24th September 2020 and judgment reserved.

[7] The appeal was heard on an expedited basis in order to accommodate the request of the parties, in particular, the JLs, who have stressed the urgency in have the appeal from the Sanction Order determined by this Court as soon as possible. The need for expedition was implicitly recognized by the learned judge at paragraph 5 of the Sanction Order, the appellants' counsel having indicated to the learned judge at the conclusion of his delivery of the judgment, their intention to appeal the said judgment. The underlying urgency is because the outcome of this appeal will inform the approach to be adopted and steps to be taken by the JLs,

along with the other parties to the Settlement Agreement, in the future conduct of the English Proceedings where Popplewell J has, by order dated 25th April 2018, directed that there will be a trial of certain of the multiplicity of issues in those proceedings ("the Directed Trial").[2] The initial date for the commencement of the Directed Trial was vacated to accommodate the settlement negotiations by the Settlement Parties which were then on foot. The Directed Trial was relisted for a period of 10 weeks commencing in January 2021, with an additional 2 weeks for pre-reading.

[8] In short, the JLs need to know whether the Sanction Order will stand, as that decision will dictate their future course of action and participation in the English Proceedings and, in particular, the hearing of what is known as "the SFO Proceedings". Accordingly, the outcome of this appeal will have financial, substantive and procedural implications for the BVI Companies (and the other insolvent Arena Companies) and the Settlement Parties in their participation in the English Proceedings and, in particular, the Directed Trial. These include the filing of a consolidated pleading by the Settlement Parties by a certain date in the SFO Proceedings, and Harbour 'taking the lead', pursuant to the terms of the Settlement Agreement, in funding the legal fees, costs and expenses of the Settlement Parties in those proceedings. During the course of the hearing of this appeal, we were informed that notwithstanding the Sanction Order (in particular, at paragraphs 2 and 5), the JLs have held their hands and have not taken steps to implement the terms of the Settlement Agreement, as they await the outcome of this appeal.

The Parties to the Appeal

[9] The respondents are the joint liquidators of the BVI Companies. The companies have been in creditors' voluntary liquidation since March 2015. On 5th March 2015, Carl Stuart Jackson, Simon Bonney and Charlotte Caulfield were appointed

[2] Record of Appeal, Volume D, Tab 55 at pages 770-796.

joint liquidators of Unicorn. On 13th March 2015, Carl Stuart Jackson, Simon Bonnet and Andrew Hocking were appointed joint liquidators of Glen Moar, Ballaugh and Sulby. Further, on 8th July 2019, Charlotte Caulfield was replaced by Greig Mitchell as one of the joint liquidators of Glen Moar, Ballaugh and Sulby. Each of the BVI Companies was placed into voluntary liquidation by the written resolution of their sole shareholder, SMA Investment Holdings Limited ("SMA"), pursuant to the provisions of the **Insolvency Act, 2003**[3] ("the **Insolvency Act**"). Accordingly, the powers and duties of the JLs are as set out in and governed by the Insolvency Act, including Schedule 2 to the said Act.

[10] As mentioned above, the BVI Companies are the main holding companies of the Arena Companies. In addition to the BVI Companies, one other Arena Company, Bridge Properties (Arena Central) Limited ("BPAC"), is incorporated in the BVI. Of the others, three were incorporated in the Isle of Man and two in the United Kingdom. The BVI Companies along with seven of the other Arena Group companies are in liquidation. However, the JLs consider that Ballaugh is solvent and Unicorn has made a proprietary claim to the shares in BPAC.

[11] The First Appellant, Phoenix Group Foundation, is an entity registered under the laws of Panama. It has made a proprietary claim in the ongoing English Proceedings to any surplus in the BVI Companies. This claim is rooted in an equitable assignment under what is called the "Arena Settlement Agreement". Phoenix does not assert a claim to be registered as a shareholder of any of the BVI Companies in place of SMA. Along with the Second Appellant, Minardi, it opposed the Sanction Application and filed joint evidence in opposition. The Sanction Application was also opposed by certain other parties to the English Proceedings. However, only Phoenix and Minardi have appealed the judgment and Sanction Order.

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[3] S.I. No. 5 of 2003.

[12] The Second Appellant, Minardi Investments Limited, lodged, with the JLs, a creditor's claim in the estate of Unicorn. It has also brought a proprietary claim to any distributions of surplus to be made by the JLs in relation to each of the BVI Companies in liquidation.

Background

[13] The background to the various disputes, claims and legal proceedings is complex and lengthy. It is amply set out in the judgment of Popplewell J dated 15th April 2017 in the Orb litigation commenced in England in 2012, and in the judgment of Mostyn J in divorce proceedings in England between a Mr. Ruhan and his then wife.[4] As to the factual and procedural history, the learned judge quoted extensively from both judgments in rendering the Oral Judgment. Also, much of the important legal proceedings and orders, dating back to May 2005, have been set out in the 'Background' section of the Settlement Agreement. I do not consider it necessary for the purpose of determining the issues in this appeal, to fully set out the factual background (much of which is in dispute) and the procedural history to the various claims, including proprietary claims, the English Proceedings and the litigation in Jersey. I propose merely to provide a sketch of certain of the important background facts, and to highlight some of the salient matters which are or may be of some relevance to the determination of the issues raised in this appeal and, if necessary, the respondents' counter appeal.

[14] The English Proceedings stem from various transactions which took place in 2003 involving Dr. Gerald Martin Smith ("Dr. Smith") and Dr. Gail Alison Cochrane ("Dr. Cochrane"). During the period May 2005 to April 2008 three orders of significance were obtained in the English courts against Dr. Smith and his assets. On 20th May 2005, in action CLA no. 73 of 2005, the Administrative Court granted a restraining order against Dr. Smith.[5] On 13th November 2007 the Crown Court in London, on the application of the SFO, made a confiscation order against Dr. Smith pursuant

[4] Richardson-Ruhan v Ruhan [2017] EWHC 2739 (Fam).
[5] Record of Appeal, Volume C2 – SFO Confiscation Proceedings at pages 2-12.

to section 71 of the Criminal Justice Act 1988 in the sum of GBP £40,965,911.00 ("the Confiscation Order");[6] and on 7th April 2008, the Administrative Court appointed receivers over the realizable property of Dr. Smith under the Confiscation Order.[7] The receivers were, by order of the English court dated 29th May 2013, replaced by the Enforcement Receivers, John Milsom and David Standish, of KPMG LLP.

[15] In 2012, litigation involving Orb a.r.l ("Orb"), a company incorporated in Jersey, and other parties ("the Orb Litigation") was commenced in England. On 4th June 2014, the Orb parties applied for an injunction against Mr. Ruhan to preserve assets pending trial. Their solicitors were Stewarts Law, LLP. This ultimately led to Stewarts making a claim to a solicitor's lien for outstanding fees which they claim arose from their recovery work. While the Orb Litigation was pending, the named beneficiaries of the Arena Settlement (Messrs. Cooper and McNally) transferred a variety of assets, including the shares in the BVI Companies and other companies in the Arena Group, to SMA, the current registered shareholder of these companies. In the Orb Litigation, Mr. Ruhan amended his case to claim that, at all material times, he was the ultimate beneficiary of the Arena Settlement, and that Messrs. Cooper and McNally held his interest as nominees for an on behalf of him. Mr. Ruhan also counterclaimed in the Orb Litigation on the basis of an alleged misappropriation of his assets. The Orb Litigation was settled in April 2016, which settlement was documented in several agreements and transactions known as 'the Geneva Settlement'.

[16] However, the Geneva Settlement was short-lived. On 24th June 2016, Phoenix commenced proceedings in England against Dr. Gail Alison Cochrane ("Dr. Cochrane") claiming GBP £73,750,000.00. On the same day, Phoenix obtained a worldwide freezing order against Dr. Cochrane to the value of GBP £145 million ("the Phoenix Freezing Order"). On 15th December 2016, Minardi joined the

[6] Record of Appeal, Volume C2 at pages 19-20.
[7] Record of Appeal, Volume C2 at pages 22-29.

Phoenix Proceedings. As co-claimants, Phoenix and Minardi obtained a worldwide freezing order against the additional defendants, namely, Dr. Smith, Dawna Sticker (Dr. Cochrane's "femme d'affaires"), Anthony Smith and Litigation Capital Ltd ("LCL"). Subsequently, variations were made to the Phoenix/Minardi freezing injunction to permit certain assets to be paid over to the Enforcement Receivers in their capacity as court appointed receivers, to be held by them to the order of the English court pending final determination of the English Proceedings. The Phoenix Proceedings were later stayed pending the outcome of the SFO Proceedings by order of the English court.

[17] On 24th November 2016, the Royal Court in Jersey declared *en désastres* the property of Dr. Cochrane and Orb on the application of Harbour, who had provided litigation funding to the Orb claimants. The effect of this order was that the assets of Dr. Cochrane and Orb were, from this point onwards, vested in the Viscount as administrator of both estates, worldwide. By declarations and orders of the Royal Court in Jersey made the same day, the property of Dr. Smith in Jersey was vested in the Seized Asset Manager and remains so vested.

[18] Dr. Smith was married to Dr. Cochrane who is said to be the current ultimate beneficial owner ("UBO") of the Arena Group of companies, including the BVI Companies, through their sole registered shareholder, SMA. Dr. Cochrane has been declared bankrupt by the courts in Jersey and her assets now vest in the Viscount.

The SFO Proceedings

[19] As mentioned above, on 26th June 2017, the SFO issued an application in the English Proceedings by which they claimed certain proprietary interests in certain property the subject of the proceedings before the Commercial Court in London ("the SFO Proceedings").[8]

[8] Claim No. CL2017/000323.

[20] By order of Popplewell J made on 25th April 2018 ("the April 2018 Directions"), 15 persons were permitted to intervene and were joined as additional respondents to the SFO Proceedings. These include Dr. Smith, Stewarts, the JLs, the Viscount, Harbour, LCL, Phoenix and Minardi. The SFO Proceedings are ongoing before the English Commercial Court. At paragraphs 3 to 5 of the April 2018 Directions, the judge directed that all non-parties will be bound by the orders and judgments made by the Commercial Court in relation to the June 2017 SFO Application as to the true ownership of and/or existence of other proprietary interests in what is defined in the said April 2018 Directions Order as "the Relevant Property". The Relevant Property falls into three categories: (i) the shares in the Arena Companies (some 18 companies incorporated in BVI and the Isle of Man formerly held in a Manx trust called "the Arena Settlement"); (ii) the shares in the "Non-Arena Companies" (comprising 25 companies incorporated in various jurisdictions); and (iii) four pieces of real estate in Jersey ("the Jersey Properties").

[21] The SFO Proceedings are very complex and heavily contested legal proceedings, with multiple parties and interested parties, and with a multiplicity of issues, legal and factual, for the determination of the English Commercial Court. In brief, the SFO Proceedings involves various parties asserting proprietary claims to assets (or to the traceable proceeds of assets) transferred pursuant to the Arena Transfer, the Isle of Man Settlement, the Geneva Settlement, the LCL Transfer and/or the Arena Cash Transfers. These assets (and their traceable proceeds) are the assets described compendiously as the 'Disputed Property'.

[22] The Directed Trial is the first phase of the trial of issues in the SFO Proceedings. The Directed Trial concerns a long list of issues for determination and has been set down to be dealt with over a 10-week trial period commencing in January 2021, with 2 weeks for pre-reading.[9] Some of the salient procedural steps and

[9] See List of Issues at Record of Appeal, Volume B at pages 175-193.

milestones in the English Proceedings are recounted in the Settlement Agreement, and are also addressed, to some extent, in the witness statements and affidavits filed on behalf of both the JLs and the appellants in relation to the Sanction Application.

[23] Notably, the Settlement Agreement recites, at item XVI, that:

> "The Settlement Parties have agreed a settlement as between themselves **of the issues raised by the June 2017 Application** (including, without limitation, their assertions to proprietary interests in the Relevant Property (as defined below)) and the further matters identified hereafter, on the terms set out below." (Emphasis added)

[24] The expression "Relevant Property" is defined at clause 1.23 of the Settlement Agreement as meaning 'the property defined at paragraph 11(a) of the Order of Mr Justice Popplewell dated 25th April 2018'.

The BVI Claim – "the Cochrane Proceedings"

[25] On 6th July 2016, the JLs of Unicorn, Glen Moar, Ballaugh and Bridge Properties (Arena Central) Limited ("BPAC"), all BVI companies in liquidation, and Specialty Finance Limited ("the BVI Claimants") commenced proceedings in the Commercial Division of the High Court in the BVI against Dr. Cochrane (Claim BVIHC(Com) 2016/0091) for knowing receipt and breach of fiduciary duty ("the BVI Claim"). By the BVI Claim, the BVI Companies seek to recover approximately GBP £80 million in cash or their traceable proceeds. The JLs are seeking to trace funds from the BVI Claimants through to the bank accounts of Dr. Cochrane and associates of Dr. Smith or their companies, into the purchase of the Disputed Property.

The Sanction Application

[26] According to clause 22 of the Settlement Agreement, its provisions, and any variation of them, will only take effect upon the 'Necessary Approvals' being obtained. Accordingly, the JLs were required to apply for and to obtain the sanction of the BVI court and the Isle of Man Court of the Settlement Agreement, 'unless the [JLs] in their sole discretion confirm in writing that they are content to

enter into [the Settlement Agreement] without the approval or sanction of the BVI Court and/or the [Isle of Man] Court'.[10] The approval by the Isle of Man court of the Settlement Agreement was obtained by the JLs on 2nd July 2020.

[27] The Sanction Order was made on the ordinary application of the JLs filed 10th September 2019 ("the Sanction Application"). Pursuant to section 186(5) of the **Insolvency Act**, a liquidator of a company may apply to the court for directions 'in relation to a particular matter arising in the liquidation'. This power is exercisable whether the liquidator holds office on appointment by the court or by written resolution of the company. By the Sanction Application, which was first listed for hearing on 14th January 2020, the JLs sought that they:

(i) have the sanction of the court 'to enter into, and to perform, the terms of [the] Settlement Agreement' and to 'deal with and to compromise claims to the assets of the [BVI] Companies on the terms set out in the Settlement Agreement'; and

(ii) are accordingly released from any liability arising from out of their entry into and performance of the terms of the Settlement Agreement.

[28] In the Sanction Application, the JLs stated:

> "This application is made on the grounds that a large number of proprietary claims have been made to the assets of the [BVI] Companies, and the [JLs] have provisionally, and subject to the sanction of the court, reached the agreements recorded within the Settlement Agreement which would compromise certain of the claims to the assets of the [BVI] Companies."

[29] The Sanction Application was said to be supported by two affidavits of Carl Jackson (one of the four Joint Liquidators), of which only one such affidavit 'will be made available to the persons identified under (g) below'. At section (g) are identified three classes of persons to whom notice of the Sanction Application is required to be given. These are (i) 'the Interested Parties' and the 'Nominated

[10] See Clause 23.1 of the Settlement Agreement.

Interested Parties' identified in the schedule to the order of Adderley J dated 16th October 2017; (ii) the creditors or persons claiming to be creditors of the BVI Companies; and (iii) the persons notified of this application in accordance with any directions of the court.

[30] Over time, the JLs' filed three witness statements in support of the Sanction Application. These are referred to as:

(i) Jackson Four, filed on 21st November 2019;

(ii) Jackson Six, filed on 20th April 2020; and

(iii) Jackson Seven, filed on 15th May 2020.

[31] In addition to the appellants, there were another four objectors to the Sanction Application. These are:

(i) Dr. Gerald Martin Smith ("Dr. Smith") who filed a witness statement dated 9th December 2019;

(ii) Hotel Portfolio II UK Limited ("HPII") and their liquidators, who did not appear at the hearing, but whose lawyers, Spring Law, submitted a letter dated 11th December 2019 setting out the basis of their objections which, apparently, mirrors, to a large extent, the points of objection relied on by the appellants at their evidence in opposition;

(iii) Litigation Capital Limited ("LCL"), whose solicitors, Keystone Law, sent a short letter relying on the matters raised by Dr. Smith in his objections to the Sanction Application; and

(iv) Mr. Ulrich Pelz whose objections were set out in an email sent on 22nd January 2020 to the court.

[32] The appellants, in opposing the Sanction Application, filed the First Witness Statement of Richard John Slade ("Mr. Slade") on 12th December 2019 ("Slade 1"), and a signed but unsworn affidavit of Mr. Slade on 24th April 2020 ("Slade 2"). In

large measure, Jackson Seven is in response to the points of objection in the witness statement and unsworn affidavit of Mr. Slade and to the witness statement of Dr. Smith.

[33] The Sanction Application has been the subject of two directions orders. The first by Wallbank J [Ag.] on 21st November 2019 ("the Wallbank Directions Order"); and the second by Jack J [Ag.] on 30th April 2020 ("the Jack Directions Order").[11] By the Wallbank Directions Order, the learned judge vacated the date of 5th December 2019 fixed initially for the hearing of the Sanction Application, and made directions providing, inter alia, for persons claiming to have a secured or proprietary claim over any assets of the BVI Companies, to provide to the liquidators certain particulars of their claim and the basis upon which they assert such a claim. Wallbank J also issued directions for the JLs to provide a copy of the said order to any person or entity reasonably thought by the JLs' to be creditors or potential creditors of the BVI Companies, and to advertise the said order in the Official Gazette in the BVI and in London, among other countries named in the order. By the Wallbank Directions Order, persons who intend to appear at the hearing of the Sanction Application were entitled to do so only if they had filed and served upon the JLs a notice of objection with reasons therefor, evidence in support, and their time estimate for the hearing of the Sanction Application.

[34] By the Jack Directions Order, the learned judge made certain directions for the hearing of the Sanction Application which was re-listed for hearing on 5th June 2020, including for the hearing to be conducted using electronic means, for the filing of further evidence by the JLs, the appellants and Dr. Smith, and for the preparation of the hearing bundles in electronic format.

The Oral Judgment and Sanction Order

[11] See Record of Appeal, Tabs 5 and 7 at pages 14-20 and 25-29.

[35] The learned judge heard the Sanction Application over a period of three days on 15th, 16th and 17th June 2020. He delivered his decision thereon on 22nd June 2020. By the Oral Judgment, the learned judge granted the Sanction Application and certain 'limited relief'. The latter is a declaration (which the learned judge had posited during the course of rendering his oral decision) as to the proper construction and effect of clause 4.4 and the distribution of surplus in the table at clause 5 of the Settlement Agreement. Specifically, it was the judge's view that clause 5 is:

> "…not effective to authorize a distribution of the Arena Surplus as defined therein otherwise than to the members and contributories of [the BVI Companies] or such persons having priority… whether by a proprietary claim or otherwise."[12]

[36] The learned judge concluded the Oral Judgment in this way:

> "I therefore, have to stand back and look at the matter holistically and I ask the question posed by Mr. Justice David Richardson in MF Global and by Mr. Justice Snowden in Nortel. Am I satisfied that the proposed exercise is within the administrator's power? And the answer is, I am.
>
> That the administrator generally holds the view that what he proposes will be for the benefit of the company and its creditor? I hold that they do.
>
> And that he is acting rationally and without being affected by a conflict of interest in reaching that view[?] I do hold that view."

He goes on to say:

> The Court should not withhold its approval merely because it would not itself have exercised the power in the way proposed.
>
> I don't think that applies. No doubt there are changes which could have been made, in particular, the drafting of clause 4.2, 4.3, 4.4. It's not a masterpiece of the draftsman art, but there is not a better compromise which I have been made aware of.
>
> Thus, although I would not give my approval if I am left in any doubt as to the propriety of the Joint Liquidators' proposed course of action, in the current case, I am wholly satisfied that the Settlement is the best that the

12 See page 76, lines 21-25 and page 77, lines 1-9 of the Transcript of Proceedings.

Joint Liquidators could achieve. That they have taken proper care over it and that it is in all the circumstances, the best deal available.

In those circumstances, I will grant the sanction which is sought of the proposed settlement and also the limited relief which I have outlined."

[37] By the Sanctions Order, the learned judge made the following orders and directions:

"1. On the true construction of the terms of the Settlement Agreement:

(i) The Joint Liquidators are not required to make any distribution of the Arena Surplus (as defined in the Settlement Agreement) otherwise than in accordance with Section 207(3) of the Insolvency Act 2003;

(ii) The Joint Liquidators shall only be entitled to distribute the Arena Surplus to the SFO, the Viscount, Stewarts and Harbour in the proportions set out in clause 5 of the Settlement Agreement in the event that one or more of those parties establishes a proprietary claim to the shares in the Arena Companies (as defined in the Settlement Agreement) and then only to the extent (and amount) that any such claim is not outranked by the proprietary claims to the Arena Surplus of Phoenix and Minardi or any of the other Non-Settlement Parties.

2. The Joint Liquidators:

(i) Have the Court's sanction to enter into and to perform the terms of the Settlement Agreement, and to deal with and to compromise the claims to the assets of the Companies on the terms set out in the Settlement Agreement;

(ii) Are released from any liability arising from or out of their entry into and performance of the terms of the Settlement Agreement.

3. …

4. …

5. Unless by 4pm on 24 July 2020 the Court of Appeal either allows an appeal against the Decision or grants a stay of this Order or other relief having like effect:

(i) the Joint Liquidators may take all and any steps to enter into and to perform the terms of [the] Settlement Agreement and to deal with and to compromise the claims to the assets of the Companies on the terms set out in that Settlement Agreement pending the final determination of the Appeal (Appeal Period); and

(ii) the Joint Liquidators are released from any liability arising from or out of their entry into and performance of the terms of the Settlement Agreement in the Appeal Period."

[38] The effect of paragraph 5 is that the learned judge granted a short stay of the Sanction Order to facilitate an urgent appeal and application for a stay to this Court by the appellants. No application for a stay of the Sanction Order was filed by the appellants and so, as from 25th July 2020, the JLs have been free to take all necessary steps and actions to fully implement the terms of the Settlement Agreement. As mentioned above, this notwithstanding, they have prudently held their hands pending the hearing and determination of this appeal.

The Issues for Determination on Appeal

[39] The appellants' notice of appeal (as amended) contains seven grounds of appeal. On the basis of these seven grounds, the appellants seek orders setting aside the Sanction Order, dismissing the Sanction Application and directing that the respondents pay the Appellant's costs in the appeal and the Sanction Application. In summary, the issues which fall for determination by this Court are:

(i) whether the Settlement Agreement, in particular the provisions of clauses 5 and 47 relating to surplus, specifically the Arena Surplus, amount to or would result in a breach of sections 185(1)(c) and 207(3) of the **Insolvency Act**;

(ii) whether the learned judge ought to have found that the JLs entered into the Settlement Agreement in breach of certain express written assurances given by them to the appellants in a letter dated 1st May 2018 from their English lawyers (and repeated in an email dated 4th May 2018) that they would not enter into a settlement agreement without (i) the prior approval of the BVI court; and (ii) on notice to all proprietary claimants in the SFO proceedings, including the appellants;

(iii) whether the learned judge ought to have found that the JLs could not have formed the view that the Settlement Agreement was in the best interest of those interested in the liquidations, or alternatively, that there was real doubt as to the propriety of the Settlement Agreement;

(iv) whether the learned judge was wrong to attach any weight or alternatively too much weight to any alleged costs savings or reductions in relation to the BVI Companies' continued participation and prosecution of their claims in the SFO Proceedings;

(v) whether the learned judge failed to take into account that no creditor was supporting the Sanction Application and that the appellants, (Minardi being a creditor of Unicorn) as parties entitled to the Arena Surplus, were opposing the Sanction Application;

(vi) whether the learned judge in granting the Sanction Application asked himself the wrong question, that is whether the Settlement Agreement represented the 'best deal'; and

(vii) whether the learned judge was wrong to make an order in the terms of paragraph 5 of the Sanction Order absolving or purporting to absolve the JLs from liability for taking steps to implement the Settlement Agreement pending final determination of an appeal, including irreversible steps such as discontinuing proceedings or abandoning claims of the BVI Companies, even if this Court subsequently allows the appeal and sets aside the Sanction Order.

The Applicable Principles – Category 2 Sanction Applications

[40] The principles applicable where administrators or liquidators come to the court to obtain approval or sanction of a course of action in the administration or liquidation of a company placed under their control, which course of action they have, in the exercise of their statutory powers and discretion, agreed to enter into or embark upon ('category two' applications), were reviewed and the test reformulated by

Snowden J in **Re Nortel Networks UK Ltd and Other Companies**.[13] The learned judge correctly identified and relied on the **Nortel** test in determining whether the JLs had satisfied the requirements necessary for the court to sanction the Settlement Agreement. This much is common ground between the parties in this appeal.

[41] Category two applications concern situations where the administrator or liquidator has, in exercise of their undoubted statutory power, decided to take or to embark upon a very significant or momentous step in the administration or insolvency of a company or companies under their control, and have approached the court subsequently to seek its approval or sanction of the intended course of action, be it some settlement or compromise.

[42] Category two applications are in contradistinction to category one sanction applications. In category one sanction applications, the applicant-officeholder seeks the court's decision as to whether they should take the particular course of action or enter into a particular compromise or settlement in the administration or liquidation of the company or companies under their control. Inherent in a category two application, is that the applicant officeholder has not surrendered to the court their power and discretion to decide whether to enter upon a particular course of action or into a particular agreement in the best interest of the estate of the company or companies over which they were appointed, and their creditors and contributories. Typically, category two applications do not involve or relate to the ordinary issues faced by administrators and liquidators in the discharge of their duties as such, but to very significant or momentous decisions during the course of an administration or liquidation, in relation to which the office holder consider it prudent to obtain the approval or sanction of the court of their decision, before proceeding with its implementation. The effect of such an order is to clothe the office holder with the blanket of immunity from being sued by dissatisfied creditors

[13] [2016] EWHC 2769 (Ch).

or contributories. Accordingly, the role and approach of the court is fundamentally different when dealing with each of these two types of sanction applications. Simpliciter, in relation to category two applications, the court's role, and hence its approach, is a somewhat limited one, but one which nevertheless must be exercised with great care and decided upon well-established principles.

[43] **Nortel** concerned an application by the administrators of 19 Europe, Middle East and Africa companies ("the EMEA companies") within the Nortel group, for the directions of the court under the UK Insolvency Act 1986, to enter into and to perform a global settlement (documented in several written agreements) of the vast majority of disputes which had arisen with respect to the affairs of the group, and the distribution of the proceeds of sale of its assets amounting to USD $7.3 billion. As in the instant matter, these settlement agreements had been entered into by the administrators prior to them applying to the court for its approval or sanction. The approval by the English court, by a specified date, was one of the agreed upon conditions for the efficacy and implementation by the administrators of the global settlement. Once the approval of the English court had been obtained, the approval of creditors and of the courts in Canada and the US were to be sought. The global settlement had been arrived at after several prior rounds of mediation had proven unsuccessful. It took several months to draft the lengthy and complex documentation necessary to give effect to what was then an 'in principle' overarching settlement. Certain steps were taken to ensure that the creditors of the EMEA Companies were notified of the global settlement and given an opportunity to object to the application by the administrators for the approval and sanction of the court.

[44] At paragraph 41 of the judgment, Snowden J remarked that while more notice could have been given by the administrators of the date and time of the hearing of their application for court approval, he was nevertheless 'content that an adequate opportunity has been given to any creditors who might have wished to participate'; and that any creditor or significant creditor who might have wished to make

representations at the hearing, had not been deprived of such opportunity. The judge reached this conclusion based on three stated reasons or factors, each peculiar to that matter.

[45] At paragraph 45, Snowden J referred with approval to a passage from the judgment of David Richards J in **Re MF Global UK Ltd (in special administration) and another**.[14] In that passage, Richards J referred to the salutary and important power of administrators (and liquidators) to compromise claims of the company or companies over which they were appointed, without resorting to the courts for approval; and the prudence in seeking the court's directions where 'there are particular reasons for doing so'. In this regard, Snowden J drew on the comparable situation of trustees seeking directions of the court, as was addressed by Hart J in **Public Trustee v Cooper**.[15] There, Hart J, dealing specifically with circumstances where the decision or step is a momentous one, opined:

> "In such circumstances there is no doubt as to the extent of the trustees' power nor is there any doubt as to what the trustees want to do but they think it prudent, and the court will give them their costs of doing so, to obtain the court's blessing on a momentous decision. In a case like that, there is no question of surrender of discretion and indeed it is most unlikely that the court will be persuaded in the absence of special circumstances to accept the surrender of discretion on a question of that sort, where the trustees are prima facie in a much better position than the court to know what is in the best interest of the beneficiaries."

[46] At paragraph 47 of **Nortel**, Snowden J underscored that the application before him by the administrators to approve the global settlement in the Nortel Group of companies, was the kind of application considered by Hart J in **Public Trustee v Cooper**. He opined as follows:

> "The instant case is, in my judgment, just such a case. In signing the documents comprising the global settlement, the administrators and the conflict administrator have already decided that the global settlement is in the best interests of each of the EMEA Companies and their creditors.

[14] [2014] EWHC 2222 (Ch).
[15] [2001] WTLR 901 at paragraphs 922-924.

> They do not propose to surrender the exercise of their discretion in that regard to the court, but they seek the approval of the court because of the great significance of the global settlement in the context of the administrators of each of the EMEA Companies. Given the size and complexity of the affairs of the Nortel group and the amounts in the Lockbox, there can, in my judgment, be no doubt that the execution of the global settlement is a truly momentous decision."

[47] Likewise, in the instant matter, there can be no doubt that that the decision by the JLs to enter into the Settlement Agreement and to implement its terms, is a momentous one in the liquidations of the BVI Companies and the other Arena Companies in liquidation. This is so given the large number of complex and competing proprietary claims in the SFO Proceedings to the Disputed Assets, which proceedings have been running for over 3 years now. Additionally, the various issues to be tried in those proceedings, the bifurcated trial of issues ordered or directed, the long list (19 pages) of issues to be dealt with at the Directed Trial to commence in January 2021, the various competing proprietary claims in those proceedings, including to the assets of the BVI Companies and their subsidiaries, and the high and mounting costs incurred and to be incurred by the JLs in the SFO Proceedings and the consequential drain on the assets of the BVI Companies, all speak to how momentous as decisions this is in the liquidation of these companies.

[48] It was therefore prudent for the respondents, *qua* liquidators, to apply to the BVI court for approval of the Settlement Agreement and the implementation of its terms. In these circumstances, the Sanction Application was made without any surrender by the JLs of their power and discretion to have approved and entered into the Settlement Agreement. This power and authority was available to them under sections 184(2), 185 and 186 of the **Insolvency Act** and Schedule 2 thereof. Further, it is to be presumed until shown otherwise, per Snowden J in **Nortel**,[16] that in exercising their power before coming to the court, the respondents

[16] See paragraph 47 of Nortel.

did so having first determined that the terms of the Settlement Agreement are in the best interest of the BVI Companies and their creditors and contributories.

[49] The approach of a court when considering a category two application by an office holder, was helpfully summarized at paragraph 2-299 of **Lewin on Trusts**,[17] which was cited with approval by Richards J in **Re MF Global UK Ltd**:

> "The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

[50] I can do no better than to respectfully endorse and adopt, for the purpose of this decision, that clear and succinct distillation of principle by the learned authors of **Lewin on Trusts**, to be applied when a court is considering a category two application. They have correctly summarized the role, approach, parameters and limitations of the court's function when considering such applications and the kind of evidence which an applicant ought to put before the court in order for the judge

[17] 18th Edn., Sweet and Maxwell (2008).

to be in the position to properly exercise the court's jurisdiction under section 186(5) of the **Insolvency Act** to sanction the particular course of action.

The Nortel Test

[51] Snowden J at paragraph 49 of **Nortel** formulated the applicable test in this way:

> "In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed."

[52] As to the court's approach to, and the evidential burden on, an applicant seeking the court's sanction, Snowden J, having likened it to the approach a court would take to a subsequent challenge by a creditor to the administrator or liquidator's decision, further opined at paragraph 50:

> "But having regard to the fact that its approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action."

[53] It is notable that an applicant's duty is to put before the court 'all relevant material', which would include the officeholder's statement of his reasons for entering into the agreement or settlement. While there is no specific requirement to place before the court the legal advice which the applicant liquidator or administrator has obtained in reaching his decision, it has become very much the practice in applications of this type, for such advice or a summary thereof to be put before the judge hearing a sanction application, including a category two application. Importantly, and this must be considered part of the 'test', if in the end, the court is left in some doubt as to the propriety of the proposed course of action, then the court ought to withhold its approval.

[54] In **Nortel**, Snowden J had before him full evidence from the administrators;[18] and, additionally, he had been provided with:

> "a number of confidential documents including projected statements for EMEA Companies and various pieces of legal advice provided to the administrators by their lawyers in the relevant jurisdictions, namely England, Canada, the US and France."[19]

The nature and extent of such legal advice, emanating from different lawyers for the administrators and the conflict administrator, is emphasized at paragraph 51 of the judgment. Reference was also made by Snowden J to the assistance which he derived from the very detailed written submissions from counsel for both the administrators and the conflict administrator, and from their oral submissions during the hearing of the application. At paragraph 54, the judge stated that he reached his conclusion to approve the global settlement 'on the basis of the evidence that [he] had seen'.

[55] Accordingly, the duty and burden rest with an administrator or liquidator seeking the sanction of the court, of his decision to embark upon a particularly momentous course of action in the administration or liquidation of the estate of a company over which he has been appointed, to put before the court all relevant material so as to enable the court to properly determine whether: (1) the exercise of the power was lawful; (2) the administrator or liquidator genuinely holds the view that the proposed course of action is in the best interest of the company, its creditors and contributories; and (3) that in coming to that decision he was acting rationally and without a conflict of interest.

[56] In the decision of the English Court of Appeal in **Re Greenhaven Motors Ltd (in liquidation)**[20] the court allowed an appeal from the decision of Harman J where the judge had approached the function of the court in deciding whether to sanction the exercise by liquidators of their power to enter into a settlement agreement, on

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[18] See paragraph 51 of Nortel.
[19] See paragraph 52 of Nortel.
[20] [1999] 1 BCLC 635.

a completely wrong basis. At page 468 of that judgment, Chadwick LJ pointed out that the exercise of the power by the liquidators was under section 167(1)(a) of the UK Insolvency Act 1986, which decision required the sanction of the court, and not under section 167(3) where a creditor or contributory can apply to the court 'with respect to the exercise or proposed exercise of those powers'. Accordingly, the judge had erred when he applied to the application before him, the test formulated by Plowman J in **Leon v York-o-Matic Ltd**,[21] which decision was applicable to a situation where the application was made under section 167(3).

[57] The decision in **Re Greenhaven Motors** has no application to the instant matter. This matter concerns that category two applications where the decision of the liquidator to enter into a settlement agreement or to take some momentous step in the winding-up, is one which is entirely within the statutory powers and discretion of the liquidator, and does not require the approval or sanction of the court for its efficacy and implementation. Whereas in **Re Greenhaven Motors**, the sanction or approval of the court is a legal requirement or precondition to the entering into or implementation of a settlement agreement negotiated by the liquidator. Thus, in **Re Greenhaven Motors**, the approach of the court is more far-ranging, and the wishes and interest of creditors and contributories of even more significance. This is not to say, that in an application under section 186(5) of the **Insolvency Act**, the court, in applying the **Nortel** test, especially the third limb, (whether the court is satisfied on the evidence before it that the liquidator is acting rationally), ought not to give some consideration to the important terms of the settlement or compromise, and to take into account how their implementation would impact upon the interests of creditors and contributories of the company in liquidation.

[58] The importance of the court considering the wishes and interests of creditors and contributories, in circumstances where the court is considering whether to give its approval to a settlement or compromise which the liquidators are proposing to

[21] [1966] 1 WLR 1450.

enter into, can be seen from the dicta of Chadwick LJ at page 643 in **Re Greenhaven Motors**:

> "In deciding whether or not to sanction a **proposed** compromise the court must consider whether the interests of those, whether creditors **or contributories**, who have a real interest in the assets of a company in liquidation, are likely to be best served (i) by permitting the company to enter into that compromise with all the terms that it contains; or (ii) by not permitting the company to enter into that compromise. It is not for the court to speculate whether the terms of the proposed compromise were the best that could have been obtained; or whether the proposed compromise would have been better if it did not contain all the terms that it does contain; or whether there could have been a better compromise, unless it is satisfied that, if the company is not permitted to enter into the compromise on the terms which the liquidator has negotiated there will be better terms or some other compromise on offer, the decision is between the proposed compromise and no compromise at all." (Emphasis added)

[59] Further, as to the court's approach to considering and weighing what at times may be the differing or conflicting interest of creditors or classes of creditors, and contributories, Chadwick LJ, at page 643, opined as follows:

> "In reaching that decision, the court may have to weigh the different interests of creditors and contributories and, perhaps, the different interests of preferential and non-preferential creditors. It will not give weight to the wishes of those who will be unaffected whichever way the decision goes; for example, the interests of contributories who have no realistic prospect of receiving a distribution in any foreseeable circumstances, or the wishes of preferential or secure creditors who will be paid in full in any event. Subject to that, the court will give weight to the wishes or creditors and contributories whose interests it has to consider, for the reason that creditors and contributories, **if uninfluenced by extraneous considerations**, are likely to be good judges or where their own best interests lie. For the same reason the court will give weight to the views of the liquidator, who may, and normally will, be in the best position to take an informed and objective view. But, as I said, at the end of the day it is for the court to decide whether or not to sanction [the] compromise." (Emphasis added)

[60] In the instant matter, there is no issue as to the inherent power of the JLs to enter into the Settlement Agreement. Such power is not expressly or by necessary implication subject to the approval or sanction of the BVI court. Accordingly, the applicable principles and test are as formulated by Snowden J in **Nortel**.

[61] In brief, the issue raised by the appellants regarding the first limb of the **Nortel** test, is a narrow one. It relates, not to whether the respondents were acting in the lawful exercise of their power to enter into the Settlement Agreement, but, specifically, to whether the provisions of clauses 5 and 47 thereof, in treating with the Arena Surplus, would breach sections 185(1)(c) and 207(3) of the **Insolvency Act**. That is, whether, as properly construed, these clauses of the Settlement Agreement expressly provides for the Arena Surplus to be distributed, in the percentages set out in the second column of the table at clause 5, 'amongst the Distribution Settlement Parties (as defined)', that is the SFO, The Viscount, the JLs, Stewarts and Harbour, of which, none of them are shareholders or contributories of the BVI Companies or any of their subsidiaries.

[62] As to the second limb of the **Nortel** test, there is no real issue between the parties concerning whether the JLs genuinely hold the view that the Settlement Agreement would be for the benefit of the BVI Companies and their creditors. Indeed, learned counsel for the appellants, in his oral argument before us, emphasized that the appellants were not raising any issue of lack of *bona fides*, bad faith or fraud on the part of the JLs in entering into the Settlement Agreement. This was a matter which the learned judge was quick to dispel early in the Oral Judgment. The issue raised by the appellants under this limb of the **Nortel** test, is whether the respondents, in coming to their decision to have the BVI Companies enter into the Settlement Agreement, had considered or properly considered the interest of members and contributories.

[63] As to the third limb of the **Nortel** test, while the appellants do not assert any conflict of interest on the part of the JLs, they do argue, quite forcefully, that there was no evidential basis upon which the learned judge could or ought to have concluded that the respondents were acting rationally when they decided to enter into the Settlement Agreement on behalf of the BVI Companies. They base this ground of challenge to the judge's findings and order on several grounds. These

include, importantly, the complete absence of any legal advice being put by the JLs before the judge as to the merits of the JLs entering into the Settlement Agreement, including advice on the relative merits of the various competing claims to the Disputed Assets.

Approach of the Appellate Court – Is this an appeal from the exercise of discretion?

[64] The respondents submit, at paragraph 9 of their skeleton argument, that in exercising his power under section 186(5) of the **Insolvency Act** on the question of whether to sanction the JLs entering into the Settlement Agreement, the learned judge had and was exercising a discretionary power. Having quoted one of the oft cited passage from **Nilon Limited and another v Royal Westminister Investments SA and Others**,[22] as to the parameters of an appellate court's review when dealing with an appeal from the exercise of discretion, the respondents, at paragraph 14 of their skeleton argument, submit:

> "This is therefore a case in which this Court should refrain from interfering, unless satisfied that the Judge made a significant error of principle, or a significant error in the considerations taken or not taken into account. This is a high hurdle in most cases, *a fortiori* where the decision under appeal turned on a multi-factorial exercise of discretion and evaluative judgment by the Judge as to whether the Joint Liquidators' commercial decision to enter into the Settlement Agreement was irrational."

[65] This submission by the respondents, seems to be rest on their earlier submission, at paragraph 12 of their skeleton arguments that:

> "the appellants' primary case is nothing less than a submission that the Joint Liquidators did not have that genuine belief [that the Settlement Agreement was in the best interest of the BVI Companies or those entitled to any surplus arising from the liquidations or that there was a proper basis for that belief], a submission that the Joint Liquidators were acting in bad faith."

[66] This categorization of their written submissions has been stoutly disputed by counsel for the appellants in his oral submissions before this Court. Mr. Lord, QC

[22] [2015] UKPC 2.

expressly stated that the appellants had not, and were not making, any allegations as to the bona fides of the JLs in entering into the Settlement Agreement and in making the Sanction Application. Moreover, no allegations of fraud or bad faith on the part of the JLs were being made, and none had been made.

[67] Section 186(5) of the **Insolvency Act** states: 'The liquidator of a company, whether or not appointed by the Court, may at any time apply to the Court for directions in relation to a particular matter arising in the liquidation.' In my considered judgment, the learned judge was not exercising a discretion or discretionary power in the purist sense when he determined the Sanction Application under section 186(5). It is common ground that such an application, made after the JLs had exercised their undoubted power and discretion to enter into the Settlement Agreement, a discretion they had not surrendered to the court below in making the Sanction Application, is to be determined applying the three limbs of the **Nortel** test to the evidence provided by the JLs (and by the appellants and the other objectors). The learned judge below was therefore required to determine whether each limb of the test had been made out on the evidence. As to the first limb, the question of whether the power was exercised lawfully is not one which speaks to a discretion, but purely to a determination of the lawfulness of the JLs decision to enter into the Settlement Agreement – a straightforward question of law. A consideration of the second and third limbs of the **Nortel** test, involves exercising an objective assessment and judgment as to whether, respectively, the JLs genuinely hold the view (assuming they so attest) that the Settlement Agreement is in the best interest of the insolvent estate of the BVI Companies, and whether the JLs' are acting rationally and not affected by any conflict of interest. Finally, if the judge is left in any doubt, which must not something speculative or wholly unsupported by the evidence, as to the propriety of the proposed course of action, then the judge must refuse the application. In coming to a determination on this aspect, where the judge has such a doubt, he is bound to withhold the court's approval and to dismiss the application.

[68] Accordingly, on this issue, I agree with the submissions of the appellants at paragraphs 4 and 5 of their Supplemental Skeleton Argument filed in response to the respondents' counter notice of appeal. The learned judge's role was not to determine whether the Settlement Agreement was in the best interest of the BVI Companies, their creditors, and those who would be entitled to share in any surplus. This determination was one solely for the JLs, and one which they were empowered to make, in their judgment and discretion, taking all relevant factors and considerations into account. I therefore hold that this is not an appeal from the exercise of the lower court's discretion. As such, the principles governing an appellate court's review of the exercise of discretion by a lower court (which are uncontroversial), do not apply to this Court's determination of this appeal. That said, the role and function of the judge was to consider the Sanction Applications applying the **Nortel** test, which included making an assessment and determination, on the evidence put before him, as to the genuineness of the JLs' decision, and whether they had reached that decision on a rational basis. In the final analysis, the learned judge was required to satisfy himself that he did not have any real doubt as to the propriety of the JLs' decision.

[69] These are matters which involved the learned judge making a qualitative assessment of the evidence put before him and coming to a decision on the merits of the Sanction Application. In conducting this exercise, the judge was required to consider all the evidence, including the evidence and grounds of objection made by the appellants and the other interested parties, and the important terms of the Settlement Agreement. This is not a matter where the first instance judge enjoyed any unique or particular advantage in assessing the evidence in support or in opposition to the Sanction Application, such that this Court would defer to the judge's specific findings on purely factual issues. In this matter, all the evidence put before the learned judge was in documentary form, and there was no cross-examination of any of the witnesses or affiants, on either side. Moreover, it was not the kind of matter which necessitated or required the judge to determine the truthfulness or veracity of the witnesses in accessing their evidence. Further, no

question of mala fides or improper motive on the part of the JLs arose for his consideration.

[70] However, having regard to the nature of the application before the learned judge and the findings which he made under the second and third limbs of the **Nortel** test, this Court ought to be slow to override or to disturb the judge's assessment and conclusions reached, on the evidence before him, concerning either of those limbs, and should do so only where it can be shown to our satisfaction that the judge committed an error of law or principle or his decision on the Sanction Application was perverse or wholly unsustainable.

Ground No. 1 – Alleged Breach of sections 185(1)(c) and 207(3) of the Insolvency Act
(A) The BVI Insolvency Provisions – Distribution of Surplus

[71] It is the case for the appellants that the learned judge ought not to have sanctioned the JLs entering into and implementing the Settlement Agreement as, on its face, the said agreement contains certain provisions relating to the distribution of the Arena Surplus which are contrary to and in breach of sections 185(1)(c) and 207(3) of the **Insolvency Act**. The kernel of this ground of appeal is that clauses 5 and 47 of the Settlement Agreement are in breach of the mandatory provisions of sections 185(1)(c) and 207(3) of the **Insolvency Act** applicable to the distribution of surplus, after settling all other expenses and claims in the liquidation in accordance with the order of priority set out in section 207(1). This latter provision is commonly referred to as the 'waterfall' provision.

[72] Section 185(1) provides:

> "(1) The principal duties of a liquidator of a company are
>
> (a) to take possession of, protect and realise the assets of the company;
> (b) to distribute the assets or the proceeds of realisation of the assets in accordance with this Act; and

(c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, **in accordance with this Act**;" (Emphasis added)

[73] Section 207 states:

"(1) Unless and to the extent that this Act or any other enactment provides otherwise, the assets of a company in liquidation shall be applied-

(d) in paying, in priority to all other claims, the costs and expenses properly incurred in the liquidation in accordance with the prescribed priority;

(e) after payment of the costs and expenses of the liquidation, in paying the preferential claims admitted by the liquidator in accordance with the provisions for the payment of preferential claims prescribed;

(f) after payment of the preferential claims, in paying all other claims admitted by the liquidator; and

(g) after paying all admitted claims, in paying any interest payable under section 215.

(2) Subject to section 151, the claims referred to in subsection (1)(c) rank equally between themselves if the assets of the company are insufficient to meet the claims in full, they shall be paid rateably.

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

(4) For the purposes of this Act, assets held by a company in liquidation on trust for another person are not assets of the company." (Emphasis added)

[74] Sections 185(1)(b) and (c) are in clear and mandatory terms. A liquidator is bound to distribute the assets of the company in liquidation or the realisation of those assets, in accordance with the applicable provisions of the **Insolvency Act**. Likewise, section 207(3) is clear and mandatory. They create a binding legal obligation (not a discretionary one) on all liquidators of BVI companies, to distribute any surplus assets or the realisation of such assets of the company over which they have been appointed, to the members or shareholders of the company, and to no one else. This much is uncontroversial. It is also accepted by the

parties to this appeal, that where any provision of the Settlement Agreement, properly construed, requires or mandates the JLs to distribute the Arena Surplus (as therein defined) otherwise than to the members or shareholders of the BVI Companies (in liquidation), that provision or provisions would amount to a breach of the mandatory provisions of sections 185(1)(c) and 207(3) of the **Insolvency Act**, and are void. Accordingly, if that were the case with the Settlement Agreement, the learned judge would have erred, as a matter of law, in sanctioning the JLs entering into and implementing the Settlement Agreement.

[75] Therefore, as conceded by Mr. Lord, QC during his oral argument before us, the determination of this ground of appeal hinges upon the proper construction of clauses 5 and 47 of the Settlement Agreement. The learned judge in his Oral Judgment construed clauses 5 and 47 as not breaching the provisions of the **Insolvency Act** relating to surplus and, accordingly, made the declarations at paragraph 1(i) and (ii) of the Sanction Order.

The Judge's Construction of the terms of the Settlement Agreement relating to distribution of surplus

[76] Paragraph 1 of the Sanction Order states:

> "On the true construction of the terms of the Settlement Agreement:
>
> (i) The Joint Liquidators are not required to make any distribution of the Arena Surplus (as defined in the Settlement Agreement) otherwise than in accordance with Section 207(3) of the Insolvency Act 2003;
>
> (ii) The Joint Liquidators shall only be entitled to distribute the Arena Surplus to the SFO, the Viscount, Stewarts and Harbour in the proportions set out in clause 5 of the Settlement Agreement in the event that one or more of those parties establishes a proprietary claim to the shares in the Arena Companies (as defined in the Settlement Agreement) and then only to the extent (and amount) that any such claim

> is not outranked by the proprietary claims to the Arena Surplus of Phoenix and Minardi [the Appellants] or any of the other Non-Settlement Parties."

[77] The learned judge in the Oral Judgment, disposed of the appellants' submissions on this ground of objection, in this way:

> "That, in my judgment, is not a comprehensive explanation of what occurs. It's only if those parties show that they have got an interest in the shares, that they will be entitled to the division in clause 5. In particular, if Minardi and Phoenix establish a claim, a proprietary claim to the surplus from the Arena Companies, then that will take priority over any claims of the Settlement Parties.
>
> Accordingly, in my judgment there's no breach of the provisions of the Insolvency Act, 2003 for the distribution of assets. The assets will be distributed in accordance with the Insolvency Act. It is simply that once there is a surplus, if the surplus doesn't go to Minardi and Phoenix, then it will go to whoever establish the claim to the shares. That person will then be under an obligation to distribute the monies in accordance with the provisions which apply to Pot 2 under clause 5.
>
> Accordingly, I reject that submission. As I reject the submission that the Settlement Agreement infringes Phoenix and Minardi's rights because they are not going to be denied anything. The liquidator[s] accept the proposition which Mr. Lord puts to the bottom of Paragraph 105 that the liquidators cannot distribute assets to the SFO, the Viscount, Stewarts and Harbour unless Phoenix and Minardi's claims is not made out. That is sufficient to deal with the first head of attack made by Mr. Lord."[23]

[78] In the table at clause 5 of the Settlement Agreement, column 1 concerns the Net Proceeds of Realization ("Pot 1"), column 2, the Arena Surplus ("Pot 2"), and column 3, the Additional Settlement Assets ("Pot 3"). Having noted that under column 1, the JLs would receive 7.32% of Pot 1, the learned judge remarked in relation to Pot 2 and Pot 3 that:

> "Under Pot 2, there's a similar distribution [to that in column 1-Pot1], except that the Joint Liquidators get nothing. That is a major complaint

[23] See lines 22-25, p.69 to lines 1-24, p.70 of the Transcript of Proceedings.

made by Mr. Lord. The third column concerns the Additional Settlement Assets. Again, the Joint Liquidators get nothing. That's Pot 3.[24]

[79] Specifically regarding clauses 4.2, 4.3 and 4.4 of the Settlement Agreement, the learned judge commented that the drafting of these clauses was 'not a master piece of the draftsman art...'[25] With this comment, I am in agreement.

[80] At page 43 of the transcript, the learned judge concludes:

> "The effect of clause 4.2 is that if anyone of the claims made by the Settlement Parties succeeds, the provisions of clause 5 bites. Clause 4.4 is the salvatory clause meaning that the obligations of a liquidator are subject to the mandatory duties of the liquidators under BVI law. That's recognised by clause 73.1."[26]

Appellants' Submissions on Legality Point

[81] The appellants submit that the learned judge was plainly wrong in his interpretation of the relevant clauses of the Settlement Agreement applicable to the distribution of surplus, in particular, the Arena Surplus. They contend, quite forcefully, that clauses 5 and 47, are clear in their meaning and effect, and clearly violate the mandatory provisions of sections 185(1)(c) and 207(3) of the **Insolvency Act** relating to the distribution of surplus. In their submission, while a court must approach the interpretation of provisions in an agreement by construing them within the context of the entire agreement, a first consideration or tenet of the interpretation of a contract is the natural meaning of the words used and their intended effect. They assert that applying this principle, clauses 5 and 47 clearly offends against the BVI insolvency regime relating to surplus. They submit, further, that the clear meaning and effect of clauses 5 and 47 is not changed or altered, and their offending effect not disapplied by any other clause or provision in the

[24] See lines 4-9, p. 44 of the Transcript of Proceedings.
[25] See line 7, p. 76 of the Transcript of Proceedings.
[26] See lines 9-15, p. 43 of the Transcript of Proceedings.

Settlement Agreement when properly construed; in particular, not by clauses 4.2, 4.3, 4.4, 42, 45 or 47 thereof.

[82] The appellants submit that, pursuant to clauses 5 and 47, the JLs are obligated to distribute the Arena Surplus in accordance with the second column of the table at clause 5, that is, to the SFO, the Viscount, Stewarts and Harbour, in the respective percentages stated in the said column and, in the case of Stewarts only, up to the maximum sum specified therein. These other Settlement Parties are not members of the BVI Companies or their subsidiaries and accordingly not entitled to share in any surplus in the liquidation of the BVI Companies and their subsidiaries.

[83] In this regard, it is to be borne in mind that neither Phoenix nor Minardi is a registered shareholder of the BVI Companies (in liquidation). The sole registered owner is SMA. However, in the SFO Proceedings, the appellants claim an entitlement to any surplus in these companies. They stress that, it is their case in the SFO proceedings, that SMA 'has assigned its rights to receive the surplus to [the appellants]'.[27] Notably the appellants do not assert a right or entitlement to the shares themselves in each of the BVI Companies. I also note in passing, that the determination of the issue as to whether the appellants, as assignees, are entitled to SMA's right to receive any surplus in the liquidation of the BVI Companies, is not a matter for this Court or the lower court. It is but one of the issues to be determined in the SFO Proceedings. Nevertheless, if these claims are established and a final order made to that effect, then the appellants would have a proprietary right to the Arena Surplus. Moreover, that right or entitlement would be unaffected by the provisions of the Settlement Agreement, as neither of the appellants are parties to it and therefore not bound by any of its provisions.

[84] As to clause 47, the appellants submit that its provisions are clear and unambiguous. The JLs are mandated or required to distribute the Arena Surplus

[27] See paragraph 73 of the appellants' written submissions.

according to the proportions provided for in Column 2 of the table at clause 5 of the Settlement Agreement to the Distribution Parties named therein. They also argue that clause 47 is an attempt to contract out of the clear provisions of the **Insolvency Act**, which is wholly impermissible.

[85] In support of these submissions, the appellants rely on the decision of the House of Lords in **British Eagle International Air Lines Ltd v Compagnie Nationale Air France**[28] and the decision of the UK Supreme Court in **Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd & Another (Revenue and Customs Comrs and Another intervening)**.[29]

[86] In **British Eagle International Air Lines**, the House of Lords was called upon to construe section 302 of the Companies Act 1948, which provided for the property of a company in liquidation to be applied, subject to the provisions of the Act as to preferential payments, in satisfaction of its liabilities *pari passu*, and then distributed to all the members 'according to their rights and interests in the company'. The regulations applicable to members of the International Air Transport Association (IATA) stipulated the basis upon, and machinery by which there would be a monthly settlement of debits and credits arising when members performed services for one another, as is a frequent occurrence in that industry. The liquidator of the plaintiff company brought an action against the defendant, a member of IATA, claiming an amount representing the difference between the value of the services rendered by the plaintiff to the defendant and by the defendant to the plaintiff after 1st September 1968. The action was dismissed by the trial judge, whose decision was affirmed by the court of appeal. However, the House of Lords, by a bare majority, allowed the plaintiff's appeal. In doing so, it was held that it would be contrary to public policy and impermissible to 'contract out' of the specific provisions of section 302 and, accordingly, the statutory rules of general liquidation must prevail. Lord Cross of Chelsea puts it this way:

[28] [1975] 1 WLR 758.
[29] [2012] 1 AC 383.

> "...such a "contracting out" must, to my mind, be contrary to public policy. The question is, in essence, whether what was called in argument the "mini liquidation" flowing from the clearing house arrangements is to yield to or to prevail over the general liquidation. I cannot doubt that on principle the rules of the general liquidation should prevail...".[30]

[87] In **Belmont Park Investments**, the issue before the UK Supreme Court concerned whether certain contractual provisions relied upon by the claimants, as noteholders, as providing an event of default triggering the noteholder's priority and changing the allocation of costs on insolvency, were contrary to the 'anti-deprivation rule' - that insolvent assets remained available for distribution among creditors - and hence was invalid. The Supreme Court, dismissing the appeal, held that the anti-deprivation rule was aimed at a different mischief from the rule that it was contrary to public policy to contract out of the *pari passu* distribution provisions of the UK Insolvency Act. Importantly, the court also held that in determining whether the latter rule applied, the court ought to look at the substance of the agreement rather than its form, and ask whether the purpose and effect of the relevant provision amounted to an illegitimate intent to evade the bankruptcy law or had a legitimate commercial basis. Applying this principle, the court found that on a proper construction of the relevant agreement in the context of:

> "...a complex commercial transaction entered into in good faith and with no suggestion that those provisions had been deliberately intended to evade insolvency law, the loss by the second defendant of its swap counterparty priority was not invalided by the rule; and that, accordingly, the provisions on which the claimants sought to rely were valid and enforceable."

[88] In **Belmont Park Investments**, Lord Collins of Mapesbury, characterised the anti-deprivation rule and the rule that it is contrary to public policy to contract out of the *pari passu* distribution of the insolvency legislation, (which rules overlap but are aimed at a different mischief), (para.1) as 'two sub-rules of the general principle that parties cannot contract out of the insolvency legislation'. As to the decision of

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[30] Supra, n.29 at 780-781.

the House of Lords in **British Eagle International**, Lord Collins concluded that '[a]ll members of the House upheld the principle that contracting out of the *pari passu* provisions of what was then section 302 of the Companies Act 1948 was contrary to public policy and void.'[31] Lord Collins also cited with approval, at paragraph 8, the following formulation by Peter Gibson in **Carreras Rothmans Ltd v Freemen Mathews Treasure Ltd**,[32] of the ratio in **British Eagle International**:

> "where the effect of a contract is that an asset which is actually owned by a company at the commencement of its liquidation would be dealt with in a way other than in accordance with [the statutory pari passu rule]...then to that extent the contract as a matter of public policy is avoided."

[89] Lord Collins continued at paragraph 78:

> "Thus there is an impressive body of opinion from some of the most distinguished judges that, in the case of the anti-deprivation rule, a deliberate intention to evade the insolvency laws is required. That conclusion is not affected by the decision in *British Eagle...*The pari passu rule is clear. Parties cannot contract out of it. That is why, by contrast with the anti-deprivation cases, Lord Cross was able to accept (p 772) that the clearing house was a commercial arrangement which was for the mutual advantage of the airlines, but that the power to go behind agreements, the result of which were repugnant to the insolvency legislation, was not confined to cases in which the dominant purpose was to evade its operation. It was irrelevant that the airlines had 'good business reasons for entering' into the arrangements and 'did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of [them]': p 780."

[90] In the instant matter, it is the case for the appellants that clauses 5 and 47 of the Settlement Agreement are an impermissible evasion, whether intended or not, of the clear provisions of sections 185(1)(c) and 207(3) of the **Insolvency Act** relating to the distribution of surplus, in particular, the Arena Surplus. Accordingly, those provisions are repugnant to the **Insolvency Act** and the learned judge erred in his construction of these clauses, and in his finding that they were not contrary to the BVI insolvency legislation. They say that, properly construed, the offending

[31] Supra, n. 29 at paragraph 7.
[32] [1985] Ch 207 at 226.

clauses of the Settlement Agreement and, hence, the Settlement Agreement itself, was contrary to public policy as being repugnant to the insolvency legislation. The effect of this is that the entering into the said agreement and the implementation of its terms by the JLs, ought not to have been sanctioned by the learned judge, who committed a reversible error of principle and of law.

[91] In their submissions on this issue, the appellants stress that pursuant to clause 5 of the Settlement Agreement, the BVI Companies (in liquidation) are themselves listed in the table as one of the five Distribution Settlement Parties (as defined in the said agreement), who would be entitled to a share of any Arena Surplus. The BVI Companies' share would be 7.32%, as specified in the second column. They underscore this point by use of an illustration or example set out in the appendix to the appellants' Supplemental Skeleton Argument. In that appendix, the appellants, *inter alia*, posit:

> "The Arena Companies are themselves Distribution Settlement Parties. Accordingly, if they make out their claims in the SFO Proceedings, then by virtue of clauses 4.2 and 4.3 of the Settlement Agreement both the net proceeds from the realisation of the Pot 1 assets, and the Arena Surplus, will fall to be distributed in accordance with the table in clause 5.
>
> Accordingly, if (a) the BVI Claimants make out their proprietary claims to the underlying assets in Pot 1, and (b) the Arena Companies are held to be the beneficial owners of the assets held by them, then the other Distribution Settlement Parties are guaranteed to receive at least the following under the terms of the Settlement Agreement **even if their own claims have failed in their entirety**." (Their emphasis)

[92] What then follows in this appendix, is a table which shows the respective shares in pounds sterling that each of the SFO, the Viscount, Stewarts and Harbour (none of which are members of the BVI Companies - in liquidation), would receive, firstly, with respect to the underlying assets in Pot 1 and, secondly, with respect to the share of the Arena Surplus. Based upon this illustration, the appellants contend that the BVI Companies would receive 7.32% or approximately GBP £2 million, 'despite being successful on their proprietary claims to assets in Pot 1 worth at least GBP £21.4 million' and, further:

> "…absent the Settlement Agreement, that £21.4 million plus the Arena Surplus of between £23.9 million and £31.6 million, would be available for stakeholders in the liquidations. Accordingly, if the Settlement Agreement is implemented, between £43.3 million and 51 million has been given away to parties whose claims, in the scenario described above, would have failed."

[93] Needless to say, the accuracy and correctness of the assumptions and figures used by the appellants in this appendix, and the deductions arrived at, were stoutly challenged by Mr. Pascoe, QC, learned counsel for the respondents, during his oral submissions. I will return to this aspect, and the respondents' submissions thereon, later in this judgment.

Respondents' Submissions on Legality Point

[94] The respondents submit that ground 1 of the appellants' notice of appeal is 'entirely pointless and nonsensical' and that the judge's interpretation of the relevant provisions of the Settlement Agreement as set out at paragraph 1 of the Sanction Order, was correct and ought to be upheld by this Court. In brief, they submit that the judge 'did not sanction an agreement which required the [JLs] to act in a manner which would be contrary to the insolvency legislation or prejudicial to the interests of those persons entitled to any surplus in the insolvent [BVI Companies].' The respondents point out that neither the appellants nor the respondents have appealed the direction at paragraph 1(ii) of the Sanction Order, which direction was made by the learned judge at the request of the appellants. This subparagraph 'records the [direction] which [the appellants] contended for below, and the steps that [the JLs] have always indicated they would be taking in regard to any surplus'. Likewise, this 'direction' also accords with the construction placed on the Settlement Agreement by the other parties thereto, as they each confirmed in writing to the court below prior to the hearing of the Sanction Application that the JLs are only obligated to make a distribution of surplus to the Settlement Parties 'in the event that one of [them] establishes a proprietary claim to the shares in that company, or a proprietary claim to the rights of payment in respect of those shares'. The JLs are therefore bound by and will comply with the

terms of the Sanction Order not to distribute any surplus otherwise than in accordance with the provisions of section 207(3) of the **Insolvency Act**. Accordingly, they argue that there could never be any breach of the insolvency legislation by the JLs with regard to the distribution of surplus, and no prejudice can be visited upon any party who establishes in the SFO Proceedings an entitlement to surplus, if any, in any of the BVI Companies.

[95] The second point of primacy made by the respondents is that, in any event, on a true construction of the terms of the Settlement Agreement, specifically clauses 4.2, 4.3, 4.4, 5, and 47, no surplus, including the Arena Surplus, can be paid out by the JLs to one of the Settlement Parties named in the table at clause 5, unless that party has established (in the SFO Proceedings) either a proprietary claim to the shares in one or more of the BVI Companies, or to the entitlement to surplus, if any, to be paid by the JLs after complying with the 'waterfall' provisions in section 207(1) of the **Insolvency Act**.

[96] On the matter of construction, the respondents rely on the principles formulated by the UK Supreme Court in the recent case of **Arnold v Britton and Others**.[33] In his written opinion, Lord Neuberger formulated seven 'factors' or rules of construction to be applied when interpreting an agreement or contract. It is not necessary for the purpose of this decision to refer to the learned Law Lord's treatment of all seven factors, some of which are of little or no relevance to construing the provisions of the Settlement Agreement in relation to ground 1 of this appeal.

[97] Lord Neuberger distilled the following principles as the first and second factors:

> "17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook [2009] AC 1011, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable

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[33] [2015] AC 1619.

reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleamed from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve."

[98] Specifically with regard to construing 'commercial contracts', Lord Neuberger, having emphasised that 'commercial common sense' is not to be applied retrospectively, continued at paragraphs 19 and 20:

"[19] The third point I should mention is that...Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made.

[20] Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed...it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract, a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party."

[99] In the very recent decision of the UK Supreme Court in **Wood v Capita Insurance Services Ltd**,[34] it was held that the court's task in interpreting a contractual term was to ascertain the objective meaning of the language which the parties had chosen to express their agreement. This was not a:

> "…literalist exercise focused solely on a parsing of the wording of a particular clause, but...the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting...give more or less weight to elements of the wider context in reaching its view as to that objective meaning."[35]

Further, when interpreting any contract, textualism and contextualism could be used as tools to ascertain the objective meaning of the language which the parties had chosen to express their agreement and the extent to which each tool would assist the court in its task would vary according to the circumstances of the particular agreements.

[100] The respondents also argue that the appellants have, in their submissions, overlooked the elementary principle that a contract is only binding on the parties to it. Accordingly, the Settlement Agreement is not binding on the appellants (or on any other non-settlement party). This, they submit, is fatal to the construction which the appellants have put on clause 47. They say further that the Settlement Agreement is, simpliciter, an agreed upon settlement between the parties thereto 'to share between them recoveries that one of them may make in the SFO Proceedings and it cannot as a matter of contract go beyond that.'. The effect of this, they contend, is that if one of the non-settlement parties establishes an entitlement to surplus, including the Arena Surplus, 'they would be entitled to an order from the BVI Court that the [JLs] pay the surplus to them.'

[101] While this fundamental principle of contract law is undoubted, in my view, this line of argument by the respondents is not a complete answer to the point of challenge raised by the appellants in this ground of appeal. The gravamen of the appellants'

[34] [2017] AC 1173.
[35] Ibid at paragraph10.

objection, as I understand it, is that the relevant provisions in the Settlement Agreement concerning the distribution of any surplus, including the Arena Surplus, would amount, on a true construction of those provisions, to a clear breach of the mandatory BVI insolvency provisions, specifically section 207(3) of the **Insolvency Act** and, accordingly, the court below ought not to have sanctioned the JLs entering into and implementing the Settlement Agreement. The appellants' standing (as persons potentially having a right or entitlement to the Arena Surplus, if any) has not been put in issue in these proceedings, either in the court below or before this Court. It is therefore no answer to this ground of appeal to say that the appellants, or any other non-party to the Settlement Agreement, would, in any event, not be bound by the alleged offending provisions of the Settlement Agreement and, therefore, have no basis for complaint. The point being made by the appellants, as I understand it, is that simpliciter, on a true construction, clauses 5 and 47 offend sections 185(1)(c) and 207(3) of the **Insolvency Act**, and are therefore impermissible and void. Accordingly, the Settlement Agreement cannot be sanctioned by the court. This is so irrespective of whether the person opposing the Sanction Application is a party to the Settlement Agreement or not.

[102] On the issue of construction, the respondents submit further that the appellants have gotten it wrong and the learned judge was correct to have construed the relevant provisions of the Settlement Agreement in the way he did and to conclude, at paragraph 1(i) of the Sanction Order, that, '[t]he Joint Liquidators are not required to make any distribution of the Arena Surplus (as defined in the Settlement Agreement) otherwise than in accordance with Section 207(3) of the Insolvency Act 2003'.

[103] Relying on the principles of construction formulated by the UK Supreme Court in **Arnold v Britton** and **Wood Capita Services**, the respondents submit that:

(a) Clause 4.2 expressly provides that the provisions of clause 5 are inapplicable or of no effect in circumstances where the Arena Property (and hence any Arena Surplus) does not, as a result of a final decision in the SFO Proceedings, fall to be distributed to any Distribution Settlement Party;

(b) The appellants' contention that clause 4.2 would not apply if the BVI Companies, as one of the Distribution Settlement Parties, was successful in the SFO Proceedings in defeating all other claims and in establishing their claim to part of the Disputed Property and that the JLs would be obligated under clause 5 to share any surplus with the other Settlement Parties in circumstances where they had all failed to establish their claim to an interest in the shares or to share in any surplus in the BVI Companies, is plainly wrong as a matter of construction as 'it ignores other clauses of the Settlement Agreement and its wider factual context.'

(c) The effect of clause 4.3 is that if, as a result of a final order in the SFO Proceedings, the shares in the BVI Companies do not fall to be distributed to a Distribution Settlement Party (but to the appellants or some other non-settlement party), 'then the provisions of clause 5 will not apply to the surplus (because no shares will fall to be distributed to any of the Settlement Parties as a result of a final order in the SFO Proceedings).' This is because clause 4.3 expressly provides that the provisions of the Settlement Agreement regarding the realisation and distribution of the Disputed Property (including the Arena Property) 'shall apply to such of those assets as fall to be distributed to a Distribution Settlement Party' as a result of a final order in the SFO Proceedings, '**and such assets shall be realised and distributed regardless of the terms of the [final order] in accordance with clauses 38 to 60 by the respective office holders named therein**'. (Emphasis added)

(d) Clause 4.4 is an 'additional saving provision'. The respondents submit that by clauses 47 and 4.4 working or being construed together, the surplus distribution provisions in clause 5 will only apply where one of the Distribution Settlement Parties, other than the BVI Companies, makes out a claim in the SFO Proceedings to surplus, including the Arena Surplus. Clause 4.4 provides as follows:

> "Nothing in this Agreement imposes any obligation upon…the Joint Liquidators...to act in a way which they reasonably consider will amount to a breach of their duties or obligations (including any directions given by their respective supervisory courts), or otherwise contrary to their status and functions, as...officers of their respective supervisory courts."

The respondents submit that 'the only way in which clause 47 and clause 4.4 work together – and they must of course both be made to work by the Court construing the Settlement Agreement – is that the sharing provisions regarding the surplus only come into operation if one of the Distribution Settlement Parties other than the insolvent [BVI Companies] makes out its claim to the surplus'.

(e) Clause 4.4 is not to be construed as only 'forward looking' or purely to deal with 'unforeseen circumstances' arising during the course of the JLs implementing the terms of the Settlement Agreement, as contended by the appellants. In the respondents' view, the words 'nothing in this agreement imposes any obligation upon …the Joint Liquidators...", means that clause 4.4 is intended to apply immediately and to the specific obligations in clauses 5 and 47, which the appellants say are contrary to section 207(3) of the **Insolvency Act**. The respondents also submit that as the Settlement Agreement was made expressly conditional upon the approval of the BVI court, the JLs were clearly not intending to breach their duties under the **Insolvency Act**.

(f) Clause 47 is also 'forward looking' in that it speaks to a point in time when there has been a final order in the SFO Proceedings in relation to the Disputed Property. It is only at that time that 'the question of what the [JLs'] obligations to distribute the surplus (whether under the Settlement Agreement or BVI law) will bite on.'

(g) In any event, pursuant to clause 42, the JLs are entitled to seek the directions from their respective supervisory court in the event that they consider it appropriate to do so and to act in accordance with the directions given to them by that court.

[104] As I understand the point at (c) above, the respondents contend that the effect of clause 4.3 is that where one of the Settlement Parties, including the BVI Companies (or any of them) has been successful in the SFO Proceedings and the Arena Property falls to be distributed to them, the provisions of clause 5 regarding the distribution of surplus, are applicable and the realisation and distribution of such surplus is to be governed by clauses 38 to 60. This includes clause 47, which provides, subject to clauses 30-37, for the Arena Surplus to be distributed in accordance with the proportions provided for in Column 2 of the table at clause 5 directly to the Distribution Settlement Parties named therein. Clauses 30 to 37 fall under Part K of the Settlement Agreement dealing specifically with Harbour's Costs, which are not relevant to the issue under consideration on this ground of appeal.

[105] I also observe that clauses 38 to 59 fall under Part L of the Settlement Agreement which is concerned with the mechanism for distribution of the settlement assets by the office holders. These provisions address, not the entitlement to surplus, but the procedures or mechanism to be followed by the various office holders, including the JLs, following a final order in the SFO Proceedings establishment of an entitlement to a Disputed Asset by a Distribution Settlement Party. Clause 60 falls under Part M relating to the application of 'caps' on distributions, as is the case with Stewarts whose entitlement to a distribution, pursuant to the table in clause 5, is capped at GBP £8 million.

Analysis and conclusion

[106] The determination of this ground of appeal hinges upon the proper construction of the relevant clauses of the Settlement Agreement, and whether they run afoul of the mandatory provisions of the **Insolvency Act** relation to the distribution of surplus, in particular sections 185(1)(c) and 207(3). This issue of construction must be approached applying the principles set out in **Arnold v Britton** and **Wood v Capita Insurance Services**. The interpretive exercise has as its primary objective determining what the parties meant by the words they choose to use in a particular provision. While the starting point is an examination of the words of the provision or term of the contract which falls to be construed, this must be carried out 'through the eyes of the reasonable reader',[36] and not applying some strained or exorbitant meaning to the words used. The interpretation of the words used is not simpliciter a 'literalist exercise' focused only on the dictionary meaning of the words or terms used in the particular provision being construed. A clause or provision in a contract must be interpreted within the wider contractual 'context' in which it is used, taking into account other relevant provisions of the contract. If the words used convey a clear meaning as to the intention of the parties, then that must be presumed to be the meaning, and a consideration of the wider contractual context may be of lesser importance in determining what the parties meant by that provision. Where the words used lead to an unclear meaning, then their interpretation within the context of the contract takes on much greater significance.

[107] Applying these principles from the decisions of the highest English courts, in my judgment, the interpretation reached by the learned judge as to the meaning and effect of clauses 5 and 47 of the Settlement Agreement, that the JLs are not obligated to make a distribution of the Arena Surplus otherwise than in accordance with section 207(3) of the **Insolvency Act**, was correct. I so find, especially when those clauses are construed having regard to other relevant provisions of the

[36] Supra, n.34 at paragraph 17.

Settlement Agreement and the contractual context in which these provisions were agreed by the parties thereto.

[108] Clause 5 states: '**Save to the extent that this Agreement provides to the contrary**, the Settlement Assets, the Arena Surplus, and the Additional Settlement Assets shall be distributed in the following proportions amongst the Distribution Settlement Parties…'. (Emphasis added)

[109] By clause 1.10 the term 'Arena Surplus' means 'the surplus from the liquidations of the Arena Companies, once the Liquidation Creditor Claims, Approved Liquidation Expenses and Liquidators' Agreement Costs (as defined hereinafter) have been paid as set out in clause 47.' Accordingly, the Arena Surplus relates to any surplus realised by the JLs from the realisation of the Arena Property, after settlement of claims and expenses ranking in higher priority (such as liquidation expenses and costs, and approved creditors' claims) over any entitlement of members or contributories of the BVI Companies.

[110] Clause 47 provides:

> "To the extent that after the payment of...there remains a surplus from the realisation of the Arena Property, i.e. the Arena Surplus, the Joint Liquidators shall, subject to clauses 30-37, distribute the Arena Surplus according to the proportions provided for in Column 2 of the table at clause 5 directly to the Distribution Settlement Parties named therein."

[111] The obligatory requirements of clause 5 are therefore qualified by or limited to the extent that some other provision in the Settlement Agreement provides otherwise. Accordingly, clause 5 falls to be construed within the context of Settlement Agreement itself and the other provisions thereof, which in any way qualify or limit the application of the surplus distribution provision in clause 5. Clause 47, which expressly incorporates the distribution provisions and percentages set out in column 2 of clause 5 applicable to the Arena Surplus, must be construed accordingly.

[112] Clause 4.2 provides:

> "If as a result of the Final Order and any Further Final Orders **none** of the Settlement Assets, the Jersey Settlement Assets, the Additional Settlement Assets or the Arena Property fall to be distributed to **any** Distribution Settlement Party (either because none of the Distribution Settlement Parties' claims are established, or that one or more such claim is established but such claim is entirely outranked by the claim of a Non-Settlement Party), then clause 5 will not take effect." (Emphasis added)

[113] Clause 4.2 is a provision to which clause 5 is subject and which clearly seeks to disapply clause 5 in circumstances where none of the Distribution Settlement Parties, including the BVI Companies (in liquidation), were successful in the SFO Proceedings in establishing their respective claim to the Disputed Assets, including the Arena Property. It is meant to apply to circumstances where 'none' of the settlement assets including 'the Arena Property' fall to be distributed to 'any Distribution Settlement Party', including the BVI Companies.

[114] The expression 'Arena Property' is defined in clause 1.9 as meaning the assets identified in Appendix 8 to the Settlement Agreement, but not including the Jersey Settlement Assets, the Settlement Assets or the Additional Settlement Assets (which terms are each also defined therein). Accordingly, in the circumstances contemplated by clause 4.2, where none of the six parties to the Settlement Agreement have been successful in the SFO Proceedings in establishing their respective claim to the Arena Property, there would be no Arena Surplus for distribution, whether under clause 5 or some other contractual provision, or under section 207(3) of the **Insolvency Act**.

[115] Clause 4.3 states:

> "[T]he provisions of this Agreement governing the realisation and distribution of the Settlement Assets, the Jersey Settlement Assets, the Additional Settlement Assets and the Arena Property **shall apply to such of those assets as fall to be distributed to a Distribution Settlement Party** as a result of the Final Order or a Further Final Order, and such assets shall be realised and distributed regardless of the terms of the Final Order or Further Final Order in accordance with clauses 38 to 60 by the respective office holders named therein. For example, if the

proprietary claims of Harbour succeed and are held to outrank the claims of the other Distribution Settlement Parties, the Settlement Assets and/or the Jersey Settlement Assets and/or the Additional Settlement Assets and/or the Arena Property shall not be transferred to Harbour for onward distribution. Rather the applicable assets shall remain with the relevant office holder and shall be distributed in accordance with clauses 38-60 of this Agreement." (Emphasis added)

[116] Clause 4.3 applies only to assets which, as a result of a final order in the SFO Proceedings, 'fall to be distributed to a Distribution Settlement Party', including the BVI Companies. In such circumstances, the applicable provisions of the Settlement Agreement governing the realisation and distribution of the kind of assets referred to in clause 4.3, which includes 'the Arena Property', are clauses 5 and clause 47, the latter dealing specifically with the distribution of the Arena Surplus only. Furthermore, clause 4.3, unlike clause 4.2, applies where, as a result of a final order in the SFO Proceedings, one of the Settlement Parties has been successful in their claim to an asset, including the Arena Property, as the 'Harbour example' demonstrates. In so providing, there is, in my view, no conflict between the provisions of clause 4.2 and clause 4.3 regarding the distribution of those assets, including the Arena Property. On the one hand, clause 5 provides for the distribution to the Distribution Settlement Parties named in column 2 of the Arena Surplus, and clause 4.3 provides for their distribution 'in accordance with clauses 38 to 60'. This includes clause 47, which in turn provides for the Arena Surplus to be distributed in accordance with column 2 of the table at clause 5.

[117] Since both clause 5 and clause 47 deal with the distribution of the Arena Surplus, they must be read together, and clause 5 is subject to clause 47. Accordingly, the Arena Surplus falls to be distributed by the 'respective office holder named in clauses 38 to 60'.

[118] Clauses 45 to 49 apply to the JLs. By clause 45 the JLs are 'to apply any realisations from the Arena Property in accordance with the priorities prescribed by

Rule 199 of the **BVI Insolvency Rules, 2005**[37] ("the Insolvency Rules") to meet (i) creditor claims (except claims of the Settlement Parties) of the particular Arena Company, and not to pay the creditors' claims of another BVI Company unless permitted by the BVI court; (ii) to pay the reasonable and properly incurred liquidation expenses; and (iii) to pay sums reasonably necessary to meet the JLs expenses, disbursements, remuneration, liabilities, etc., relating to their obligations under the Settlement Agreement; and to do so on an account basis. This provision is largely a restatement of the statutory obligations imposed upon liquidators under Rule 199 of the Insolvency Rules with regard to the application of the proceeds of realisation to the approved liquidation expenses and disbursements of a company in liquidation. Rule 199 sets out the prescribed payment 'priority' applicable to certain costs, expenses and remuneration which liquidators of BVI companies are obligated to follow. This provision does not address the payment of surplus, which is governed by section 207(3) of the **Insolvency Act** and, accordingly, does not qualify or limit the applicability of clauses 5 and 47.

[119] By clause 46, the JLs are entitled to apply any sum distributed to them pursuant to the table at clause 5 to meet any liquidation or creditors' claims and to pay approved liquidation expenses of the four BVI Companies in liquidation. By clause 47, the JLs shall distribute any Arena Surplus, subject to clauses 30 to 37, in the proportions provided for in column 2 of the table at clause 5 directly to the Distribution Settlement Parties named therein. As mentioned above, clauses 30 to 37 fall under Part K which deals with 'Harbour's Costs', which to the extent that any such provision is relevant to the issue under consideration, provides for the JLs to preserve from the Net Proceeds of Realisation and the Arena Surplus the sum of GBP £3 million ("the Harbour Costs Cap"), and not to pay this sum over to Harbour (clause 31). It also provides that where, after a final order, Harbour has not fully complied with its financial obligations under clause 30, to make a

[37] S.I. No. 45 of 2005.

distribution in excess of the Preserved Sum 'to all Distribution Settlement Parties including Harbour **in accordance with clause 5**.' (Emphasis added)

[120] Clause 4.4 states:

> "[N]othing in this Agreement imposes any obligation upon the...Joint Liquidators...to act in any way which they reasonably consider will amount to a breach of their duties or obligations (including any directions given by their respective supervisory courts), or otherwise contrary to their status and functions, as receivers and as officers of their respective supervisory courts."

[121] In my considered judgment, clause 4.4, expressly or by necessary implication, imposes upon the JLs a contractual obligation (in addition to their legal obligation under the **Insolvency Act**), when discharging their obligations under the Settlement Agreement, to only do so in full compliance with their duties and obligations imposed by statute or by any direction or order imposed upon them by their supervisory court. Furthermore, this provision, properly construed, imposes that obligation, with regard to the implementation of all the provisions of the Settlement, now and in the future. In short, clause 4.4 provides a salvatory (as the learned judge mused) reminder that no provision of the Settlement Agreement imposes or was intended by the parties thereto to impose on the JLs any obligation which would breach the BVI insolvency legislation, or their legal obligation to always comply with their statutory duties and to discharge their functions as liquidators in accordance with the **Insolvency Act**. Accordingly, I hold that the respondents have, on this issue, the better of the argument, and their interpretation of clause 4.4 and its effect is correct. I therefore, respectfully, do not accept as correct the appellants' interpretation that clause 4.4 is merely forward looking.

[122] The difficulty posed by clauses 5 and 47 is that, on the face of these provisions, they seem to impose an obligation on the JLs to distribute the Arena Surplus to the other Distributions Settlement Parties at the percentages listed in column 2 of the table at clause 5, even in circumstances where none of the other Settlement parties have established a claim to the Disputed Assets, including the Arena

Property. In the language of clauses 5 and 47, no distinction is made between a situation whereby a Settlement Party, other than the BVI Companies, has been successful in their claim to the proceeds of column 2 ("Arena Surplus") in the SFO Proceedings, and one where only the BVI Companies have been successful in establishing a claim to such assets. Furthermore, neither clause 5 nor clause 47 expressly states that where the BVI Companies have been successful in their claims to the Disputed Assets in the SFO Proceedings, but the other parties named in column 2 were not, those other parties would not be entitled to share in the Arena Surplus. This difficulty is to some extent highlighted by the example in the appendix to the appellants' supplemental skeleton argument, and has been stressed in the appellants' submissions before us.

[123] The respondents have relied upon the written statements from each of the other parties to the Settlement Agreement as to their intention and understanding of the obligations of the JLs under clauses 5 and 47 of the Settlement Agreement relating to the distribution of the Arena Surplus. It is trite that the correct construction to be accorded to a provision of an agreement is not to be determined based upon what the parties say they had agreed. The task of the court is to determine what was the intention of the parties when they agreed those provisions. Accordingly, the court is obligated to construe the words used by the parties objectively, in light of other provisions of the agreement and the particular contractual context. I therefore do not place much, if any, reliance upon these written statements emanating from the other contracting parties to the Settlement Agreement as informing or aiding the court's interpretation of clauses 5 and 47.

[124] In my view, with respect, the learned judge approached the interpretation of clause 5 on the wrong footing. In doing so, he incorrectly approached this exercise from the perspective of the appellants and their possible rights and interests to the Arena Surplus, in circumstances where they have been successful in their claim thereto in the SFO Proceedings. This is clear from page 69 (lines 22-25) and

page 70 (lines 1-24) of the transcript of the Oral Judgment which extract is at paragraph 77 above.

[125] The point being made by the appellants is not simply that the provisions or clauses 5 and 47 do or might infringe upon their rights or entitlement to surplus if they were successful in the SFO Proceedings in establishing an entitlement to the Arena Surplus, but whether the distributions provisions of these clauses in the Settlement Agreement are contrary to the provisions of section 207(3) of the **Insolvency Act**, and are therefore null and void, rendering the Settlement Agreement not one which the court ought to have sanctioned. Furthermore, the learned judge did not consider that pursuant to clause 5, where the BVI Companies were successful in establishing their claim in the SFO Proceedings to the Arena Property, and none of the other Settlement Parties were successful in establishing a claim to the Arena Surplus, whether the JLs would be under an obligation to distribute or to share the Arena Surplus with the other Distribution Settlement Parties named in column 2. While it is correct to say that where the appellants are successful in establishing their claim in the SFO Proceedings to the Arena Surplus, whether by way of assignment from SMA or otherwise, the Settlement Agreement would be inapplicable and the appellants adjudicated entitlement would be unaffected by its provisions, and the JLs would be obligated to distribute the Arena Surplus to the appellants, this does not address the interpretation issue and whether those provisions are repugnant to section 207(3) of the **Insolvency Act** if a Settlement Party, including the BVI Companies, was successful in their claim.

[126] Do clauses 5 and 47, properly construed, lead inexorably to an obligation imposed on the JLs which is contrary to their statutory duty under the BVI insolvency legislation to distribute the Arena Surplus (if any(to the other Settlement Parties who are not members of the BVI Companies and their subsidiaries? And if so, is such a meaning and effect saved or prevented either by other provisions of the Settlement Agreement itself, or by the order made by the learned judge at paragraph 1(ii) of the Sanction Order? In my view, the alleged offending

provisions of the Settlement Agreement cannot be construed in isolation. They must be construed in the context of the Settlement Agreement in determining their true meaning and effect. Furthermore, it is notable that by virtue of the table at clause 5, the JLs, as agents for the Arena Companies, would not share in the Arena Surplus at all. In my view, this could not and was not the intention of the Settlement Parties, whereby the very entities who have been successful in establishing their claims to the Arena Property cannot participate in or receive a share of any realized surplus of those very companies. In my considered judgment, those provisions were clearly intended to apply only where the JLs have been unsuccessful in establishing the claims of the BVI Companies in liquidation to the Arena Property and some one of the other Settlement Parties have been successful in establishing their claims to the Arena Property. I come to this conclusion mindful to some extent that the drafting of these clauses leaves something to be desired and that the interpretation being put on those provisions by the appellants would make a nonsense of the entire Settlement Agreement.

[127] Moreover, in my considered view, clauses 4.4 and 42 are apposite and must be taken into account in determining whether clauses 5 and 47 would result in a breach of the insolvency provisions. By clause 4.4, the JLs and the other Settlement Parties agreed, as a binding term of the agreement, that the JLs are not being required or obligated by any of the provisions of the Settlement Agreement to do anything or to act in any way which they reasonably consider 'will amount to a breach of their duties or obligations (including any directions given by their…supervisory court) or otherwise contrary to their status and functions…as officers of their…supervisory court'. Accordingly, the force of this provision is that regardless of the apparent meaning or import of any other provision of the Settlement Agreement, whether from imprecise or lax drafting or otherwise, including clauses 5 and 47, the JLs are not contractually being obligated or required to act in any way contrary to their statutory duties or obligations and the insolvency laws of the BVI. In my opinion, this includes not distributing the Arena Surplus in a manner contrary to section 207(3) of the **Insolvency Act**. The true

essence and import of clause 4.4 is that it imposes a binding contractual obligation on the JLs. This is buttressed by clause 42 which underscores the right of the JLs (a right preserved by statute) to seek the directions of their supervisory court before acting in a way that might or would amount to a breach of legal duty or obligation as officeholders.

[128] For emphasis, the learned judge stated:

> "As I reject the submission that the Settlement Agreement infringes [the Appellants'] rights because they are not going to be denied anything. The liquidator[s] accept the proposition which Mr. Lord put to the bottom of paragraph 105 [of the Appellants' skeleton below] that the liquidators cannot distribute assets to the SFO, the Viscount, Stewarts and Harbour unless [the Appellants'] claims is not made out. That is sufficient to deal with the first head of attack."[38]

[129] In the round, while I am satisfied that the learned judge, in part, did approach the matter of the construction of clauses 5 and 47 in an incorrect way, and while I am likewise satisfied that the terms and legal effect of clauses 5 and 47 read in isolation present some difficulty, I am satisfied that when due consideration is giving to clause 4.4 and clause 42, the correct interpretation is that the JLs are not required to act in any way which would be contrary to the BVI Insolvency legislation, including the mandatory provisions of sections 185(1)(c) and 207(3) of the **Insolvency Act**. The effect of this is that the learned judge's conclusion and interpretation at paragraph 1(i) of the Sanction Order, albeit reached by adopting, in part, an incorrect and flawed approach to the construction of clauses 5 and 47, was the correct one. Accordingly, by the terms of the Settlement Agreement properly construed, the JLs are not required and cannot be required, as a matter of binding contractual obligations, to make any distribution of the Arena Surplus otherwise than in accordance with the provisions of section 207(3) of the **Insolvency Act**. This position is further reinforced by the order made by the learned judge at paragraph 1(ii) of the Sanction Order, and by the stated

[38] See lines 16-24, p. 70 of the Transcript of Proceedings.

understanding of the other Settlement Parties, as exhibited to the JLs evidence in support of the Sanction Application.

[130] The appellants assert that the JLs breached certain assurances made or given to them in a letter from the JLs' English solicitors dated 1st May 2018, which letter was in reply to a letter dated 29th April 2018 from the appellants' English solicitors. It is the appellants argument under this ground of appeal, that the learned judge erred in not finding that the JLs had entered into the Settlement Agreement in breach of the express assurances given to them that they would not do so without first seeking the approval of the BVI court and on notice to all proprietary claimants in the SFO Proceedings.[39] Their complaint is that, in breach of these assurances, neither they nor any of the other 'stakeholders and putative stakeholders' in the liquidations of the BVI Companies (and the other Arena Companies), were consulted by the JLs prior to entering into the Settlement Agreement; and that the JLs did so without first seeking the approval of the BVI court.

[131] The appellants also complain that the learned judge, in coming to his decision on this point of objection to the Sanction Application, considered the wrong letter, namely, a letter dated 2nd May 2018 from the appellants' English solicitors to the respondents' English solicitors.[40] Accordingly, they say, the learned judge did not deal with or properly deal with this point of objection in his Oral Judgment.[41]

[132] Before this Court, the appellants argued at paragraph 87 of their Skeleton Submissions that the effect of the alleged breaches of the assurances in the 1st May 2018 letter were that they were:

> "…deprived of the opportunity they had been promised to be able to comment on the Settlement Agreement before it was entered into. Had the learned judge found that such a breach had occurred, as he ought to have done, that would have been a relevant consideration in deciding

[39] See Appellants' Skeleton Submissions at paragraph 82.
[40] See Record of Appeal, Volume C1 at 108.
[41] See Appellants' Skeleton Submissions at paragraph 86.

> whether or not to sanction the Settlement Agreement (even if not necessarily decisive on its own)."

[133] The documentary evidence before the learned judge disclosed that during the period 29th April and 2nd May 2018, there was an exchange of correspondence between the English solicitors (Slade) for the appellants and the English solicitors (HFW) for the JLs. In that exchange, the appellants requested certain 'assurances' of the JLs and the JLs responded thereto by providing the assurances, which the appellants assert were breached. I set out below the salient parts of each correspondence:

i. On 29th April 2018 Slade wrote on behalf of the appellants to one of the JLs (Mr. Carl Jackson) expressing the appellants' concern with regard to certain settlement negotiations taking place involving the JLs and the other settlement parties, and stating their expectation to be consulted by the JLs:

> "before [the JLs] enter into any settlement which potentially compromised any of the claims which [the appellants] have mentioned. We can, at present see no basis whatsoever on which any settlement of these claims could be justified."

The appellants sought from the JLs their written assurance, 'within the next 24 hours' that the settlement discussions with the other settlement parties do not include a compromise of (a) 'the right to distributions from the liquidations'; or (b) 'the claims which you have or may have against third parties for the recovery of assets to the benefit of the estates'. In the said letter, the appellants reserved their right, if they were not satisfied with the JLs response, 'to apply for an injunction to restrain any breach of [the appellants'] rights by [the JLs] participation in [the settlement] negotiations'.[42]

[42] Record of Appeal, Volume C1 at 101-102.

ii. HWF, the JLs English solicitors, responded by letter dated 1st May 2018 stating, in part:

> "We wish to reassure you that our clients would only enter into a settlement (1) on the basis of prior approval from the BVI Courts; and (2) on notice to all proprietary claimants in the proceedings before Popplewell J in the English High Court with claim number CL-2017-000323 ("the Proceedings") and creditors of the Insolvent Companies. As such, your clients and all other Interested Parties will have the opportunity (where so advised) to challenge any settlement agreement the Joint Liquidators may wish to enter into."
> "Further, our clients would not make any distributions from the estates of the Insolvent Companies of any surplus, if one remains, after payment of all approved costs until the determination of: (1) the various proprietary claims in the Proceedings; and (2) creditor claims in respect of the Insolvent Companies."[43]

iii. Slade replied by email sent 1st May 2018[44] stating: 'Thanks. Please prepare a draft form of undertaking to be signed by the joint liquidators for my approval.'

iv. In their reply letter dated 2nd May 2018[45] HFW, on behalf of the JLs, having stated that they did not consider it necessary for the JLs to provide a formal undertaking, especially in light of their letter of 1st May 2018, the JLs were nevertheless prepared to give an undertaking in the following terms:

> "The Joint Liquidators undertake they will give notice to [the appellants] of: (1) any settlement of their proprietary claims in proceedings before Popplewell J in the English High Court with claim number CL-2017-000323 ("the Proceedings"); and (2) of any hearing before the BVI Court to approve such settlement."
>
> "Further, the Joint Liquidators undertake that they will not make distributions from the estate of the insolvent

[43] Record of Appeal, Volume C1 at 103-104.
[44] Record of Appeal, Volume C1 at 106.
[45] Record of Appeal, Volume C1 at 108.

> companies over which they have been appointed ("the Insolvent Companies") of any surplus, if one remains, after payment of all approved costs, the Joint Liquidators' remuneration and disbursements, until determination of (1) various proprietary claims in the Proceedings; and (2) creditor claims in respect of the Insolvent Companies."

v. By email sent by Slade on 3rd May 2018[46] the appellants requested of the JLs a formal undertaking "more along the lines of the attached." The draft undertaking sent with this email would require the JLs give to the appellants 14 days' notice before entering into a settlement of any proprietary claim or other claims in the proceedings before the English High Court in claims CL-2016-000402 and or CL-2017-000323; and that:

> "any such settlement and/or participation in it will not have legal effect unless and until such approval has been obtained; and that [the JLs] will give 14 days notice …of the hearing of any application for such approval in the BVI and afford [the appellants] an opportunity to be heard at such hearing."

Additionally, to:

> "undertake that they will not make, or enter into any agreement to make, distributions from the estates over which they have been appointed ('the Insolvent companies') of any surplus, if one remains, after payment of approved costs, the [JLs'] remuneration and disbursements, until the determination of (1) the various proprietary claims in the [English] Proceedings; and (2) the claim by [the appellants] to be the person entitled to receive such distributions….".

vi. By email sent 4th May 2018[47] the JLs solicitors, HFW, responded stating that the JLs "were not prepared to provide you with the undertaking you seek in the form of the draft attached to your last email…" HFW also stated:

> "We also note that the scope of the undertaking you now seek, particularly in paragraph 2 of your draft, is excessive and unjustified in the circumstances **because**

[46] Record of Appeal, Volume C1 at 110.
[47] Record of Appeal, Volume C1 at 111.

this would prevent our clients from even entering into a settlement agreement in relation to distributions of any surplus that was conditional on the prior determination of the proprietary claims. It is not appropriate that your clients should be able to fetter the Joint Liquidators' powers in this way."

(Emphasis added)

[134] The record in these proceedings discloses that what followed was an exchange of emails between the respective English solicitors, but the appellants and the JLs were unable to agree on the terms of a formal undertaking. The last correspondence in evidence about the wording of a formal undertaking is an email of 19th May 2018[48] from the JLs solicitors to the appellants' solicitors. By that email HFW, on behalf of the JLs, rejected any possibility of a contractual undertaking being entered into by the JLs, stating that the JLs 'cannot go beyond the undertaking they have already given in correspondence as officers of the BVI Court;' and ended with this sentence: 'The [JLs] hope that [the appellants] will continue to engage with them in constructive dialogue going forwards.' Furthermore, the appellants did not follow through with their threat to apply for injunctive relief against the JLs if they were not satisfied with the JLs response to their request for certain assurances.

[135] The learned judge dealt with this point of objection at pages 16-17 of the transcript of his Oral Judgment. It is correct, as the appellants point out, that the learned judge focused his assessment of the documentary evidence on the letter dated 2nd May 2018 from HFW to Slade, by which HFW set out the terms of a draft undertaking which the JLs would be prepared to give to the appellants. In his analysis, the learned judge did not consider the letter of 1st May 2018 from HFW to Slade, by which the JLs gave certain 'assurances' to the appellants, as mentioned above. The judge alluded to the fact that Slade had sought, on behalf of the appellants, a toughened version of the undertaking which version was rejected by

[48] Record of Appeal, Volume C1 at 120.

the JLs in their solicitors' letter of 4th May 2018. The learned judge then concluded as follows:

> "There is, in my judgment, a simple answer to Minardi and Phoenix's complaint. There has been no breach of the undertaking. The liquidators have given notice of the proposed settlement and, indeed, Minardi and Phoenix have appeared before me, so there is no breach of the first limb.
>
> Likewise, the liquidators have made no distribution from the estates so there is no breach of the second limb either."

[136] As to the complaint that the JLs' did not, in breach of the assurances given in their solicitors' letter of 1st May 2018, consult with the appellants during the settlement negotiations and before entering into the Settlement Agreement, the learned judge, having alluded to the 'general rule' that it is prudent for liquidators of a company to consult with those interested in the liquidation and the estate, opined:

> "Given the known opposition of [the appellants] to the liquidators position, there was, in my judgment, little practical purpose in the liquidators consulting with [the appellants]. The relationship was obviously confrontational. In my judgment, [the appellants] had their opportunity to have input to the process by their appearing before me on this application."

[137] It is clear that the learned judge, in error, focused his attention on the letter dated 2 May 2018 which contained draft terms of the undertaking proposed by the JLs in their solicitors' letter of 2nd May 2018, the terms of which were never accepted by the appellants either in their letter of 3rd May 2018 or in the subsequent correspondence. The upshot of the correspondence exchanged between these parties was that no form of undertaking was agreed or accepted, and hence none was given or made by the JLs. Accordingly, there could be no 'breach' of an undertaking per se by the JLs.

[138] However, the appellants contend they were not relying on the letter of 2nd May 2018 and hence not on a breach of any undertaking. Instead, they relied on breaches of the express assurances given to them by the JLs in their solicitors' letter dated 1st May 2018.

[139] The respondents at paragraph 43 of their Skeleton Submissions submit that this ground of appeal is baseless, and "turns on an absurd construction of correspondence passing between the parties' respective English solicitors in the early part of May 2018, 16 months before the Settlement agreement was signed." They also observe that the terms of the assurances were in substance the same as the undertaking offered, which was not accepted by the appellants. Furthermore, there was no breach of the assurances by the JLs as 'the implementation of the Settlement Agreement is expressly conditional upon the sanction of the BVI court'; and, as the judge found, the appellants, who were obviously confrontational and in opposition to the position of the JLs, availed themselves of the opportunity to participate fully in and to object to the Sanction Application.

[140] In my judgment, on a simple reading of the letter of 1st May 2018 relied on by the appellants to ground this ground of appeal, while the assurances given by the JLs were to only enter into a settlement 'on the prior approval of the BVI court', there was no express assurance made to not do so without first consulting with the appellants or all other proprietary claimants in the English Proceedings. Furthermore, those assurances were, in essence, overtaken by the subsequent correspondence from the appellants' English solicitors requesting a formal written undertaking (which the JLs' were content to give in terms of the assurances they had made in the 1st May 2018 letter), and the failure by the parties to agree the terms of such a formal undertaking. That said, the JLs did provide and did not expressly withdraw the assurances given in their letter of 1st May 2018, the continued existence of which they confirmed in subsequent correspondence, and which they characterized as an 'undertaking' in the 10th May 2018 email from HFW to Slade (referred to above). In my view, these 'assurances' remained as given by the JLs to the appellants, who considered that they had done so properly in their capacity 'as officers' of the BVI court.

[141] It was therefore for the learned judge to treat them as assurances (as he did, albeit by reference to the 2nd May 2018 letter) and to determine, on the evidence, whether the JLs had breached any of the said assurances and, if so, what, if any consideration or weight ought to be given to such breaches in determining the Sanction Application. The judge concluded that there had been no breaches by the JLs of undertaking in the letter of 2nd May 2018, the terms of which had never been agreed.

[142] While the learned judge erred in focusing his attention on the letter of 2nd May 2018 and not the letter of 1st May 2018, the conclusions he reached must be assessed in relation to the assurances given in the 1st May 2018 letter. It is clear that the appellants had requested in their letter of 29th April 2018 to be consulted in advance of the JLs entering into a settlement agreement and to have such settlement agreement approved by the BVI court before it was entered into by the JLs. It is also clear that in their response letter of 1st May 2018 the JLs assured the appellants that they would only enter into a settlement (1) on the basis of prior approval from the BVI court; and (2) on notice to all proprietary claimants in the English Proceedings and the creditors of the Insolvent Companies. There was no express assurance given by the JLs to consult with the appellants and other persons interested in the liquidations of the BVI Companies and their subsidiaries, prior to entering into a settlement. Furthermore, at the time of the exchanges, the appellants were aware that the JLs were negotiating a settlement agreement with other claimants in the SFO Proceedings. Accordingly, they were free to avail themselves of the opportunity, over the 16 month negotiating period, to correspond with and to make known to the JLs, their position on terms of any settlement with these other parties, and to repeat their earlier request, if they so wished, to be consulted in advance of the JLs concluding the negotiations and entering into a settlement agreement. Most importantly, the appellants were expressly permitted, as interested parties, by the directions of the BVI court, to participate fully in the Sanction Application proceedings, including the filing of evidence and making extensive submissions in opposition to the Sanction Application. In any event, the

Settlement Agreement, by its express terms, was entered into subject to obtaining the sanction of the BVI court and has not, for the most part, been implemented by the JLs thus far. Having considered these factors, I am satisfied that while there were no breaches by the JLs of any of the assurances given in their solicitors' letter of 1st May 2018. To the contrary, there has been substantial compliance with both limbs of the 'assurances' made, and the appellants have no sound basis upon which to complain. Accordingly, this ground of appeal fails.

Ground No. 3 – Whether the Settlement Agreement was in the best interest of those interested in the liquidations – doubt as to the propriety of the Settlement Agreement.

[143] Under this ground of appeal, the Appellants argue that the JLs failed in their duty to put before the learned judge 'all relevant material' in support of the Sanction Application. Accordingly, the learned judge could not properly conclude and ought not to have been satisfied, upon the material before him, that the JLs had properly formed the view that the Settlement Agreement and its terms were in the best interest of the insolvent BVI Companies, their creditors and contributories. Alternatively, the learned judge should have entertained some doubt as to the propriety of the proposed or intended course of action in entering into and implementing the terms of the Settlement Agreement, and ought to have dismissed the Sanction Application. Accordingly, the judge erred in approving or sanctioning the Settlement Agreement and that order should be set side and the sanction of the court refused.[49]

[144] The appellants make five broad complaints in this regard. Before considering these complaints, I pause to observe that this ground of appeal and the issues raised thereunder, relate principally to the third limb of the **Nortel** test which deals with the rationality of the decision by the JLs to enter into the Settlement Agreement on the terms therein (there being no issue as to the existence of any conflict of interest); and not so much to the second limb of that test which is

[49] Appellants' Skeleton Argument at paragraphs 88-90.

concerned with whether the JLs genuinely hold the view that the Settlement Agreement is in the best interest of the BVI Companies and their subsidiaries and creditors, there being no issue as to the bona fides of the JLs. These various bases of complaint under this ground, and the Appellants' submissions thereon, concern, ultimately, whether the court ought to have had some doubt as to the propriety of the JLs intended course of action.

[145] As to the second limb of the **Nortel** test, as already observed, there is no real issue as to the bona fides of the JLs in coming to the view, as they did, that the Settlement Agreement was genuinely for the benefit of the BVI Companies and their creditors. Likewise, there is no allegation of fraud or bad faith made against the JLs. As I understand it, what is being contended by the Appellants is that, objectively, on the evidence of JLs and the evidence from the Appellants and the other objectors, the learned judge ought to have concluded that the JLs could not genuinely and did not properly or rationally reach that conclusion. Further, that in coming to that view, the JLs failed to consider the interest of all persons interested in the liquidation of the BVI Companies, including contributories, and the Appellants who claim an entitlement to the Arena Surplus. In all the circumstances, the learned judge ought to have entertained some doubt as to the propriety of the JLs intended course of action and should not to have sanctioned the Settlement Agreement.

[146] This ground of appeal, and to some extent ground no. 4, involves a detailed consideration of the evidence put before the BVI court by the JLs in support of the Sanction Application. As mentioned above, the JLs relied on the fourth, sixth and seventh witness statements of Mr. Carl Stuart Jackson, one of the JLs.

The JLs' evidence in support of the Sanction Application
(i) Jackson 4

[147] By Jackson 4 filed 22nd November 2019,[50] the JLs exhibited certain documents as "CSJ-6". Mr. Jackson's witness statement alludes to the fact that the ownership of shares in the BVI Companies and their assets are the subject of substantial litigation before the English High Court, involving 'a historic fraud perpetrated by Dr. Gerald Smith'.[51] Three of the four BVI Companies are parties to an application by the SFO in the English Proceedings 'to have certain property declared to be the 'realizable property' (within the meaning of section 74 of the [UK] Criminal Justice Act 1988…) of Dr. Smith, which [the SFO] are entitled to recover in discharge of a criminal confiscation order against him'.[52] There are 27 parties to this litigation, including the BVI Companies in liquidation. Six of the litigants in those proceedings are the parties to the Settlement Agreement, described as a 'provisional settlement'.[53] Notably, at paragraph 10, the JLs indicate their intention 'to address the Court on issues that are privileged and confidential, which are therefore not set out in [the] witness Statement'. This presumptively was a reference to confidential legal advice received by the JLs in relation to their decision to enter into the Settlement Agreement with the five other Settlement Parties.

[148] In addition to addressing the Orb litigation in the UK, the JLs addressed in Jackson 4, the claim brought in BVI on 6th July 2016 by the BVI Companies (in liquidation) and Bridge Properties (Arena Central) Limited ("BPAC") against Dr. Cochrane. This BVI claim("the BVI Claim") is for knowing receipt and breach of fiduciary duty by which the JLs seek to recover cash payments amounting to GBP £80 million or their traceable proceeds. The knowing receipt claim is brought by Glen Moar in relation to two payments totalling GBP £10.5 million and the breach of fiduciary claim is for approximately GBP £73 million. In the BVI Claim, Unicorn also asserts a proprietary claim to the shares of Glen Moar and Ballaugh and various 'connected companies', which were transferred to SMA pursuant to what is

[50] See Record of Appeal, Volume C1 at 60-88.
[51] See paragraph 9.2.
[52] See paragraph 9.3
[53] See paragraph 9.5

described as ‘the Isle of Man Settlement’. That claim is said to be based upon the Hayes Settlement, which is an agreement entered into between a number of parties, including Unicorn and SMA, in August 2015 after the BVI Companies had gone into liquidation and the JLs had been appointed.[54]

[149] Further on 8th July 2016, Popplewell J in the English Commercial Court granted an interim proprietary injunction and worldwide freezing injunction against Dr. Cochrane and Sinead Irving (“the Proprietary and Worldwide Freezing Injunction”). The proprietary injunction was over specific assets listed at paragraph 5 of the order, which assets Popplewell J considered had a value of GBP £45 million. On 3rd October 2016, the Proprietary and Worldwide Freezing Injunction against Dr. Cochrane was, by agreement, continued until the trial of the JLs’ Part 8 claim, or further order.

[150] By Jackson 4, the JLs also addressed the proprietary claims to the Arena Assets.[55] These include the claims by the SFO/Enforcement Receivers for GBP £40,956.91 plus interest; the Viscount (as administrator of Orb) for approximately £35 million; Harbour for assets values at approximately £34 million and assets transferred under the Isle of Man Settlement and their traceable proceeds; and Stewarts for £7,971,000.00 plus interest accruing.

[151] By Jackson 4, the JLs also addressed the settlement itself.[56] At paragraph 84, Mr. Jackson states:

> “In essence the [JLs] settled the proprietary aspect of the BVI Claim against Dr. Cochrane and Unicorn’s claim to the shares in the Connected Companies via the Hayes Settlement, in return for the settlement of the proprietary claims of the other parties and 7.32% of the ‘Net Proceeds of Realisation’ of the assets held by the Enforcement Receivers and the Viscount.”

[54] See paragraph 45(h).
[55] Section F, paragraphs 58-82.
[56] Section G, paragraphs 83-85.

[152] Jackson 4 goes on to provide a summary of the key terms of the Settlement Agreement.[57] Mr. Jackson states that the effect of the Settlement Agreement is for the parties thereto to 'fully and finally settle all of the claims amongst themselves', which claims are defined to include: '…the claims in issue at the Phase 1 trial, together with other issues which arise or may arise in the English proceedings (and in particular claims to the underlying assets): see clause 1.11(vi)'. Also, that the Settlement Parties have agreed to 'cooperate to have dismissed or compromise the claims of Non-Settlement Parties as further provided for by this Agreement'. And, at paragraph 85.3, Mr. Jackson states: 'In return for the compromise of their claims inter se, the Settlement Parties have agreed that in the event that any one of their claims is established, they will share distributions from any recoveries made in specific percentage shares (clause 5).'

[153] Jackson 4 also highlights the cost saving element under the Settlement Agreement whereby Harbour would 'take the lead' in interlocutory and trial matters in the English proceedings, utilizing Harbours English solicitors and counsel team to represent the interest and claims of all Settlement Parties, which litigation costs will be funded by Harbour, 'subject to a first charge on such realisations as are made (clause 30-37)'. This leading role by Harbour in the funding and prosecution of the claims of the Settlement Parties in the English Proceedings would include the future conduct of the SFO Application and making an application for summary judgment/striking out against Non-Settlement Parties or any of them if so advised.[58]

[154] As to the requirement for each office holder of a party to the Settlement Agreement to obtain the sanction of their supervisory court, the JLs make clear at paragraph 85.10 that (1) 'most of the operative parts of the Settlement Agreement do not become effective until such sanction has been obtained (clauses 22 and 61)'; and (2) the JLs fully intend to seek the sanction of both the BVI court and the

[57] Paragraphs 85.1 to 85.10.
[58] See paragraph 85.7

Isle of Man court, as they are unwilling to confirm in writing, as permitted by the terms of the Settlement Agreement, that 'they are willing to be bound by the materially operative parts of the agreement without obtaining such sanction'. Mr. Jackson states further: 'In the extremely complex circumstances of these liquidations the [JLs] consider it to be prudent to seek [the BVI court's] sanction of our decision'.

[155] At paragraph 92, Mr. Jackson concludes in this way:

> "As stated above at paragraph 10, the [JLs] intend to expand upon this Witness Statement in relation to matters which are **privileged and confidential**. Those submissions, together with this Witness Statement, will elucidate why I consider it to be in the best interest of the respective creditors of the Insolvent Companies that the [JLs] enter into the Settlement Agreement. At the substantive hearing of [the Sanction Application], I will seek an order sanctioning my decision to enter into the Settlement Agreement and such further order or relief as [the BVI court] thinks fit." (Emphasis added)

[156] It is noteworthy that, by Jackson 4, the JLs had not put before the court either a statement of reasons why they conclude that the Settlement Agreement and its implementation would be in the best interest of the BVI Companies (in liquidation) and that of its creditors and contributories. Likewise, they had not then put before the BVI court any confidential legal advice which they had received from their lawyers as to the merits of the Settlement Agreement, its advantages and disadvantages, including the settlement or compromise of disputes or claims between the parties thereto in the BVI Claim/Cochrane Proceedings and in the English Proceedings.

(iii) Jackson 6

[157] Jackson 6 was filed by the JLs principally in support of their application seeking further case management directions of the BVI court with regard to the further management, conduct and hearing of the Sanction Application. At the time, the

JLs had obviously become concerned about the delay in having the Sanction Application heard and disposed of. Thus, in Jackson 6 reference is made to the need to get on with the preparation and filing of a consolidated pleading on behalf of the Settlement Parties in the SFO Proceedings for the purpose of the Phase 1 trial, the commencement of which trial had been adjourned by Moulder J from January 2020 to January 2021, in order to accommodate the approval of the settlement and to afford time for the preparation and filing of the consolidated pleading.[59] Also, Foxton J had extended to 29th July 2020 the time for filing of the consolidated pleading. The 10-week Phase 1 Trial is set to commence on 11th January 2021 with a prior 2-week judicial pre-reading period.[60] Notably, the sanction by the Royal Court of the Viscount entering into the Settlement Agreement was granted on 27th January 2020, and their written reasons delivered on 9th March 2020.

[158] In Jackson 6, the JLs go on to deal with a number of procedural issues relative to or impacting the listing and hearing of the Sanction Application, none of which are relevant to this or any other issue in this appeal, except the stated urgency surrounding the final determination of this appeal.

(iii) Jackson 7

[159] The JLs' main evidence on the Sanction Application is set out in Jackson 7 filed on 15th May 2020. In that witness statement Mr. Jackson responds to the objections to the Sanction Application set out in the First Witness Statement of Dr. Smith filed 9th December 2020, and in Slade 1 filed on 12th December 2020 and Slade 2 filed on 24th April 2021. Mr. Jackson also provided an update on the progress of the liquidations of the BVI Companies, the SFO Proceedings and the other sanction application filed in the Isle of Man court; and gives the JLs 'rationale' for the Sanction Application. I will only deal in some detail with certain of these matters to

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[59] See paragraphs 7 and 8.

[60] See paragraph 12.

the extent that they are some relevance to the bases of complaint under this ground of appeal and the Court's consideration of grounds 3 and 4.

[160] In response to the Appellants' criticism of the JLs for not providing in Jackson 4 information in relation to realisations and anticipated realisations in the liquidations of the BVI Companies, Mr. Jackson, at paragraph 17, points to the 'detailed information' which the JLs have provided on these matters through filings with the BVI court 'over the last few years', which filings have been provided to all interested parties, including the Appellants and the other persons opposing the Sanction Application. At paragraphs 18 to 28, he gives some details as to the extent of the JLs consultations with interested parties and the information provided to them concerning asset realisations and debt collection

[161] From paragraphs 29 to 41 of Jackson 7, the JLs set out and address their: 'current range of estimated outcomes for each of the [BVI Companies]'. These figures are set out in a table at paragraph 29 which, at column 2, shows estimates 'based on creditor adjudications to date and the [JLs] provisional assessment of the non-adjudicated claims'. At column 3, the estimates shown said to be 'based solely on creditor adjudications to date (and include all other claims at their full value)'. Accordingly, this tables shows, in column 2 and column 3 in relation to each of the four BVI Companies (in liquidation) the following:

> **Unicorn**: creditors: GBP £49 - 83 million, shareholders: nil; and creditors: GBP £4.06-5.44 million, shareholders: nil;
>
> **Glen Moar**: creditors-payment in full, and shareholders: GBP £3.4 - 6 million; and creditors: GBP £4.57-8.00 million, and shareholders: nil;
>
> **Ballaugh**: creditors: payment in full, shareholders: GBP £20.5 – 25.6 million; and creditors: GBP £85.69 – 99.47 million, shareholders: nil;
>
> **Sulby**: creditors: nil (no realisations), shareholders: nil; and creditors nil (no realisations), shareholders: nil.

[162] It is pointed out at paragraph 30 of Jackson 7 that the realisations in columns 2 and 3 'are based on (i) realisations to date in the BVI Companies (in liquidation) (GBP £12.2m) and Ballaugh's solvent subsidiary, BPAC (GBP £14.6m); and (ii) estimated future realisations (GBP £20.9m to £30.5m)'. And at paragraph 31, Mr. Jackson points out that with regard to future realisations, the sums in columns 2 and 3 assume that the sanction would be granted by the supervisory courts and the terms of the Settlement agreement will take effect:

> "and… that one or more of the Settlement Parties will succeed in establishing their proprietary claims to the various assets the subject of the dispute between the Interested Parties ("Disputed Property"). Therefore, the estimates assume that:
>
> (1) The assets of the [BVI Companies (in liquidation) will be available to discharge the costs and expenses of the liquidations, creditors' claims and to make a distribution to the person (or persons) who establish (in the SFO Proceedings) that they are entitled to the shareholder surplus (if any).
>
> (2) The [BVI Companies (in liquidation)] will receive approximately £2m under the Settlement Agreement when the SFO Proceedings are finally concluded." (Emphasis added)

[163] At paragraph 32 of Jackson 7, the JLs state categorically that it has not been possible for them 'to provide a meaningful estimate on the opposite hypothesis, viz., that the Settlement Agreement does not take effect'. They ground this statement of opinion on the 'significant difficulties' in (i) assessing the merits of the various competing claims to the Disputed Property which makes it impossible to arrive, in a meaningful way, 'on a net value of the BVI Claim in particular'; and (ii) calculating the adverse costs which the JLs may be required to pay if they 'were unsuccessful in the SFO Proceedings'. In this regard, the JLs surmise:

> "Thus, although there is a possibility of a higher return to stakeholders in the event that the [BVI Companies] were to succeed [as claimants] in establishing their proprietary claims (and defeating all competing claims), there is also a risk of a lower return to stakeholders in the event that the [BVI Companies] failed in establishing their claims (because they **will not receive a share of the settlement sum under the Settlement**

> **Agreement**, will not recover their costs of the claim and will have to pay adverse costs).” (Emphasis added)

Under this section of Jackson 7, the JLs go on to provide their analysis and opinions with regard to (1) the impact of creditor claims on the column 2 and 3 estimates; and (2) liquidation costs and expenses included in the column 2 and 3 estimates.

[164] In Jackson 7, the JLs also provided, in section C, an update on the SFO Proceedings addressing the ‘Disputed Property’ as referring to the assets the subject of the Interested Parties’ various claims; and provided at paragraph 42 a detailed list of such assets, which includes the shares in the BVI Companies and 14 other companies in the Arena Group incorporated in the BVI and the Isle of Man; the assets of the Arena Companies; and the shares in and assets of the Non-Arena Companies.

[165] The expression ‘Relevant Property’ is said to include the shares in Orb arl, LCL, the Arena Companies and the Non-Arena Companies, and certain properties in Jersey. The distinction in the use of both expressions is of some significance, as the JLs point out.[61] They state that:

> “only the Relevant Property [as defined] fall within the scope of the SFO Proceedings. **However, the Settlement Agreement seeks to settle the claims of the Settlement Parties inter se to all of the Disputed Property and not just the Relevant Property**.” (Emphasis added)

[166] Significantly, in their update on the SFO Proceedings, the JLs pointed out that the proprietary claims to the Arena Assets are not included in the original list of claims to be determined at the Phase 1 Trial. However, by an order made by Fox J at the February 2020 CMC in the said proceedings, permission was given to the parties to apply to include other claims in the Phase 1 Trial. The JLs subsequently made an application to include the proprietary claims to the Arena Assets in list of claims

[61] See paragraph 45.

to be determined at the Phase 1 Trial. This application was heard at a further CMC on 18th May 2020. The upshot is that 'the claims to these assets will have to be determined in Phase 2 unless a global settlement can be reached with all parties in the meantime'.[62]

[167] The JLs also provided an update in Jackson 7 on the applications in Jersey and Isle of Man for sanction of the Settlement Agreement. The application by the Viscount was granted on 27th January 2020 for the reasons set out in the decision of the Royal Court dated 9th March 2020. The JLs' application in the Isle of Man in relation to the two Manx Arena Companies was granted on 2nd July 2020. As noted by Mr. Jackson at paragraph 51(2), under the terms of the Settlement Agreement these Manx Companies are not giving up any claims against the Settlement Parties, 'but are nevertheless getting the benefit of the release of the Settlement Parties' proprietary claims to their assets'.

[168] Notably, at paragraphs 53 and 54 of Jackson 7, the JLs record that the Appellants' application to the BVI court for directions filed 24th April 2020 which included an order for disclosure and an order for cross-examination of the JLs, was unsuccessful.

[169] The JLs also address the background circumstances and 18 months of negotiations leading to the execution of the Settlement Agreement. At paragraph 57 Mr. Jackson records that during the negotiating period, the JLs held 'one without prejudice settlement discussion with [the Appellants]', which did not bear fruit. Specifically, at paragraph 58, the JLs address the Appellants' accusation that the JLs had been for 18 months 'clandestinely' negotiating the terms of the Settlement Agreement. They stoutly refute this allegation, pointing to the correspondence exhibited at pages 102 to 121 of 'RJS-2' which shows that the

[62] See paragraph 50.

Appellants where aware 'that settlement discussions were ongoing between a number of the Settlement Parties'.

[170] The JLs also addressed, at paragraph 59 of Jackson 7, the allegation in Slade 2 that they had breached the written assurances given to the Appellants in the correspondence passing between their respective English solicitors, to seek the prior approval of the BVI court and to give advance notice thereof to the Appellants or 'other parties and creditors so they could seek an injunction' restraining the JLs from entering into the Settlement Agreement (ground no. 2). They point out that the correspondence discloses that the JLs expressly refused to provide an undertaking to give the Appellants notice prior to entering into any settlement agreement, and stated their intention to seek the approval of the BVI court to any settlement and to do so on notice to 'both the Proprietary Claimants and the creditors of the [BVI Companies]'; both of which they have complied with. The JLs also state that, as the settlement negotiations were conducted on a without prejudice basis, it would not have been appropriate for them to 'share details of those negotiations with another party to the SFO Proceedings …or with any putative stakeholders, unless and until settlement terms were agreed'; and through the avenue of the Sanction Application to the court, the JLs have '**sought to ensure that both [the BVI court] and stakeholder scrutiny of the Settlement Agreement happened at an early stage before the agreement was fully implemented**'. (Emphasis added)

[171] Section F of Jackson 7 deals with what is termed therein as the Appellants' 'main objection' to the Sanction Application, that is, that the Settlement Agreement represents a 'bad deal' for the stakeholders of the BVI Companies and the Appellants in particular. At paragraph 62, the JLs list some six reasons why the Appellants have, in their evidence, so concluded. I do not propose to set those out and the JLs response thereto in detail at this juncture, as they will be dealt with, to the extent necessary, when I come to consider the cogency and soundness of grounds 3 and 4 in the Appellants' notice of appeal, in particular

ground 3 which is their most expansive ground, and whether the learned judge erred in finding that the JLs had satisfied both the second and third limbs of the **Nortel** test.

[172] At section H of Jackson 7, the JLs address the objections made by Dr. Smith, questioned 'the basis of his newly asserted creditor's claim' in the sum of GBP £60 million, and concludes that he in fact does not assert any claim against the BVI Companies.[63] It is for those reasons that his proof of debt was rejected by the JLs on 29th January 2020. The JLs also state that Dr. Smith 'does not assert any proprietary claim to the shares in the [BVI Companies]'.[64] Accordingly, the JLs took the position in Jackson 7 that 'Dr. Smith has no relevant interest in the [BVI Companies] for the purposes of the Sanction Application and accordingly no relevant interest in the outcome of the Sanction Application'. In any event, Dr. Smith had not appealed against the Sanction Order.

[173] At section I of Jackson 7, the JLs deal with the 'rationale' for the Sanction Application. These are two-fold: (1) the very significant effect that the Settlement Agreement, if approved, would have on the future conduct of the liquidations; and (2) the complexity, scope and value of the English proceedings and the BVI Claim.[65]

[174] The JLs conclude at paragraph 143 of Jackson 7 in these terms:

> "The liquidations of [the BVI Companies] are highly complex. The English proceedings has been heavily contested at every stage and has significantly impacted on the progress and overall costs of the liquidations of [the BVI Companies]. There is a real danger that the litigation will consume more in legal and other professional fees than the value of Non-Arena Assets. The Arena Assets will also be substantially reduced by the [JLs'] costs of participation in the litigation and are themselves the subject of proprietary claims by the Settlement Parties. In the [JLs'] view, a commercial settlement in relation to these diminishing pots of assets is the

[63] See paragraph 138.
[64] See paragraph 137.
[65] See paragraph 142.

> only sensible way forward. A global settlement has not yet been possible but is more likely now that the majority of active parties in the SFO Proceedings have agreed terms of settlement inter se. Either way the [JLs] believe that the Settlement Agreement is in the best interest of [the BVI Companies]…..The [JLs] believe that the Settlement Agreement is in the best interest of each of [the BVI Companies].”

(B) The Appellants’ Evidence in Opposition to the Sanction Application

[175] As mentioned above the Appellants’ evidence in opposition to the Sanction Applications is contained in Slade 1 and Slade 2. These are, to a large extent, the same grounds of objection dealt with in the Oral Judgment and which inform the Appellants’ grounds of appeal before this Court. Accordingly, these points will be dealt with as part of this and other grounds of appeal.

(C) Appellants Submissions on ground 3

[176] The Appellants submit that the learned judge, having held correctly that the approach to be adopted to the Sanction Application was the **Nortel** test, ought to have declined to sanction the Settlement Agreement.[66] They base this ground of appeal on the following five matters:

(i) the terms of the Hayes Settlement Agreement;

(ii) the alleged failure by the JLs to consider or to properly consider the interests of those entitled to the Arena Surplus;

(iii) that the JLs by entering into the Settlement Agreement would be giving up valuable claims for little in return;

(iv) the failure by the JLs to put before the court legal advice as to the claims and matters involves in the settlement and merits of the Settlement Agreement itself; and

(v) the alleged failure by the JLs to put before the court other relevant material.

[66] See Appellants’ Skeleton Argument at paragraph 90.

I shall deal with these matters in turn.

(i) The Hayes Settlement

[177] The essential terms of the Hayes Settlement are summarized at paragraphs 77 to 81 of Jackson 7. Briefly, the parties to the Hayes Settlement are Glen Moar, Unicorn and SMA (the registered shareholder of the BVI Companies) and others. It was entered into on 12th August 2015. It concerned the settlement of liabilities arising under a loan and guarantee relating to properties located in Hayes, Middlesex, and Littlehampton in the United Kingdom. As set out at paragraph 77 of Jackson 7:

> "…pursuant to the terms of the Hayes Settlement, SMA agreed to transfer the shares in the Connected Companies to Unicorn, and Glen Moar agreed to transfer the shares in three other companies, namely, Hayes Freehold Limited, Sentrum (Hayes) Limited and Watersmead Holdings Limited, to SMA".

However, legal title to the relevant shares has not been transferred to or by SMA as provided under the Hayes Settlement.

[178] The apparent significance of the Hayes Settlement, as identified by the JLs at paragraph 78 of Jackson 7, is that two of the Arena Companies, Glen Moar and Ballaugh, may ultimately have a substantial surplus. In the opinion of the JLs, while there is a possibility of realisations in the estates of two of the other Arena Companies, namely, Legion NA Investments Limited and Land Consultants Limited ("the Manx Companies"), this 'remains very uncertain'. The JLs have also concluded that although at the time of entering into the Hayes Settlement the shares in the other three companies which Unicorn was required to transfer to SMA were considered to have some value, those shares are now of no value.[67]

[67] See paragraph 78 of Jackson 7.

[179] However, SMA disputes in the SFO Proceedings Unicorn's right to demand a transfer of the shares in these three companies, and nine of the Interested Parties (including the Viscount, Stewarts and Harbour) have asserted in the SFO Proceedings a proprietary claim to the Arena Companies, including the BVI Companies and their subsidiaries. In this regard, the JLs acknowledge that certain claims, if established, are likely to have priority over Unicorn's claim to the shares in the Connected Companies.[68] These include the claims of Harbour and LCL.

[180] At paragraph 80 of Jackson 7, the JLs address the complexity of the various competing claims to the Connected Companies (Arena Companies) by reference to the List of Issues filed in the SFO Proceedings, which identifies some seven sub-issues arising out of the claims to the Arena Companies. These sub-issues do not warrant repeating here in any detail, but include whether the Hayes Settlement is a valid agreement, whether title to the shares in the Arena Companies could pass without the sanction of the BVI court, whether SMA is the beneficial owner of the shares in the Arena Companies, whether the Hayes Settlement gave rise to equitable proprietary rights in favour of Unicorn, and whether Unicorn was a *bona fide* purchaser for value without notice of any prior proprietary interests in the said shares.

[181] At paragraph 81 of Jackson 7, the JLs state their reasons and rationale for deciding, under the terms of the Settlement Agreement, to release Unicorn's claims to the Arena Companies, as follows:

> "….the [JLs] took into account the complexity of the competing claims to the Connected Companies, the merits of Unicorn's claim, the number of Interested Parties whose claims we have acknowledged would take priority (if made out) and the terms and benefits of the Settlement Agreement as a whole."

[182] The gravamen of the appellants' complaint with this is three-fold. The first is the likely quantum of surplus available to creditors of Glen Moar in the event that the

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[68] See paragraph 59 of Jackson 7.

Unicorn claims under the Hayes Settlement are successful; and the second and third speak to the alleged lack of evidence as to the merits of the Unicorn claims, including legal advice in relation thereto, and the failure on the part of the JLs in seeking to justify the giving up of Unicorn's claims under the Hayes Settlement.

[183] Firstly, the appellants argue that in deciding to give up the Unicorn claims under the Hayes Settlement which, if implemented, would have resulted in any surplus in the other companies being distributed to Unicorn and thus available to creditors, the JLs have effectively deprived such creditors, of which Minardi is one of the largest, of the benefit of sharing in such surplus. And, on the JLs own estimates, while there will not be any surplus in Unicorn, there will be a surplus in Glen Moar and Ballaugh in the region of GBP £23.9 million to £31.6 million which, '**if the claims under the Hayes Settlement were successful**, would be available to creditors of Unicorn, including the second appellant, Minardi'.[69] (Emphasis added)

[184] The second point made by the appellants is that the JLs 'did not put the Hayes Settlement Agreement in evidence before the [learned judge] or any evidence as to their views on the merits of Unicorn's claims under the Hayes Settlement Agreement or any evidence as to any advice they had received in relation to them'.[70] The evidence provided by the JLs on this aspect was limited to a 'bald assertion' at paragraph 81 of Jackson 7 quoted at paragraph 181 above.

[185] The appellants' third line of attack in relation to the Hayes Settlement is that:

> "no attempt was made [by the JLs] to justify the giving up of the [Unicorn] claims under the Hayes Settlement (which is self-evidently detrimental to the creditors of Unicorn) by reference to the relative strength and weakness of Unicorn's claims and those of the other Interested Parties".[71]

[69] See paragraph 93 of the Appellants' Skeleton Arguments.
[70] See paragraph 94 of the Appellants' Skeleton Arguments.
[71] See paragraph 95 of the Appellants' Skeleton Arguments.

[186] On this aspect the appellants submit that it was not possible for the learned judge to have been satisfied on the evidence before the court that the JLs 'had genuinely formed the view that the Settlement Agreement was in the best interest of the creditors of Unicorn and/or that they could properly have formed such a view'. And, in any event, the issues surrounding the Hayes Settlement were not addressed by the learned judge in his Oral Judgment on the Sanction Application.[72]

[187] The respondents, in countering these bases of criticism, observed that the appellants have changed tact in the appeal from their primary case in the court below. Before the learned judge they had argued that the Settlement Agreement represents a 'bad deal' for the BVI Companies, as the BVI Companies had the strongest claims to the Disputed Property, including the Arena Property.[73] However, they are now complaining on appeal that the JLs had failed to put all relevant material before the court below.

[188] The respondents in their submissions caution that the learned judge's task on the Sanction Application was to decide, on the evidence before him, whether the JLs' view that the Settlement Agreement was in the best interest of the BVI Companies 'had been formed rationally and without being affected by a conflict of interest'.[74] In short, the task of this Court (like the court below) is not to decide whether the BVI Companies should enter into the Settlement Agreement, a decision which vest solely with the JLs, but to decide whether, on the evidence before the court, the judge had sufficient basis for concluding that the JLs' decision was a rational one, there being no live issue as to the bona fides or genuineness of the JLs decision. With that submission, I am entirely in agreement. However, I observe that while the appellants in their skeleton arguments grounded this line of attack on the second limb of the **Nortel** test, which concerns whether the court is satisfied that

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[72] See paragraph 96 of the Appellants' Skeleton Arguments.
[73] See paragraph 51 of the Respondents' Skeleton Arguments.
[74] See paragraph 52 of the Respondents' Skeleton Arguments.

the liquidators 'genuinely' hold the view that the Settlement Agreement was in the best interest of the BVI Companies, their creditors and contributories,[75] during the course of his oral submissions before this Court, Mr. Lord, QC, in response to a question from the Court, accepted that the matters the subject of grounds 3, 4 and 5, fall more squarely for consideration under the third limb, which speaks to the rationality of the decision by the JLs to enter into the Settlement Agreement.

[189] The respondents also cautioned in their submissions that this Court's duty, as was the duty of the court below, is to consider the evidence 'in the round'.[76] In my judgment, that is the correct approach to be adopted by this Court. However, as I understand Mr. Lord's submissions on this ground of appeal, while the appellants have singled out for special treatment certain features of the Settlement Agreement and of the existing proprietary claims and disputes, and have criticized the lack of certain evidence being put before the court on the Sanction Application, looking at these matters individually or collectively, the decision reached by the JLs to enter into the Settlement Agreement was not a rational one. This is not in the sense of any lack of bona fides on the part of the JLs, but in the sense that, having regard to the terms of the Settlement Agreement and what the JLs were giving up and receiving in return from the other Settlement Parties, and this being not a global settlement of the litigation, that decision, objectively, could not have been made 'rationally'. Accordingly, the learned judge ought to have entertained some doubt as to the propriety of such a decision and declined to give the court's sanction to such a course of action.

[190] Specifically with regard to the Hayes Settlement, the respondents observed that this complaint was first raised by the appellants during oral submissions below, but had not been raised in either their evidence or written submissions in opposition to the Sanction Application. The respondents also contend that, in raising this issue, the appellants have not asserted that the claims of Unicorn, based on the Hayes

[75] See paragraph 96 of the Appellants' Skeleton Arguments.
[76] See paragraph 53 of the Respondents' Skeleton Arguments.

Settlement, have any merit. Further, the appellants have positively pleaded in the SFO Proceedings that these claims have no merit, and that their rights or entitlement to any surplus in the liquidations of the Arena Companies take priority over Unicorn's claims under the Settlement Agreement.[77] Accordingly, the appellants cannot be heard to submit that the JLs may be acting contrary to their interest or that of the other putative shareholders of Unicorn by releasing Unicorn's claims under the Hayes Settlement.[78]

[191] In my considered view, while on a particular view there may be some force in this submission by the respondents, the merits of Unicorn's claims under the Hayes Settlement, in any event, is not a matter for the determination by either this Court or the learned judge. Neither is it for this Court (or the judge below) to seek embark upon any assessment as to the relative strengths and weaknesses of Unicorn's claim under the Hayes Settlement. These are matters to be determined, if necessary, by the English court in the SFO Proceedings, after taking evidence and hearing full argument. I also agree with the submissions by the respondents that, while a copy of the Hayes Settlement Agreement was not put before the judge by the JLs, which itself was not surprising in light of the complexity of these issues which are to be decided by another court, its omission from the documentary evidence was not detrimental to the Sanction Application.

[192] Furthermore, the JLs in Jackson 7 did sufficiently address the particulars of the Hayes Settlement, the competing claims being made thereunder by Unicorn and other interested parties in the SFO Proceedings, the relative weakness of Unicorn's claim,[79] and the difficulty at this stage in the liquidations in coming to any reasonable determination of the merits of the claims by other Settlement Parties to the Disputed Property, including the Arena Properties.[80]

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[77] See paragraph 62 of the Appellants' Skeleton Arguments.
[78] See paragraph 63 of the Appellants' Skeleton Arguments.
[79] See paragraphs 76-81 of Jackson 7.
[80] See paragraphs 64(1), (2) and (3) Respondents' Skeleton Arguments.

[193] There is also no merit in the appellants' assertion that the learned judge did not refer to the Hayes Settlement in rendering his Oral Judgment. At pages 54 – 55 of the Transcript of Proceedings, the learned judge read extensively from paragraph 82 of Jackson 7, in the context of the various responses by the JLs to the objections in Slade 1 to the Sanction Application. This included, specifically, the claims by Unicorn. While the learned judge did not go into any depth, nor did he specifically address the issue posited by the appellants based upon the JLs' releasing under the Settlement Agreement any claims by Unicorn, he did deal, in general terms, with the broad criticism then being made by the appellants, that the other Settlement Parties' claims to the Disputed Property, including the shares in the Arena Companies, were so bad that the 'only reasonable course the [JLs] could take would be to ignore them'.[81] Furthermore, the appellants' categorization of these claims was stoutly disputed by the respondents in Jackson 7. Finally, on this issue, at page 70 of the Transcript, the learned judge, having traversed the objections by and submissions made by Mr. Lord, QC on behalf of the appellants, concludes on this point at pages 70-71 of the Transcript as follows:

> "The second [head of objection] is that the Settlement Agreement is not in the best interest of those interested in the liquidation in any event.
>
> In paragraph 108, [Mr. Lord] effectively repeats the proposition of Mr. Slade that a very large sum, it's put by Mr. Lord at 83 and a half million rather than 90 million pounds, but he said that the 2 million pounds is a gross underestimate.
>
> In my judgment, that's not made out on the facts. The liquidators, in particular, in Jackson Four and Seven, explained why it is a reasonable settlement of those matters. Mr. Lord's submissions do not give adequate weight to the fact that all of the proprietary claims in the assets of the Arena Companies are being given up by the Settlement Parties.
>
> He also says that the Settlement Parties are getting too much, so he deals with Harbour's claim and says that it's a weak claim.
>
> Again, Mr. Jackson has dealt with why it's a perfectly well-arguable claim."

[81] Page 54 of the Transcript of Proceedings.

[194] For the reasons set out above, in my judgment this basis of complaint rooted, as it is, in the JLs agreeing to release, as between the Settlement Parties, Unicorn's claims under the Hayes Settlement, has not been made out by the appellants, and is, accordingly, rejected.

(ii) Alleged failure by the JLs to consider the interest of those entitled to the Arena Surplus

[195] It is not in dispute that the JLs had as one of their duties to act in the best interest of the those entitled to any surplus in the liquidations of the BVI Companies and their subsidiaries. The appellants contend under this head that the JLs failed to discharge that duty as it relates to those entitled to any surplus in the Arena Companies, including the BVI Companies.

[196] The appellants' submission under this head of complaint, is that the JLs accepted that there was likely to be a surplus in two of the liquidations, Unicorn and Ballaugh in the range of GBP £23.9 - £31.6 million, but nevertheless 'the effect of the Settlement Agreement is that the JLs have agreed to give up that surplus with four of the Settlement Parties'.[82] When this is coupled with the failure on the part of the JLs in their evidence to express the view that the Settlement Agreement was in the best interest of those entitled to the surplus, it is not possible for the court to have been satisfied that the JLs 'genuinely believed' that it was in the best interest of those entitled to the surplus, including the appellants.[83]

[197] In the Oral Judgment, the learned judge concluded that the statement by Mr. Jackson at paragraph 143 of Jackson 7 that the Settlement Agreement 'is in the best interest of each of the Insolvent Companies', was 'sufficient to encompass those entitled as contributories or persons with a proprietary interest in the Arena

[82] See paragraph 98 of the Appellants' Skeleton Arguments.
[83] See paragraph 100 of the Appellants' Skeleton Arguments.

Surplus to have the confidence that the liquidators think they have got the best deal they can in the circumstances'.[84]

[198] The respondents' counter that this basis of complaint is 'not properly arguable'. They refer to paragraph 143 of Jackson 7 where Mr. Jackson says, on behalf of himself and his follow liquidators, that 'the [JLs] believe that the Settlement Agreement is in the best interest of each of the Insolvent Companies'. They submit that the learned judge was correct in his characterisation of the breath of this statement to include not only the creditors, but those entitled to share in any surplus in the Arena Companies.[85]

[199] In my view, the JLs had a duty to consider the interest of the BVI Companies and their subsidiaries when deciding whether to enter into the Settlement Agreement. This duty also included the interest of creditors, particularly those creditors whose claims were accepted or were likely to be accepted in the liquidation of these companies; and, to the extent that there is or is likely to be a surplus, the interest of those who are or may be found to be entitled to the surplus or to share in the surplus. This will include the appellants and any other interested party who claims to be entitled to either the shares in the BVI Companies and/or their subsidiaries, or to any surplus in the liquidation of these companies. However, the JLs are, as office holders, imbued with certain powers and authority. This includes, most importantly, the power to compromise claims. This power extends to both claims made by the company in liquidation and claims made against the company in liquidation or its assets.

[200] Furthermore, as a necessary feature of their powers, liquidators are imbued with the authority to negotiate and to enter into settlements upon terms which they consider, in their own judgment and discretion, to be in the best interest of the company in liquidation over which they have been appointed. In reaching that

[84] See page 75, lines 4-9 of the Transcript of Proceedings.
[85] See paragraph 73 of the Respondents' Skeleton Arguments.

decision, liquidators are required to consider and to weigh several relevant factors which may impact, positively or negatively, on the estate of the company and the assets available to meet the expenses and fees of the liquidation and to pay creditors.

[201] In considering these various factors and interests, liquidators must consider and weigh the interest of creditors and, where there is likely to be a surplus, the interest of contributories. However, in deciding whether to enter into a compromise or settlement liquidators do not have to accord to each interest or category of interest the degree of paramountcy which (not unexpectedly) persons claiming such interest or falling within such category would, in their judgment, consider to be in their best interest. In the proper discharge of their duty liquidators often have to consider and weigh not only overlapping but competing interests in the liquidation. In the final analysis, liquidators must take a pragmatic and wholistic view, in deciding whether to enter into a particular compromise or settlement, being ever mindful of their paramount duty to collect in and to realize the assets of the company in liquidation and to do so without putting the realisable assets in jeopardy of substantial depletion or of being devalued. .

[202] Accordingly, liquidators must consider the value of such assets and especially their realisable value; their ability to recover such assets and the time involved and costs likely to be incurred in doing so; the likely costs and fees to be expended or which have been expended to date in making claims and in defending against claims made against or to the assets of the company; the estate's exposure to adverse costs orders, especially in very large and heavily contested litigation; the relative merits of each claim to and defence of a claim against the company and its assets; and the costs and expenses of the liquidation to date on the realizable assets and the likely costs to be incurred in the future. This is by no means an exhaustive list of material considerations.

[203] In my considered view, the JLs from the evidence put before the court and from the background to the Settlement Agreement, considered and weighed the various factors in coming to the view that entering into the Settlement Agreement with some, but not all of the parties to the English Proceedings or the SFO Proceedings, was in the best interest of the BVI Companies (and their subsidiaries) and creditors, at this stage of their liquidation.

[204] In my judgment, while the JLs in their evidence did not specifically refer to the interest of those entitled or who may be entitled to any surplus in the Arena Companies in liquidation, it would not be a fair reading of their evidence and, indeed, it would not be correct to say, that they gave such interest no consideration. The JLs in their evidence, particularly in Jackson 7, addressed the issue of a surplus in the context of the objections made by the appellants in Slade 1 and Slade 2 to the Sanction Application. They concluded that two of the companies over which they had been appointed JLs were likely to have a surplus, in the even that one of the other interested parties' claims to such surplus was not successful. In this regard, it is to be noted that the appellants claim to be entitled to the surplus in the Arena Companies and dispute in the English proceedings Unicorn's claim to the surplus in the Arena Companies.

[205] In all the circumstances, I am satisfied that the JLs in their evidence did consider the interest of those who may be entitled to the surplus in the liquidation of the Arena Companies in reaching their decision to enter into the Settlement Agreement. The likely surplus in two of those companies was estimated by the JLs as between GBP £23.9 million and £31.9 million. This estimate was made on the basis that the BVI Companies would be successful in establishing their claims in the BVI Claim, the merits of which the JLs discounted in Jackson 7 as being too difficult at this stage to properly assess.

(ii) Joint Liquidators are giving up valuable claims for little in return

[206] The appellants contend that the JLs, by entering into the Settlement Agreement, are giving up their claims in the BVI Claim (also known as the Cochrane Proceedings), which claims are 'strong claims' that have already been found by Popplewell J in the English proceedings to include good arguable proprietary claims to assets. This is a reference to the decision of Popplewell J by which he granted to the BVI Companies a proprietary and freezing injunction against Dr. Cochrane in support of the BVI Claims. In short, this was a preliminary view expressed by the learned judge on an interlocutory application in those proceedings for interim relief and cannot be put any higher than that.

[207] The appellants also rely on prior statements by the JLs in the both the BVI Claim and in the English proceedings to the effect that the BVI Claim would realise approximately GBP £21.5 million.[86] This sum is taken from paragraph 75 of Jackson 7 where Mr. Jackson, is disputing Mr. Slade's characterization of the BVI Claim in Slade 1 as a straightforward and 'very valuable proprietary claim with… a book value of £90 million'. Mr. Jackson, on behalf of the JLs, opined that the BVI Claim is in fact not a straightforward one, and its value is uncertain. Mr. Jackson further states:

> "Even if all competing claims were defeated, and the proprietary claim made out, its value is substantially less the £90 million pounds. The [JLs'] best estimate of the maximum value of the BVI Claimants' proprietary claims to the Non-Arena Assets, i.e. assuming the defeat of all competing claims that the proprietary claim to these assets succeeds in full, is that it is approximately £21.5 m (see further paragraph 106 below). It is not possible to place a meaningful realizable value on the BVI Claimants' (possible) proprietary claims to the Tracing Assets: they are not under the control of officeholders (unlike the Non-Arena Assets) and in some cases the [JLs] have very little information in relation to the nature of the assets or even their whereabouts. In any event, see paragraph 113 below."

At paragraph 106 of Jackson 7, Mr. Jackson also addressed the Non-Arena Assets (which are under the control of the Enforcement Receivers) and which form part of Pot 1:

[86] See paragraph 101 of the Appellants' Skeleton Arguments.

> "The current estimated gross value of the Non-Arena Assets is £29,175,707. This includes assets with a total estimated value of £5,608,081 in respect of which the BVI Companies are not asserting any proprietary claim. Thus, approximately 20% of the assets in Pot 1 are assets which would not otherwise be available to the BVI Claimants even if they were successful in establishing their proprietary claims."

[208] The appellants surmise that the principal justification advanced by the JLs for agreeing to give up the BVI Companies' claims in the BVI Claim (the Cochrane Proceedings) is that the other Settlement Parties were giving up their claims to the underlying assets of the BVI Companies, in circumstances where the JLs had previously expressed the view to the BVI court that the claims of the other Settlement Parties to those assets were 'faintly articulated and weak'.[87] This is a reference to paragraph 80 of the affidavit of Simon Bonney (one of the JLs) filed 26th July 2017 in support of the JLs prior application for Berkeley Applegate relief.[88]

[209] At paragraph 80,[89] Mr. Bonney questions the merits of these proprietary claims opining that some or perhaps all of them are based either on a misunderstanding of what assets had been transferred under the Isle of Man settlement, or a failure to take properly into account the corporate personality of the BVI Companies and the distinction between claims to the shares in these companies and claims to the assets of companies. He deposes further, 'to the extent that the claims of the Interested Parties to the Arena Assets are not based on the above misunderstandings, the [JLs] consider that the information provided to date discloses no proper factual or legal basis for most of these claims'.

[210] To buttress their argument on this aspect, the appellants refer at paragraphs 104 to 106 of their Skeleton Argument in the appeal and to paragraphs 29 and 49 of the respondents' skeleton argument for the hearing of their application for

[87] See paragraph 102 of the Appellants' Skeleton Arguments.
[88] Record of Appeal, Volume E1 at 171.
[89] See fuller extract at paragraph 103 of the Appellants' Skeleton Arguments.

Berkeley Applegate relief[90] where the basis and merits of the claims to the assets of the BVI Companies were accessed by the JLs in similar terms to those stated by Mr. Bonney's in his affidavit referred to above. It includes, at paragraph 49:

> "….in the circumstances it is very far from clear whether any claim, if issued, would have any real prospect of success. The proprietary claimants have consistently declined to answer the [JLs] requests for proper explanation and particularization of their claim; such answers as have been received have failed to clarify the position."

[211] In further support of their argument on this aspect, the appellants rely on the JLs pleaded position in the English proceedings prior to entering into the Settlement Agreement, where the claims of the other Settlement Parties were said to have been characterized as being 'bad' by virtue of the reflective loss principle.[91]

[212] The appellants contend that although these statements were made by the JLs in 2017 and 2018, nothing has changed, and there is nothing in the JLs evidence in support of the Sanction Application to suggest that anything has changed concerning these claims, or which would or could have altered the JLs previously stated assessments of the merits of these claims. They also say that these prior assessments must have been based on legal advice received by the JLs at the time. Accordingly, these claims remained, up to the hearing of the Sanction Application, 'faintly articulated' and flawed; and there is nothing in the evidence filed by the JLs in support of the Sanction Application to suggest that their views on the merits of these proprietary claims by the other Settlement Parties had changed.

[213] Accordingly, the appellants submit, the learned judge was wrong to conclude that the appellants' submissions before him 'do not give adequate weight to the fact that all of the proprietary claims to the assets of the Arena Companies are being given up by the Settlement Parties', under the terms of the Settlement

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[90] Record of Appeal, Volume E1 at 196.

[91] See paragraph 37 of the JLs' Responsive Statement of Case in relation to the Harbour claim at Record of Appeal, Volume D(2) at 620-621.

Agreement.[92] It is the appellants' case that this conclusion 'failed wholly to take account of the fact that the [JLs] themselves repeatedly (and correctly) expressed the view that the claims of the other Settlement Parties to the underlying assets of the Companies were fundamentally flawed'.[93] Further, in reaching this conclusion the learned judge made no reference to and did not weigh or assess the various statements by the JLs as to the merit or lack of merit of these claims.

[214] With regard to the claims of the other Settlement Parties to the remainder of the Disputed Assets, the appellants submit that the learned judge ought to have come to the conclusion that these claims were 'weak and unlikely to succeed and did not justify them receiving the bulk of the assets under the Settlement Agreement'. The learned judge failed to address the 'obvious flaws' in those claims in his Oral Judgment.[94]

[215] Finally, on this aspect, the appellants submit, at paragraph 111 of their Skeleton Arguments, that the learned judge dealt very briefly in his Oral Judgment with the merits of the claims of the other Settlement Parties; incorrectly concluded that the JLs had, in their evidence, dealt with why Harbour's claim was a 'perfectly well-arguable claim' when in fact they had not done so; failed to appreciate that there are very real difficulties with the SFO making out their claim that Dr. Smith retained an interest in any of the Disputed Assets, when Dr. Smith, as part of the Geneva Settlement, had given up all his claims to the Disputed Assets; and, further, in relation to the claim by Stewarts, having apparently accepted (correctly) that their claim was 'parasitical' on the Isle of Man Settlement, failed to appreciate that 'Stewarts' client did not become beneficially entitled to anything as a result of the Isle of Man Settlement'.[95]

[216] Accordingly, the appellants submit that:

[92] See page 71 of the Transcript of Proceedings at lines 11-14.
[93] See Appellants' Skeleton Arguments at paragraph 109.
[94] See Appellants' Skeleton Arguments at paragraph 110.
[95] See Appellants' Skeleton Arguments at paragraph 111(c).

> "there was nothing in the JLs' evidence to suggest that they had grappled with the issues identified at paragraph 114 of [the appellants'] skeleton argument [below], or that they had subjected the claims of the other Settlement Parties to any sort of rigorous examination prior to entering into the Settlement Agreement, in order to satisfy themselves that the terms fairly reflected the litigation risk faced by the [BVI Companies] in the English proceedings."[96]

[217] The respondents, on the other hand, submit that this basis of complaint, which they characterize as the 'bad deal complaint', is without merit and without any proper foundation. In their submission, the merits of the BVI Claim depend on (i) the JLs ability to trace into the Disputed property ("the tracing claim"); and (ii) the merits of the competing claims to those assets ("the "competing claims"). As to the tracing claims, the JLs will have to trace funds from the BVI Companies through to the bank accounts of Dr. Cochrane and close associates of Dr. Gerald Smith or their companies into the purchase of the Disputed Property, which Mr. Jackson concluded, at paragraph 74 of Jackson 7, was not a straightforward claim. As to the reliance by the appellants on the JLs earlier characterization of the BVI Claims as 'arguable', the respondents say that this did not mean that the said claims are straightforward.[97]

[218] With regard to the merits of the competing claims to the Disputed Assets in the BVI Companies, the respondents submit that these claims are complex and no determinative assessment of their merits can possibly be made in advance of the scheduled 10-week Phase 1 Trial in the SFO Proceedings.[98] Accordingly, the learned judge was correct to recognize this and to decline the appellants' invitation to undertake a summary assessment of these claims.

[219] To illustrate the complexity and difficulties inherent in an assessment of the merits of these competing claims, the respondents referenced, by way of example, the

[96] See Appellants' Skeleton Arguments at paragraph 112.
[97] See Respondents'' Skeleton Arguments at paragraph 77.;
[98] See paragraph 89 of Jackson 7.

SFO claim to the Disputed Property in the SFO Proceedings. There, the SFO has obtained a criminal restraint order over large portions of the Disputed Property, which order could only have been obtained on the basis that the SFO had a good arguable case that that property was Dr. Smith's realizable property, and that the SFO has a good arguable case in the SFO Proceedings. Accordingly, the learned judge was correct in not concluding that the SFO claim had no merit.

[220] In my judgment, the important principle is that where a court, be it in BVI or in England, has, on application in on-going proceedings, granted interim relief (such as a proprietary or freezing injunction) based, inter alia, on a preliminary finding by the judge that the applicant has a good arguable case to certain assets or an interest therein, this finding cannot be the singular basis for an office holder concluding that the claim is a good one which has a high likelihood of succeeding. There are necessarily many other factors which may impact upon and must be weighed in any assessment of the merits or likelihood of success of a claim, including the cogency of the defence filed in relation to it. Further, that preliminary assessment by a judge, based on the materials put before him by the applicant, cannot be determinative of whether, in settlement negotiations by the liquidators of a company, that claim should or should not be compromised or even released. While a preliminary finding of a court of competent jurisdiction that a party has a 'good arguable case' carries some weight and may be factored into the decision made by the liquidator whether to settle certain claims upon the terms being proposed, it is not in of itself conclusive or determinative of the merits of that claim and the propriety of any decision to compromise or to release that claim as part of a settlement or compromise involving a company in liquidation.

[221] The overarching principle is that liquidators are required, as part of their statutory duties and powers and as officers of the court, to properly and rationally consider the pros and cons of a proposed settlement or compromise, and to do what, in their judgment, is in the best interest of the company, its creditors and contributories having given due regard to their interests. Exercising such judgment

and discretion is quintessentially what liquidators do. In discharging their duties, liquidators are required to exercise sound judgment, to be genuine in the actions which they take and in the decisions which they make about the estate of the company over which they have been appointed, and to act rationally in making such decisions, after taking into account and weighing all relevant or material information. Put differently, sometimes even apparently technically 'good' or strong claims may be compromised or released by a liquidator as part of a settlement, after taking all relevant factors into account, including the costs of the liquidation, the likely costs in pursuing or continuing to pursue a good or strong claim, the likelihood of recoveries, and the likely costs and expense involved in defending against the claims of other settlement parties. Of much significance in such decision-making by liquidators, is the overall impact which such costs and expense has or may have on the estate of the company in liquidation, and what would likely be left for the benefit of creditors and contributories. This is essentially a judgment to be made by the liquidator and not by those advising them in the liquidation or by the court. It is a judgement to be made in the best interests of the company and those interested in its estate.

[222] The respondents, in dealing with this aspect, dispute the appellants' characterization, at paragraph 102 of their Skeleton argument, of the JLs 'principal justification' for releasing their claims in the BVI Claim, as between the Settlement Parties. They point out that 'the Settlement Agreement has other benefits for the BVI Companies over and above the release of the other Settlement Parties' proprietary claims to the Arena Assets including a guaranteed share of 7.32%... of Pot 1'.[99] They also make the point that 'it is non-sensical to suggest that the [JLs] should have given no weight at all to the release of the proprietary claims to the Arena Assts', for the reasons set out at paragraphs 82(1) to 82(3) of the respondents' Skeleton Arguments. These include the JLs' being 'alive to the potential weaknesses in the other Settlement Parties' claims to the Arena Assets',

[99] See paragraph 81 of the Respondents' Skeleton Arguments.

which the JLs have set out in their evidence and in their skeleton argument on the Sanction Application. However, they say, 'it is difficult to take a determinative view of the likely merits of those claims as they have not to date been fully pleaded'.[100] Another factor is that it is unlikely that there will be any final determination soon of the other Settlement Parties claims to the Arena Assets. These claims do not fall to be decided in the Phase 1 trial in the SFO Proceedings.

[223] The respondents also point to paragraph 2(4) of the order of Adderley J dated 16th October 2017 by which the JLs are 'expressly restricted from using the assets under their control to fund any challenge to any proprietary claims to those assets'. At paragraph 82(3) of the respondents' Skeleton Arguments, they state:

> "The release of the Settlement Parties' proprietary claim to the Arena Assets therefore has the advantage of a potentially much speedier end to the dispute and resolves the need for the [JLs] to seek a variation of the [16th October 2017 order of Adderley J] or third-party funding to contest those claims. Further, even if one or more of the Settlement Parties claims have merit, by reason of the Settlement Agreement the [JLs] will nevertheless be able to use the proceeds of realization of the Arena Assets to meet liquidation expenses and creditor claims and, if these is a surplus, to make a distribution to shareholders."

[224] The gravamen of these submissions by the respondents at paragraph 82 of their Skeleton Argument in the appeal, is that, as Mr. Jackson has pointed out in Jackson 7, the outcome of the other Settlement Parties' claims to the Disputed Assets in the BVI Companies is difficult to assess and to determine with any reasonably degree of certainty. In any event, these claims involve a complex factual matrix and compete with each other, and they are, as yet, not fully pleaded out. These factors contribute to the uncertainty concerning their relative merits and strengths. Therefore, notwithstanding the view of the JLs as to the potential weaknesses of these proprietary claims as expressed by the JLs in 2017 and 2018, the considerable delays in having them finally brought to trial and resolved, and, importantly, the prohibition by order of the BVI Commercial court on the JLs

[100] See paragraph 82(1) of the Respondents' Skeleton Arguments.

using assets under their control to defend against these claims are important considerations which informed the JLs decision to enter into the Settlement Agreement on those terms. Additionally, the JLs clearly considered and weighed in coming to their decision, the other benefits to be derived by the BVI Companies under the Settlement Agreement, including the guarantee of them receiving 7.32% share of Pot 1 and the costs savings to the estate of these companies by having Harbour take the lead in funding of the litigation in the English Proceedings.

[225] On this aspect, I find the argument advanced by the respondents more compelling. It was not for the learned judge to substitute his assessment of the merits or the BVI Claims and the competing claims by the other Settlement Parties for that of the JLs, as set out in their evidence in support of the Sanction Application, and the learned judge was quite correct in declining to do so. Furthermore, it is not for this Court to embark upon a similar exercise, and, accordingly, we also decline to do so. These are matters which the JLs would have to consider and to weigh in light of the current overall position of the BVI Companies in liquidation.

[226] While it can be expected that those who view the terms of a settlement as not advantageous to their interest as creditors or as contributories or persons who may be entitled to surplus, would disagree with the course of action being pursued by the JLs, in the final analysis it is a matter for the judgment and discretion of the JLs in discharging their duties and powers as office holders. In my judgment, the JLs were entitled to and did consider the relative merits of the BVI Claims and competing claims and their decision to compromise or to release the BVI Claims as against the other Settlement Parties, in exchange for the other Settlement parties releasing their claims to the Disputed Assets in the BVI Companies. Their decision to do so cannot be assailed on this basis.

[227] Accordingly, in my view the appellants' complaint that the Settlement Agreement represent a 'bad deal', or one where the JLs are causing the BVI Companies to give up much more in releasing their tracing claims to such assets, is not justified

and the learned judge was correct in so concluding. I therefore go on to consider the appellants' next point of challenge under this ground of appeal, the absence of any legal advice received by the JLs as to the merits of them entering into the Settlement Agreement.

(iv) Failure to put legal advice before the Court

[228] In brief, the appellants' case on this ground of appeal is that the JLs failed to put before the learned judge any legal advice which they had received on the relative merits of entering into the Settlement Agreement and, in the absence of such evidence, they failed in their duty to put before the court 'all relevant material'. Accordingly, the learned judge ought to have found that the JLs were not acting rationally when they entered into the Settlement Agreement or that there was some doubt as to the propriety of their course of action, and to refuse the Sanction application.

[229] It is not in dispute that the JLs did not put before the court below in support of the Sanction Application, any legal advice or opinion as to the merits of them entering into the Settlement Agreement. However, it is readily apparent that this omission was not because of any deliberate decision on their part not to do so or to withhold such evidence from the court. In fact, the JLs had made known to both the judge and to the appellants their intention to do so by way of a confidential annex to be disclosed to the judge only.

[230] Further, while it is quite commonplace for an applicant for sanction to put before the court the written legal advice which they have received as to the relative merits of their intended course of action, there is no rule or principle of law which specifically requires that it must always be done. In **Mahomed v Morris (No 2)**[101] the UK Court of Appeal makes it plain that, while the notional reasonable liquidator is presumed to seek and obtain legal advice in the discharge of their statutory

[101] [2001] BCC 223 at [39].

duties, it is not for a judge to assume that a liquidator has obtained legal advice. It is within the discretion of the joint liquidators whether to put into evidence the fact alone that legal advice was sought or obtained, or to go further and disclose the contents of that advice.

[231] Where it is necessary or prudent for liquidators to put before the court on an application for sanction the legal advice which they have received as to the merits of an intended course of action in the liquidation, be it a compromise or settlement, this can be achieved by exhibiting the written advice with the application or (where such advice attracts legal professional privilege or it would be imprudent for other cogent reasons for such advice not to be shared with other persons interested in the liquidation) by making the advice available to the judge in the form of a confidential annex. In addition, where appropriate, the court may decide to facilitate this process by adopting the procedure in **Re Moritz (deceased); Midland Bank Executor and Trustee Co Ltd v Forbes and Others**[102] and to hear the office holder in private in relation to any privileged or confidential matters.

[232] In this matter, it is apparent that the JLs intended to provide the judge with the confidential legal advice which they had received on the merits of them entering into the Settlement Agreement, and had elected to do so by way of a confidential annex. This was on the basis that such legal advice was subject to legal and professional privilege. However, the appellants took issue with the JLs invoking of privilege and with them not intending to share such advice with them. The record also indicates that the learned judge ruled that he did not consider it necessary, in the face of the appellants' objections, to have the JLs tender such advice by way of a confidential memorandum, and that he would decide the Sanction Application on the evidence before him. In those circumstances, the JLs elected not to pursue the matter further.

102 [1959] 3 All ER 767.

[233] On this issue, which is an important one, I pause to note that in the **Nortel** case (as one example) the applicants for sanction provided Snowden J with a number of confidential documents including projected outcome statements for EMEA Companies and various pieces of legal advice provided to the administrators by their lawyers in the relevant jurisdictions, namely, England, Canada, the US and France. I also observe and remind myself that in **Nortel**, Snowden J made clear that in considering a category 2 sanction application (such as the instant one), the approach of the court will mirror the approach of the court to a subsequent application to challenge the decision by a creditor. However:

> "…having regard to the fact that [the court's] approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action."

[234] The duty placed on liquidators and other officeholders to disclose to the court all relevant considerations and material evidence when seeking the court's sanction of a particular course of action which the liquidators have decided or intend to embark upon in the liquidation of the company under their control, is an important one. It is one which officeholders must take seriously, and where it is not possible to fully discharge that duty, they must provide to the court a reasonable explanation for their inability to do so. This is so particularly because the sanction of the court when given will prevent any subsequent challenge by creditors or contributories to that decision.

[235] The relevance or materiality of particular facts and information to a court's consideration of a sanction application will vary from application to application, and will depend upon, among other considerations, the particular course of action for which the court's sanction is being sought, how momentous that decision or action is in the context of the liquidation, and the likely implications for the company's estate, its creditors and contributories. Accordingly, each application for court sanction must be considered on its merits and in the context of the liquidation.

[236] As to liquidators making available to the court the legal advice they have received on the merits of entering upon the proposed course of action, its the materiality and significance must be assessed in the context of prevailing issues, claims and other considerations which impact or are likely to significantly impact upon the company and its estate, and the significance of such legal advice to the decision being embarked upon by the liquidator and the rationality of such decision. Accordingly, the full disclosure to the court of all relevant material, including legal advice on the merits of the intended settlement or compromise, cannot be overstated. Such materials go to the role and function of the court in assessing whether the liquidators are acting rationally when reaching their decision, and the propriety of the particular course of action.

[237] The learned judge dealt with this point of challenge by the appellants early in his Oral Judgment. At page 15 of the transcript, the judge remarks that there was a dispute between the JLs and the appellants as to whether the JLs are entitled to legal and professional privilege with respect to the legal opinions and advice of their lawyers on the merits of entering into the Settlement Agreement. However, this issue was never finally put before the learned judge for resolution prior to the hearing of the Sanction Application. The learned judge also pointed out that the appellants are 'locked in combat' with the JLs on the Sanction Application and, in the end, the JLs decided not to put any of these confidential materials before the court.

[238] Having mused that in many cases the omission to put legal advice before the court may give rise to an inference adverse to the liquidators, the learned judge considered that 'in light of the arguments about privilege, it would in my judgment, be wrong to draw any inference against the liquidators. Neither can I, however, draw any inference in favour of the liquidators. It seems to me that the matter is just a blank, evidentially'.

[239] The assessment by the learned judge of this omission as a 'blank' evidentially, is challenged by the appellants in this appeal. They say that the arguments between them and the JLs about privilege was not a good reason for the judge to treat the JLs omission as a 'blank'. Further, if the JLs had such advice which was capable of justifying or would go some way towards justifying them entering into the Settlement Agreement, they would have been more than happy to put it in rather than 'hide behind the cloak of privilege'.[103]

[240] Alternatively, even if the learned judge was correct in treating the omission as a 'blank' evidentially, and not to draw any inferences adverse to the JLs, the appellants argue that, in the absence of such evidence, 'it was impossible for the learned judge not to have been left in some doubt as to the propriety of the Settlement Agreement'. The appellants submit that evidentially such legal advice was highly relevant where, as in this matter, 'the decision is to compromise claims'.[104]

[241] In my considered view, there is some force in this submission. I say this mindful of the cautionary imperative by Snowden J in **Nortel** that where an officeholder is seeking the approval of the court to a course of action or settlement which he or she has entered into and which, if granted, will prevent any subsequent challenge, whether by creditors or contributories, the court will require the office holder to put all relevant evidence before it. However, the appellants go one step further. They submit that the failure to put into evidence such legal advice ought to have been fatal to the Sanction Application.

[242] The respondents take issue with this conclusion. They address, at paragraph 55 of their skeleton argument in the appeal, the chronology leading to them not putting evidence of legal advice received on the merits of entering into the Settlement Agreement before the court below. They say, in particular, that they

[103] See paragraph 114 of the Appellants' Skeleton Arguments.
[104] See paragraph 115 of the Appellant's Skeleton Arguments.

had prepared a confidential annex containing privilege legal advice, which they intended to share with the court and not the appellants. However, at the second directions hearing in late April 2020, the appellants indicated orally their intention 'to seek disclosure of the confidential annex', and applied for an order that the JLs produce a 'privilege log' listing the privileged materials to enable them to prepare their disclosure application.

[243] At that hearing, the learned judge refused to make an order for disclosure, and 'observed that even if the legal advice was put confidentially before the court, it would have no material impact on the decision that the court needed to make'.[105] Further, when the appellants pursued their application for disclosure of the privilege legal advice, the JLs' lawyers wrote to them before the hearing, referring to the observations which the judge had made and stating that the JLs had taken the position not to provide the confidential annex to the court 'unless the court determined that it should have regard to the contents of the confidential annex in making its decision on the Sanction Application'. In such circumstances, the appellants would then produce the confidential annex and ask the court to adopt the procedure in **Re Moritz** (that is, to hear from the office holders in private in relation to such privileged and/or confidential matters).[106] No substantive response was received from the appellants. At the hearing of the Sanction Application, the appellants continued to complain about the absence of legal advice and the JLs suggested to the learned judge that if he wished to have sight of the confidential annex, they would provide their submissions on privilege in writing after the hearing, in order not to waste time and delay further the hearing of the Sanction Application. Upon objection by the appellants to this course of action, the learned judge ruled: 'I don't think I need submissions on privilege as I'll deal with this on the evidence available, so I won't give you leave for written submissions.'[107]

[105] Paragraph 55(2) of the Respondents' Skeleton Arguments.
[106] Record of Appeal, Volume F at 177-178.
[107] See paragraph 55(7) of the Respondents' Skeleton Arguments.

[244] The respondents also point out that during the hearing on the Sanction Application, the appellants did not invite the judge to draw any adverse inference from the absence of the confidential legal advice, taking the position instead that the court ought not to draw any positive inferences in favour of the JLs. The respondents therefore submit that the learned judge cannot be faulted, because what he did is exactly what the appellants had invited him to do. Accordingly, it was not now open to the appellants to invite this Court to draw any inferences adverse to the JLs.

[245] On the factual and procedural matrix before the court, it is not possible to conclude that the JLs deliberately decided not to put the legal advice they received as to the merits of entering into the Settlement Agreement before the court below. To the contrary, the JLs sought to do so and, in the face of the appellants' objections to the JLs' claim to privilege and to the confidential documents being placed before the judge by way of a confidential annex, the learned judge decided, in effect, to proceed in the absence of the confidential annex and to decide the Sanction Application on the evidence before him. In such circumstances, the learned judge was correct in my judgment to consider the absence of the legal advice as a blank evidentially, and not to draw any inference positive or negative to the JLs and in relation to the Sanction Application.

[246] Further, in my opinion, while the JLs had the duty and were required to put before the court all material evidence, they cannot be faulted, in the particular circumstances of this case, in not putting such legal advice before the court when they offered to do so by way of a confidential annex to be seen by the judge only. Indeed, as late as the hearing of the Sanction Application, the JLs were seeking to do so by way of the confidential annex, and it is the learned judge who, in the face of the continued objection by the appellants to the adoption of this procedure by the court, declined to allow the JLs to do so on the basis that he would decide the Sanction Application on the evidence before him. In this regard, is also a relevant

consideration that the interests and claims of the appellants and those of the JLs are not completely aligned, and the disclosure to the appellants of the JLs' legal counsel's assessment of the merits of the various claims in the BVI Claim and in the SFO Proceedings, would not have been prudent.

[247] The respondents, at paragraph 59 of their skeleton argument, submitted that there was abundant evidence before the court below as to the JLs approach to the Settlement Agreement, and their difficulties in arriving at any concluded position or view on the merits of the numerous competing and conflicting claims to the Disputed Property in issue in the SFO Proceedings.[108] Accordingly, they submit that the learned judge was entitled to conclude in his Oral Judgment that 'clearly great care has been taken by Mr. Jackson with regard to the claims made by the various parties', and that the JLs had acted rationally in coming to the view that the Settlement Agreement was in the best interest of the BVI Companies and their creditors. Further, that there was nothing irrational in the JLs' view that the Settlement Agreement 'fairly reflected the litigation risk faced by the [BVI Companies]'.

[248] On balance, taking all factors into account and notwithstanding the court below not having the benefit of the legal advice received by the JLs as to the merits of them entering into the Settlement Agreement on behalf of the BVI Companies, I am satisfied that the learned judge's conclusion on the evidence before him was permissible and correct. Accordingly, I find this basis of challenge, albeit with some merit, is dismissed.

(v) Alleged failure to put other relevant material before the court

[249] The appellants also seek to rely on the alleged failure by the JLs to put before the court below other additional relevant material rendering it, they say, impossible for the learned judge not to have any doubt as to the propriety of the Settlement

[108] Paragraphs 70 -91 of Jackson 7.

Agreement. At paragraph 116 of their skeleton argument, the appellants argue that:

(a) the JLs having not ruled on the claims of all the creditors, failed to put before the court relevant material that would enable the court to form a view of the likely creditors of the BVI Companies; and

(b) the JLs failed to put all relevant material before the court concerning asset realisations, including legal advice in relation thereto, so as the enable the court to form a view regarding likely recoveries and what sums may be available for creditors of each of the BVI Companies and those entitled to surplus. Under this head the appellants argue that such evidence of asset realisations that the JLs provided in Jackson 7, was 'fairly broad brush estimated income statements'; and no estimated income statements were provided on the basis that the Settlement Agreement would not take effect, 'thereby depriving the court of the ability to compare outcomes'. Further, only some limited information was provided by the JLs concerning certain valuable claims which some of the Arena Companies have against Mr. Cooper and Mr. McNally, but which did not provide any indication as to what the JLs expect to realize from those claims.

[250] The respondents address these contentions at paragraphs 66 to 68 (information on creditors' claims) and paragraphs 69 and 70 (information on asset realisations) of their skeleton argument. They submit this basis of complaint is irrelevant to a decision on an application for sanction and, in any event, the JLs put before the court very detailed information in relation to creditors' claims in the insolvent estates of the BVI Companies.

[251] At paragraphs 29 to 40 of Jackson 7, the JLs do address the 'current range of estimated outcomes for each of the [BVI Companies]', including a table at paragraph 29 to which I have alluded above. In my view, this information more

than satisfies any such requirement for the purposes of the Sanction Application and there is no merit in this criticism.

[252] Likewise, there is no merit in the criticism that the JLs did not provide any information regarding asset realisations or that the information provided was scant. Firstly, the relevance of such information to the application of the **Nortel** test to the Sanction Application is questionable. Secondly, the matter of asset realisations was addressed by the JLs at paragraphs 30 and 31 of Jackson 7. At paragraph 32, the JLs address, sufficiently in my view, the difficulties, as they see them, with coming up with a meaningful estimate of realisations in the event that the Settlement Agreement does not take effect. And from paragraphs 33 to 40 of Jackson 7, the JLs address the impact of creditors' claims on the estimates at columns 2 and 3 of the table at paragraph 29. In doing so, the JLs refer at paragraph 34 to a full list of creditors' claims lodged with the BVI Companies, having been previously set out in the schedule to the A&C Paper;[109] the subsequent filing of some 30 further claims; and to an updated schedule of creditors' claims lodged in the insolvent estates. In my view, without deciding on its relevance to the court's determination of the Sanction Application, this information was more than sufficient for the court's consideration. Accordingly, this head of complaint by the appellants is rejected.

(D) Conclusion on Ground No. 3

[253] For the reasons set out above, the appellants' ground 3 is not made out. There is no basis upon which this Court ought to conclude that the learned judge erred in finding that the decision by the JLs to enter into the Settlement Agreement was rational or that the judge ought to have entertained some doubt as to the propriety of the Settlement Agreement, such that he ought not to have given the court's sanction to it.

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[109] Exhibit "CJS-6" at pages 243-267.

Ground No. 4 – The Judge attached undue weight to cost savings and reduction in the issues

[254] This ground of appeal is dealt with at paragraph 117 of the appellants' skeleton argument. The appellants argue that the judge was wrong to attach undue weight 'to any alleged costs savings or reductions in the issues that will have to be resolved in the English proceedings'. The appellants point out that the Settlement Agreement is only a partial settlement. It has not or will not result in any reduction in the issues that arise in the English proceedings, as is confirmed by the recent service by the Settlement Parties in those proceedings of a consolidated pleading; and all the issues listed for hearing at the Phase 1 Trial will still have to go ahead. These points are not controversial.

[255] The appellants go one step further. They argue that any cost savings resulting from the BVI Companies being jointly represented in the English proceedings by the legal team of, and funded by, Harbour is over-stated, and does not justify the high price paid under the Settlement Agreement given the value of the assets at stake. They point out that under the terms of the Settlement Agreement, the JLs will still be liable to reimburse Harbour in the sum of GBP £3 million in the event that Harbour cannot recover its costs from the Non-Settlement Parties. Furthermore, the JLs will still have to bear their costs of assisting and co-operating with Harbour in the English proceedings.

[256] This is a reference to clauses 7 to 19 and 31 of the Settlement Agreement whereby it is agreed by the Settlement parties that Harbour will take the lead in interlocutory proceedings and in the trial, and pending Harbour complying with its obligation under clause 30 to 'use reasonable endeavours to receive' its costs from the Non-Settlement parties or Third Parties, the Enforcement receivers and the JLs will, 'between them in equal shares so far as possible, preserve an amount equal to Harbour's costs or any shortfall thereon realized through Harbour's enforcement action up to a maximum of GBP £3 million'. Accordingly, this

obligation is conditional and, in the case of the JLs, only 50% of the Harbour Costs Cap, that is GBP £1.5 million.

[257] The appellants posit that the interest of the JLs and the appellants 'are entirely aligned in the SFO Proceedings', and a more sensible approach would have been for the JLs to have left it:

> "…to [the appellants] to oppose the claims of the other Interested parties to the assets which are at issue in the Phase 1 Trial (i.e. the shares in various companies and the Jersey properties), whilst they focus on establishing the BVI Claimants' own tracing claims to the Jersey Properties and Unicorn's claims under the Hayes Settlement."

[258] In my view, this 'proposal' by the appellants was obviously not a realistic course of action for the JLs to adopt in order to save substantial litigation costs, and it is a stretch to say that their interest in the SFO Proceedings are aligned with those of the appellants. This is especially so where the JLs have not recognized the basis of the appellants' claim to the Arena Surplus or that Minardi is a creditor of Unicorn.

[259] The respondents argue that this ground of appeal misunderstands the judge's role on the Sanction Application. His role was not to decide whether the JLs should enter into the Settlement Agreement, but to decide whether they acted rationally in doing so. With this submission I am in full agreement.

[260] In his Oral Judgment, the learned judge did note that:

> "the parties agreed that Harbour should act as the lead claimant in the [English] proceedings so that they would incur the majority of the legal costs and act on behalf, effectively, of all the Settlement parties. On any view, [this] will save the expense of the other Settlement Parties having each to fund a [full] legal team."

[261] In my view there is no merit in this ground of appeal. The JLs were well within their rights and duty to point to any costs savings in the liquidations of the BVI Companies (the Arena Companies) resulting from the implementing of the terms of

the Settlement Agreement. Had there been no costs savings or very little, this would have been a point stressed in opposing the Sanction Application. Further, the learned judge correctly recognized that an important feature of the Settlement Agreement is that Harbour would be funding the bulk of the litigation costs of the Settlement Parties in the English proceedings, resulting in substantial savings in costs and expenses to the estates of the BVI Companies. Accordingly, this ground of appeal fails.

Ground No. 5 – The Judge failed to take into account the lack of support by creditors for the Sanction Application

[262] The appellants address this ground at paragraphs 118 and 119 of their skeleton argument. They argue that it was highly significant that there was a 'complete absence of support' for the Sanction Application and the Settlement Agreement from 'any of the stakeholders (or putative stakeholders) in the liquidations of these companies and the learned judge ought to have regarded this as a strong reason for declining sanction'.

[263] In response, the respondents submit at paragraph 86 of their skeleton argument, that this contention is a misunderstanding of the role of the liquidator and that of the court on a sanction application. They set out some four points in support of this submission as follows:

> "(1) The Court's task is not to mechanically add up the voices on both sides of the dispute and give effect to the voice of the majority. Rather, it must apply the Sanction Test.
>
> (2) Nor is a liquidator required to do the bidding of one faction of the (putative) creditor or shareholder body. He must act in what he believes to be in the interests of the insolvent estate as a whole: see e.g., In Re Longmeade Ltd (in liquidation) [2017] BCC 203 per Snowden J at [52] to [53].
>
> (3) As such, the question of whether or not a liquidator is acting rationally in deciding to settle claims against the wishes of certain (putative) stakeholders, requires an examination of the reasons given by those opposing for saying that the liquidators' views as to the commercial merits of the settlement are irrational.

> (4) In the present case, the Judge carefully considered the objections made by the Appellants (and other opposing stakeholders) in the Decision and rejected them."

[264] Suffice it to be said that I agree entirely with the submissions of the respondents at paragraph 86 of their skeleton argument. Although, the learned judge was required in coming to his decision on whether to sanction the JLs entering into the Settlement Agreement to consider the wishes and interest of creditors and contributories or persons interested in the liquidation of the BVI Companies in keeping with the principles set out in **Re Greenhaven Motors Ltd (in liquidation)**,[110] his role ultimately was to form a view on the rationality and propriety of the course of action proposed to be taken by the JLs, in accordance with the **Nortel** test. The learned judge in his Oral Judgment referred to the letters of objection to the Sanction Application which the court had received, and considered, in some detail, the objections by the appellants in Slade 1 and Slade 2, and by Dr. Smith who appeared before him at the hearing below. These matters are amply covered by the respondents at paragraph 87 of their skeleton argument and do not bear repeating here in any detail. The judge in his Oral Judgment carefully considered each basis of objection and rejected them. Accordingly, the judge's reasoning on this aspect does not disclose any error of law on his part and is not perverse and does not warrant appellate interference. I see no merit in this ground which, in my view, is misconceived and is accordingly dismissed.

Ground No. 6 – The judge asked himself the wrong question in deciding the Sanction application

[265] By this ground of appeal the appellants say that the learned judge asked himself the wrong question in deciding the Sanction Application, that is, whether the Settlement Agreement represented 'the best deal available' in all the circumstances. This is a reference to a statement by the learned judge in the concluding paragraphs of his Oral Judgment. At page 76 of the transcript, the

[110] Quoted at paragraph 58 herein.

learned judge is recorded as stating '…but there is not a better compromise which I have been made aware of… that they have taken proper care over it and that it is in all the circumstances, the best deal available'.

[266] This ground of appeal is in my judgment entirely without merit. Firstly, there can be no doubt that the learned judge recognized and applied the correct test to the sanction application (having rejected the incorrect test relied on by the respondents). Secondly, the judge's use of the term 'best deal' has to be considered in the full context of his earlier findings on each of the limbs of the **Nortel** test essential to his determination of the Sanction Application. At page 75 of the transcript the learned judge stated:

> "I, therefore, have to stand back and look at the matter holistically and I ask the question posed by Mr. Justice David Richardson in MF Global and by Mr. Justice Snowden in Nortel. Am I satisfied that the proposed exercise is within the administrator's power? And the answer is, I am.
>
> That the administrator generally holds the view that what he proposes will be for the benefit of the company and its creditor? I hold that they do.
>
> And that he is acting rationally and without being affected by a conflict of interest in reaching that view. I do hold that view."

[267] At page 76, the learned judge further stated:

> "Thus, although I would not give my approval if I am left in any doubt as to the propriety of the [JLs'] proposed course of action, in the current case, I am wholly satisfied that the Settlement is the best that the [JLs] could achieve."

[268] In my view, there can be no doubt that the learned judge applied the correct test when determining the Sanction Application, and his reference to or use of the expression 'best deal' was not in applying this as the test. It was merely a loose remark which to him may have summed up the terms and advantages of the Settlement Agreement, having already applied the correct test to the Sanction Application. The judge's 'best deal' remark therefore does not impugn his decision and this ground of appeal accordingly fails.

Ground No. 7 – Paragraph 5 of the Sanction Order

[269] The full text of paragraph 5 of the Sanction Order is set out at paragraph 37 of this judgment. By paragraph 5(i) of the Sanction Order, the learned judge, having at paragraph 2 sanctioned the JLs entering into and implementing the terms of the Settlement Agreement, ordered that unless this Court allows an appeal against his decision or grants a stay of the Sanction Order by 4:00pm on 24th July 2020 (9 days hence), the JLs may take all steps to implement the terms of the Settlement Agreement, and to deal with and compromise the claims to the assets of the BVI Companies on the terms in the Settlement Agreement 'pending the final determination of the appeal (Appeal period)'. This was to facilitate the appellants filing an urgent appeal and making an urgent application to this Court for a stay of the Sanction Order. They made no application for a stay.

[270] However, the appellants' main complaint under this ground is with the second limb of paragraph 5 by which the JLs are 'released from any liability arising from or out of their entry into and performance of the Settlement Agreement in the Appeal Period'. They say this order was wrong in principle 'because it would deprive [the Appellants] of the fruits of a successful appeal and/or seek to limit the effect of any order which this Court may make'. The appellants submit further, that there is no justification for placing the JLs 'in any better position than that which all successful parties find themselves pending determination of an appeal against the decision in their favour'.[111]

[271] The respondents submit that by paragraph 5 of the Sanction order, the learned judge granted or imposed an interim stay of the Sanction order pending any application by the appellants to this Court for a stay under the final determination of any appeal which they may file against the judge's decision. In making the orders at paragraph 5, the learned judge stated that he considered it 'essential

[111] See Appellants' Skeleton Arguments filed 18th September 2020, at paragraph 127.

that the liquidators know whether the settlement is approved. Otherwise they will have to incur the extensive costs of preparing for trial'.[112] As noted previously, the appellants did not apply to this Court for a stay of the Sanction order pending the determination of their appeal.

[272] It is trite that an appeal does not operate as a stay.[113] A person appealing a decision of a court adverse to them may apply to either the judge who made to order or to the Court of Appeal for a stay pending the determination of their appeal.

[273] In my view, this ground of appeal is misconceived. The order made by the learned judge at paragraph 5, does not provide any greater advantage to the JLs over those normally applicable to other successful litigants pending the determination of an appeal filed by the losing party. Further, the appellants' complaint about the order at paragraph 5(ii) is simply wrong as a matter of law. This order in no way seeks to nor does it tie the hands of the Court of Appeal upon a consideration of an appeal from the Sanction Order. This Court has the jurisdiction and power on a determination of the appeal to make such consequential orders as it deems appropriate. This includes, in the event that the appeal was successful, discharging any consequential orders made by the court below in granting the Sanction Application. Accordingly, this ground of appeal fails.

Respondents' Counter-Notice

[274] In light of the conclusions reached on the seven grounds of appeal relied on by the Appellants, I do not consider it necessary to consider the Respondents' counter-notice of appeal by which they sought to uphold the decision of the learned judge on the Sanction Application on the further grounds therein stated.

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[112] See p. 12, Transcript of judge's decision of consequential matters dated 15th July 2020.

[113] See Rule 62.19 of the Civil Procedure Rules 2000.

Conclusion

[275] The appellants have failed on all seven grounds of appeal. Accordingly, I would make the following orders:

(1) The appeal is dismissed.

(2) Costs in the appeal to the respondents/joint liquidators to be assessed by a judge of the Commercial Court if not agreed within 21 days.

(3) The counterappeal is dismissed with no order as to costs.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Mario Michel
Justice of Appeal

By the Court

Chief Registrar