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IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD NO. 189 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF ASCENTRA HOLDINGS, INC. (IN OFFICIAL LIQUIDATION)

Appearances:	Blair Leahy KC, Guy Cowan, Nienke Lillington and Katie Logan of Campbells LLP on behalf of the Joint Official Liquidators of Ascentra Holdings, Inc (in official liquidation)
	Nikki Singla KC, Jessica Williams, Caitlin Murdock and Catie Wang of Harneys on behalf of Shang Peng Gao Ke, Inc. SEZC
Before:	The Hon. Justice David Doyle
Heard:	20 and 21 September 2022
Draft Judgment circulated:	28 October 2022
Judgment delivered:	3 November 2022

HEADNOTE

Jurisdiction of the court to give directions to official liquidators in respect of a sanction application made by them pursuant to section 110 of the Companies Act

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JUDGMENT

Introduction

1. Even before I opened the 28 page skeleton argument of Shang Peng Gao Ke, Inc. SEZC ("SPGK Cayman") dated 14 September 2022 authored by Nikki Singla KC of Wilberforce Chambers, Jessica Williams and Caitlin Murdock of Harneys, I had concerns as to whether the joint official liquidators ("JOLs") of Ascentra Holdings Inc (the "Company"), represented by Blair Leahy KC of Twenty Essex, Guy Cowan, Nienke Lillington and Katie Logan of Campbells LLP, had adopted the correct procedure in respect of the relief they were requesting from the court.

2. Having considered the skeleton arguments and the oral submissions on 20 and 21 September 2022 on various jurisdictional and procedural issues I have concluded that the court had jurisdiction to entertain the summons of the JOLs dated 6 May 2022 and amended on 25 May 2022 pursuant to Grand Court Rules Order 32, rule 2 (3) (the "Amended Summons"). I have further concluded that the JOLs had adopted the correct procedure and that I should exercise my discretion in favour of the JOLs and grant them some relief. I give my reasons for reaching these conclusions as follows.

The Amended Summons

3. The Amended Summons is stated to be pursuant to section 110 (2) of the Companies Act (2022 Revision) (the "Act") and seeks "orders and directions" that "pursuant to paragraph 7 of Part 1 of Schedule 3 of the Act" the JOLs "be authorised" to treat approximately

US$11 million in accounts held at Bank of the West (the "BoW Funds") as unencumbered assets of the Company. Paragraph 2 of the Amended Summons reads as follows:

> "Further, or in the alternative, the JOLs be authorised pursuant to paragraph 1 and/or paragraph 7 of Part II of Schedule 3 of the Act, to take possession of, collect and/or get in the BoW Funds."

4. At paragraph 3 of the Amended Summons the JOLs seek that their costs of and incidental to their Amended Summons shall be paid from the assets of the Company as an expense of the official liquidation.

5. The JOLs say that the Amended Summons "gives rise to a short point of construction, namely whether, pursuant to the terms of [a Deed of Mutual Release dated 5 May 2021], the BoW Funds should be transferred to SPGK Cayman or retained within the liquidation estate." It is common ground that SPGK Cayman is not a creditor or contributory of the Company.

Jurisdictional and procedural issues

6. In his skeleton argument Mr Singla made various complaints in respect of the procedure adopted by the JOLs and submitted that where substantive rights are involved the appropriate way of proceeding is not by way of the JOLs seeking directions from the court but by way of an *inter partes* action with the usual orders for discovery and the giving of evidence. Mr Singla submitted that it was plainly inappropriate for the JOLs to seek to have determined the beneficial ownership of the BoW Funds within the sanction jurisdiction and the Application should accordingly be dismissed. Mr Singla's position

was that formal pleadings, discovery and cross-examination was required for a proper determination of the issues and the matter should proceed by way of an *inter partes* proceeding.

7. Mr Singla did not initially question the jurisdiction of the court. At paragraph 114 of his skeleton he accepted that the JOLs had the right to apply to the court for advice when difficult questions arise and that a sanction application can raise substantive rights of the parties, which the court can go on to resolve. However he stressed that where substantive rights are required to be so resolved, the appropriate way of proceeding is for the court to make directions that the issue proceed by way of taking on the character of an *inter partes* action. Indeed he initially maintained this position in his opening oral submissions:

> "… we are not contending that there are no circumstances, as a matter of jurisdiction, where liquidators can come to this court under section 110 and obtain relief which ultimately or incidentally has the effect of determining rights to property. What we do say is that as the procedure is currently being used, it is a matter of your discretion. It is wrong to use this procedure here, on its face, the very purpose of the summons is to obtain what Your Lordship will recognise as being effectively interpleader-type action, i.e. an action purely to determine proprietary rights to an asset … the sanction jurisdiction has a very useful role derived from the old trust jurisdiction to obtain the court's directions and advice …" (Transcript Day 1, pages 5 and 6).

8. The court having raised questions in respect of its jurisdiction under section 110 of the Act Mr Singla, somewhat opportunistically, changed horses and his closing oral submissions were to the effect that this court did not have jurisdiction under section 110 of the Act. We

will therefore have to consider these jurisdictional and procedural issues in respect of section 110 of the Act in some detail.

Section 110 and Schedule 3 of the Companies Act

9. Under section 110 (1) of the Act it is the function of an official liquidator (a) to collect, realise and distribute the assets of the company to its creditors and, if there is a surplus, to the persons entitled to it; and (b) to report to the company's creditors and contributories upon the affairs of the company and the manner in which it has been wound up.

10. Section 110 (2) of the Act provides that the official liquidator may:

(a) with the sanction of the Court, exercise any of the powers specified in Part 1 of Schedule 3; and

(b) with or without that sanction, exercise any of the general powers specified in Part II of Schedule 3.

11. Under section 110 (3) of the Act it is provided that the "exercise by the liquidator of the powers conferred" by section 110 "is subject to the control of the Court" and provision is made to enable creditors and contributories to "apply to the court with respect to the exercise or proposed exercise of such powers."

12. The Amended Summons refers to paragraph 7 of Part 1 of Schedule 3 to the Act and paragraphs 1 and 7 of Part II of Schedule 3 to the Act.

13. Paragraph 7 of Part 1 of Schedule of the Act provides:

> "Power to deal with all questions in any way relating to or affecting the assets or the winding up of the company, to take any security for the discharge of any such call, debt, liability or claim or to give a complete discharge in respect of it."

14. Paragraph 1 of Part II of Schedule 3 to the Act provides as follows:

> "The power to take possession of, collect and get in the property of the company and for that purpose to take all such proceedings as he considers necessary."

15. Paragraph 7 of Part II of Schedule 3 to the Act provides as follows:

> "The power to do all other things incidental to the exercise of his powers."

Order 11 of the Companies Winding Up Rules, 2018

16. Order 11 of the Companies Winding Up Rules, 2018 concerns what are referred to as "sanction applications". Order 11 rule 1 (2) provides that sanction applications shall be made by summons in CWR Form No 16.

17. Order 11 rule 3 relates to the hearing of sanction applications. Order 11 rule 3 (3) provides that:

> "The Court may direct that, when a sanction application gives rise to an issue in respect of the substantive rights as between the company and any creditor or

contributory or any class thereof, it shall be adjudicated as an *inter partes* proceeding as between shareholders, creditors or any class of shareholders or creditors (as the case may be), for which purposes the court may –

(a) make a representation order; and/or
(b) direct that the official liquidator's role shall be limited in such way as The (sic) Court thinks fit; or
(c) direct that the official liquidator shall take no further part in the proceeding."

Section 129 of the Act

18. Section 129 (1) of the Act headed "Reference of questions to Court" provides:

"The voluntary liquidator or any contributory may apply to the Court to determine any question arising in the voluntary winding up of a company or to exercise, as respects the enforcing of any calls or any other matter, all or any of the powers which the Court might exercise if the company were being wound up under the supervision of the Court."

19. Section 129 (2) of the Act provides:

"The Court, if satisfied that the determination of the question or the required exercise of power will be just and beneficial, may accede wholly or partly to the application on such terms and conditions as it think fit, or make such other order on the application as it thinks just."

20. Section 129 of the Act only applies to voluntary liquidators and contributories. It does not apply to official liquidators. It is common ground between the parties that there is no equivalent section for official liquidators, although Ms Leahy submits that section 110 is treated locally as enabling the court to give directions to JOLs in respect of issues arising during the course of liquidations.

Section 138 of the Act

21. For the sake of completeness I should also refer to section 138 of the Act a provision referred to by Ms Leahy in her oral submissions when she produced an English authority (*Re London Iron and Steel Co Ltd* [1990] BCLC 372; discovered by Mr Cowan within the JOLs' team of lawyers) which Ms Leahy optimistically referred to as the JOLs' "silver bullet" – a simple solution to a complicated jurisdictional problem. Mr Singla put it in the category of an unhelpful "lead bullet" and submitted in effect that it simply confirmed that by seeking to proceed by way of the Amended Summons the JOLs had adopted the wrong procedure.

22. Section 138 (1) of the Act (not referred to in the Amended Summons) provides:

> "Where any person has in his possession any property or documents to which the company appears to be entitled, the Court may require that person to pay, transfer or deliver such property or documents to the entitled liquidator."

23. Section 138 (2) of the Act provides that where the official liquidator seizes or disposes of any property which he reasonably believed belonged to the company, he shall not be

personally liable for any loss or damage caused to its true owner except in so far as such losses or damage is caused by his own negligence.

Section 48 Trusts Act (2021 Revision)

24. It may also be helpful, as in my consideration of the authorities I refer to some of the relevant trust cases by way of analogy, I set out the provision of the Trusts Act which enables trustees to seek directions from the court. Section 48 of the Trusts Act (2021 Revision) provides:

> "Application to the Court for advice and directions
>
> 48. Any trustee or personal representative shall be at liberty, without the institution of suit, to apply to the Court for an opinion, advice or direction on any question respecting the management or administration of the trust money or the assets of any testator or intestate, such application to be served upon, or the hearing thereof to be attended by, all persons interested in such application, or such of them as the Court shall think expedient; and the trustee or personal representative acting upon the opinion, advice or direction given by the Court shall be deemed, so far as regards that person's own responsibility, to have discharged that person's duty as such trustee or personal representative in the subject matter of the said application: Provided, that this shall not indemnify any trustee or personal representative in respect of any act done in accordance with such opinion, advice or direction as aforesaid, if such trustee or personal representative shall have been found to have committed any fraud, wilful concealment or misrepresentation in obtaining such

opinion, advice or direction, and the costs of such application as aforesaid shall be in the discretion of the Court."

25. It can be seen that sections 110 and 129 of the Act contain no equivalent express statutory indemnity to that contained in section 48 of the Trusts Act (2021 Revision).

Some authorities

26. Other than reference to legislative provisions the JOLs in their skeleton argument referred to no authorities on the procedural and jurisdictional issues. SPGK Cayman in its skeleton argument referred to:

(1) *In the matter of DD Growth Premium 2X Fund* 2013 (2) CILR 361 ("*DD Growth Premium*");

(2) *In the matter of Re Belmont Asset Based Lending Limited* 2011 (2) CILR 484 ("*Belmont Asset*");

(3) *Emergent Capital Limited* 2012 (1) CILR 12 ("*Emergent Capital*"); and

(4) *Traianedes in his capacity as Deed Administrator of Mercury Brands Group Pty Ltd* [2010] FCA 1140 (Federal Court of Australia) ("*Traianedes*").

I now turn to a review of these authorities.

DD Growth Premium

27. Smellie CJ in *DD Growth Premium* at paragraph 30 set out the general legal principles applying to the sanction of the exercise of a liquidator's powers in the context of the proposed entering of a funding amendment agreement and a conditional fee agreement as follows:

(1) the decision whether to sanction the exercise of a power falling within Part 1 of the Third Schedule is a decision of the court (*Re Greenhaven Motors Ltd* [1999] BCC 463; [1999] 1 BCLC 635);

(2) in exercising its discretion as to sanction, the court must consider all the relevant evidence;

(3) the court must consider whether the proposed transaction is in the commercial best interests of the company, reflected *prima facie* by the commercial judgment of the liquidator (*Re Edennote Ltd (No 2)* [1997] 2 BCLC 89);

(4) the court should give the liquidators' views considerable weight unless the evidence reveals substantial reasons for not doing so;

(5) the liquidator is usually in the best position to take an informed and objective view;

(6) unless the court is satisfied that, if the Fund is not permitted to enter the compromise in question, there will be better terms or some other deal on offer the choice is between the proposed deal and no deal at all.

I appreciate that the context of *DD Growth Premium* was very different to the context of the case presently before me.

28. In *Income Collecting 1 – 3 Months T-Bills Mutual Fund (in official liquidation)* in a judgment delivered on 21 January 2022 I briefly touched upon section 110 of the Act and the relevant law in respect of sanction applications generally and made reference to *Edennote*.

29. Jones J in *UCF Fund Limited* 2011 (1) CILR 305 considered section 110 (2) of the Act in further detail and stressed that JOLs should not seek "blanket authorisation" to exercise the statutory powers. JOLs needed to file evidence to justify specific powers in the particular circumstances of the case. Jones J at page 309 stated that the purpose of section 110 (2) of the Act was "to subject official liquidators to the general supervisory jurisdiction of the court", adding:

> "In respect of the Part 1 powers, the onus is on the official liquidator to make a sanction application in every case, whether or not the exercise of the power is controversial. In respect of Part II powers, the onus is on the creditors or contributories to make a sanction application if they disapprove of the way in which the official liquidator has exercised or intends to exercise the powers."

30. See also Smellie CJ's ruling in *Premier Assurance Group* (FSD unreported judgment 26 April 2022) for sanction of a liquidator's decision to treat mistaken payments as held on constructive trust and repaid accordingly.

Belmont Asset

31. Jones J in *Belmont Asset* further explored the nature of the court's sanction jurisdiction. In that case Bear Stearns claimed to be an ordinary secured creditor of the company. On legal advice the JOLs in that case concluded that Bear Stearns should be admitted to proof as an ordinary unsecured creditor but did not in fact follow this advice. Instead, they made a sanction application by which they sought the direction of the court that Bear Stearns be admitted to proof. In response three shareholders issued a summons for directions and argued that the JOLs should take no further part in the proceeding. At the hearing the three shareholders were supported by another three shareholders (the "Six Shareholders"). The Six Shareholders submitted that the JOLs should have either adjudicated the proof or adopted a neutral position and made a sanction application. The Grand Court made an order for directions that the sanction application be treated as an application by Bear Stearns against Finter Bank Zurich Ltd (one of the Six Shareholders which agreed to act in a representative capacity on behalf of all six) whether to determine upon the true construction of an option agreement, Bear Stearns was a creditor for approximately US$60 million and that the JOLs take no further part in the application or alternatively for leave to appeal to the Court of Appeal.

32. Jones J held that when a sanction application took on the character of an *inter partes* action between stakeholders in which substantive rights against the company would be determined, the court could authorise or direct that the JOLs take no further part in the proceedings in order to avoid incurring unnecessary expense. Though the court was not persuaded that the JOLs' continued participation in the application would serve any useful purpose, the direction that the JOLs take no further part in the sanction application was unnecessarily prescriptive. The court would vary it to provide that the JOLs were

authorised to take no further part in the application, but if they participated, they would do so at their own risk as to costs. No leave to appeal would have been given as the case raised a pure liquidation case management issue and no point of principle which ought to be considered by the Court of Appeal. It is clear from the judgment of Jones J (see for example paragraph 9) that the judge had been told that there was no dispute about the underlying facts or quantum and he directed that the parties should prepare an agreed statement of facts. It is also clear from the judgment (see paragraph 16) that the issue in that case was "a pure point of law which will be decided upon an agreed statement of facts, based upon documentary evidence which has already been put before the court by the JOLs, counsel instructed by Finter should be perfectly capable of putting the contrary argument against treating Bear Stearns as an ordinary unsecured creditor. In reality there is nothing more for the JOLs to do …."

33. At paragraph 12 on page 491 the following comments of Jones J are recorded:

> "In the ordinary case the purpose of a sanction application is to provide the liquidator with guidance (which may be permissive or prescriptive) and to protect him against a claim for breach of duty. However a sanction application may raise substantive issues in which case the court can go on and resolve substantive rights, thus making it unnecessary for a separate action to be commenced by or against the company."

34. Jones J then referred to *Traianedes* and *Emergent Capital,* which I shall consider later in this judgment. Jones J at paragraph 13 added:

> "When a sanction application takes on the character of an *inter partes* action, it is open to the court to authorise or direct that the official liquidators take no further part in the proceedings which they have commenced. The purpose of giving such a direction is to avoid incurring unnecessary expense …"

35. At paragraph 15 Jones J referred to the liquidation process and the liquidator's role "which is to collect and realise the assets and then distribute them in accordance with the statutory scheme."

Emergent Capital

36. Jones J in *Emergent Capital* considered further the nature of a sanction application. At paragraph 3 he referred to the procedural history and the fact that the official liquidators had made a sanction application for directions in respect of a dispute about the respective shareholdings of the company's only two shareholders, namely KTC and RAAL. Jones J had made an order the effect of which was that the sanction application would take on the character of an *inter partes* action between KTC (as applicant) and RAAL (as respondent) by which their substantive rights against the company would be determined. Jones J directed the service of pleadings and the exchange of witness statements as if the matter was an action commenced by writ. Jones J at paragraph 3 also records that the trial lasted five days and "was conducted in exactly the way in which it would have been had the originating process been a writ issued by KTC, as opposed to a sanction application issued by the official liquidators."

37. Jones J at paragraph 6 stated that sanction applications "made by official liquidators or stakeholders, are the mechanism whereby the court gives directions (which may be

permissive or prescriptive) about the way in which the official liquidators should exercise or refrain from exercising their powers in the interests of all the creditors or shareholders as the case maybe. The directions resulting from a sanction application take effect for the benefit of the estate as a whole …"

38. At paragraph 8 Jones J added:

> "As a matter of procedure and as a matter of form, the application was a sanction application. In substance it was not. In substance, the order for directions had the effect of converting it into an *inter partes* action between KTC as applicant and RAAL as respondent. They are the only parties with an interest. The official liquidators took no part in the application."

39. Jones J at paragraph 9, refers to his directions "that a sanction application should be treated as an *inter partes* action between the only two shareholders. In my judgment the proposition that I erred in principle in adopting this course is quite simply unarguable."

Traianedes

40. Finklestein J sitting in the Federal Court of Australia in *Traianedes* in his concise and impressive reasons for judgment delivered on 21 October 2010 in Melbourne dealt with directions under section 447D of the Corporations Act 2001 and at paragraph 6 stated:

> "Generally speaking, a power to give directions does not involve making orders that either bind, or affect the rights of, third parties: *Re GB Nathan & Co Pty Ltd (In liquidation)* 1991 24 NSWLR 674. The principal purpose for giving directions

to an administrator is so that he/she can obtain protection from liability in respect of what he/she does in accordance with the direction."

41. At paragraph 8 Finkelstein J stated:

> "So far I have been speaking of an ordinary application for directions. Often, however, proceedings commenced for purposes of obtaining a direction will raise substantive issues. In that circumstance, it is common for the court, provided the necessary parties have been joined, to go on and resolve substantive rights, thus making it unnecessary for the administrator to begin a separate action: *Re GB Nathan* at 680. This is a case where proceedings for directions have been transformed into a suit inter-partes".

42. Finkelstein J, who was in effect considering an application to adduce additional evidence, at paragraph 9 stated:

> "When an application for directions takes on the character of a suit between parties and raises for determination a dispute concerning claimed rights or the commission of alleged wrongs, the application brings with it the usual rules of civil practice and procedure. According to those rules there are only limited circumstances in which additional evidence can be led in the hope of producing a different outcome".

Polarcus

43. Amongst the supplementary case law filed late by the JOLs on 16 September 2022 is *Polarcus Limited (in official liquidation)* a judgment of Kawaley J dated 6 July 2022 in respect of a matter decided on the papers.

44. Kawaley J in *Polarcus* considered an application by JOLs for a declaration that, as a matter of Cayman Islands law, the company, acting by its JOLs was authorised to acquire quotas pursuant to a quota purchase agreement to be entered into by the company and to authorise the JOLs to incorporate a special purpose vehicle for the purpose of acquiring the quota. It is clear from paragraph 2 of the judgment that the need for the JOLs' powers to be confirmed only arose because the acquisition limb of a larger transaction involving the disposition of assets required regulatory approval from a jurisdiction unfamiliar with the local insolvency law regime. Kawaley J also confirmed that the court possessed the jurisdiction to grant declaratory relief within winding up proceedings. Kawaley J referred to section 110 of the Act and at paragraph 7 stated:

> "The liquidators powers, defined in Schedule 3, and derived from the Companies Act 1948 (UK), are correspondingly broad as well and include carrying on the Company's business so far as may be necessary and broad powers to compromise claims which may be asserted against the Company by creditors and claims the Company may have against its debtors."

45. Kawaley J at paragraph 15 referred to section 129(1) of the Act and the ability of a voluntary liquidator to apply to the court to determine any question arising in the voluntary winding up. Kawaley J at paragraph 16 stated:

> "Official liquidators, creditors and/or contributories are entitled to have the court determine whether the proposed exercise of a liquidator's powers is legally permissible or not. Most applications for directions made by official liquidators are made *ex parte*, as occurred in the present case. Sometimes the Court is asked to declare that the power to enter a transaction exists. On other occasions the Court may be asked to declare, as between the Company and the stakeholder, what the correct legal position is in relation to, for instance, the terms upon which a distribution are made."

46. Kawaley J at paragraph 17 referred to two examples where an applicant "seeks directions which are in substance declarations as to the rights of the company and its creditors or contributories." In *Re Ascot Fund* (FSD unreported judgment 11 January 2021) Kawaley J considered an application by liquidators for "directions" in relation to the proposed basis of a distribution. Facts were agreed and the issues in dispute were argued by counsel for the joint official liquidators and counsel for a representative party. Kawaley J stated "In substance, this was an *inter partes* determination of the rights of the parties and the Court granted declaratory relief in relation to the disputed legal issues." Kawaley J in *Polarcus* also referred to Segal J's judgment in *Re Direct Lending Income Feeder Fund Inc* (FSD unreported judgment 9 May 2022). At paragraph 10 Segal J noted that there was in the Cayman Islands "no explicit power to seek directions as there is in the UK Insolvency Act 1986 (see section 112(1)…), an application for an order seeking sanction for the exercise of (and permission to exercise) their powers is, as a matter of practice, referred to as an application for directions in this jurisdiction."

47. It may be useful to set out section 112 (1) headed "Reference of questions to court" which reads:

> "The liquidator or any contributory or creditor may apply to the court to determine any question arising in the winding up of a company, or to exercise, as respects the enforcing of calls or any other matter, all or any of the powers which the court might exercise if the company was being wound up by the court."

48. On the first day of the hearing I referred to a number of other authorities which I thought may shed some light on the jurisdictional and procedural issue before the court. Just before the luncheon adjournment on Day 2, the JOLs produced a supplemental authorities bundle containing these authorities and some additional authorities. I now refer to some of these authorities and also an authority from Guernsey which before the luncheon adjournment on Day 2, I also referred to counsel for consideration.

Re Exchange Securities

49. Mervyn Davies J sitting in the Chancery Division of the High Court of England and Wales in *Re Exchange Securities & Commodities Ltd and others* [1983] BCLC 186 dealt with ten applications for leave pursuant to section 231 of the Companies Act 1948 to commence proceedings against each relevant company notwithstanding the appointment of provisional liquidators of the companies. The applications were made on the footing that those who had invested the money were not mere creditors in the windings up but rather beneficiaries under trusts. As and when a sum was handed over for investment, it was, it was said, impressed with a trust so that in the course of the liquidation an investor or beneficiary was entitled to trace his money into the funds now held by the liquidator. The

judge was not asked to decide any questions relating to the trusts at the hearing for leave before him. Mervyn Davies J at page 192 stated:

> "It is no part of my duty to say now whether or not there subsists such trust interests as counsel for the applicants (Mr Stewart) contends for. If it were plain to me that such interests did not subsist I should say so and that would be an end of the application, but such is not plain to me. There is I think an arguable case about the nature of the investors' or plaintiffs' rights. It follows that I should consider further whether or not to accede to the application. If I do, then all questions about the nature of the investors' rights will be answered in the litigation that will ensue."

50. In that case Mr Heslop for the respondents adopted some words in *Buckley on the Companies Acts* (14th edn, 1981) Vol 1, p 580 as follows:

> "But, in general, leave to institute or proceed with an action will only be given where some question arises which cannot be properly determined in the winding up and for the determination of which an action is requisite."

51. From that footing Mr Heslop said that everything the proposed plaintiffs sought in their proposed action would be offered to them by the liquidator in the course of the liquidation. The argument ran as follows: Section 246 (3) enables a liquidator to apply to the court for directions. The provisional liquidator would make use of that sub-section to determine what trust interests, if any, subsist. The respondents to the summons would be representatives of various classes of investors and a representative of the general creditors and the liquidator's neutrality would be preserved. Advantages in relying on the ordinary liquidation machinery in this way were (a) that all proceedings would be in one court, (b)

that the liquidator could see that all competing claimants were found and (c) that the laborious working out of a Chancery writ action would be avoided. Mr Stewart (for the applicants) said that his proposed proceedings might be commenced by originating summons. Mervyn Davies J was plainly persuaded by Mr Heslop's pragmatic submissions as he concluded at page 195:

> "My decision is that the companies are not to be at liberty to commence the proposed proceedings… I must do what is right and fair in the circumstances… It seems right and fair to me, in the circumstances of this case, not to allow the action. The approach should be, I think, that leave should be refused under s231 if the action proposed raises issues which can be conveniently decided in the course of the winding up. It seems plain to me that the issues which would be discussed in the proposed Chancery action can perfectly well be decided in the ordinary course of the liquidation. Now the liquidator is aware of the trust claims and, moreover, has by his counsel undertaken to put before the court in a neutral fashion the issue whether or not the various classes of investors have trust issues, it seems to me quite unnecessary to allow a separate action to decide these issues. I add that there seems to me to be positive benefit in having the issues decided in the liquidation because the procedure should be quicker and less expensive than writ or originating summons proceedings."

The judge was also concerned at page 196 that "nothing could be more calculated to make more for delay in the liquidation and add to the expense than to have the liquidator dealing not merely with the difficulties of the liquidation but also having to defend the action desired by investors."

London Iron and Steel

52. Warner J in *Re London Iron and Steel Co Ltd* [1990] BCLC 372 considered the court's jurisdiction under section 234 (2) of the Insolvency Act 1986 which is in similar format to section 138 of the Act. The concise and accurate headnote to the report of that case reads:

> "The court has jurisdiction under s234 (2) of the Insolvency Act 1986 to order property to be handed over to the office-holder designated in s234 (1) of that Act even though there is a dispute as to its ownership."

53. In that case, an application by joint administrative receivers appointed by a debenture holder for an order that the respondents surrender to the receivers possession of some motor cars, including "Rolls Royces and Mercedeses", came before the court in October 1989 and directions were given about evidence and a number of affidavits were sworn. The hearing was in November 1989 and on that occasion a preliminary point was taken by Mr Nugee (counsel for the respondents) that the procedure under section 234 was inappropriate where there was a genuine dispute about the company's entitlement to the property in question. In such a case counsel contended that the office-holder must bring proceedings by writ to have the dispute resolved. Mr Registrar Scott decided the question against the respondents and they appealed to Warner J.

54. Warner J reviewed two previous cases and four textbooks and in effect held that the dispute could be decided within the context of section 234. Warner J at page 376 added:

> "Counsel for the respondents did not suggest that his clients would suffer, or might suffer, any prejudice or injustice because of the adoption by the receivers of this form of procedure."

55. Warner J referred to the relevant procedural rules for pleadings, discovery and interrogatories and cross-examination including other directions provided for in Part 7 of the Insolvency Rules of England and Wales and added:

> "So that, if I were to allow this appeal and reverse the decision of Mr Registrar Scott, the only result would be additional delay and costs."

Sealey & Milman

56. Counsel helpfully brought to my attention *Sealy & Milman: Annotated Guide to the Insolvency Legislation 2020* (23rd edition) which includes the following notes under section 234:

> "Under earlier provisions corresponding to the present section, the courts had held that its procedure was not appropriate to determine questions of disputed ownership, but in *Re London Iron & Steel Co Ltd* [1990] B.C.C. 159 Warner J held that the words "to which the company appears to be entitled", coupled with the comprehensive rules laid down in IR 2016 Pt 12 are of sufficient scope to enable the court to settle such matters; and it now seems that the courts entertain such questions as a matter of course …"

57. The authors refer to numerous examples including the relatively recent case of *Conn v Ezair* [2019] EWHC 1722 (Ch). In that case (which was heard on 17, 18 and 19 June 2019) His Honour Judge Halliwell sitting as a judge of the High Court of England and Wales in a judgment delivered on 4 July 2019 considered an application by joint administrators for an order under section 234(2) requiring the respondent to transfer to them registered title to six properties. The application raised issues as to the nature of a sub-purchaser's rights in respect of registered land and the operation of the equitable doctrine of conversion and proprietary estoppel. Witnesses were called to give evidence but were not cross-examined at length. In that case the respondent had made an admission to the effect that following a 2003 Agreement the company steps into the shoes of NEL and Mr Ezair held the properties on trust for the company. Mr Ezair sought to modify or resile from the admission and the judge declined to give him permission to do so, commenting at paragraph 34 that: "Mr Ezair can be taken to have a clear understanding of the concept of a beneficial ownership and trusts. When stating that he held "ownership on trust for the Company", he can be taken to have accepted that, whilst the legal title was vested formally in his name, the Properties would be held for and on behalf of the Company."

58. At paragraph 89 the judge referred to relief under section 234 being discretionary. Counsel for the respondent (Mr Lander) had submitted that relief should be declined for a number of reasons namely:

(1) Section 234 was manifestly inappropriate for the present case on the basis that it amounts to a summary jurisdiction designed for use in simple and straightforward cases. In more difficult or complex cases, office holders can generally be expected to issue proceedings by way of ordinary action, in the name of the company. They can be expected to bring such claims under CPR Part 7. In addition to paying the standard

court fees for such a claim, they will be expected to file statements of case and comply with the procedure governing case management and disclosure. They can also be met with an application for security for costs;

(2) In view of the fact that section 234 does not confer jurisdiction on the Court to entertain pecuniary claims or claims to an account and damages, the court is being invited in the present case to deal in isolation with the issues of title. It is thus unable to see the dispute in its full perspective. Moreover, there is likely to be wasteful duplication of time if and when the court considers any application on the part of the Company for an account of the rents due;

(3) More seriously, Mr Lander submitted that Mr Ezair, as a trustee is entitled to be indemnified out of the trust assets in respect of his expenses and he is entitled to a lien over the properties in respect of the same. If an order is made for the transfer of the properties Mr Ezair will be deprived of his lien.

59. Although recognising some substance in each of these submissions the first instance judge was not persuaded that it would be inappropriate for him to grant the relief requested. Judge Halliwell provided his reasons as follows:

(1) the proceedings were issued as long ago as November 2017. Since then the court had made directions for disclosure, delivery of witness statements and the determination of the preliminary issue in relation to the administrators' entitlement to relief. By consent in November 2018 the court made a series of directions providing, *inter alia*, for the case to be referred to trial with an estimated duration of four days. Had it been

envisaged the administrators have adopted the wrong procedure, the issue should have been addressed at the formative stage of the proceedings;

(2) it had been fully understood since the hearing before HHJ Eyre QC on 9 July 2018, if not before, that the issue of title in these proceedings will have to be heard separately from the parties' respective claims for pecuniary relief. Whilst it is true that this will involve separate judicial determinations on overlapping issues and a certain amount of duplication of costs and expense, there is no logical reason why they cannot be heard separately. If the relief was declined, the title issues will have to be re-visited on a future occasion and further costs consumed in doing so;

(3) Mr Ezair has adduced evidence in relation to some of his outgoings on the properties but he has also been in receipt of the rents which he has failed to account for and which likely exceed the indemnity;

(4) it is now some 20 months since the company was placed in administration. Mr Ezair holds the properties on trust for the company and the administrators seek to realise the properties as part of their statutory function. The judge could see no good reason to decline to make an order providing for the properties to be transferred to the administrators immediately so that they can be realised in the proper course of the administration.

Marley

60. Lord Oliver delivering the judgment of the Board of the Judicial Committee of the Privy Council in *Marley v Mutual Security Merchant Bank and Trust Co Ltd* [1991] 3 ALL ER

198 considered issues arising in respect of the estate of Robert (Bob) Nesta Marley deceased. In that case the court at first instance had approved a conditional contract for the sale of the principal assets of the estate including "the Cayman Music Inc catalogue" and the Court of Appeal of Jamaica had in substance dismissed the appellant's appeals. The relief had been opposed by the widow and 11 children. Lord Oliver at page 201 stated what he described as "two general propositions" without citing any authority in support of such propositions. Firstly where a trustee applies to the court for directions and surrenders his discretion to the court, full and proper information must be provided and:

> "Secondly, it should be borne in mind that in exercising its jurisdiction to give directions on a trustee's application the court is essentially engaged solely in determining what ought to be done in the best interests of the trust estate and not in determining the rights of adversarial parties. That is not always easy, particularly where, as in this case, the application has been conducted as if it were hostile litigation …"

Macedonian Orthodox Community Church

61. In *Macedonian Orthodox Community Church St Petka Incorporated v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* [2008] HCA 42 the High Court of Australia, that jurisdiction's final court of appeal, considered the court's jurisdiction and discretion under section 63 of the Trustee Act 1925 (NSW) which enabled a trustee to apply to the court for an opinion advice or direction on any question respecting the management or administration of the trust property, or respecting the interpretation of the trust instrument. In a densely reasoned judgment Gummow ACJ, Kirby, Hayne and Heydon JJ commented at paragraph 56 that there was

nothing in section 63 which limited its application to "non-adversarial" proceedings. The senior Australian judges considered *Marley* at paragraph 104 and stated:

> "105. While accepting that it was not beyond power to give judicial advice that determined substantive rights in contested proceedings, the Court of Appeal appeared to think that it was so powerful a discretionary factor that generally this should not be done, and that this was decisive in the present case. The Attorney-General argued that the Privy Council in *Marley's* case was not establishing a dichotomy, as the Court of Appeal appears to have thought, between ascertaining the best interests of the trust on the one hand and not determining adversarial rights on the other, the former function being permissible and the latter not. Rather the Privy Council was concerned to make the point that the court's sole purpose in giving judicial advice is to determine what ought to be done in the best interests of the trust estate, and that while it was not the court's purpose to determine the rights of adversaries, that could be done as a necessary incident of determining what course ought to be followed in the best interests of the trust estate.
>
> 106. In the present context, that conclusion would appear to be supported by s63(3)-(4) of the Act, which contemplate the use of evidence in some cases, by the notice procedures in s 63(4) and (8)-(10), and by the possibility of appeal contemplated by s 63(11) – all steps which could be material if there were a risk that the judicial advice given might affect the rights of adversaries. That is, while the time and cost involved in giving judicial advice at an early stage of litigation, when the issues involved in disputes about rights may not be fully sharpened and it may not be possible for the

factual position to be as efficiently exposed as in a trial, may be factors relevant to a decision not to grant judicial advice but to let the matter be examined in conventional litigation, they are not factors which either automatically bar judicial advice or are so weighty as generally to compel the court not to grant the advice. If they were, the consequence would be that advice would either never, or only very exceptionally, be given on the issue whether trustees should defend proceedings instituted against them for breach of trust. Nothing in the language of s 63 suggests this outcome.

107. Further, some forms of advice about adversarial cases may be in the best interests of the trust estate. An approach that treats an adversarial character as being always, or at least very often, fatal to the success of a judicial advice application, contradicts what the Privy Council saw as the sole function of the court…"

At paragraph 125 the judges concluded that:

"Palmer J only determined the rights of adversarial parties to the limited extent necessary to ensure the protection of the best interests of the trust estate."

Mento Developments

62. *Macedonian Orthodox Community Church* was applied in *Mento Developments (Aust) Pty Ltd (in liq) v Wixart Pty Ltd* [2009] VSC 343 by Robson J sitting in the Commercial Court of the Supreme Court of Victoria at Melbourne. In that case Robson J considered section

479 (3) of the Corporations Act 2001 (comparable to s447 D) which provided that a liquidator may apply to the court for directions in relation to "any particular matter arising under the winding up". Wixart submitted that the function of a liquidator's summons for directions is to give him advice as to his proper course of action in the liquidation; it is not to determine the rights and liabilities arising from the company's transactions before the liquidation. The liquidator submitted that there was sufficient flexibility in the procedures of the Court to convert an application for directions into proceedings for the determination of substantive rights.

63. Robson J at paragraph 49 set out his views. In his view:

> "(1) The liquidator is entitled to seek directions on his administration of the winding up even though the issue about which he seeks a direction may be or become an adversarial issue in other proceedings.
>
> (2) The direction or advice is to be directed to advising the liquidator on whether or not he or she is justified in conducting the winding up in a certain way and not deciding disputes between competing parties.
>
> (3) The direction or advice should not seek to resolve an issue between competing parties but the fact that the advice may tend to foreclose an issue in other disputed proceedings is not of special significance in the court exercising its discretion to give private advice to the liquidator.

(4) Where a liquidator seeks advice on an issue which may be contested between competing parties, the court should be alert to not going further than is necessary to give the advice sought …"

McPherson

64. The Australian publication McPherson *Law of Company Liquidation* 3rd edition chapter 9 "Right to Assistance and Advice" at paragraph 9-049 (footnotes omitted) states:

> "While courts have generally said that they are unable to bind other parties, they have made orders declaratory of substantive rights and intended to be binding on parties to the proceedings where the proceedings have commenced as a liquidator's application for directions. It has been said that court procedures are sufficiently flexible to enable directions' proceedings to be changed to permit determination of substantive rights. The caveat expressed by McLelland J should be noted, namely that such a fundamental change in the nature of the proceedings should not be allowed unless the court is satisfied that the persons affected consent to this action."

These comments are repeated at paragraph 9-047 of the fourth edition.

CanArgo

65. In *CanArgo Limited (in liquidation)* [2020] GRC 064 Lt Bailiff Hazel Marshall KC sitting in the Royal Court of Guernsey set out the law in detail concerning applications by liquidators in compulsory liquidations seeking assistance from the courts. The Lieutenant Bailiff referred to the "extremely broadly drafted" section 426 of the Companies

(Guernsey) Law 2008 which provided that a liquidator of a company may seek the court's directions in relation to any matter arising in relation to the winding up of the company and upon such an application the court may make such order as it thinks fit. The Guernsey judge felt that there were two limitations. Firstly, it is envisaged that "directions" be given rather than "orders" being made and secondly, it is aimed at "assisting the liquidator to conduct the liquidation" (paragraph 43). The judge at paragraph 46 stated that section 426 contemplated there being "directions" regarding the future course of the conduct of the liquidation and "whether the liquidators can or cannot, or should or should not, do something (and possibly, what) in the future. It would therefore have been within the scope of the section for the liquidators to bring a draft of the [Conditional Asset Purchase Agreement] before the court and to ask for the court's direction as to whether they should follow their inclination to execute it."

66. The judge also at paragraph 46 added:

> "In any event, though, it also appears to me that as the Joint Liquidators are appointed by the court order, the court would have an inherent jurisdiction to direct and assist its officers in the performance of their duties."

67. At paragraph 50 the judge had difficulty in envisaging any situation in which the court would ever be likely to accept the surrender of a liquidator's discretion adding:

> "What the court will do, rather, is to assist the liquidator in carrying out his functions, by giving him directions as to the appropriate *process* to follow in order to enable him to make the decision himself, and provide him with the comfort that, if he follows the court's directions, he will be protected from subsequent attack or

> criticism by any aggrieved person. Of course, in the course of carrying out this function, the court can, if necessary or appropriate in the particular circumstances (and always with any appropriate parties joined) make determinations of fact or right or legal principle, but this will be as part of the function of assisting the liquidator to discharge his own functions as liquidator. The objective of s426 is to assist the liquidator to make liquidation decisions, and not for the court to take over the conduct of the liquidation."

68. The judge at paragraph 52 referred to the analogy with trust cases where trustees seek the blessing of the court to a decision and at paragraph 55 felt that the court's powers in trustee cases provide "a helpful guide to the proper scope of the court's function when its powers of assistance are invoked by such an office-holder. In a company administration or liquidation context, the court's powers will therefore include power to "bless" a decision of a liquidator or administrator in a similar way to the power available in a trust context."

69. At paragraph 138(3) the judge stated:

> "… if it is sought to bind any party to the result of the application, that party will need to be convened and heard on the matter."

70. At paragraph 138 (4) the judge added:

> "The court's "blessing" simply provides the office-holder with a judicial determination that, *on the evidence put before the court at the relevant time*, (this is to be emphasised) the decision which he took was a proper decision because it was taken in a proper way, and within the general bounds of what could be a

reasonable decision in the circumstances … As regards any party to the application, it will create a *res judicata* on the relevant facts."

Conclusion on jurisdictional issue

71. I note that at first instance Segal J in *Direct Lending Income* (FSD unreported judgment 9 May 2022) accepted that there was no explicit power to seek directions but stated at paragraph 10 (e) that "an application for an order seeking sanction for the exercise of (and permission to exercise) their powers is, as a matter of practice, referred to as an application for directions in this jurisdiction." Segal J at paragraph 10 (h) added:

> "sanction applications seeking directions regarding the manner in which official liquidators are to exercise their powers and conduct the liquidation and which determine the rights of creditors or contributories in the liquidation are not uncommon. But they do need to be properly structured and prepared …"

72. I also note, again at first instance, Kawaley J in *Polarcus* held that the Grand Court did have jurisdiction to grant declaratory relief in a winding-up proceeding. At paragraph 16 adding:

> "Official liquidators, creditors and/or contributories are entitled to have the Court determine whether the proposed exercise of a liquidator's powers is legally permissible or not."

73. Ms Leahy helpfully brought my attention to *Alibaba.com Limited* 2012 (1) CILR 272 where Cresswell J at paragraphs 63 and 64 referred to the position of decisions of courts

of co-ordinate jurisdiction quoting from 11 *Halsbury's Laws of England* 5th edition at paragraph 98 (2009):

> "There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision; and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong …"

74. Parker J in *Padma Fund* (FSD unreported judgment 8 October 2021) at paragraph 84 stated that a decision of another judge of the Grand Court, Financial Services Division should be followed unless the judge is convinced that it is wrong, and special care must be taken in circumstances where the judge heard argument by experienced lawyers and wrote a fully reasoned judgment. Parker J referred to *China Shanshui Cement Group Limited* 2015 (2) CILR 255 where Mangatal J at paragraph 64 stated: "I appreciate that, in the interests of judicial comity and certainty, I would be inclined to follow the judgment, unless I am convinced that it is wrong. I am also, on the other hand, cognizant that if I am convinced that the decision is wrong, I cannot shy away from not following it." Kawaley J in *Simamba v Health Services Authority* 2019 (2) CILR 213 at paragraph 68 stated: "I accept the defendant's submission that courts of coordinate jurisdiction should ordinarily follow previous decisions unless satisfied that the previous decisions are wrong."

75. In my judgment, following the guidance of Jones J in *Belmont Asset*, Segal J in *Direct Lending* and Kawaley J in *Polarcus* (which I am far from convinced were plainly wrong a la *Alibaba* and in fairness Mr Singla does not seek to persuade me otherwise) I think this court does have jurisdiction within the context of section 110 of the Act to entertain the sanction application by the JOLs for directions. It is perhaps not ideal that there is no statutory equivalent to section 129 of the Act for JOLs. Section 110 of the Act, however, plainly places the exercise of the powers of a liquidator under the control of the Court and it does not take a crowbar to slip in adequate jurisdiction within the court to properly assist the JOLs in the circumstances of this case. In this case the JOLs seek to exercise their powers and treat the BoW Funds as unencumbered assets of the Company. The questions raised do impact on the assets or potential assets of the Company. I am accordingly satisfied that I have jurisdiction to consider the Amended Summons.

76. Before determining how I should exercise my jurisdiction and discretion in this case there is one other procedural issue to deal with first.

One other procedural issue – alleged abuse

77. On behalf of SPGK Cayman it was also argued that the Amended Summons should be dismissed as it is an abuse of process. Reliance was placed on the well known English case of *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 and the court's inherent power to dismiss proceedings as an abuse of process to prevent misuse of its procedure especially where manifest unfairness may be caused to a party in litigation.

78. Reference was also made to *Divine-Bortey v Brent London Borough Council* [1998] I.C.R. 886 (Court of Appeal of England and Wales). This case applied *Henderson v Henderson*

(1843) 3 Hare 100 and considered the law of estoppel in the context of racial discrimination. Potter LJ at paragraph 898 stated:

> "The basis of the rule in *Henderson* is the avoidance of multiplicity of litigation in relation to a particular subject or set of circumstances in order to avoid the prejudice to a defendant which inevitably results in terms of wasted time and cost, duplication of effort, dispersal of evidence and risk of inconsistent findings which are involved if different courts at different times are obliged to examine the same substratum of fact which gives rise to the subject of litigation."

79. The identity of the various litigation issues between the JOLs and SPGK Cayman was not immediately apparent from a reading of SPGK Cayman's skeleton argument. At paragraph 3(3) of SPGK Cayman's skeleton it was stated that there were a number of "significant issues in dispute between the JOLs and SPGK" but unhelpfully these were not described in the skeleton argument. SPGK Cayman's position was that "the issues should be dealt with in one substantive proceeding." A small portion of meat was put on the skeleton at paragraph 15 whereby it is stated:

> "The Court should note that the JOLs dispute the separation of the SPGK group from Ascentra, and SPGK's separate entitlement to funds generated by SPGK's sales. This is the so-called "wider dispute" which has been the subject of extensive correspondence from the JOLs for several months. The "wider dispute" is yet to be commenced by the JOLs but the JOLs have made it plain that they reserve their right to issue "such proceedings as may be necessary in any jurisdiction and against any relevant parties in the event that it is not resolved amicably.""

80. Mr Yoshida in his first affidavit starting at page 23 refers to various issues in dispute between the JOLs and SPGK entities that are not included in the Amended Summons.

81. In short, suffice to say I am not persuaded on the basis of the evidence, information and limited arguments presently before the court that I should dismiss the Amended Summons on the grounds of abuse of process. I should record that wisely the somewhat sweeping and generalised abuse arguments were not pressed before the court with much vigour, and eventually morphed into case management suggestions which I did not find persuasive either.

The relief sought by the JOLs

82. Having satisfied myself on the jurisdictional issue I turn now as to whether it is appropriate, as between the JOLs and SPGK Cayman, to exercise my discretion and to grant the relief requested by the JOLs.

83. One further initial question is whether it would be appropriate and fair to exercise such jurisdiction and proceed pursuant to section 110 of the Act in the circumstances of this case. Mr Singla's main complaints were in effect that his client would be prejudiced as in the context of these proceedings there had been no pleadings, no discovery or cross-examination of witnesses and no time to make a rectification application. Frankly I found those complaints somewhat hollow and it appeared to me that his client was impermissibly seeking to further delay the determination of the issues raised in the Amended Summons. Mr Singla's client agreed directions and various consent orders prior to this matter coming on for a two day hearing. There were no applications for additional pleadings, specific

discovery or for cross-examination. Moreover there was no prior application seeking relief by way of rectification.

84. I take into account the overriding objective and I think that much time and money would be wasted if I was simply to dismiss the Amended Summons and require the JOLs to start a fresh action or if I was to adjourn and convert the Amended Summons proceedings into *inter partes* proceedings with directions for pleadings, discovery and cross-examination. Mr Singla's generalised concerns in respect of lack of detailed pleadings, discovery and cross-examination did not persuade me that it would be unfair to his client for the court to determine the issues raised in the Amended Summons. In my judgment Mr Singla's client was not unduly prejudiced by the court proceeding to determine the issues raised in the Amended Summons, after the two day hearing at which it had an opportunity to put relevant evidence and submissions before the court.

85. I questioned Ms Leahy as to the precise nature of the relief sought by the JOLs. Was it simply a direction or was it a declaration? Ms Leahy stated that the JOLs would be happy with either.

86. The Amended Summons seeks "orders and directions" that pursuant to paragraph 7 of Part 1 of Schedule of the Act the JOLs be authorised to treat the BoW Funds as unencumbered assets of the Company. Further that the JOLs be authorised to take possession of, collect and/or get in the BoW Funds. The JOLs also requested that the costs of and incidental to the Amended Summons be paid from the assets of the Company as an expense of the official liquidation. For the brief reasons which follow I am content to make such directions.

87. I agree with Ms Leahy that the Amended Summons gave rise to a short point of construction namely whether pursuant to a Deed of Mutual Release dated 5 May 2021 (the "Deed") it is appropriate to direct the JOLs to treat the BoW Funds as unencumbered assets of the Company. I also agree that the wider dispute between SPGK Cayman and the Company is obviously not for determination in these proceedings. I do not accept Mr Singla's submission that such wider dispute needs to be determined before this court can give the JOLs directions in respect of the BoW Funds. I do however have full regard to the factual matrix put before the court by Mr Singla.

The relevant law

88. It may be helpful if I briefly set out some of the relevant law. Ms Leahy helpfully referred to a recent summary of the relevant principles applicable to the construction of commercial documents provided by Popplewell J in the High Court of England and Wales in *Lukoil* [2018] EWHC 163 (Comm) at paragraph 8. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant.

89. These principles have been followed in the Cayman Islands. Smellie CJ in *FIA Leveraged Fund* 2012 (1) CILR 248 at paragraph 80 stated:

> "In the modern world, while the approach to the construction of contracts will allow the words used in the contractual documents to speak for themselves, the words

used must ultimately be understood to bear the meaning which they would convey to a reasonable person against the relevant background of the transaction entered into …"

90. In *Tempo Group Limited v Fortune East Asia Holding Corporation* 2015 (2) CILR Note 5 the Cayman Islands Court of Appeal applied English authority and held that if the meaning of a contractual term is ambiguous and two or more constructions seem consistent with the natural meaning of the words used, the court is entitled to prefer the construction which is most commercially sensible.

91. Mr Singla helpfully referred the court to *J P Morgan v Finter Bank Zurich Limited* 2012 (2) CILR 12 where Jones J applied *Investors' Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 and emphasised the reference to the "matrix of fact" and the inclusion of "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" but excluding "the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification."

92. Mr Singla also highlighted the following:

> "The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common-sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had …"

93. On the subject of mistake and construction Lord Hoffmann in the well known case of *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 at paragraphs 22 to 25 refers to the relevant authorities and the two conditions that must be satisfied to enable "correction of mistakes by construction." First there must be a clear mistake on the face of the document and secondly it must be clear what correction ought to be made in order to cure the mistake. This is not a separate branch of the law. In deciding whether there is a clear mistake the court is not confined to reading the document without regard to its background and context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration. At paragraph 25 Lord Hoffmann stated:

> "All that is required is that it should be clear that something has gone wrong with the language and that it should be clear what a reasonable person would have understood the parties to have meant …"

94. On the law in respect of unilateral mistake Ms Leahy asks the court to consider *Thomas Bates Ltd v Wyndham's (Lingerie) Ltd* [1981] 1 WLR 505 in the Court of Appeal of England and Wales, Buckley LJ at pages 514 to 516. The reference to equitable estoppel in *Snell on Equity*: "if one party to a transaction knows that the instrument contains a mistake in his favour but does nothing to correct it, he (and those claiming under him) will be precluded from resisting rectification on the ground that the mistake is unilateral and not common". Buckley LJ at page 516 stated that for the doctrine of unilateral mistake to apply it must be shown:

> "…first, that one party A erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party B was aware of the omission or the inclusion and that it was due to a mistake on the part of A; thirdly, that B has omitted to draw the mistake to the notice of A. And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit B. If these requirements are satisfied, the court may regard it as inequitable to allow B to resist rectification to give effect to A's intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake."

95. In respect of common mistake Ms Leahy referred me to *FSHC Group Holdings Limited v Glas Trust Corporation Limited* [2019] EWCA Civ 1361 where Leggatt LJ got his teeth into this area of the law. At paragraph 46:

> "At a general level, the principle of rectification based on a common mistake is clear. It is necessary to show that at the time of executing the written contract the parties had a common intention (even if not amounting to a binding agreement) which, as a result of mistake on the part of both parties, the document failed to record. This requires convincing proof to displace the natural presumption that the written contract is an accurate record of what the parties agreed."

96. At paragraph 176:

> "We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the

basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that, as a result of communication between them, the parties understood each other to share that intention."

97. Ms Leahy and Mr Singla were agreed as to the relevant law in respect of a *Quistclose* trust claim and in particular the question being whether the parties intended the money to be at the free disposal of the recipient and his freedom to dispose of the money was necessarily excluded by an arrangement that the money should be used exclusively for the stated purpose (*Twinsectra v Yardley* [2002] 2 AC 164; *Prickly Bay Waterside Ltd v British American Insurance Company Ltd* [2022] UKPC 8).

The Deed

98. Having briefly referred to some of the relevant law I now turn to the Deed. I have considered the whole of the Deed. It is dated 5 May 2021 and is stated to be between the Company and SPGK Cayman and various other parties. At recital (A) there is reference to various services having been provided to the Company and others. Recital (B) refers to the discontinuance of such services and a Commission Payment Services Agreement to provide services "going forward and for a limited time period." Recital (C) refers to the resignation of Theodore Sanders ("Mr Sanders"). Recital (D) refers to another agreement and the paying of accrued commissions and expenses and various sums of money are

defined as the "Funds". Recital (E) is important and provides that Mr Sanders has, at the request of the Company, been using Asian Offshore Services ("AOS") and SPGK International's Bank of the West accounts (the "AOS Accounts") to pay vendors and corporate credit cards on behalf of the Company and has previously provided the Company statements to these accounts. It is further provided that as part of the terms of the Deed AOS shall remit the balance of funds held on behalf of the Company in the AOS Accounts to the account of the Company as detailed in Schedule 2 to the Deed within ten calendar days of the date of execution of the Deed by all of the parties. Schedule 2 is entitled "Account to which funds from Designated Bank Accounts will be transferred" and the Beneficiary Account Name is Scuderia Bianco Pte Ltd who, it is common ground, had a cash management agreement with the Company. Recital (F) concerns the removal of Mr Sanders as an authorised signatory. Recital (G) provides that the Company and others wish AOS and/or SPGK International ("SPGK") to provide use of their Bank of West accounts to the Company and others for a period of time under mutually agreeable terms. Recital (H) refers to Mr Sanders providing the board of the Company with unaudited financial statements. Recital (I) states that the parties wish to document their agreement that AOS and/or SPGK holds the Funds (defined in Recital (D)) on trust for the benefit of the Company and to the order of the Company and will remit the Funds to the Company within ten calendar days of the date of the Deed.

99. Clause 3.1 provides that the parties agree that:

> "i. AOS and/or SPGK hold the Funds held in an account with BlackTower Financial Management Group in the Cayman Islands on trust for the benefit of [the Company] and to the order of [the Company], and AOS and/or

SPGK shall remit the Funds to the Recipient Bank Account (as defined below) on the Closing Date.

ii. [Mr Sanders] before the Closing Date and at the expense of [the Company] (i) request from the relevant bank, copies of up to date bank account statements in respect of each of the bank accounts set out in Schedule 1 hereto (the "Designated Bank Accounts"), (ii) procure the wire transfer of all monies held in each of the Designated Bank Accounts to the bank account details of which are set out in Schedule 2 hereto (the "Recipient Bank Account"), and (iii) request that each of the Designated Bank Accounts is closed."

100. Under clause 3.1 iii. Mr Sanders at the expense of the Company is to use reasonable endeavours to assist the Company and others to amend the authorised signatory on bank accounts. Clause 3.1 iv. states that SPGK and SPGK PTE LTD shall enter the Commission Payment Services Agreement. Clause 3.1 v. states that Mr Sanders shall provide to the board of the Company unaudited financial statements of the Company.

101. Schedule 1 is entitled "Designated Bank Accounts" and the first two named accounts are "Bank of the West-Asian Offshore Services" and "Bank of the West – SPGK International", the two accounts with which the Amended Summons is concerned.

102. Ryunosuke Yoshida has executed the Deed for the Company, SPGK Cayman and SPGK Pte Ltd. Mr Sanders has executed the Deed for himself and for AOS and SPGK.

The Submissions

103. I now turn to some of the main submissions put before the court.

Ms Leahy's submissions on behalf of the Company

104. Ms Leahy in her submissions on the construction of the Deed says that everything turns on recital (E) and clause 3.1(i) and (ii). She described recital (D) as a complicated recital which addresses the BlackTower funds which are not in issue in respect of the Amended Summons. The reference to the Funds in the Deed is to the BlackTower funds. Ms Leahy says that there was an obligation to remit the BlackTower funds, which she says it is common ground were always the property of the Company, also to Scuderia Bianco.

105. Ms Leahy says it is quite clear that the obligation on Mr Sanders and the companies was to transfer the money in the Bank of West accounts that appear in Schedule 1 to the Company by remitting them to Scuderia Bianco. Recital (E) makes it clear that Mr Sanders and the companies are holding the monies in the Bank of West accounts on behalf of the Company and that AOS shall remit the funds to the Company to the account of the Company as detailed in Schedule 2, and then clause 3.1 ii. provides for the remission of all funds in the designated bank accounts which include the AOS accounts, to the recipient bank account. Ms Leahy says that the construction is obvious when the Deed is read as a whole and also explains why in clause 3.1 (ii) the expenses of complying with that provision were to be borne by the Company. Ms Leahy says that in effect SPGK Cayman concedes that it says what it says but that Mr Singla adds that in recital (E) there is an obvious mistake that the court can correct through construction.

106. Ms Leahy says that there is no clear and obvious mistake in this case. Ms Leahy says Mr Singla's next point is if there is not an obvious mistake then they have a claim for mistake and rectification. Mr Singla in his skeleton does not say whether they rely on a unilateral mistake or a common mistake. If a unilateral mistake, SPGK Cayman needs to show it erroneously believed that the Deed made provision for the transfer of the BoW Funds to itself and not to the Company and that the other parties were aware of its mistake and omitted to draw the mistake to its attention and the mistake was calculated to benefit those other parties.

107. Ms Leahy also referred to the resignation email of Mr Sanders dated 27 January 2021 stating that "SPGK International's … results should be consolidated into the unaudited financial statements for Ascentra" and also the response from Yoshio Matsuura and Ryunosuke Yoshida dated 23 February 2021 with the heading "Ascentra Holdings, Inc." adding:

> "We agree that SPGK International's results should be consolidated into the unaudited financial statements of Ascentra … To us, there has never been any fundamental disagreement as to how Ascentra's assets are to be treated. Sums are held by SPGK International and Asian Offshore Services on trust for Ascentra and we are amending the Deed of Release, that you sent, to reflect this."

108. Ms Leahy says that the difficulty SPGK Cayman faces is what was said in the resignation response which was signed by its beneficial owner (Mr Yoshida) namely that the relevant funds were held on trust. Moreover as to the awareness of the other parties Mr Yoshida

was a director of SPGK Cayman and the Company at the relevant time and signed the Deed for both parties. Ms Leahy described unilateral mistake as a complete non-runner.

109. Having referred to the relevant law on common mistake Ms Leahy submits that SPGK Cayman cannot point to a single outward expression of accord. The resignation letter, the response and the Deed all undermine any suggestion that the parties had an actual shared or common intention that the BoW Funds would be transferred to SPGK Cayman so common mistake is also a non-runner.

110. On the *Quistclose* trust claim Ms Leahy submits that if the Sanders' companies were providing cash management services to SPGK Cayman and the Company that means that the monies going into the BoW accounts were mixed with Ascentra Group monies and that mix in itself would defeat the *Quistclose* trust claim because the Sanders' companies would not have been free just to use the pot of cash to spend on the relevant operational expenses of the two separate groups. Moreover if the Deed says what Ms Leahy says it says then the Deed brought any *Quistclose* trust to an end.

Mr Singla's submissions on behalf of SPGK Cayman

111. Mr Singla in his detailed address on the construction of the Deed referred me to what he described as the factual matrix, which I have full regard to but, for brevity's sake, do not set it out in this judgment. I note the reference to Mr Yoshida's affidavit, the letter from Alix Partners and the documents. Mr Singla commented on the lack of evidence from Mr Sanders or "other actors in this business". Mr Singla stressed that the court should consider the evidence in respect of cash flows and movements adding "if I can't show or persuade

your Lordship … that there was a proprietary base in [SPGK Cayman] before the deed was signed, I'm stuffed … Without proprietary base, I've got no case …"

112. Mr Singla submitted there was not a great deal of commingling of funds from other sources. The monies are coming from Planet Payment. The revenues have come from PRC customers. Mr Singla submitted that there was no evidence that the Company had a proprietary base in the tracing exercise that had been conducted.

113. Mr Singla took me through the Deed including the recitals. Mr Singla referred to the definition of "Funds" in recital (D) and the word "trust" in respect of the BlackTower funds.

114. Mr Singla submitted that when Mr Matsuura and Mr Yoshida sent their resignation response they were looking at a deed of release dealing purely with BlackTower funds. Mr Singla submitted that insofar as we are dealing with Bank of West accounts those services can only be a reference to commission payment services. Mr Singla referred to Schedule 2 and stated that Scuderia Bianco is not the account of the Company. He accepted that Scuderia Bianco managed cash for the Company but added that it also managed cash for SPGK Cayman. Mr Singla submitted that in recital (E) where there is a reference to the Company that should read SPGK Cayman.

115. Mr Singla emphasised that recital (E) refers to funds "held on behalf of [the Company] and does not use the word "trust" and says nothing about the true ultimate beneficial ownership of the funds. Mr Singla submitted that Recital (E) was poorly drafted and also mistakenly drafted in that SPGK Cayman should have been inserted in place of the reference to the Company. As part of the process of construction the court has the power to correct obvious mistakes in the written expression of the parties and once corrected the contract is interpreted in its correct form. Mr Singla says that the "mistake and the correction are

clear". Reference is made to Recitals (A), (B) and (G) and Mr Singla submitted that taken together they clearly proceed on the basis that AOS and SPGK have been providing in the past commission payment services to SPGK Cayman and SPGK Singapore and both SPGK Cayman and SPGK Singapore intend to continue the arrangement by entering into a new commission payment services agreement. Mr Singla says recital (E) which refers to "various services" needs to be read not only with the underlying facts (movement of cash flow) but also with other documents including the agreements with Planet Payment and the Consulting Service Agreement between SPGK LLC (a wholly owned subsidiary of SPGK Cayman) and AOS which clearly shows that AOS was handling funds on behalf of SPGK Cayman. Mr Singla submitted that the Deed did "not reflect the true position which has been demonstrated by the Alix Report." The main thrust of Mr Singla's submissions was that the error (and the correction required) to Recital E is clear: for the Company, read SPGK Cayman.

116. Mr Singla submitted that "overwhelmingly, monies are going into the BoW accounts for a purpose, which is to pay commission payments that are due. It's my submission that these monies, 11 million odd, should be paid for commission outstanding as at the date received." (Day 2 pages 94 – 95). The monies are subject to a "*Quistclose* agreement", submitted Mr Singla. Mr Singla submitted that in order to deal with the mistake/rectification points the court would need documents and there has been no discovery in this case.

Determination of construction issue

117. I have considered the respective arguments on the proper construction of the Deed. Both sides make reference to Clause 3.1 which I have considered in detail. I note also in particular Recital E. I have considered all the recitals and the whole Deed.

118. I agree with Ms Leahy that on the true construction of the Deed when read as a whole, the BoW Funds were to be remitted to Scuderia Bianco to be held for the Company.

119. There is nothing in Mr Singla's trust or mistake/rectification arguments. If Mr Singla's client wished to obtain rectification relief from the court in respect of the Deed it should have applied long before now. Furthermore, there is no plain and obvious mistake. The mistake/rectification arguments appear quite hopeless.

120. Mr Singla during his oral submissions did not address me in detail in respect of the alleged *Quistclose* trust, although I note all he writes in his skeleton argument on this topic. I have considered the evidence and arguments presented. Sometimes the doctrines of equity do not easily fit into a commercial context especially where the position is governed by express contractual agreements or arrangements. In my judgment the evidence in this case does not establish a *Quistclose* trust. The comingling is a strong indicator that no such trust was intended. The Deed speaks for itself and is also a contra indicator to any *Quistclose* trust. The requirements for and the features of a *Quistclose* trust are not established or present in this case.

The relief granted

121. In conclusion based on the evidence and arguments placed before the court I am content to grant the JOLs the following relief by way of directions to the JOLs:

(1) the JOLs may treat the BoW Funds as unencumbered assets of the Company;

(2) the JOLs may take possession of, collect and/or get in the BoW Funds; and

(3) the JOLs costs of and incidental to the Amended Summons may be paid from the assets of the Company as an expense of the official liquidation.

Draft order and ancillary applications

122. The attorneys should, within the next 7 days, file a draft order reflecting these directions for my approval. Any ancillary applications (such as costs) should be filed within 14 days together with a concise skeleton argument (no more than 5 pages) in support and any concise skeleton argument (no more than 5 pages) in opposition within 10 days thereafter. I will determine any ancillary applications on the papers.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT