IN THE CAYMAN ISLANDS COURT OF APPEAL ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION

CICA (Civil) APPEAL No. 0018 of 2020
(Grand Court Cause No. FSD 0127 of 2019 (CRJ))

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)
AND IN THE MATTER OF LUNG MING MINING CO., LTD

APPELLANT

Mr. XIAOMING LI

-AND-

KRIS BEIGHTON AND PATRICK COWLEY
(in their capacity as former Joint Official Liquidators of the Dissolved Company)

RESPONDENTS

BEFORE:

The Hon John Martin KC, Justice of Appeal
The Rt Hon Sir Alan Moses, Justice of Appeal
The Rt Hon Sir Jack Beatson, Justice of Appeal

Appearances: **Mr. Thomas Lowe KC instructed by Mr. John Harris of Nelsons for the Appellant**

Mr. Spencer Vickers and Ms. Sean-Anna Thompson of Conyers Dill & Pearman LLP, Counsel for the Respondents

Date of hearing: **29th August 2023**

Draft circulated: **6th September 2024**

Judgment delivered: **12th September 2024**

JUDGMENT

MARTIN JA:

1. This is an appeal from an order dated 27 May 2020 of Richards J directing that Lung Ming Mining Co., Ltd ("the Company") be dissolved forthwith. The appeal is brought by Mr Xiaoming Li ("Mr Li"), a shareholder and former director of the Company. The principal ground of appeal is that the judge erred in holding that the statutory precondition for dissolution - that the affairs of the Company had been completely wound up - was satisfied.

Background

2. The Company was incorporated in the Cayman Islands on 6 May 2008. It operated as the holding company of a group whose primary operations were in Mongolia and the People's Republic of China ("the PRC"), including the operation of the Mongolia Eru Gol Iron Ore Mines and the production of iron ore.

3. Prior to the 2015 restructuring referred to below, the Company's subsidiaries included Shiny Glow Limited ("Shiny Glow"), Iron Mining International (Mongolia) Ltd ("IMI") and Erlian Lung Ming Railway Services and Development Co Ltd ("Erlian"). Erlian was established to develop and operate a railway company in Erlianhaote in the PRC. The railway was intended to serve the Company's Mongolia iron ore mine, which was itself owned by IMI. Shortly before the Company's dissolution, Shiny Glow transferred – or, as the respondent former joint official liquidators ("the JOLs") would say, purported to transfer – to the Company the sole issued share ("the PFL Share") in a company called Peace Fame Ltd ("PFL"), of which Erlian was by then a wholly-owned subsidiary.

4. The operations of the Company and its then subsidiaries were financed by borrowings from banks in the PRC, notably China Development Bank Corporation ("CDB"). The borrowings were to be serviced once the Mongolian mine and associated infrastructure and the Erlian railway had been fully developed and had started to operate, but delays

meant that the Company was unable to meet its loan obligations. This led to an attempted restructuring in 2015 designed (according to Mr Li) to lead to a listing on the Shenzhen stock exchange. The restructuring involved the sale of Shiny Glow and IMI to a PRC company called Zhongrun Resources Investment Corporation. Full details of the transaction were not in evidence; but part of it was set out in a document governed by Hong Kong law, known as the Payment Agreement, clause 2.8(b) of which (as amended, and in English translation) appears to provide so far as material that if CDB was not repaid as a result of the restructuring (as it was common ground it was not) the parties other than CDB should immediately take steps to restore the position to the status before the transaction, "including but not limited to [the Company] re-acquiring and holding all shares of [IMI] and Shiny Glow, hereinafter referred to as "Share Reversal"". This share reversal did not happen at the time, but is said by Mr Li to be the justification for the transfer to the Company of the PFL Share in December 2019.

Procedural history

5. On 16 August 2019 the company was wound up on a petition presented on 3 July 2019 by CDB, and the JOLs – one of them based in the Cayman Islands and one in Hong Kong – were appointed joint official liquidators. Following their appointment they identified two other creditors, both of them also banks in the PRC. The Company's total indebtedness was approximately US$2.21 billion. The JOLs' first report was made on 19 September 2019. On 8 October 2019 the JOLs met Mr Li, who among other things told them that the Company had no valuable assets and its subsidiaries had no realisable assets. On 18 November 2019, just over three months after the winding up order was made, the JOLs issued a summons for the dissolution of the Company, returnable on 17 December 2019. On the day before the hearing, attorneys for Mr Li notified the JOLs that the PFL Share had been transferred to the Company on 4 December 2019; and on 17 December 2019 evidence was filed by Mr Li and by Mr Yuanheng Wang, who had formerly been the Company's counsel. Mr Wang exhibited documents relevant to the transfer, including – importantly to Mr Li's case – PFL's register of members, showing the Company as owner of the PFL Share. This caused the hearing to be adjourned to 29 January 2020. The hearing on 29 January 2020 was

again adjourned, this time to 20 May 2020, on terms set out in a consent order which provided for Mr Li to pay an amount to be agreed in respect of further investigations to be undertaken by the JOLs, and for Mr Li to provide documents and information as requested by the JOLs. At the hearing on 20 May 2020, the material available to the court included further evidence from the JOLs and from Mr Li, including a valuation dated 3 March 2020 provided by AP Appraisal Ltd on the instructions of Mr Li, giving a net asset value for PFL and its subsidiary Erlian of US$106 million, and various opinions dealing with the validity of the transfer of the PFL Share. The judge heard oral argument, but no oral evidence. On 27 May 2020 she made the order for dissolution now appealed against. Notice of appeal was filed on 24 June 2020, and the appeal initially came on for hearing on 10 November 2020. On that occasion, this court (Goldring P and Rix and Martin JJA) rejected a preliminary objection by the JOLs that it had no jurisdiction to entertain the appeal following the dissolution of the Company, but did not deal with the substance of the appeal. The matter was not listed again until 29 August 2023.

The Legal Framework

6. (a) Section 152 (1) of the Companies Act ('the CA") is in the following terms:

> "When the affairs of the company have been completely wound up, the Court shall make an order that the company be dissolved from the date of that order or such other date as the Court thinks fit, and the company shall be dissolved accordingly".

This provision is based on section 111 of the UK Companies Act 1862, which itself was amended in 1908 to permit the court to declare a dissolution void. No similar amendment has been made in the Cayman Islands.

(b) Section 153 of the CA is in the following terms:

> "(1) Any unclaimed dividends or undistributed assets in the possession or control of the liquidator or former liquidator of a company shall be held by that person as trustee upon trust for the benefit of the contributories or creditors to whom such funds are owed.

(2) At the end of one year after the dissolution of the company, the former liquidator shall transfer any funds or other assets held on trust by that person to the Minister charged with responsibility for Finance who shall manage them in accordance with Part VIII of the Public Management and Finance Act (2020 Revision)" ("the PFMA").

(c) Part VIII of the PMFA provides for separate accounting of trust assets (section 70); for the return of trust assets to a beneficiary with any earned income (section 73), but subject to management costs (section 70 (4)); for trust assets unclaimed after four years to be treated as executive revenue (if in the form of money) or sold and so treated (if not in the form of money), but subject to a power to satisfy any established claim made within 10 years after the money was first received by the Minister as a trust asset (section 74 subsections (1)-(5)); and for those provisions of section 74 to prevail to the extent of the inconsistency in the event of any inconsistency between them and the operation of any other law (section 74 (5)). Section 75 of the same Act deals with bona vacantia and provides among other things for satisfaction without time limit of established claims to assets held by the Crown as bona vacantia. On the face of it, these provisions have the effect that on dissolution undistributed assets in the possession of the liquidator do not pass to the Crown as bona vacantia (contrary to the position in England), but are held on trust by the liquidator for a year following dissolution, then pass to the Minister of Finance, again on trust, and may be claimed by any person entitled to them for a period which in aggregate is 11 years after the dissolution.

(d) Section 127(1) of the CA provides in the case of a voluntary winding up (which this is not) that "as soon as the company's affairs are fully wound up" the liquidator is to make a report and an account of the winding up showing how it has been conducted and how the company's properties have been disposed of, and is to call a general meeting of the company for the purpose of laying the account before it and giving an explanation for it. Subsection (3) requires the liquidator, no later than seven days after the meeting, to make a return to the Registrar specifying the date of the meeting and particulars of any resolutions passed at it. The Registrar is then to register the return, and three months after registration the company is

deemed to be dissolved, subject to the ability of the court to make an order deferring dissolution on the application of the liquidator or other interested person made within that three-month period: section 151 of the CA.

The Judgment

7. The judge identified the following issues: (1) whether the affairs of the company had been completely wound up (paragraphs 31 to 39); (2) the conduct and responses of Mr Li (paragraphs 40 to 48); (3) the validity of the transfer of the PFL Share (paragraphs 49 to 61); (4) the effect of the 2015 Payment Agreement (paragraphs 62 to 73); (5) the ambit of the JOLs' investigation (paragraphs 74 to 81); (6) disclaimer (paragraph 82); and (7) the value of the PFL Share (paragraphs 83 to 102). These issues were discussed partly in the identified paragraphs relating to each issue, but primarily in the section of the judgment headed "Discussion and Conclusions" running between paragraphs 107 and 146. The whole of this section – indeed, the whole of the judgment – is carefully considered and clearly expressed, and the summary which follows is intended merely to identify the key reasoning without being a substitute for reading the whole.

8. In paragraph 107 the judge said that the issue of the validity of the transfer of the PFL Share had been argued extensively, with the JOLs maintaining that it was invalid; that there were meritorious arguments made on behalf of Mr Li as to legal title; but that in her view the more fundamental question was beyond the formalities of execution of the transfer and the legal title to the share as recorded on the register of members, namely whether there were creditor restrictions which affected the purported transfer and the value of the PFL Share. She recorded that it was argued that the value of the PFL Share was inextricably linked to the value of the Erlian property owned by its subsidiary, and she had therefore considered with some care all the evidence and submissions in relation to value as well as funding. Having then considered the material relating to the financial positions of PFL and Shiny Glow, at paragraph 110 the judge said that

> "the Court was left with the clear impression that at the very least PFL was in a less than healthy financial position. Shiny Glow which purported to effect the transfer appeared to be worse. On the face of the documents seen, the JOLs

must be correct that neither Company appeared to be in a position to be able to transfer assets at will".

9. The judge then considered the evidence about value and the effect of the Payment Agreement. At paragraph 129 she stated that

> "the risks and costs identified by the JOLs include:
>
> i) The risks that the assets are already obsolete.
>
> ii) The risks/costs of challenge by CDB.
>
> iii) The risks/costs in relation to obtaining funding to complete constructions and to operate the underlying business.
>
> iv) The risks/costs relating to realising assets in a remote location in Mongolia.
>
> v) The JOLs costs and expenses in respect of such (including any funding costs)".

At paragraph 130 the judge recorded that "the conclusion of the JOLs is that they are unable to ascribe any realisable value to the [PFL] Share on the information provided by Mr Li". At paragraph 131 she said this:

> "Having reviewed the financial statements provided, the information about the Company itself, the other entities, PFL, Shiny Glow and their various circumstances of insolvency, the possible creditor claims against them, the possible creditor restrictions, the Court was left with the distinct impression that seeking to realise some value from the disputed asset is very likely an entirely hopeless exercise, where good money will be thrown after bad and where the disputed asset will begin to disappear from view, the closer one gets to it".

In the following paragraph (132) she said that

> "while the distinction between sanction applications and other such discretionary matters is well made by Mr Li's attorney, the Court considers that there is some weight to be given in circumstances such as these to the experience and expertise of the JOLs as to value and risk. As I read paragraph 35 of the Fourth Affidavit of Mr Cowley, weighing asserted value against the

likely costs and risks of realising that value, the balance does not fall in favour of taking that risk".

10. The judge's ultimate conclusion was expressed in the following terms:

> "[137] Having considered all the material provided, I am of the view that on balance, the assertion that the Company has an asset of value, namely the PFL Share, is not made out. In practical terms the asserted value or any value, appears to be either non-existent or unrealisable. Any attempt to realise it would be fraught with risk and challenges at every step. The transfer to the Company is questionable. Proof of the Company having an equitable interest in the Share is seriously questionable. Whether PFL was a party to the Payment Agreement is on its face doubtful as is whether the Company could effectively withstand a challenge from Shiny Glow if it claimed to have a better title. Ultimately even if all this could be overcome, to what end. The Erlian valuation provided is doubtful not taking into account its creditor claims and other factors. Even if Shiny Glow was left with Erlian's residual assets of US$24 million through its ownership of PFL, given the financial statements provided, Shiny Glow is insolvent and PFL itself is in debt. The Company is insolvent and would not be in a position to borrow capital.
>
> [138] On balance I conclude that the JOLs are correct in their assessment that no value can practically or realistically be ascribed to this asset. Put another way, from all the evidence that I have seen, there appears to be no real prospect of realisation of some value.
>
> [139] I have also considered the positions taken by the creditors. The creditor in common does not seek to pursue this disputed asset. It is telling though not determinative that none of the three creditors ask that this asset be pursued despite the possible suggested residual value after debt of some US$24 million. The court gives due weight to the views of the creditors.

[140] There are also practical considerations as to funding. The JOLs' Final Report of December 2019 records that the First Meeting of the Liquidation Committee discussed the steps that could be taken to reverse the 2015 restructuring. Under funding it was noted that there is no cash available to fund the liquidation and that the JOLs remained in discussion with the petitioning creditor in respect of the funding needed to settle all costs of the liquidation to date. …

[144] At this hearing Counsel on behalf of the Petitioning Creditor stated in clear and unequivocal terms that no funding will be provided for any further enquiries which are viewed as of doubtful efficacy. There are no funds available from the Company to pursue this disputed asset.

[145] Applying the guidance from the cited case of *In re London and Caledonian Marine Insurance* [as to which see paragraph 20 below] I have asked myself, from all that I have seen and heard, have the JOLs done all they can to wind up the Company? Have they made the necessary enquiries and sought relevant information as far as they possibly can? Have they disposed of the assets as far as they can realise them? In all the circumstances of this case, at this stage, the answer is yes. Applying a practical and sensible meaning to the words of the section, as the said case discusses, this does not mean that if there was a single asset outstanding the affairs of the Company were not to be considered as wound up. This must be particularly so where there are likely substantial risks and costs to be sustained in respect of such action, no funding to undertake such action and the likely result would be of no benefit to creditors. The JOLs have sought extensive and detailed information from the person in the best position to provide it. They have sought information from third-party sources. They have carried out an analysis of all the information received. While not by itself determinative of any issue, the effect of the inconsistent statements made by and the conduct of Mr Li does mean that his assertions are given less weight and due scrutiny particularly where these are inconsistent with documents he has provided or documents which have been otherwise obtained. The creditors have been provided with the relevant

documentation, have had input and provided documentation to the JOLs. The Court has been provided with sufficient information in order to make its own assessment.

[146] For all these reasons and considering all the evidential material before the Court and accepting the submissions of the JOLs, I am satisfied that the affairs of the Company have been completely wound up."

The Grounds of Appeal

11. In summary, the grounds of appeal were as follows:

(1) The judge was wrong to hold that the affairs of the company had been completely wound up.

(2) and (3) Instead, she ought to have held (a) that she had no jurisdiction to dissolve the Company in circumstances where it had assets of more than de minimis value, alternatively net value, or claims to such assets and (b) that the burden was on the JOLs as applicants to demonstrate that the Company had no such assets – instead of which the judge in effect put the burden of proof on Mr Li to demonstrate that the Company had a valuable asset and/or gave excessive weight to the views of the JOLs.

(4) The judge should have refused to order the dissolution of the Company on the ground that the JOLs had not discharged the burden of negating the existence of assets, and should have held that (a) the JOLs had not properly investigated the existence of certain legal claims and (b) since the Company was the registered owner of the PFL Share no further transfer from Shiny Glow was required.

(5) The judge was wrong to hold that the PFL Share had no value, or her conclusion was not one which it was reasonable for her to reach, because (i) the financial position and creditor claims against Shiny Glow were not relevant to the value of the Company's interest in PFL based on its registered title to the PFL Share; (ii) the value

of the PFL Share depended on the value of its interests in Erlian and, indirectly, in the Erlian Property; (iii) the JOLs had not obtained an independent valuation of the Erlian property or themselves investigated its value; (iv) the JOLs had no valuation material sufficient to fault the judge's conclusion that Erlian had a net value of US$24 million; and (v) having failed to obtain adequate answers from Mr Li to their enquiries, the JOLs had not sought a valuation.

The Appellant's Case

12. Mr Li's written submissions may be summarised as follows.

(1) The complete winding up of the affairs of the company was a precondition of dissolution. Whether or not the precondition had been satisfied was a matter of fact, not of discretion.

(2) It was for the JOLs to establish that the precondition was satisfied as a matter of fact, not merely as a matter of their opinion. That was particularly so once it was established that the PFL Share was an asset of the company: the evidential burden was then on the JOLs to show that the winding up was complete notwithstanding the existence of that share.

(3) "Affairs of a company" was a very wide expression, comprising "all its business affairs, interests or transactions, all its investment or other property interests, all its profits and losses or balance of profits or losses and its goodwill": *R v Board of Trade, ex p St Martin Preserving Co Ltd* [1965] 1 QB 603, 618, per Winn J.

(4) The precondition might not be satisfied at any given time, or indeed ever; but the CA did not require dissolution, and the liquidator was under no duty to seek one. Even though a liquidator might have collected assets and identified creditors so far as he could or so far as funds permitted, the winding up might still not be complete: assets might exist but appear irrecoverable, and resources might not allow full investigation.

(5) In modern times, dissolution had become common; but in earlier times (when the English statutory provision on which section 152(1) of the CA was based was still in existence) it was possible to say that "as a matter of fact, wound up companies very seldom are dissolved": *Re Matheson Brothers Ltd* (1884) 27 Ch D 225, 229, per Kay J.

(6) The expression "completely wound up" differed from the expression "fully wound up", the latter being the criterion for dissolution in the case of a voluntary winding up: section 127(3) of the CA. The expression "fully wound up" was considered in relation to the equivalent English legislation in *In re London and Caledonian Marine Insurance Company* (1879] 11 Ch D 140 ("*London and Caledonian*"), James LJ saying this (at 143-4):

> "We must put some practical and sensible meaning on the words, and in my opinion they mean "as far as the liquidators can wind them up"; that is, when the liquidator has done all that he can to wind up the company, when he has disposed of the assets as far as he can realise them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is *functus officio*".

But the legislature must have intended "completely" to mean more than "fully". A complete winding up must be an exhaustive one.

(7) A winding up could not be exhaustive if assets (even onerous unrealisable assets) remain. Unlike in England, there was no power to disclaim onerous property.

(8) A compulsory winding up was not complete just because the liquidator had reached some imprecise practical or financial limit. Such practicalities would be subjective, arbitrary and would often depend on questionable ethical judgements. They had no part to play in the statutory scheme.

(9) Between paragraphs 94 and 99 of her judgment, the judge considered and quoted extensively from *In Re Exten Investment Fund* (unreported, FSD 96-99/2017), a decision of the Grand Court on an application to postpone dissolution under section

151(3) of the CA. But postponement of dissolution involved the exercise of discretion, which a decision that the company is completely wound up did not. The judge referred (at paragraph 98 of her judgment) to the Grand Court's view that no detriment would flow from deferral and that the preparedness of the petitioner to provide funding was a sign that there were important matters outstanding that required investigation; but detriment was not an element in the question whether the statutory precondition can be satisfied. The judge was wrong to consider that cases on deferment of dissolution had any relevance.

13. In his oral submissions, Mr Lowe KC for Mr Li made two main points: the judge had misconstrued section 152 by in effect reading in the words "so far as practicable" after "completely wound up"; and she was wrong in relation to title to the PFL Share (her erroneous view colouring all findings in the judgment) and in relation to valuation. As to the first of these, he submitted that there were significant differences between voluntary liquidation and compulsory liquidation. Voluntary liquidation was a largely consensual exercise, and a voluntary liquidator was not an officer of the Court. Compulsory liquidation was not consensual, and a compulsory liquidator was an officer of the court. In those circumstances, one would not expect a voluntary liquidator to be as diligent as a compulsory liquidator. Viewed in that light, there was a significant and intentional difference between a full winding up and a complete winding up. This was reinforced by the absence of any power to restore a dissolved company to the register, and by the absence of any power to disclaim an onerous asset. Mr Lowe made clear that he was not saying that a company could not be dissolved if there was any possibility of a claim or an asset - indeed, companies could be dissolved when debts existed; but if there was an acknowledged asset in existence it could not be said that the company had been completely wound up. The JOLs could have gone to court for directions as to how to deal with the PFL Share; but, in the absence of a power to disclaim, the court had no ability to dissolve the company while assets remained. As to the second point, Mr Lowe submitted that the judge had not been entitled on the facts to find that the winding up was complete. This was a massive insolvency, and there had been no explanation as to why the JOLs had moved to dissolution within three months of their appointment. By moving so quickly, the JOLs had run the risk that the winding up would not have been completed. The judge's

assessment of the questions of title and valuation was flawed. She should have started with the facts that the title to the PFL Share was registered and that there were valuable underlying assets, and should not have investigated inhibitions on Shiny Glow's ability to transfer the PFL Share or considered value in the absence of any attempt by the JOLs to obtain their own valuation of the underlying assets.

The JOLs' Submissions

14. The JOLs appeared by counsel at the request of the Court, the President having indicated that they should participate in the hearing if the court were properly to decide the case. They nevertheless pointed out that they were functus officio and therefore thought it appropriate to take a neutral, although not passive, position: to that end, they had sought to ensure that the court was provided with all relevant material such that it could properly decide the case. As to the substance of the appeal, Mr Li's case was that the question whether or not the affairs of the company had been completely wound up was one of fact; and it was trite law that an appellate court should intervene only if satisfied that a judge's finding of fact was "plainly wrong". Reference was made to *McGraddie v McGraddie* [2013] UKSC 58 at [3-4] and *In the matter of B (a Child)* [2013] UKSC 33 at [53]. In relation to the transfer of the PFL Share, Mr Li had no authority once the Company was in liquidation to execute the transfer on behalf of the Company; when he did so, he was subject to a bankruptcy order of the Hong Kong Court; the provision of the Payment Agreement relating to share reversal referred to a transfer of the shares of Shiny Glow, not PFL; and at the time of the transfer Shiny Glow was hopelessly insolvent, and its major creditor (CDB) did not appear to have authorised the transfer. As to the value of the PFL Share, Mr Li's own evidence was that the share had no value; in the materials said by Mr Li to document the transfer of the PFL Share by Shiny Glow, the value ascribed to the share was HK$1. Moreover, the value of the PFL Share did not equate to the value of the underlying properties, given the liabilities of entities within the corporate structure. The JOLs had offered by letter dated 14 February 2020 to undertake a valuation, but Mr Li preferred to instruct his own valuer – a course to which the JOLs had agreed on the basis that the valuer would be available for interviews, but the valuer declined to be interviewed or to answer questions. So far as concerned the JOLs' own investigations, Mr Li had waited

until the day before the first dissolution hearing on the 17 December 2019 to inform the JOLs that the PFL Share had been transferred to the Company on 4 December 2019; and the Statement of Affairs which stated the value of PFL to be nil was provided by Mr Li only in January 2020. Moreover, the second dissolution hearing was adjourned on 29 January 2020 to give the JOLs a further opportunity to make necessary enquiries on the basis that Mr Li would provide funding and evidence to support his allegations regarding the alleged value of the PFL Share and the Company's entitlement to it but Mr Li provided documents and information in a piecemeal fashion between 17 March 2020 and 22 April 2020; and many of the enquiries made by the JOLs to Mr Li in his various capacities as legal representative of Erlian and director of PFL and Shiny Glow went unanswered. As to Mr Li's contention that the judge had in effect put the burden of proof on him, Mr Li was a director of each of the relevant entities, and at paragraph 78 of her judgment the judge had stated that the criticism of the JOLs for relying to a significant extent on Mr Li was unwarranted. So far as concerned Mr Li's proposed construction of section 152 of the CA, it would result in any company with any claim (no matter how remote or uncommercial) being unable ever to be dissolved. Such a construction could not be reconciled with accepted principles of statutory interpretation, including the principle that a statute should be construed so as to avoid absurdity. There was in any event no difference between a full and a complete winding up of the Company's affairs: cf *Re Working Project Ltd* [1995] BCC 197 per Carnwath J at 199. Moreover, section 153 of the CA recognised that there might be assets left in a liquidator's hands when the winding up was completed. Finally, as a matter of public policy, the JOLs submitted that dissolution, and the finality of the discharge of liquidators, was an important part of the liquidation process: insolvency practitioners needed a clear path to the termination of their appointment as liquidators and officers of the court.

Discussion

15. The first matter to be resolved is the meaning of the phrase "when the affairs of the company have been completely wound up" in section 152(1). It is to be noted that when that state of affairs exists the court "shall" make an order for dissolution: whatever the position may have been in the United Kingdom in 1884 (see paragraph

12(5) above), dissolution is an obligatory final step in the Cayman Islands. The question is one of statutory interpretation: the principles are well known, and were conveniently summarised by Lord Neuberger of Abbotsbury JSC in *Joint Administrators of LB Holdings Intermediate 2 Ltd v Joint Administrators of Lehman Brothers Intl (Europe)* [2017] UKSC 38 at [123] as follows:

> "… [W]hen it comes to deciding the meaning of a legislative provision, judges are primarily concerned with arriving at a coherent interpretation, which, while taking into account commerciality and reasonableness, pays proper regard to the language of the provision interpreted in its context".

16. As to the context in which section 152 falls to be construed, it appears to me necessary first to identify what is involved in winding up the affairs of a company. Section 110(1) of the CA defines the function of an official liquidator as being (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. Section 140(1) of the CA requires the property of the company to be applied in satisfaction of its liabilities *pari passu* and subject thereto to be distributed amongst the members according to their rights and interests in the company. These provisions emphasise the primary purpose of a winding up, which is to apply the available assets in or towards satisfaction of all identified liabilities; and that purpose cannot be achieved in relation to unrealisable or valueless assets. That suggests that a winding up of the affairs of a company as envisaged by the CA may be complete even if there are valueless or unrealisable assets in the hands of the liquidator.

17. Apparent support for that suggestion is provided by section 153 of the CA (quoted in paragraph 6(b) above), which plainly contemplates that unclaimed dividends or undistributed assets may remain in the hands of a liquidator after dissolution. That necessarily implies that the inability to distribute such dividends or assets does not prevent the affairs of the company being completely wound up (since otherwise dissolution could not occur). For this reason, the JOLs' counsel claimed that section 153 was important; but it seems to me in reality to be of no real assistance. It assumes

that the dividends have been identified by the liquidator and the assets collected, and the specific persons entitled to them identified. That means that the dividends and assets have ceased to be part of the assets available to the creditors generally, so that the collective exercise of apportioning available assets to identified liabilities has been concluded. The problem the section is designed to address is not a problem of settlement of the company's affairs, but a problem of vesting the dividends or assets in the persons beneficially entitled to them at the conclusion of the winding up process. Read in this way, the section says nothing about the position where, as in the present case, there are or may be assets in the hands of the liquidator which might be capable of being applied for the benefit of the creditors or contributories as part of the winding up exercise.

18. As Mr Lowe pointed out, the CA does not contain – as the United Kingdom legislation (section 178 of the Insolvency Act 1986) does – a power for a liquidator to disclaim onerous property, defined as meaning any unprofitable contract and any other property which is unsaleable or not readily saleable or is such that it may give rise to a liability to pay money or perform any other onerous act. It might therefore be said that the absence of this power indicates that a winding up cannot be complete while there is anything at all – onerous or otherwise – left unadministered. But, as I have pointed out in relation to the liquidator's functions, the primary purpose of a winding up – the realisation of available assets to meet identified liabilities – cannot be achieved in relation to unrealisable or onerous assets. And it is again the case that the Cayman legislation does not contain anything equivalent to sections 1029-1034 of the UK Companies Act 2006, which give the court power to order restoration of a dissolved company to the register of companies. This latter power is typically exercised when assets or liabilities come to light after dissolution, and, because the effect of dissolution is to bring the company's existence to an end, the absence of any such power means that the company cannot deal with any undiscovered asset and cannot be sued in respect of any undiscovered liability. But it is noteworthy that under section 205 of the UK Insolvency Act 1986 dissolution only occurs once the registrar is given notice by the official receiver that the winding up is complete, so that the existence of a power to restore may be said to imply a recognition that a winding up may be certified as complete on the basis of the known facts. The only step taken in the

Cayman Islands to mitigate the sort of consequence addressed by the power to restore is the trust mechanism contained in section 153, but that applies only to assets that were in the possession or control of the liquidator before dissolution (which undiscovered assets typically will not be), and on the face of it cannot apply to liabilities at all, or to any possibility of a future claim. But in my view the absence of these powers has no relevance to the construction of section 152. The lack of a power to disclaim means that there may still be valueless or unrealisable assets in the hands of a liquidator, but the fact that they cannot be disclaimed adds nothing to consideration of the question whether a winding up of the affairs of a company may nevertheless be complete. The same applies to the absence of a power to restore to the register a dissolved company: the company cannot be dissolved unless the winding up is complete, and the fact that it cannot be restored once it is dissolved adds nothing to the statutory requirement. Overall, it seems to me that the completeness or otherwise of the winding up is to be judged without regard to the fact that there is no power of disclaimer and no power of restoration to the register. It is possible to see these as deficiencies in the legislative scheme, but they have no impact on the construction of elements of the scheme as it stands.

19. In the light of these considerations, I turn to Mr Lowe's contention that there was an intentional distinction of meaning between the expression "fully wound up" in section 127 and the expression "completely wound up" in section 152(1), the distinction being intended to reflect the difference between the relative lack of formality of a voluntary winding up and the onerous duties and responsibilities of a liquidator in a compulsory winding up. It is true that the CA is much less concerned to identify the characteristics of a voluntary winding up and the attendant functions of a voluntary liquidator than those of a compulsory winding up and an official liquidator; but I find it impossible to suppose that the legislature intended to draw any distinction between them in relation to the criterion for dissolution. In each case, dissolution brings the existence of the company to an end, and the imperative to ensure that its affairs have been properly concluded before it ceases to exist is equally strong in both cases. Moreover, as a matter of ordinary language, "fully" and "completely" mean the same. The Oxford

English Dictionary includes "completely" as one meaning of "fully"[1], and "fully" as one meaning of "completely"[2].

20. Again, as Moses JA pointed out in argument, however heavy the burden on a liquidator in a compulsory winding up may be similar practical difficulties are capable of arising as in a voluntary winding up. It is those practical difficulties which underlie the statement in *London and Caledonian* quoted in paragraph 12(6) above. That case concerned a petition by a creditor for the winding up by the court of a company which had previously been in voluntary liquidation and then dissolved. On behalf of the petitioner, it was argued that the affairs of the company could not be said to have been fully wound up while a debt of which the company had notice was still unsatisfied and when a large sum had been left in the hands of the liquidators to meet future claims. The petition was dismissed at first instance, and again on appeal. The material part of the judgment of James LJ (only part of which is quoted above) is as follows:

> "… What was decided in [*In re Pinto Silver Mining Company* (1878) 8 Ch D 273] was, that we could not put upon these words, "as soon as the affairs of the company are fully wound up", the construction contended for, namely, to make that a condition precedent and construe it to mean that everything had been done which was to be done. We are of opinion that those words could not mean that if there were a single asset outstanding or a single debt unpaid, the affairs of the company were not to be considered as wound up. Take the case of an insolvent company, insolvent because there were contributories at that time insolvent who had not paid their calls; or suppose that had been judgment against a hundred contributories recovered, and a return made by the sheriff that they had no assets and that he could not levy the amount of the judgment, could it be said that so long as a thing of that kind continued the company could not be fully wound up? Or suppose an outstanding liability under a lease, under the covenants in which the company might be liable any number of years afterwards, could not the company be fully wound up? We must put some practical and sensible meaning on the words, and in my opinion they mean "as far as the liquidators can wind them up"; that is, when the liquidator has done

[1] "In a full manner or degree; to the full; in (its) entirety or totality; **completely**, entirely; thoroughly, exactly, quite."

[2] "In a complete manner; **fully**, perfectly; entirely, wholly, thoroughly."

> all that he can to wind up the company, when he has disposed of the assets as far as he can realise them, got in the calls as far as he can enforce them, and paid the debts as far as he is aware of them, and has done all that he can do in winding up the affairs, so that he has completed his business so far as he can, and is *functus officio*".

21. This passage is not binding on us, and does not in terms apply to a compulsory winding up; but it makes obvious sense, and in my judgment represents the position in the Cayman Islands regardless of the type of winding up in issue. Once it is accepted, as Mr Lowe did, that there will inevitably be liabilities outstanding (in the sense of not having been fully satisfied) when the winding up of an insolvent company is concluded, it becomes clear that the complete winding up of the affairs of a company cannot be an absolute requirement. As *London and Caledonian* shows, it must take account of circumstances; and, I would add, of the primary purpose of a winding up.

22. The judge quoted the relevant part of the passage and, as appears from paragraph 145 of her judgment (quoted in paragraph 10 above), based herself upon it. Her conclusion was that the JOLs had done all that they could to wind up the Company. That conclusion represents her assessment of the facts as she had found them to be; and it is not an assessment with which we should interfere unless we are satisfied that in reaching it the judge clearly misunderstood the import of one or more relevant facts. Although it is indeed trite law to say that an appellate court should not ordinarily interfere with the findings of fact at first instance, or with a judge's assessment of them or the weight to be placed on them, it is worth quoting a passage from one of the cases referred to by counsel for the JOLs, namely the Scottish case of *McGraddie v McGraddie* [2013] UKSC 58, per Lord Reed at [2]-[3], which makes clear that the practice is not confined to cases where the first instance judge has heard oral evidence:

> "[A]s was said by Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19, in a dictum which was cited with approval by Viscount Simon and Lord Du Parcq in *Thomas* [*Thomas v Thomas* [1947] AC 484] at pp 48, 62-63, 486 and 493 respectively, and by Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* [2003] UKHL 45; 2004 SC (HL) 1, para 17:

> "It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest of considerations, that it would be justified in finding that the trial judge had formed a wrong opinion."

The reasons justifying that approach are not limited to the fact, emphasised in *Clarke* [*Clarke v Edinburgh & District Tramways Co Ltd* 1919 SC (HL) 35] and *Thomas* that the trial judge is in a privileged position to assess the credibility of witnesses' evidence. Other relevant considerations were explained by the United States Supreme Court in *Anderson v City of Bessemer* 470 US 564 (1985), 574-575:

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one: requiring them to persuade three more judges at the appellate level is requiring too much. As the court has stated in a different context, the trial on the merits should be 'the "main event" … rather than a "tryout on the road." … For these reasons, review of factual findings under the clearly erroneous standard - with its deference to the trier of fact - is the rule, not the exception."

23. Mr Lowe's essential case on this aspect of the appeal was that the judge had misunderstood the fundamental import of the fact that the Company was the registered owner of the PFL Share. Registration meant that unless and until the register was rectified the Company had a title valid against the world. Had the judge understood that, she would have seen that questions of the validity of the transfer by Shiny Glow were irrelevant, would have seen that the Company had title to an asset of substantial

actual or potential value, and would have been unable properly to conclude that the affairs of the Company had been completely wound up while it continued to hold the asset. Her entire assessment was faulted by the initial failure to focus on the fact of registration.

24. What then is the effect of registration? Section 38 of the CA provides that the subscribers of the memorandum of association and "every other person who has agreed to become a member of a company and whose name is entered on the register of members, shall be deemed to be a member of the company". In *Enviroco Ltd v Farstad Supply A/S* [2011] 1 WLR 921 the United Kingdom Supreme Court said in relation to the equivalent provision in the United Kingdom legislation that it "reflects a fundamental principle of United Kingdom company law, namely that, except where express provision is made to the contrary, the person on the register of the members is the member to the exclusion of any other person, unless and until the register is rectified…" (per Lord Collins of Mapesbury JSC at [37]). The same is the case in the Cayman Islands. The judge quoted this passage (as part of a larger citation from *Nilon Ltd v Royal Westminster Investments SA* [2015] UKPC 2).

25. Mr Lowe focused on the judge's statement in paragraph 107 of the judgment that there were "meritorious arguments" made on behalf of Mr Li as to legal title, and her subsequent identification of matters which she regarded as of greater significance, as a clear indication that she had failed to ascribe the necessary importance to the fact of the Company's registration as owner of the PFL Share. But this focus is too narrow, and fails to have full regard to the consideration given by the judge to the question of title. The judge had recorded Mr Lowe's arguments about title in paragraphs 52 to 61 of the judgment, stating at [52] that "he argued with some force that legal title is derived from the registered title and that the invalidity of the transfer no longer matters once ownership is recorded on the Register of Members". She then continued as follows:

> "[60] As I understood the effect of Counsel's submission it is that the ultimate question for the JOLs was not the validity of the transfer but whether or not given that the transfer had been recorded on the Register they had a "decent

> enough equitable claim or a claim worth investigating" such that it should be pursued and which would allow them to measure the chances of successful opposition if challenged by other entities as to ownership.
>
> [61] Counsel then submitted that the important question is by what means the Company obtains equitable title, and that consequently the main issue is whether the 2015 Payment Agreement gives the Company a sufficient equitable interest in the shares of PFL to be able to withstand opposition".

It was not suggested that the judge had mis-recorded or misunderstood Mr Lowe's submissions. But on the basis that the argument is properly recorded, it is clear that it was not being suggested to the judge that the fact of registration of the Company as owner of the PFL Share was the end of the matter. Nor could it have been: given that the registration gives a title good against the world unless and until the register is rectified, it was relevant when considering what to do about the PFL Share to make at least some assessment of the possibilities that the register would be rectified. On the face of it, the share had been transferred for a nominal consideration of HK$1.00 by a company which was heavily indebted, and in circumstances where the major creditor – CDB – had not apparently consented to the transfer. The asserted justification for a transfer made in these circumstances was that it represented the share reversal required by the Payment Agreement. But PFL was not a party to the Payment Agreement, and the share reversal contemplated the return of the Company's interest in Shiny Glow, not in PFL. At paragraph 73 of the judgment, the judge considered that these matters "would mean that reliance on the terms of the Payment Agreement as a means of establishing equitable title would not be a position of strength". Thus when the judge stated, at paragraph 107, that Mr Li's arguments as to legal title were meritorious, but that the fundamental question went beyond legal title, she was not doing so in a vacuum. It is clear from the totality of her remarks that she well understood the effect of registration of the Company as owner of the PFL Share, but took the view – expressed in paragraph 137 – that it was "doubtful … whether the Company could effectively withstand a challenge from SGL if it claimed to have a better title".

26. In my view, the judge was fully entitled to look beyond the fact that the Company had legal title to the PFL Share and consider how secure in practical terms that title might be. To ignore the circumstances in which the PFL Share suddenly became an asset of the Company at a very late stage in the liquidation would have been artificial in the extreme. To put the point another way, Mr Lowe's proposition that the fact of registration is of overriding importance leaves out of account all questions of practicalities; but when considering how the assets of a company in liquidation may be realised for the benefit of creditors and contributories, practicalities may very well be important. It is no use having a good paper title if in the end it turns out to be merely paper.

27. Similar considerations apply to the question of valuation. If the PFL Share had any value, it was because of PFL's ownership of Erlian and thus of the Erlian railway property. But there were at least two difficulties with that. First, as Moses JA remarked in argument, it was all very well to look at photographs of the railway property, but it needed money to exploit it and none was readily available. The Company was certainly in no position to borrow, and it was highly speculative whether any proper business case could be made for completion of the railway. That was particularly so because of the second difficulty, which is that the railway was designed to serve the operations of the Mongolian iron mine – which the Company did not own and was instead held by IMI, whose shares had not been the subject of any share reversal. The absence of an assured user for the railway meant that completing it would have been at best highly risky and at worst pointless. It was these and other considerations which led the judge to ask rhetorically what purpose would be served by overcoming the difficulties about title. As she said (at paragraph 137, quoted above but repeated here for ease of reference): "ultimately even if all this could be overcome, to what end. The Erlian valuation provided is doubtful not taking into account its creditor claims and other factors. Even if SGL was left with Erlian's residual assets of US$24 million through its ownership of PFL, given the financial statements provided, SGL is insolvent and PFL itself is in debt. The Company is insolvent and would not be in a position to borrow capital".

28. The judge's overall conclusion (paragraph 138) was that there was no real prospect of realisation of some value for the PFL Share. It is impossible to say that in reaching that conclusion she misunderstood or otherwise failed to take proper account of some material fact; and it is certainly not the case that it was a conclusion that no reasonable judge could have reached. On the contrary, the judge carefully considered the underlying facts and the opposing arguments and, as I have said, not only took into account the fact of the Company's registered ownership of the PFL Share but, in addition to explaining why that was not conclusive, went on to consider the question of valuation on the footing that the difficulties of title could be overcome. In my judgment, her analysis cannot be faulted.

29. Mr Lowe complained that the effect of the judge's decision was to permit the JOLs to abandon or disclaim the PFL Share when there was no statutory power to do either of those things. But the question for the judge was whether the affairs of the Company had been completely wound up; and in answering that question she was entitled for reasons I have already given to take the view that the fact that the Company owned a valueless, unrealisable asset was not an obstacle to completion of the winding up – the main purpose of which was to realise realisable assets for distribution to creditors and contributories. The fact that the PFL Share, assuming it to be an asset of the Company at all, would thereafter for a long period be held on trust for whomever might be entitled to it, or perhaps would pass to the Crown as bona vacantia, in any event meant that title would not simply disappear. It is also pertinent to consider what the consequence would be if the existence in the hands of a liquidator of an unrealisable asset of no value meant that a winding up could not be completed: in such a case, the liquidation would continue and the liquidator would remain in post, continuing to owe duties to the court and the creditors, but without any function to perform or any funds or any ability to bring the liquidation to an end. In my judgment, such an outcome is not consonant with modern conditions; and it is also not consonant with the legislative policy, evinced by the mandatory nature of section 152(1), that a company should cease to exist once its affairs have been resolved.

30. For completeness, it is desirable to deal with some further points raised by Mr Lowe. First, the suggestion that the judge wrongly took into account *In re Exten Investment*

Fund is unfounded: whilst it was cited to and considered by her, paragraph 99 makes clear that the JOLs had acknowledged that the case was not directly on point, but had been cited as an invitation to the Court to consider what was hoped to be achieved by the deferral of dissolution. Whilst it is true that the case concerned deferral of dissolution as a matter of discretion, and discretion plays no part in consideration of the question whether the affairs of the company have been completely wound up, for the reasons I have given practical considerations do play such a part: and that is what the judge was being invited to consider. There was nothing wrong in her doing so. Secondly, there is similarly no substance in the suggestion that the judge placed the burden on Mr Li to disprove the existence of assets and gave excessive credence to the views of the JOLs: Mr Li was a director of Shiny Glow as well as of the Company, and it was for him to explain – as up to a point he did in his various affirmations – the circumstances of the late arrival of the PFL Share. That did not amount to placing any burden on him other than elucidation of events which he had himself brought about. Nor did the judge too readily accept the JOLs' views: as she made clear, notably in paragraphs 138 and 145 which I have set out in paragraph 10, she was exercising her own judgment. Thirdly, there is once again no substance in the criticism that the JOLs were over-hasty in moving to dissolve the Company three months after their appointment. At the time they made that application, there was no suggestion that the Company had any assets of substantial value, and no suggestion that it might come to do so in the form of the PFL Share. Indeed, Mr Li had made clear to the JOLs in their meeting on 8 October 2019 that the company had no assets. Nor can the JOLs be criticised for their scepticism about the value of the PFL Share and the underlying assets: they – and the judge – were entitled to have regard to the fact that Mr Li gave the JOLs inconsistent information about the value of the PFL Share, to the changes of position in the documents he provided, and to the stance of his unco-operative valuer. Finally, as to Mr Lowe's point that to treat the absence of funding as a relevant consideration was open to abuse, it remains the position that in every case the Court must be satisfied that the affairs of a company in compulsory liquidation have been completely wound up, providing a safeguard against any abuse; but in general terms it seems to me clear that an established absence of funds must necessarily curtail the extent of the actions and investigations which a liquidator can be expected to carry out.

Disposition

31. For the reasons I have given – which, in summary, are that the judge was entitled to follow *London and Caledonian* and have regard to the practical difficulties of valuation and realisation of the PFL Share, and that her assessment comprehended all relevant matters such that this court should not interfere with her conclusions – I would dismiss this appeal.

32. My provisional view is that the costs of the appeal should be borne by Mr Li; but if either party wishes to propose a different order, they may do so in writing to be filed within 10 working days from the circulation in draft of this judgment (with any reply in writing within 7 working days thereafter), and the matter will then be determined on the papers.

BEATSON JA:

33. I agree.

MOSES JA:

34. I also agree.