In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2022 No: 289

IN THE MATTER OF US HOLDINGS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT 1981

RULING

Dates of Hearing:	Monday 12 February 2024 and Thursday 22 February 2024
Date of Ruling:	Tuesday 02 April 2024
Counsel for the Petitioner:	Mr. Keith Robinson (Carey Olsen Bermuda Limited)
Counsel for the JPLs:	Mr. Rhys Williams (Conyers Dill & Pearman Limited)
Counsel for BMK:	Mr. Kevin Taylor (Walkers Bermuda Limited) (Observing)

Pre-Winding-Up – Court's Sanction of a Momentous Decision by Joint Provisional Liquidators- Whether principles applicable to Court's granting of sanction for a momentous decision made by a trustee is relevant in a liquidation- Section 175 of the Companies Act 1981– Power of liquidator to sell company assets- Duty of Liquidator to preserve assets until winding up order is made

RULING of Shade Subair Williams J

Introduction:

1. This case calls into question the correct legal principles and approach to be used by the Court when called upon to sanction a momentous and controversial decision to be taken by joint provisional liquidators. The impugned decision relates to the proposed disposal of a significant portion of an insolvent company's assets via a commercial contract for sale prior to a winding-up order. For context, the petitioning creditor fervently opposes the bid of a major shareholder for the purchase of the company's subsidiaries on the basis that the sale is anything but lucrative and yields no return for which payment could be secured to satisfy the debts of any class of unsecured creditor.

2. The JPLs contend that their decision to support the sale is a sound commercial one and that the Court need only withhold its sanction of the sale if it finds that the JPLs are acting irrationally in proceeding. Otherwise put, the JPLs caution this Court against engaging in any analysis as to whether the commercial decision taken is indeed the best one. The JPLs also say that it is their role to safeguard the best interests of the insolvent company over and above any individual or class of unsecured creditors.

3. The petitioning creditor, on the other hand, maintained that the role of the JPLs and the role of the Court in liquidation proceedings is to prioritise any opportunity for the debts of the unsecured creditors to be settled.

4. These issues were the subject of robust and well-researched arguments from Counsel. At the close of the hearings, I reserved my decision and stated that I would provide a speedy decision in advance of these written reasons. In the end, however, I thought it better to carefully examine all of the arguments made via this written decision so to avoid the unwanted risk of hastily judging the issues which were hotly contested.

5. Accordingly, I express my gratitude to Counsel for their patience and understanding.

Background:

6. The affidavit evidence filed in support of the JPLs' application came from Mr. Charles Thresh, one of the two appointed JPLs, the second appointee being Mr. Michael Morrison. In his evidence he explained that the primary assets of US Holdings Limited (the "Company") are the shares in its wholly owned subsidiary, Madagascar Oil Limited ("MOL"). MOL, a company incorporated in Mauritius, owns 99.9% of the shares in the Madagascar Oil SA ("MOSA"), also insolvent. The Company owns the remaining 0.1% of the MOSA shares.

7. BMK Resources Ltd ("BMK") is the major shareholder of the Company, holding 82.59% of the share total. The only other shareholder in the Company holding the remaining balance of the shares is the John Paul Dejoria Family Trust ("JPD Family Trust").

8. The JPLs reported that the Company has some 20 or so unsecured creditors, one of which is the Petitioner, Outrider Master Fund LP (the "Petitioner"). The Petitioner together with the shareholders, BMK and JPD Family Trust, were the original lenders of a Restated Facilities Agreement dated 29 June 2015 extended to provide financing to the Company as the borrower. However, in January 2018 the Company cleared the debt owed to the JPD Family Trust leaving the Petitioner and BMK as the only remaining financing creditors.

9. On 20 August 2021 the Petitioner presented a Petition against the Company in respect of the unpaid debt. This was subsequently withdrawn on the terms of a Twelfth Amendment & Restatement of the Facilities Agreement dated 7 September 2021 (the "Facility Agreement") which extended the repayment term to 31 August 2022.

10. By 31 August 2022, the Company had defaulted on the payment owed to the Petitioner. Consequently, on 2 September 2022 the Petitioner served a statutory demand on the Company in respect of the sum of US$45,796,237. A petition for the Company to be wound up on the grounds of insolvency was subsequently filed on 29 September 2022 (the "Petition).

11. The total debt sum owed by the Company is said to be US$75,924,117.00 or thereabouts. The lion share of that debt, (approximately US$72,000,000.00), is payable to the Petitioner and

BMK. The majority portion of the total debt is owed to the Petitioner. Noting an appearance of some discrepancy on the precise figures, the total sum owed to the Petitioner is said to be US$60,634,044 and approximately US$13,500,000.00 is reportedly the balance owed to BMK under the Twelfth Amendment & Restatement of the Facilities Agreement. Both the Petitioner and BMK are unsecured creditors.

12. A further approximate sum of US$2,400,000.00 (principal and interest) is owed to the Petitioner. This arises out of various funding agreements which the Petitioner entered with the JPLs as a lifeline to the Company for up-keeping of its operational needs and for payment of the JPLs' fees and expenses. The balance of the Company's debt comprises preferential and unsecured employee claims and third party unsecured creditor claims.

13. On 6 December 2022 the Petitioner, by way of *ex parte* summons returnable on 20 December 2022, applied to the Court for an Order appointing joint provisional liquidators. The Petition and the *ex parte* summons were both adjourned and on 27 February 2023. Hargun CJ further adjourned for the purpose of allowing the Company "*to propose a restructuring which has realistic prospects of succeeding and which will satisfy the indebtedness owed to the Petitioner or satisfy the Petitioner's claims in some other way*."

14. On the 27 March 2023 return date, now just over one year ago, the Court proceeded to appoint the JPLs with full powers. The Petition has since which been adjourned on multiple occasions.

<u>The JPLs' efforts to secure financing</u>

15. This Court was made to understand that one of the terms of the Facility Agreement between the Company and the Petitioner and BMK was that the Company would raise money, whether by making itself the subject of a sale or by selling its assets to an investor or by other means so to pay off the debt. Pursuant to the Facility Agreement, the Company's debt to the Petitioner is guaranteed by MOSA and MOL up to the sum of US$80,000,000.00 (the "Guarantee"). This Court was made to understand that the current sum payable under the Guarantee is in the region of US$58,000,000.00.

16. On 29 September 2015 the parties to the Facility Agreement together with an escrow agent entered into an escrow agreement (as amended by a Transfer Agreement dated 15 June 2017) (the "Escrow Agreement") whereby MOSA's and MOL's share certificates and registers were held in escrow. Under the Escrow Agreement, the escrow agent is barred from releasing the escrowed property back to the respective companies until receipt of a joint instruction notice from the Petitioner and BMK each as a confirmation of repayment of their debt (the "JIN").

17. Once in office, the JPLs embarked on a strategy to explore an expedited sale of the Company's interest in MOSA. In his evidence, Mr. Thresh explained the difficulties encountered which resulted in the exclusion of otherwise potential investors such as "Stellar" and "Carlingford". In part, he said that both entities required upfront payment of a retainer for which the funding accessible to the JPLs did not provide. He also explained another cause of deadlock to be the tight timeline that the JPLs robustly imposed.

18. The JPLs then embarked on a marketing process, alongside their in-house Mergers and Acquisitions team, to secure proposals from interested parties. To that end, BMK was invited to make a bid. The marketing process began on 2 May 2023 with a deadline date fixed for 12 May 2023. It is disclosed on Mr. Thresh's evidence that a total of eight parties (including BMK) participated in the process. Notwithstanding the JPLs tight deadline for the bidders, five final bids were made. Focusing on the highest bidder ("Bidder C") the JPLs further engaged in the prospect of sale. Of the long and short, the JPLs eventually came to a point of concern as to the authenticity of Bidder C's documentation establishing proof of funds. During this period, the JPLs also pressed a "Bidder F" to improve on the offer made. Although progressing to an advanced stage, Bidder F withdrew from the process stating its inability to meet the JPLs' timetable.

19. In the end, the only remaining bidder was BMK. Mr. Thresh stated in his Sixth Affidavit [para 56]:

"*All other bidders, except for BMK, had either withdrawn or been discounted from the JPLs' sale process on the basis that their period of due diligence was too long and/or their proposal*

was not sufficiently valuable or credible (for example, the party had limited prior experience of similar assets to MOSA)."

The Company's current financial standing

20. The JPLs reported that the Company has been cash-poor and reliant on funding agreements to support MOSA's operational needs while the JPLs have been managing its local creditors. The JPLs were reliant on funding agreements from the Petitioner and another related entity. Pursuant to the "Outrider Funding Agreement" a total of US$2,100,000.00 (with interest, the funding totaling approximately US$2,320,000.00 as at 15 December 2023). The advanced sums were applied towards MOSA's operational shortfall to 31 August 2023, the Company's salaries to 22 September 2023 and towards a portion of the JPLs' fees and expenses.

21. No further funding was provided by the Petitioner after Bidder F withdrew from the sale process. The remaining funds available to the Company were applied to MOSA's operational shortfall as a priority, even over the JPLs' fees. Consequently, the JPLs advised Outrider and BMK of their intention to terminate the employment contracts for the Company's remaining employees while other employees were placed on no-pay leave from May 2023 onwards.

22. Since which, the JPLs entered into a funding agreement with BMK (the "BMK Funding Agreement"). This was to be advanced by way of four installments totaling US$500,000.00.

The Impugned Asset Purchase Agreement

23. On 8 September 2023 BMK provided the JPLs with a draft Asset Purchase Agreement (the "APA") confirming that it would provide funding to the Company. A funding agreement was subsequently entered with BMK on 2 October 2023. This was to cover the costs of their negotiations, Court costs and upon finalization of the APA, the JPLs' fees.

24. Under the APA, BMK would acquire the entirety of the Companies' shares in MOL and MOSA at a sale price of US$2,039,867.00. This is to be in consideration for: (i) the JPLs' fees

(estimated total US$1,810,000.00 plus US$230,000.00 in estimated costs and expenses) and (ii) the Petitioner's costs (estimated total of US$300,000 to the date of a winding up order). To say that the purchase price is far below the sums proposed by the other would-be bidders is an understatement.

25. The APA is contingent on the Petitioner's cooperation in providing a signed JIN and a Deed of Release (Guarantee). This would release MOL and MOSA from the guarantees they provided to the Petitioner and BMK for the Company's debts made.

26. The JPLs' report that a key component of the APA is the assumption that escrowed property is capable of being sold or transferred. In anticipation of a successful bid meeting the Petitioner's approval, the Petitioner previously provided the JPLs with its executed JIN, notwithstanding that the debt owed to the Petitioner had not been satisfied. However, when Outrider's proposed scheme of arrangement was rejected by BMK, the Petitioner also withdrew the JIN. BMK, however, confirmed that it would provide a JIN releasing the escrowed property in the event of execution of the APA or in the event of its debt being paid in full. To date, Outrider maintains that it will refuse signature.

27. On the JPLs' understanding of the effects of the Escrow Agreement, they initially took the view that the escrowed property cannot be released without a JIN signed by Outrider, BMK and the JPD Family Trust each. Without those signatures, the escrowed property cannot be sold, transferred or otherwise used. Having subsequently reviewed advice from a UK-based King's Counsel, they since which proceeded on the understanding that the Escrow Agreement does not provide any of the parties to it with a security interest. As such, the JPLs take the view that they are at liberty to sell or transfer the escrowed property, even without an executed JIN from the Petitioner. The JPLs also reviewed legal advice from Mauritius and Madagascar legal counsel who are said to have supported this view.

28. The JPLs' urgency for proceeding with the APA is plain. BMK's position is that it will not provide the Company the funding it desperately requires for its operational needs until after

the APA is executed. In a summary conclusion explaining the JPLs' support for the APA, they state[1]:

"*In the circumstances, whilst the BMK Bid offers no return to any class of creditor, it does provide payment of certain Company liabilities (i.e. the liquidation expenses), a sale of the shares in MOL and MOSA to BMK and the prospect of continuation of MOSA's operations (in contrast to the ABI/Outrider Bid, for which the JPLs have not been provided proof of funding to date).*

The JPLs therefore believe that entering into the BMK APA is in the best interests of the Company and executed the BMK APA on behalf of the Company on 21 December 2023, with its effectiveness subject to sanction of this Court."

Discussion on the Relevant Law

29. Section 175 of the Companies Act 1981 (the "CA") outlines the powers of a liquidator. These powers may be broadly categorized as follows:

    (i) Acts which may be carried out by a liquidator only with the approval of either the Court or a Committee of Inspection (pursuant to subsection (1)); or

    (ii) Acts which may be carried out by a liquidator without the approval of either the Court or a Committee of Inspection (pursuant to subsection (2)).

30. Each of the two subsections particularize the scope of power conferred on a liquidator. Relevant to these proceedings is section 175(2)(a) which empowers a liquidator to sell company property (including things in action) by private contract. The Court's sanction or that of a Committee of Inspection is not required for any such sale of company assets.

[1] See Sixth Affidavit of Charles Thresh paragraphs 118-119.

31. In *Re Longmeade Ltd (In Liq)* [2017] B.C.C. 203 Snowden J referred to Chadwick LJ's judgment in *Re Greenhaven Motors Ltd*. [1999] B.C.C. 463 as the leading authority on the Court's approach to granting sanction for the exercise of powers under what he termed the 'old regime'. Snowden J said [50]:

"*In Greenhaven Motors, Chadwick LJ distinguished cases where sanction was required from cases where no sanction was required. In the latter type of case, the decision to be taken was entrusted to the liquidators' commercial judgment as to what was in the best interests of the insolvent estate. Authority in the area is sparse, but from the permissive words of s. 168(2) of IA 1986, it would seem that the liquidators in such a case would not be obliged to hold a meeting to ascertain the wishes of creditors before making their decision.*"

32. However, there is a catch-all provision under section 175(3) which applies to both classes of power under subsections (1) and (2). Section 175(3) subjects a liquidator's exercise of any or all of these powers to the ultimate control of the Court. This empowers the Court to adjudicate any application by a creditor or contributory concerning the liquidator's use of any one or more of these powers. Further section 176(5) entitles any person who is dissatisfied by an act, omission or decision of a liquidator to apply to the Court which may confirm, reverse or modify the act. So, while a liquidator may proceed to exercise a power listed under subsection (1) where authoritative approval is not required in the first instance, the Court statutorily retains its duty to keep control over the actions of a liquidator. This is consistent with the Court's powers of appointment and removal of liquidators.

33. How the Court is to approach an application to set aside the decision of a liquidator was considered by the Court in *San Antonio International Limited v San Antonio Oil & Gas Services* [2020] SC (Bda) 46 Com. In that case the Court was seized of an application for an order to compel joint liquidators to provide disclosure of audited accounts of their receipts and payments. On that application there was also a pursuit to inspect the company books and other documents. It is to be noted that the applicant was neither a creditor nor a contributory and that the Court found that the applicant had no standing without any economic interest in the winding up of the company. In the *obiter dictum* of the Court, Hargun CJ remarked:

"*In order to set aside the decision of the Joint Liquidators under section 175(6)* [sic] [176(5)], *the Applicant has the burden to demonstrate that the decision of the Joint Liquidators not to provide the requested documents is so utterly unreasonable and absurd that no reasonable liquidator properly advised would have made it*..."

34. Hargun CJ relied on the English Court of Appeal's decision in *Re Edenote Ltd* [1996] 2 BCLC 389, per Nourse LJ at 394 b-c, j. In subsequent High Court proceedings in *Re Edenote Ltd* (No. 2) [1997] 2 BCLC 89 at 92 Lightman J said:

"*Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary case, where there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed*."

35. Section 176 of the CA governs the exercise and control of a liquidator's powers in the administration and distribution of assets. Section 176(1) compels a liquidator to have regard to any resolution made, whether by a Committee of Inspection or by creditors or contributories at any general meeting whereby directions are agreed in that forum. In the event of any conflict, directions issued by creditors or contributories at any general meeting shall be deemed to override that of any committee of inspection. All the same, a liquidator's management and distribution of the assets of the state is an exercise of discretion, as so stated under section 176(4).

36. Section 176(2) permits a liquidator to summon general meetings to ascertain the wishes of creditors and contributories. However, the liquidator is statutorily obliged to meet with the creditors and contributories where at least one-tenth in value of them so request in writing.

37. Within the spirit of these provisions, a liquidator is duty bound to protect and preserve the assets of the company so that they remain available to the entitled when the company is to be wound up. So this objective is especially key prior to the holding of general meetings of creditors or contributories or the convening of a Committee of Inspection. So, the role of a

liquidator, commencing from his/her appointment by the Court, is to preserve the status quo pending the hearing of the winding-up petition. At no stage of a (provisional) liquidation is this mandate diminished.

38. Mr. Williams referred me to an extract from McPherson & Keay's Law of Company Liquidations (5th Edition) ("*McPherson*") where the role of a liquidator is stated as follows [6-024]:

"*…Provisional liquidators are to carry out their role: "with the least possible harm to all concerned so as to enable the court to decide after a proper and final hearing whether or not the company should be wound up*" (footnote citing *Re Carapark Industries Pty Ltd* (in liq) [1967] 1 N.S.W.R. 337 at 341 as approved in *Commonwealth v Hendon Industrial Park Pty Ltd* (1995) 17 A.C. S.R.. 358 at 366).

39. Mr. Williams contends that, ultimately, the liquidator must act in the best interests of the company, even above creditors. Mr. Robinson, on the other hand, insisted that a liquidator's decisions ought to be driven only by a determination to ensure that the creditors' interests are protected before that of the company, the directors and the shareholders. To assist the Court, I was referred to the following extract, also from *McPherson* [6-026]:

"*While the function of the provisional liquidator is to take control of all company property with the object of protecting it and preserving it for the ultimate beneficiaries of its realization, usually the creditors, this essentially involves maintaining the status quo until the winding up petition has been determined. A provisional liquidator must exercise discretion, and the ultimate interests of the creditors and members of the company may determine that he or she should sell the assets quickly (in cases where the provisional liquidator has the power to sell). It has been held in Australia that there may be circumstances in which it is appropriate for a provisional liquidator to sell the business of the company but plainly this would only be in exceptional circumstances. Therefore, a provisional liquidator may, if the commercial circumstances dictate, depart from his or her traditional role of simply protecting and preserving. However, a prudent liquidator would probably seek court directions where there is no legal obligation to sell, but where it is apprehended that it is the correct course of action*

(footnote citing: *Northbourne Developments Pty Ltd v Reiby Chambers Pty Ltd* (1990) 8 A.C.L.C. 39). *The exercise of any power of sale is always subject to the control of the court.* (footnote citing: *Re Rothwells Ltd* [1990] 2 Qd. R. 181 at 187). *Whether any sale is commercially prudent is primarily a matter for the judgment of the provisional liquidator* (footnote omitted). *Unless bad faith is established, the decision of a provisional liquidator will be regarded as proper, except where the court is satisfied that he or she acted in a way in which no reasonable liquidator would have acted* (footnote omitted)."

40. As stated in *McPherson* [6-027], a provisional liquidator has no vested interest in company property. Rather he or she owes a fiduciary duty to the company. This principle is not in conflict with the ultimate interests of creditors. A liquidator's duty to safeguard the assets of an insolvent company is primarily for the purpose of ensuring that the company's assets are, so far as commercially and reasonably realistic, accessible to creditors.

41. The degree of interface between the Court and a liquidator may shift depending on any circumstances peculiar to the winding up proceedings. In *Re Refco Capital Markets Ltd*. [2006] Bda L.R. 94 the Court was concerned with a voluntary liquidation and parallel cross-border proceedings in which the company had filed for protection under Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York ("the New York Bankruptcy Court"). Having appointed a provisional liquidator on the same day as the presenting of the petition, Kawaley J engaged in an *ad hoc* telephone conference with the New Bankruptcy York Court with the aim of achieving a shared approach to assessing the fees of the JPLs. For the benefit of the New York Bankruptcy Court, Kawaley J delivered a Ruling which defined the scope of the duties already performed by the JPLs. In turn the New York Bankruptcy Court agreed to assess the quantum of the JPLs' fees.

42. Having, himself, described this approach as a "*departure from the usual practice in parallel insolvency proceedings in Bermuda and the United States*", Kawaley J expressly advised against treating this approach as a precedent for future cases. In the context of those facts, Kawaley J spoke about the Court's role when approving the actions of JPLs. He said [34-35]:

"*The role of the Court on approving the actions of the JPLs is not to act as a rubber stamp. This is particularly the case in parallel proceedings where no committee of creditors has been constituted under Bermuda law. In a traditional Bermuda liquidation of any complexity, the Court would place considerable reliance on the prior approval of the committee of creditors (known under Bermuda company law as the "committee of inspection") in deciding whether or not to approve significant actions on the liquidator's part. Where this Court, as in the present case, is the sole formal decision maker, a higher level of judicial scrutiny will be brought to bear before the actions of the liquidators are approved. However, it is also necessary to point out, that this Court places some reliance on the more participatory process in the dominant Chapter 11 proceedings, and the fact that an Official Unsecured Creditors Committee is constituted which can instruct Bermuda counsel to challenge the actions of the JPLs in this Court, if not, to some extent at least, before the US Court.*

But the primary and overriding consideration of this Court in approving actions taken by a provisional liquidator of an insolvent company is to ensure that the best interests of the general body of unsecured creditors is being served."

43. When Kawaley J advised against a rubber-stamp exercise, he was speaking not only in the broad sense but also in a case involving a cross-border taxation procedure for the approval of the liquidators' fees in the absence of a formed Committee of Inspection. Emphasis is warranted that the learned judge was not referring to the Court's approach to sanctioning a momentous commercial decision proposed by a liquidator.

44. While the Court ought never to be lured by the fast and easy rubber stamp, it must also avoid any inclination to micro-manage the decision-making powers of a liquidator. Liquidators are professional practitioners and officers of the Court who are equipped with an expertise in assessing the viability of commercial measures aimed to rescue a corporate entity from its final breath while meeting the authorized claims of creditors. It is not for the Court to impose itself on a liquidator by acting as a party of equal voting power to that analysis.

45. The Chancery Division of the English High Court in *Re Charnley Davies Ltd* [1990] BCC 605 was concerned with a creditor's petition and complaints that the administrator managed the company's affairs in a manner prejudicial to the creditors' interests. Millet J said [618]:

"*It is to be observed that it is not an absolute duty to obtain the best price that circumstances permit, but only to take reasonable care to do so; and in my judgment that means the best price that circumstances 'as he reasonably perceives them to be' permit. He is not to be made liable because his perception is wrong, unless it is unreasonable*.

An administrator must be a professional insolvency practitioner. A complaint that he has failed to take reasonable care in the sale of the company's assets is, therefore, a complaint of professional negligence and in my judgment the established principles applicable to cases of professional negligence are equally applicable in such a case. It follows that the administrator is to be judged, not by the standards of the most meticulous and conscientious member of his profession, but by those of an ordinary, skilled practitioner. In order to succeed the claimant must establish that the administrator has made an error which a reasonably skilled and careful insolvency practitioner would not have made. None of this was in dispute before me."

46. In *Re Charnley Davies Ltd*, the petitioners complained that the company administrator disposed of the company businesses with undue haste and in accordance with a self-imposed and unreasonable deadline. This is on par with the factual background to the present case, save that in *Re Charnley Davies Ltd* the petitioners' claim was for compensation to the company for what they alleged to be the result of loss due to the administrator's negligence. So the application before the Court was not one in which the petitioners were merely seeking to have the administrator's decision set aside nor was the company in compulsory liquidation. The trial, in which evidence was heard, was an adjudication of a claim of professional negligence.

47. Mr. Williams on behalf of the JPLs invited this Court to be guided by Hart J's well-established approach in *Public Trustee v Cooper* [2001] W.T.L.R. 901. He submitted that this English High Court decision, often cited by chancery law practitioners, would assist this Court in its deliberation on whether or not to sanction a momentous decision to be taken by a liquidator.

Mr. Williams relied on the key passage of Hart J's Ruling explaining the second category of cases in which the Court might be asked to accord its sanction [922]:

> "*The second category is where the issue is whether the proposed course of action is a proper exercise of the trustees' powers where there is no real doubt as to the nature of the trustees' powers and the trustees have decided how they want to exercise them but, because the decision is particularly momentous, the trustees wish to obtain the blessing of the court for the action on which they have resolved and which is within their powers…In such circumstances…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 interests of the beneficiaries."*

48. Mr. Williams recognized that in *Public Trustee v Cooper* Hart J was concerned with the Court's supervisory role in enforcing the duties and powers vested in trustees. On his argument, the subject of an administrator's momentous decision is more or less irrelevant to the question of the Court's sanction. Mr. Robinson, on the other hand, robustly argued that *Public Trustee v Cooper* has no application to a liquidator's approach to making a momentous decision. He argued that the key difference is that a liquidator owes a duty to the general body of unsecured creditors. Boldly, Mr. Robinson further asserted that there is no authority in Bermuda case law which supports the proposition that the principles applicable to a trustee's making of a momentous decision applies to that of a liquidator. However, Mr. Williams pointed to previous Bermuda case law in which Collett, J drew a parallel between trust cases and liquidations when considering the protections afforded to a trustee and a liquidator. In *Re Mentor Insurance Limited Civil Jurisdiction* 1985 No. 228 Collet, J of concurrent jurisdiction said [page 10]:

> "*…as a matter of principle it is right and convenient that the same tests should be applied for the protection of liquidators in compulsory winding-up of companies as is applied for the protection of trustees in bankruptcy. Both are officers of the Court discharging discretionary*

functions of a similar nature for a similar purpose and subject therefore to a degree of control which logically should be applied on similar principles. Nor is there any logical reason for applying different tests for different classes of complaint, as regards what each of them must first establish before the Court will consider the exercise of its jurisdiction under the subsection…"

49. In more recent and persuasive case law, the English High Court in *In re Sova Capital Ltd* (Ch D) [2023] Bus LR 779 endorsed the relevance of *Public Trustee v Cooper* to insolvency cases. Endorsing a broad application to the principles concerning the approval by the Court of a transaction, Miles J agreed that the starting approach was that as stated under the second category of *Public Trustee v Cooper.* This followed the decision of Snowden J in *In re Nortel Networks* (UK) Ltd (Ch D) [2017] Bus LR in which Snowden J said [49]:

"*Although the position of an administrator seeking directions under the Insolvency Act 1986 is not identical to that of a trustee seeking directions under the Trustee Act 1925, most of the same considerations apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. 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 would 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*."

50. In that case, Snowden J cited the decision of Richards J *In re MF Global UK Ltd* (No 5) [2014] Bus LR 1156 where *Public Trustee v Cooper* was applied where the Court was asked to authorize a disputed settlement agreement by which company claims to trust assets for its own clients was to be compromised. Speaking to what the Court held to be the correct approach, Richards J was quoted [paras 45-46] as follows:

"*In commercial matters, administrators are generally expected to exercise their own judgment rather than to rely on the approval or endorsement of the court to their proposed*

course of action: see In Re T &D Industries plc [2000] 1 WLR 646. While the compromise of claims raising difficult legal issues may not be on all fours with a purely business decision, administrators commonly exercise the power of compromise without recourse to the court and in general apply to the court for directions only if there are particular reasons for doing so: see In re Lehman Bros International Europe [2014] BCC 132.

One such "particular reason" which might justify administrators applying to the court for directions in relation to the exercise of the power of compromise can be derived by analogy from the second category of cases in which trustees can seek directions from the court. This was identified by Hart J in Public Trustee v Cooper [2001] WTLR 901, 922-924: "The second category is …""

51. Offering particular assistance on this question of the Court's approach to sanctioning a momentous decision, this Court was referred to Kawaley J's judgment from the Financial Division of the Grand Court of the Cayman Islands in *Re Energicon Holdings (Caymans) (In Official Liquidation)* FSD 273 of 2020 (IKJ). In that case the Court heard objections from Tempest (BVI) (a minority creditor) against two sales proposed by the Joint Official Liquidators ("JOLs"). The sale transactions involved the principal assets of the Company which were to be acquired by one of its minority shareholders but largest creditor.

52. The grounds for the criticism were, *inter alia*, that:

    (i) the sale price was far below the only valuations available and
    (ii) the only beneficiaries of the sale were the JOLs and Tempest PE (the petitioner and majority creditor and minority shareholder).

53. In the absence of sufficient funding for the marketing needed to carry out the public sale proposed by Tempest (BVI), the JOLs accepted the only offer on the table which was from Tempest PE. However, Tempest (BVI) sought to cast doubt on the need for an urgent sale and pushed for the JOLs to allow for an extended period to search for other buyers at a higher bid.

Kawaley J said that this "*seemingly ignored the compelling evidence that PDC was a distressed asset and for its shares to have any value they had to be sold quickly*".

54. In the Ruling of the Court, Kawaley J held [20]:

"*It was common ground that the Court was being asked to sanction two transactions in which the Company was selling its principal assets to its largest creditor, which was also a minority shareholder, at a distressed sale price which would only yield sufficient funds to cover liquidation expenses. Those factors were not, by themselves, grounds for refusing to sanction the transaction. It is a fundamental winding-up principle that liquidation expenses should be paid on a priority basis*…"

Analysis and Decision

55. The Petitioner has opposed the JPLs' application for the Court's sanction of the APA on the grounds that it is oppressive, contrary to the interests of the general body of unsecured creditors and that the APA indicates a failure to demonstrate impartiality on the part of the JPLs. Additionally, the Petitioner argued that JPLs are not empowered to execute the APA because in so doing it would cause the Company to commit a breach of the Facility Agreement as governed by English law.

Whether the APA is oppressive and contrary to the interests of creditors

56. The Petitioner pointed out that the value of the consideration for the sale of MOL and MOSA equates to the total of the JPLs' fees and expenses and the Petitioner's costs of the Petition. This outcome is particularly egregious on the Petitioner's view as it provides no return to any class of creditor. In the written submissions of the Petitioner [19] it is stated:

"*…The Petitioner, which is the largest creditor by some distance, will in fact be in a worse position than any other unsecured creditor. Not only will it receive zero return on the Petition*

debt if the transaction is completed, but it will also be faced with an election, imposed upon it by an agreement between the JPLs and BMK, of which contractual rights it will forgo."

57. The Petitioner highlighted that under the APA additional consideration would be conditionally provided by BMK to cover the precise outstanding sum owed to the Petitioner by way of the funding it provided to the JPLs for the Company's interim operational costs. This refers to the approximated figure of US$2,400,000.00 (principal and interest). At the peak of the oppressive terms of the APA, the Petitioner points to the conditional term that it would be expected to falsely provide a JIN, thereby waiving its rights to seek repayment of US$58,000,000.00 under the Guarantee, in an unequitable exchange for receipt of repayment of the US$2,400,000.00 it provided in funding to the Company. This leaves the Petitioner in an unenviable position because a refusal to provide the JIN will result in the Petitioner forfeiting repayment of the US$2,400,000.00 in circumstances where that repayment will most unlikely be available post-liquidation.

58. Further explaining its grievances, the Petitioner argued on its written submissions [22]:

"*BMK has evidently valued the risk that the Petitioner does not provide a JIN, there is non-compliance with the Escrow Agreement, and that undermines the effectiveness of the sale of the shares at $2.39 million or less. The JPLs have satisfied themselves that they should ignore the protections that were built into the financing provide by the Petitioner and BMK. The entering into the APA implicitly permits BMK to seek to circumvent the requirement for the Petitioner to have executed a JIN (indicating it had had its debt satisfied) and transfer the shares in MOSA and MOL without the escrowed property being released*."

59. In the affidavit evidence of Mr. Stephen Hope, a Managing Member of the General Partner of the Petitioner, the JPLs are criticized for the haste in their decision to dilute the Company's equity interests. Mr. Hope complained that the JPLs have pushed for the closing of the APA without having fully explored whether there are any viable options for maintaining the current capital structure and refinancing the defaulted unsecured debts of the Company. Mr. Hope also envisaged that another better approach would be to eliminate the debt via a revision of the

Company's current capital structure. This could entail a debt for equity swap so that creditors or new lenders might instead acquire equity in the Company while the Company secures interim funding. Mr. Hope proposed a hybrid debt option and equity capital raising.

60. The Petitioner spotlighted the 17 February 2023 Ruling of Hargun CJ (as he then was) when the Court appointed the JPLs in lieu of a winding up order to enable a full evaluation of alternative financing options which would give more advantage to unsecured creditors than a winding up order. The objective was for creditors to see repayment as it was understood that their position in a liquidation would be grim.

61. That said, the decision to sell the Company's assets is not at the be-all and end-all of the controversy. The Petitioner takes issue with the terms of the APA. The Petitioner's case is that the JPLs fell short of negotiating a result in which creditors would receive at least some return on the outstanding debts. The Petitioner feels aggrieved by the prospect of a major shareholder acquiring the entirety of the Company's assets at a real undervalue. On the Petitioner's assessment of the APA on its current terms, BMK would not only have walked away with the Company's assets for a nickel and a dime but it would have also absconded with the benefit of the c.US$60,643,044 infused by the Petitioner into the Company since the Petitioner is expected to provide a JIN, thereby writing off its own claim.

62. While the Petitioner's injury is evident, its losses are also unavoidable on the JPLs' analysis. Similar to the circumstances of the sale in *Re Energicon Holdings (Caymans) (In Official Liquidation),* the shares to be sold under the APA are clearly being sold by the JPLs as distressed assets in need of quick disposal. Mr. Williams argued that the exposure of the shares to the market is conclusive of the sale value of the shares. Mr. Robinson, however, contended that the short timeframe allotted by the JPLs to securing a sale transaction compromised all opportunity to achieve a significantly higher bid. Mr. Robinson underscored the advantageous position of BMK as a major shareholder in completing the due diligence requirements of the sale process. He submitted that this enabled BMK, unlike any other potential purchaser, to meet the stringent deadline for proof of funding. To that end, Mr. Robinson pointed out that

the benefit being conferred on BMK applies only to its capacity as a purchaser of assets rather than an unsecured creditor of the Company.

63. This is strikingly similar to the circumstances of *Re Energicon Holdings (Caymans) (In Official Liquidation)* save that in the present case before me the buyer is both the majority shareholder of the Company and a major creditor. The largest creditor in this case is the Petitioner, Outrider. In *Re Energicon Holdings (Caymans) (In Official Liquidation)* the purchaser, Tempest PE, was a minority shareholder and the largest creditor. However, that distinction is immaterial. Salvaging the remains of the Company's assets is not akin to prioritizing the interests of the shareholders above that of the creditors.

64. In this case, the JPLs have not come before this Court tainted by uncertainty as to the next step forward. They fervently wish to proceed with the APA on their professional view that this is the only commercially viable option available to preserve all that could be rescued of the Company's assets. It is not to be forgotten that the APA follows various unsuccessful attempts for a restructuring. Equally, it is not to be overlooked that the Company's access to funding is finite and flails month to month. This is all evidence which underpins the logic in the decision to sell the Company's business.

65. I have no reason to conclude that an obviously better decision is open to the JPLs to make. The alternative proposals put forth by the Petitioner are broad ideas as to an approach for possible solutions, much of which has already been explored through previous restructuring efforts. This is not a case where the JPLs have ignored more advantageous offers on the table. So, this Court is in no position to find that the JPLs have acted unreasonably in wanting to proceed with the only sale offer which is available to the Company having been exposed to the open market within a timeframe commensurate to the Company's survival period. For that reason, the JPLs have reasonably accepted the only finalized bid. To withhold this Court's sanction would be tantamount to accelerating the Company's journey to what would be an inevitable commercial dead-end. I see no reason why the JPLs should be compelled to gamble and conjure the expense of a second bidding process without any real prospect for a more optimal result. I accept that the APA is the only rescue vessel in sight.

66. The Legislature clearly entrusted the expertise of a liquidator to engage in sale transactions without the pre-approval of the Court. It appears that it is only on account of the Petitioner's hard-fought objections that the JPLs have sensibly brought this issue for the Court's approval. The Court's sanction however is not an expression of the commercial quality of the decision. Rather, it is an agreement that there is no evidence before it to suggest that the JPLs are acting in a way contrary to a competent and reasonably skillful insolvency practitioner.

Whether the JPLs have acted impartially and with bias

67. This Court would be duty bound to intervene if the evidence indeed established that the JPLs are acting in their own individual interests and in so doing acting *mala fide*.

68. The Petitioner alleged that the JPLs, in agreeing to the "oppressive" terms of the APA, have demonstrated an improper motive on their own part. Their bias, says the Petitioner, lies in their focus to secure an outcome in which their fees and expenses would be paid.

69. Under Bermuda statutory law, priority is given under section 232 of the CA to the payment of a liquidator's fees and expenses above all other claims applies in a voluntary liquidation. In more general terms, Rule 23(3) of the Companies (Winding-Up) Rules 1982 (the "Rules") provides that a liquidator's costs, charges and expenses shall be payable out of the company's assets. This is consistent with Rule 140 which provides that the fees and expenses properly incurred by a liquidator in preserving, realizing or getting in the assets shall be paid out of the funds of the company. It is not until after that payment is made that the order of priority is established to make provision for payment of the taxed costs of the petition, the expenses related to the preparation of the company's statement of affairs, the liquidator's disbursements, the costs of any person properly employed by the liquidator and then for payment of the remuneration of the liquidator. The fees and expenses of the liquidation, including the costs of the petition, rank in priority over payments to unsecured creditors.

70. The fact of the matter, is that the Company is insolvent, as is its subsidiary MOSA. The evidence before this Court points to a clear and urgent need for the JPLs to secure immediate

funding in order for the Company to meet its operational needs. This also appears to have been foreshadowed on the terms of the Facility Agreement in which it is expected that the Company would raise money, whether by making itself the subject of a sale or by selling its assets to an investor or by other means so to pay off the debt. In my judgment, there is no fair or reasonable basis for the Petitioner's assertion that the JPLs' claim of urgency is improperly driven by their attention or hope for payment of their own fees. The Company's cash-flow position is undeniably critical.

71. In this case, I have found no merit in the Petitioner's complaints that the JPLs have carried out their duties with any such bias or partiality.

The Petitioner's Complaint on Breach of Contract

72. Mr. Robinson submitted that this Court ought not to sanction the APA without first receiving expert evidence on the English law which governs the position on the contractual effect of the APA on the Facility Agreement and the Escrow Agreement. Mr. Robinson referred to Clause 18.14 of the Funding Agreement which prohibits the Company as the borrower from selling any of its assets unless the disposal is a "Permitted Disposal" (where the Majority Lenders (including the Petitioner) consent) or a "Permitted Transaction" (where the proceeds are sufficient and used to repay the outstanding loans in full). The Petitioner flagged that the APA, not being a Permitted Disposal or a Permitted Transaction, constitutes a breach of the Funding Agreement.

73. Pointing to various provisions of the CA and the Rules, Mr. Robinson argued that the JPLs' statutory powers do not permit them to breach the Company's contractual obligations. Mr. Robinson referred to section 175(e) of the CA where a liquidator is empowered, with the sanction of either the Court or a Committee of Inspection, to make a compromise or arrangement with creditors. The argument made here is that this provision is designed to shield insolvent companies from engaging in unfavourable contracts.

74. Mr. Robinson also directed this Court's attention to section 240 of the CA where a liquidator may disclaim property if leave of the Court is given. Section 240 arises in circumstances where a liquidator forms the opinion that the insolvent company is burdened by ownership of any such property on the grounds of it being unprofitable or unsaleable. The disclaimer is intended to serve as a determination of the rights, interests and liabilities of the insolvent company without prejudice to the rights or liabilities of any other person. It is also open to the Court to impose terms conditional to the granting of leave and to require notices to be issued to persons interested.

75. On the common denominator of these provisions, the Court will be concerned not only with protecting an insolvent company from hemorrhaging its value (pre-winding up) but also with the rights and interests of creditors or persons interested in the company's assets. Thus, the real question to be considered is whether the withholding of the Court's sanction of the APA would enable or increase the Petitioner's chance or that of any class of unsecured creditor for a return on their respective debts. Simply put, with or without the APA, the Petitioner will not receive the return of any portion of the US$60,634,044.00 on the analysis of the JPLs. When exposed to the open market, only BMK was able to make good an offer within the Company's limited timeframe of operational sustainability. In the absence of a speedy disposal of MOL and MOSA, it is far more likely that the value in those assets will be further diluted. In fact, it would have been more advantageous to the Petitioner for the APA to proceed as it gave the Petitioner the option to at least recover monies advanced under the "Outrider Funding Agreement". It is not to be forgotten that those monies served as a lifeline to MOSA against its imminent operational shortfalls. So, there can be no sincere doubt that the Company and its subsidiaries are in real fiscal danger.

76. For these reasons, I find that neither the Petitioner nor any class of creditor is prejudiced by the APA itself nor any technical breach it may impose on the Funding Agreement or the Escrow Agreement.

Whether to make a Winding-Up Order in lieu of sanction of the APA

77. I am now left only to deliberate the Petitioner's submission that a winding up order is the better alternative to the APA and the JPLs' failed restructuring efforts. Broadly speaking and as a matter of principle, an unpaid creditor is entitled to a winding up order as a matter of right where a possibility can be shown that there is the prospect of some benefit to creditors on a winding up order (*Re Demaglass Holdings Ltd* [2001] 7 WLUK 657 [2001] 2 B. C.L.C. 633 and *HKSB v NewOcean Energy* [2022] CA (Bda) 16 Civ).

78. The Petitioner claims that on a winding up order, there is at least the possibility of some return to the unsecured creditors. I am bound to reject this contention. I have not found that the JPLs have departed in any way from their primary duty to preserve, as best as is reasonably possible, the Company's assets until a winding up order is to be made. This entails proceeding with the APA which is a means of securing the most value from the assets of the Company as can be achieved in the circumstances. This has not been without regard to the creditors, even though there is no return available.

79. The reality is that there is no more possibility of a benefit for the creditors on an immediate winding up order than there is on an executed APA. The JPLs' resources in the Company are not only modest but insufficient either way. However, the APA is the only viable opportunity for the JPLs to ensure that the value of the shares owned by the Company are not entirely dissipated. On a winding up order in lieu of the APA, the Company's shares would most likely be rendered valueless.

80. In my judgment, there is no evidence before this Court which would lead to a reasonable conclusion that a winding up order would possibly produce any prospect of benefit to creditors.

Conclusion

81. In these circumstances and for all of the above reasons, this Court confirms its sanction of the APA.

Dated this 2nd day of April 2024

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT