



**GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO. FSD 135 OF 2022 (IKJ)

**IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF REAL ESTATE AND FINANCE FUND (DISSOLVED)**

IN CHAMBERS

Appearances: Ms Gemma Lardner and Mr Max Galt,
Ogier, on behalf of the Plaintiff

Before: The Hon. Justice Kawaley

Heard: 6 July 2022

Date of decision: 6 July 2022

Draft Reasons circulated: 12 August 2022

Reasons delivered: 24 August 2022

HEADNOTE

Ex parte application to set aside dissolution of company, continue voluntary liquidation under Court supervision and appoint joint official liquidators-inherent jurisdiction of Court-governing

220824 - In the Matter of the Real Estate and Finance Fund - FSD 135 of 2022 (IKJ) Reasons for Decision - Final

principles-dispensing with service and advertisement of petition-Companies Act (2022 Revision) sections 127, 129(2), 131, 151-Grand Court Act (2015 Revision) section 11(2)-Companies Winding Up Rules 2018 Orders 15, 24-Grand Court Rules Order 9

REASONS FOR DECISION

Introductory

1. The Petition dated June 2, 2022 was sealed on June 14, 2022. Worldwide Opportunities Fund SPC (in Official Liquidation) (the “Petitioner”) sought the following principal relief in respect of a dissolved company, Real Estate and Finance Fund (“REFF”/the “Company”):

“1. The deemed dissolution of REFF be declared void.

2. REFF be restored to the Register of Companies.

3. The liquidation of REFF continues under the supervision of the Court.

4. REFF be deemed to have continued in existence as if it had not been dissolved;

5. The property vested in the Minister for Financial Services and Commerce be restored to REFF upon REFF's restoration to the Register of Companies.

6. Mr Andrew Morrison and Mr David Griffin of FTI Consulting (Cayman) Limited, Suite 3212, 53 Market Street, Camana Bay, PO Box 30613, Grand Cayman, KY1-1203, Cayman Islands and Mr John Batchelor of FTI Consulting (Australia) Pty Ltd of Level 21, Bourke Place, 600 Bourke Street, Melbourne, VIC 3000, Australia be appointed as joint official liquidators of REFF (the ‘JOLs’).”

2. On July 6, 2022 I granted the relief sought by the Petitioner. This appeared to be the first time this Court had set aside a dissolution following a voluntary winding-up. The only

previous local decisions relating to similar applications were two cases where this Court refused to set aside the dissolution. These are the reasons for that decision.

The Petition

3. The Petition was primarily supported by the First Affidavit of Andrew Morrison and the First Affidavit of John Batchelor, two of the Petitioner's Joint Official Liquidators, who verified its contents. The Petition and the Summons for Directions were listed for hearing on July 6, 2022 and the key directions sought were that (1) the Petitioner should not be required to serve the Petition and (2) the Petitioner should not be required to advertise the Petition. If those directions were granted, the Petitioner invited the Court to grant the substantive relief sought on the Petition without further ado.

4. The Petition alleged as follows. REFF was incorporated in the Cayman Islands as an open-ended mutual investment fund on May 25, 2012. Until 2017, the sole management share was held by Giant Management Corporation Limited, a Hong Kong Corporation, which also served as sole director. From November 2017, the sole director and management shareholder was a Seychelles company with the same name ("Giant Management Seychelles"). The Petitioner, a segregated portfolio company, was wound-up by this Court on May 16, 2019¹; prior to this it was managed by associates of brothers Alan Sun and Ricky Sun, along with Kimmy Luk, individuals who also controlled REFF (the "Syndicate"). The Petitioner held a segregated portfolio the acronym of which was "HKIF (2)", 88.8% of the participating shares in which were held by AXA China Region Insurance Company (Bermuda) Limited ("AXA"). Between May 2016 and December 2018, the NAV of HKIF (2) fell by more than 93%. The Petitioner alleged that the Syndicate carried out various unauthorised transactions "*whereby REFF's assets were stripped for their own*

¹ That Order was made by me at an unopposed *inter partes* hearing. On the papers by Order dated April 12, 2022 in FSD 34 of 2019, I approved a funding agreement on the basis of now sealed materials which alluded to the possibility of the Petitioner pursuing the present application. That application in the Petitioner's liquidation did not address or require me to consider or in any way evaluate the merits of the present application to set aside the dissolution of REFF.

personal benefit and/or the benefit of others, which accounts for the dramatic reduction in HCIF (2)'s NAV". These transactions are said to give rise to various causes of action for REFF against the Syndicate. In addition, it was averred that in December 2020, "the Hong Kong Police executed search warrants and arrested 24 persons in respect of the fraudulent misappropriation of REFF's assets, including inter alia Alan Sun, Ricky Sun, Kimmy Luk, Clara Kwok, and Iris Leung"².

5. Against this background the Petition sets out the central allegation that a fraud occurred in the liquidation of REFF. Giant Management Seychelles placed REFF into voluntary liquidation on November 1 2018 and appointed itself as voluntary liquidator. REFF was dissolved on May 27, 2019. It is alleged, *inter alia*:

"26. Pursuant to section 124(1) of the Companies Act a voluntary liquidation shall continue under the supervision of the Court unless, within twenty-eight days of the commencement of the liquidation, the directors have signed a declaration of solvency.

27. Pursuant to section 124(2) of the Companies Act a declaration of solvency means a declaration to the effect that a full enquiry into a company's affairs has been made and, to the best of the directors' knowledge and belief, a company will be able to pay its debts in full together with the prescribed rate of interest within twelve months of the commencement of the winding up.

28. It is averred that no director, taking into account the matters set out above, could have had reasonable grounds for the opinion that a full enquiry into REFF's affairs had been made and/or that REFF's assets were properly realised for distribution to creditors and/or shareholders.

² Clara Kwok was described as a former director of Worldwide, together with Ricky Sun. Iris Leung was said to be the wife of Ricky Sun.

29. *It is further averred that the voluntary liquidation was procured by the Syndicate for the purpose of concealing the misappropriation of REFF's assets set out above in circumstances where:*

(a) Giant Management Seychelles is controlled by Alan Sun, Ricky Sun and Kimmy Luk and paragraph 6 above is repeated;

(b) The authorised signatory of Giant Management Seychelles who signed the special resolution placing REFF into voluntary liquidation is an individual who is connected with the Syndicate...”

30. *By reason of the foregoing:*

(a) the voluntary liquidation of REFF has been perpetuated by fraud;

(b) although REFF appears to have been solvent when it entered voluntary liquidation, upon restoration Giant Management Seychelles could not continue in the position of voluntary liquidator; and

(c) the liquidation of REFF under the supervision of this Honourable Court will facilitate a more effective, economic or expeditious liquidation of REFF in the interests of contributories and creditors in circumstances where the powers of an official liquidator will be required for recovery of the assets misappropriated from REFF.

31. *It is therefore averred that REFF should be restored to the Register of Companies and wound up under the supervision of this Honourable Court.*

The Petitioner's submissions

Directions

6. Ms Lardner referred the Court to the following evidence in support of the directions sought dispensing with service and advertisement of the Petition. Firstly, the First Affidavit of Jermaine Rasheed Taylor established that on June 20, 2022, the Petition, Summons for Directions and supporting Affidavits were served on (a) the Registry of Companies, (b) the Ministry for Financial Services and (c) the Company's last registered address. Secondly, the Second Affidavit of Batchelor explained that GM Seychelles had, according to searches, itself been dissolved so service on the Voluntary Liquidator was simply not possible. The Petitioner's counsel also indicated that the whereabouts of the members of the Syndicate were unknown.

Legal principles

7. In the absence of a statutory remedy for setting aside the dissolution of a company following its winding-up, the Petitioner had to rely on common law remedies. In the Petitioner's Skeleton Argument, Ms Lardner described the jurisdiction and governing principles as follows:

"24. The Court has recently confirmed In the Matter of Porton Capital Inc. and Porton Capital Ltd (unreported, 24 March 2022, Doyle J) ('Porton'), the inherent jurisdiction to restore dissolved companies where there has been fraud in the voluntary liquidation, and that the applicable burden of proof is the ordinary civil standard.

25. While the jurisdiction on which Doyle J relied to make a restoration order in these circumstances is well-settled, it is worth setting out the concise dicta of Lord Justice James In re Pinto Silver Mining Company (1878) 8 Ch. D. 273 at pages 283-284...

26. A year later, James L.J again considered a similar application *In re London and Caledonian Marine Ins. Co. (1878) 11 Ch. D 140 at page 144 [AB/10/94]:*

'We thought that was the meaning of "fully winding up", and that being so, we thought there was no power to go behind the dissolution except in the case which I suggested as a possible case – the case of absolute fraud – fraud which the company could be fixed with. If there were a case of that kind, then very likely the whole thing might be set aside...'

27. *The Court will be cautious to exercise its discretion to restore a dissolved company. On the one hand the Court must consider the policy principle that 'fraud unravels all' and on the other the principles of 'certainty and finality'; noting in particular that the Cayman Islands has elected not to enact a statutory process for applicants to restore dissolved companies (Doyle J at paragraph 17 of Porton).*

28. *While Doyle J did not ultimately find that the requirements for restoration had been made out in Porton, the Supreme Court of the Bahamas restored a dissolved company In the Matter of Soothsayer Limited and others v the Registrar General and others 2017/CLE/gen/00684. The headnote of that decision at page 2 says:*

'The Company was voluntary dissolved on 21 May 2015. Four months after its dissolution, the First Plaintiff discovered that there had been fraudulent activity in the management of his accounts held with the Bank including unauthorized purchases of shares, imprudent trading activity and false reporting. An employee of the Bank admitted guilt in a criminal matter before the Swiss Court. In the interim, civil action has commenced against the Bank in the High Court of the Republic of Singapore. The Plaintiffs seeks a restoration of the Company to the Register for the sole purpose of joining in proceedings currently before the High Court of Singapore.'

29. *In that case, the Honourable Madam Justice Indra H. Charles said at paragraph 43 'In my opinion, there is conclusive evidence to show that a fraud has been perpetrated in respect of the Company that led to its dissolution.' The allegations of fraud in that case are summarised at paragraph 28 of the judgment, but notably do not include a fraudulent misstatement in the declaration of solvency itself. The Court was satisfied that the company had been subject to a fraud by third parties (i.e. an employee at the Bank of Singapore) and that was sufficient basis to exercise its discretion to restore the company."*

8. In her careful oral submissions, Ms Lardner made it clear that the Petitioner's case was not simply based on the fact that it had been a victim of a fraud before the liquidation (as was seemingly considered sufficient to set aside the dissolution in *Soothsayer Limited and others v the Registrar General and others*). The Petitioner was willing to assume the burden of meeting the more stringent test of demonstrating that the liquidation itself had been fraudulent to some material extent, as required by the English authorities considered by Justice David Doyle J in this Court in the recent case of *In the Matter of Porton Capital Inc. and Porton Capital Ltd*, FSD 226/2022 (DDJ), Judgment dated 24 March 2022 (unreported).

Merits

9. As regards the application of the governing principles and the merits of the application to set aside the dissolution, the Petitioner submitted as follows:

"32. A voluntary liquidator owes personal duties to maximise the returns to those with an economic interest in the company. This includes creditors and (where creditors have been paid in full) the company's shareholders in accordance with their respective rights under the company's Articles of Association.

33. *The Cayman Islands Court of appeal confirmed at paragraph 99 of In the Matter of Asia Private Credit Fund Limited (in voluntary liquidation) [2020] (1) CILR 134*

that:

'I agree with the view expressed by Kawaley, J. in his judgment (Cause No. FSD 72 of 2019, at paras. 35–36) that the relationship between those holding the management shares in a fund and those holding the participating shares radically changes when the fund is contemplating the cessation of business and a voluntary winding up. The exclusive power conferred on the manager to resolve to wind up the company is conferred not for their benefit but for the benefit of the participating shareholders who, under the articles, have the predominant financial interest in the proposed winding up.'

34. *In breach of Giant Management Seychelles' duty as voluntary liquidator of REFF to the Petitioner (as the holder of 88.1% of the participating shares) to collect in assets of REFF, it failed to investigate the following fraudulent transactions which have now been identified by the JOLs...*

35. *As a result, it cannot be said that the affairs were "fully wound up" so as to enable Giant Management Seychelles as voluntary liquidator to present a report of the winding up to the company and file it with the Registrar in accordance with section 127(3) of the Companies Act to procure the dissolution of REFF.*

36. *In fact Giant Seychelles Management knew or ought to have known that the Proposed Claims should have been pursued...*

37. *The timing of the commencement of the voluntary liquidation also reveals its true purpose. By the time Giant Management Seychelles resolved to place REFF into voluntary liquidation on 1 November 2018, the series of unauthorised transactions had recently concluded.*

38. AXA had, since February 2018, been pressing the Petitioner to explain the dramatic decrease in value of the NAV and to provide a full suite of information in relation to the unexplained transactions which appeared to have no commercial rationale. Accordingly, by 1 November 2018, REFF would have been well aware of the concerns of AXA and should have anticipated legal action by the shareholders of REFF to recover the stolen funds and assets.

39. The effect of the voluntary liquidation was of course, ultimately, for REFF to be dissolved on 27 May 2019, thereby preventing contributories or creditors from petitioning the Court to wind up REFF so that its affairs could be investigated by an independent insolvency practitioner under the supervision of the Court. This was plainly contrary to the interests of REFF's contributories and creditors.

40. In the circumstances referred to above, it is submitted that the dissolution of REFF by way of voluntary liquidation was the final part of the fraud committed against it and was for the purpose of defrauding its contributories and creditors. REFF was drained of its assets and then wound up by its sole director, also being a party related to the Syndicate and without supervision by independent insolvency practitioners or the Court. There are accordingly features of conduct in the liquidation of REFF which are consistent only with dishonesty...”

10. As regards the ancillary prayers for the liquidation to continue under the supervision of the Court and for the Petitioners’ Joint Official Liquidators to be appointed as Joint Official Liquidators of REFF, the following main submissions were advanced:

“53. It is overwhelmingly in the interest of the contributories (i.e. the Petitioner for and on behalf of HKIF (2)) for the Court to supervise the conduct the liquidation and for independent insolvency practitioners to be appointed, in circumstances where Giant Management Seychelles previously failed to make a full enquiry into REFF's affairs.

54. *The choice of which liquidators are to conduct the supervised liquidation is an exercise of discretion and the petitioner's choice of liquidators as the majority if not sole party with an economic interest ought generally to be respected (paragraph 96 of Asia Private Credit).*

55. *The Petitioner asks that the JOLs be appointed as JOLs of REFF. The JOLs have consented to be appointed and meet the requirements of Order 3, rule 4(1) of the Companies Winding Up Rule 201836. The JOLs do not consider that their appoint [ment] as JOLs of REFF will present a possible independence issue because the interests of the Petitioner and REFF are entirely aligned; i.e. in seeking successful prosecution of the Proposed Claims. This will ensure an efficient and economic liquidation given the significant work already undertaken by the JOLs of the Petitioner which is clearly in the contributories (and creditors) best interest.”*

11. As regards the Petitioner’s duty of full and frank disclosure, the following potentially material points were very properly addressed:

“Merits of the fraud claims

63. *It is possible that the Syndicate or Giant Management Seychelles may have some explanation for some or all of the fraudulent transactions but based on the evidence it is difficult to see how they could.*

Acquiescence

64. *Notice of the voluntary liquidation of REFF was published in the Cayman Islands Gazette on 17 December 2018. It may be said that, by this time, AXA had raised concerns in relation to the Petitioner and ought to have either lodged proof of debts in the liquidation*

of REFF or subsequently objected to its dissolution of REFF which ultimately happened on 27 May 2019.

65. However, the JOLs were only appointed over the Petitioner on 16 May 2019, and their investigations were in their infancy by the time REFF was dissolved only two weeks later. Prior to 16 May 2019, the Petitioner was under the control of the Syndicate.

Effect of restoration

66. It may be said that as the voluntary liquidation of REFF was procured by fraud that it should be restored to the register as active – rather than in voluntary liquidation. If the policy principle "fraud unravels all" is applied strictly then arguably that is the correct outcome. However, this would be highly impractical in the circumstances of this case for the following reasons:

(a) The JOLs have been advised by their Hong Kong solicitors, privilege of which is not waived, that the limitation period for some or all of the Proposed Claims to be brought on REFF's behalf may soon expire. The claims must be commenced by no later than the end of July 2022 to preserve the position.

(b) If REFF is restored to the Register of Companies as active, the Petitioner would be required to seek leave to wind it up on an alternative basis (for example on the just and equitable grounds) which would be time consuming, expensive, and serve no practical purpose.

67. Moreover, the resolution subject to challenge in this instance is not the resolution to place the company into voluntary liquidation (as REFF was indeed solvent) but rather the filing of the return with the Registrar following the "conclusion" of the winding-up.

Service

68. *It may be said that the Court is being asked to make a determination of fraud which is directed at the Syndicate and, in particular, Alan Sun, Ricky Sun and Kimmy Luk, in circumstances where they have not been served with the Petition or been given the chance to make representations to the Court.*

69. *However, there is no requirement for the Court to make any finding of fraud or dishonesty against any particular members of the Syndicate. The evidence shows that there has been a series of unauthorised transactions in relation to REFF which are, on the face of it, fraudulent in nature and which require investigation. While Ricky Sun, Alan Sun, and Kimmy Luk were in control of REFF at all material times when the fraud was committed, the fact and extent of their liability is not an issue for this Court to decide.*

70. *There is an additional safeguard in this matter, which is that should the Court grant the restoration order, REFF will commence proceedings prosecuting the Proposed Claims and, at the trial of that action in Hong Kong, the Syndicate will have the opportunity to represent themselves to the extent they wish to participate in those proceedings.”*

Findings: Summons for Directions (dispensing with service and advertisement)

12. I did not lightly dispense with the need to serve the Petition and advertise it. I required the Petitioner’s counsel to orally explain the case set out in the materials placed before the Court. The position was, on careful analysis, ultimately simple. On an application to set aside the dissolution of a company following a voluntary liquidation under Cayman Islands law, it will usually be unsurprising that the dissolved company has no active registered office. However, it is reasonable to expect that the persons managing the last registered office might have some means of contacting the dissolved company’s former principals. Service on the former registered office was accordingly a reasonable step to take to attempt

to bring the Petition to the attention of REFF's former principals; and this step had been taken.

13. The most appropriate party to serve with a petition seeking to set aside a dissolution following a voluntary liquidation is the former voluntary liquidator. One would ordinarily expect that, assuming a suitable voluntary liquidator was appointed by the company's controllers, the voluntary liquidator could be effectively served if proceedings to set aside the dissolution were commenced just over 3 years after the dissolution. Here, the former Voluntary Liquidator, on the face of it unsuitable in light of its lack of independence in the face of AXA's ignored concerns as the main stakeholder in the voluntary liquidation, had been dissolved and could not be served. Moreover, the members of the Syndicate believed to have perpetrated a fraud while controlling REFF could not be located.
14. In these circumstances it was ultimately clear that it was appropriate to dispense with any further service of the Petition and advertisement of the Petition. The Petitioner's stake in REFF was so great (88.8%), and the nature of its relief so urgent (due to the pending expiry of potential limitation periods), that there was no basis for believing that advertisement would confer any material benefit on the proceedings. It was possible that the only other stakeholders were the Syndicate (or interests controlled by them). Such interests were highly unlikely to affect the ultimate disposition of the Petition in any event.

Findings: governing legal principles on applications to set aside a dissolution at common law

Introductory

15. In *In the Matter of Porton Capital Inc. and Porton Capital Ltd*, FSD 226/2022 (DDJ), Judgment dated 24 March 2022 (unreported), Doyle J summarised the principles applicable to an application such as that made by the present Petition as follows:

“15. It is common ground that this court has jurisdiction to restore a company to the register when it has been dissolved following a voluntary liquidation if an applicant for such relief can prove that there was a fraud in respect of the liquidation (Schramm and Hiscox Syndicate 33 v Financial Secretary 2004-05 CILR 39 Chief Justice Smellie applying Pinto Silver Mining Co. (1878) 8 Ch. D. 273 dicta of James LJ and Cotton LJ and London and Caledonian Marine Ins. Co. (1878) 11 Ch. D 140 dicta of James LJ and on appeal [2004- 05 CILR 104] considering Pinto, London & Caledonian and Russian & English Bank v Baring Brothers & Co Ltd [1936] A.C. 405). I therefore determine that this court has jurisdiction to grant the relief claimed if satisfied that a fraud in the liquidations has been proved.

16. It is not a statutory jurisdiction. In his skeleton argument Mr Quest described it as a ‘general or inherent jurisdiction’ but in his oral submissions stated that it was better described as an equitable jurisdiction rather than a common law jurisdiction. Mr Quest also submitted that it was a discretionary jurisdiction. Mr Samek submitted that it was not a discretionary jurisdiction and seemed to suggest that once fraud was proved the court must set aside the dissolutions. Mr Samek submitted that by 1878 common law and equity had been fused in England so it was wrong to refer to it as an equitable jurisdiction. Mr Samek’s fall back position was that if the jurisdiction was discretionary then it should only be in the rarest and most exceptional cases that the discretion would be exercised so as not to visit upon the fraudster the consequences of his fraud.

17. However the jurisdiction is described, it is a jurisdiction which a court must exercise with great caution. I note the cases on the policy principle that “fraud unravels all” but attention must also be given to the policy principles of certainty and finality. In other jurisdictions the elected representatives have passed laws which permit applications for companies that have been dissolved to be restored within a limited period (usually 2 years).

18. Collett JA sitting in the Court of Appeal in the Cayman Islands in *Schramm* at paragraph 8 stated:

‘That decision [not to follow later UK models] must be regarded as a deliberate one on the part of the well-informed local legislature and is readily to be understood as a reaction to the establishment of the formidable array of offshore companies registered in these Islands, which present a scenario unlike that of the United Kingdom, Canada, Australia or other established countries of the Commonwealth: they do not, to anything like the same extent, seek to attract overseas business incorporations. Occasional injustice must be regarded as the price which the local legislature has considered to be worth permitting to occur rather than to introduce the uncertainties which might plague the Law if the more recent English precedents, or indeed those very recently introduced in Australia, were to be adopted here. Indeed, Australia has radically reformed its legislation within the recent past.’”

16. In a comprehensive and compelling judgment, Smellie CJ in *Schramm and Hiscox Syndicate 33 v Financial Secretary* [2004-05 CILR 39] concluded that there was no express statutory jurisdiction to set aside a dissolution following a voluntary winding-up. He disapproved of an earlier contrary decision in *Campillo-v-Registrar of Companies* [2001 CILR 547], which had held that the jurisdiction to restore struck-off companies to the register could be invoked. The application in *Schramm* was ultimately refused because (a) it was based on the mere fact of an incomplete winding-up and (b) the Act did not confer the same broad discretion on the Court to restore a company dissolved after a winding-up as it explicitly did in the case of a company which had been struck-off the register. The final paragraph of the Chief Justice’s judgment is still relevant today as it explains why the jurisdiction to set aside a dissolution following a winding-up should be narrowly construed:

“44 In summary, I was compelled to differ from the conclusion reached in the Campillo case (2) for the following reasons:

(1) As to the construction of s.146 as itself giving power to the court to restore a company whose affairs have not been fully wound up (for example if there is proof simply that a significant asset exists), it would be difficult if not impossible to ascertain the event which rebuts the presumption of dissolution. The discovery of any significant asset could provide the trigger. There would be surprising results. There would be no limitation of time for rebutting the presumption. There would be no need to establish locus standi—anyone having an interest however speculative could apply. Section 146 does not say who could apply. Most significant (and unlike the English provisions since 1907 which expressly allow it), there would be no controlling discretion of the court as to the basis for rebutting the presumption of dissolution. It could mean that so long as a significant asset is discovered to exist, even years after the deemed dissolution of the company, a disgruntled creditor could insist upon its recovery, however impracticable. The result could be that the company might never be dissolved and the disruption that would be caused would be the reversal of rights which were deemed to have been settled when the company was wound up.

(2) It is striking that when the Cayman legislature passed the Companies Law in 1963 as including s.146, it did not at the same time adopt the provision which had long been in the English legislation (since 1907) which would have enabled it to modify the effect of s.146 so as to restore a company which had been dissolved pursuant to the provisions governing voluntary liquidations.

(3) As to the construction of s.178 as giving rise to the power to restore a company deemed dissolved under s.146, it is of fundamental importance that s.178 expressly relates only to companies which have been ‘struck off the register in accordance with this Law.’ Section 178 comes within the part of the Law dealing with defunct companies. It contemplates the

administrative process without notice (i.e. under ss. 175 or 176), by which a company's name is struck off the register. The section makes no mention of the word 'dissolution' as the process to be reversed by its application, and so what the court does by order under s.178 is restore the name of the company to the register 'as if it had never been struck off.' An order of the court under s.178 may not operate to restore a company as if it had never been dissolved—a matter, for all the reasons discussed above, with potentially very different and far-reaching consequences.

(4) The giving effect to statutory provisions which would permit such fundamental and important consequences is not properly a matter for judicial construction against the background of legislation which could readily have expressly adopted them were that the intention. This is not by any means the only respect in which the local Law, based as it still is on the original Victorian legislation of 1862, has been found to be lagging behind the times. For instance, the Privy Council only recently observed, in CVC/Opportunity Equity Partners Ltd. v. Demarco Almeida (1), that it contains no specific provisions which deal with the problem of minority oppression. Such legislative shortcomings require legislation to remedy them. It is inappropriate that judicial construction should strain to fill the breach.”

17. This decision was comprehensively affirmed by the Cayman Islands Court of Appeal in a very short decision with the most pertinent observations of Collett JA ([2004-2005 CILR 104] at paragraph 8) reproduced by Doyle J in paragraph 18 of his Judgment in *In the Matter of Porton Capital Inc. and Porton Capital Ltd* (set out above above).
18. Against this background, in the present case the governing principles fell to be considered for the first time in this jurisdiction in the context of a case where it was being positively asserted that the dissolution should be set aside because the winding-up was vitiated by fraud. In my judgment it is important to distinguish two jurisdictional questions: (1) the Court's jurisdictional competence to set aside a dissolution on non-statutory grounds (i.e.

what are the qualifying grounds?) and (2) what are the parameters within which the Court should exercise its jurisdictional competence to set aside a dissolution on non-statutory grounds (e.g. questions of standing, burden and/or standard of proof and delay and/or acquiescence).

19. The only authority placed before me where a dissolution was set aside on common law grounds was *In the Matter of Soothsayer Limited (Dissolved)*, Commonwealth of Bahamas Supreme Court, 2017/CLE/gen/00684, Judgment dated November 7, 2017, Indra Charles J (unreported). In that case Charles J defined the Court's jurisdiction as follows:

"[35] It is common ground that the IBC Act 2000 and its subsequent amendment, the IBC (Amendment) Act, 2010 contain no provision for the restoration of a company which has been dissolved and subsequently struck off of the Register.

[36] It is also common ground that, under its inherent jurisdiction, the Court may, after considering the circumstances under which an IBC was dissolved, restore that company to the Register once it is satisfied that such dissolution was perpetuated by fraud in respect of the Company. See: In re London and Caledonian Marine Insurance Company, In re Cornish Manures Ltd and In re Pinto Silver Mining Company [supra]."

20. The key question which arose for consideration in my judgment ought properly to be framed as follows: has a fatal non-compliance with a mandatory statutory provision (the requirement under section 127(1) of the Act that the affairs of a company be "*fully wound up*" before it is dissolved) occurred which completely invalidates the purported conclusion of the voluntary winding-up proceeding? This was the tacit question that James LJ asked (and answered in the negative) in 1878-1879, Smellie CJ asked (and answered in the negative) in 2006, Charles J asked (and answered affirmatively) in 2017 and Doyle J asked (and answered in the negative) in 2022. In my judgment a voluntary winding-up is a form of statutory proceeding which is subject to various procedural requirements including

(under sections 127 and 151) steps which a liquidator must take to bring the winding-up proceeding to an end. The requirement that the winding-up process should be completed is a mandatory requirement which must be substantially complied with in practical terms (not complied with in absolute perfection terms). Because there are clearly an infinite variety of ways in which a winding-up may be completed, one can only infer a fundamental obligation to substantially comply with the objectively reasonable minimum requirements of a ‘full’ winding-up having regard to the circumstances of each case. The problem of having to discern what Parliament intended the consequences of non-compliance with a statutory provision should be is a familiar one. By the early 21st century the emerging judicial consensus appears to have been that “*the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness*”³. However valuable guidance as to how courts should approach the question of the legal consequences of non-compliance with statutory provisions (and which supports the way in which I construed the statutory scheme in the present case) may still be found in the judgment of Dame Mary Arden LJ (as she then was) in *7 Strathway Gardens Limited-v-Pointstar Shipping and Finance Ultratown Ltd* [2004] EWCA Civ 1669:

“43. *I have gained most assistance from Burman v Mount Cook Land Ltd [2002] Ch.256 and Petch v Gurney [1994] 3 AER 731. As to the Burman case, I gratefully adopt the summary given by Carnwath LJ in the M25 case cited above:-*

‘16. ... [Burman v Mount Cook Land Ltd] concerned a requirement under the Leasehold Reform, Housing and Urban Development Act 1993, for the landlord to serve a counter-notice saying whether or not the right to a new lease was admitted and, if so, which of the tenants’ proposals were acceptable. The notice in question did not contain such a statement. The judge had upheld the notice on the basis that ‘a reasonable tenant’ would

³ *R-v- Soneji* [2006] 1 AC 340 at paragraph 22 (Per Lord Steyn).

not have been misled. That decision was reversed in this court. Chadwick LJ, giving the leading judgment said that the answer could only be found by construing the statutory language in the context of the statutory scheme. Having reviewed the complex statutory requirements in detail he concluded that the landlords' counter-notice was 'integral' to the proper working of the statutory scheme, and the failure to comply with the statutory requirements was fatal to its validity.'

44. The decision in the Burman case does not turn on the mandatory/directory distinction. However, it is authority for the proposition that the effect of non-compliance with a particular statutory requirement must depend on the particular statutory scheme in point.

...

47. The second authority which I have found of particular assistance on this appeal is Petch v Gurney, above. In this case Millett LJ, with whom Henry LJ agreed, illuminated the distinction between mandatory and directory requirements by these words:-

'The question whether strict compliance with a statutory requirement is necessary has arisen again and again in the cases. The question is not whether the requirement should be complied with; of course it should: the question is what consequences should attend a failure to comply. The difficulty arises from the common practice of the legislature of stating that something 'shall' be done (which means that it 'must' be done) without stating what are to be the consequences if it is not done. The court has dealt with the problem by devising a distinction between those requirements which are said to be 'mandatory' (or 'imperative' or 'obligatory') and those which are said to be merely 'directory' (a curious use of the word which in this context is taken as equivalent to 'permissive'). Where the requirement is mandatory, it must be strictly complied

with; failure to comply invalidates everything that follows. Where it is merely directory, it should still be complied with, and there may be sanctions for disobedience; but failure to comply does not invalidate what follows.

The principles upon which this question should be decided are well established. The court must attempt to discern the legislative intention. In Liverpool Borough Bank v Turner (1861) 30 CJ Ch 379 at 380 Lord Campbell LC said:

'No universal rule can be laid down for the construction of statutes, as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature, by carefully attending to the whole scope of the statute to be construed.'

In a well-known passage of his judgment in Howard v Bodington (1877) 2 PD 203 at 211 Lord Penzance said:-

'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter; consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in that aspect decide whether the matter is what is called imperative or only directory.'

...

Where statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement.'

21. Petch v Gurney directs me to consider the substance of the statutory requirement and the reasons for it. If Parliament properly regarded the requirement as one that had to be fulfilled in all cases, the court should give it that effect. The court must not substitute its own view." [Emphasis added]

Grounds upon which a dissolution may be set aside following a voluntary liquidation

22. In my judgment it was ultimately clear that the provisions of section 127 and 151 imposed a mandatory requirement for the affairs of the company to be fully wound-up in the sense that an honest liquidator had taken *bona fide* steps to complete the winding-up process, even if perfection had not been achieved. In the absence of substantial compliance with the statutory requirements, the dissolution would potentially be liable to be declared void on the basis that Parliament cannot have intended a valid and binding dissolution to follow from a fundamentally flawed voluntary liquidation. The foundational cases, cited by the Petitioner's counsel in written submissions (and reproduced above) support this conclusion. In *In re Pinto Silver Mining Company* (1878) 8 Ch. D. 273 at pages 283-284, James LJ opined as follows:

"Where there has been a de facto winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the Companies Act, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need

a great deal of argument to satisfy me that the Court can go behind the return. The provisions of the Act as to dissolution would be of very little value if a creditor could, after that period, come and open the whole matter because, through mistake, some formality has been omitted, some creditor had not come in, or some asset has been left undiscovered. The only case in which it is desirable that what has been done should be undone is where there has been a fraud by which some one is injured. Such a fraud must be the fraud of somebody, and the person guilty of it would be personally liable; but it may be that it would also invalidate the proceedings.” [Emphasis added]

23. In *In re London and Caledonian Marine Ins. Co.* (1879) 11 Ch. D 140 at page 144, James LJ elaborated upon the English Court of Appeal’s earlier decision in *In re Pinto Silver Mining Company*:

“We thought that was the meaning of ‘fully winding up’, and that being so, we thought there was no power to go behind the dissolution except in the case which I suggested as a possible case – the case of absolute fraud – fraud which the company could be fixed with. If there were a case of that kind, then very likely the whole thing might be set aside; that is to say, it might, on proper proceedings being taken, be made clear that the whole winding-up was null and void, and then the company would be restored again to its position, subject to claims of creditors and contributories, or any other persons who might have rights to enforce or equities to be adjusted in relation to the company.”[Emphasis added]

24. These extracts from two foundational nineteenth century cases, the legal effect of which was repealed by statute in England and Wales long ago, remain instructive for the position under Cayman Islands law today. They make it clear that the jurisdiction to set aside a dissolution not expressly conferred by Parliament fundamentally involves an exercise of statutory construction. When a statutory provision provides for a company to be dissolved following its winding-up without conferring an express power to set aside the dissolution, on what grounds will the courts imply that the requirements of the statute have been not

complied with to so great an extent that the winding-up (and subsequent dissolution) should be declared to be a nullity? James LJ intuitively suggested that “*absolute fraud*” might be a “*possible case*”, but did not have to consider the point directly because in neither case did anything arise which resulted in the winding-up proceedings being liable to be declared to be “*null and void*”. The core principle to be extracted from these cases, therefore, is one of general application. Where a court is invited to declare that anything done under a statutory provision should be set aside on the grounds that a statutory requirement has not been complied with, the relief sought may only logically be granted where either:

- (a) the statute contains an express power to set aside the relevant decision or proceeding;
- or
- (b) the statute contains an implied power to set aside the relevant decision or proceeding on grounds of substantial non-compliance.

25. Category (b) is the category of cases into which section 142 of the UK Companies Act 1862⁴, referred to by James LJ in the cited 1878 cases, fell. It provided:

“142. As soon as the affairs of the company are fully wound up, the liquidators shall make up an account showing the manner in which such winding-up has been conducted, and the property of the company disposed of; and thereupon they shall call a general meeting of the company for the purpose of having the account laid before them and hearing any explanation that may be given by the liquidators: The meeting shall be called by advertisement, specifying the time, place, and object of such meeting; and such advertisement shall be published one month at least previously to the meeting, as respects companies registered in England in the London Gazette, and as respects companies registered in Scotland in the Edinburgh Gazette, and as respects companies registered in Ireland in the Dublin Gazette.”

⁴ The versions of sections 142 and 143 of the 1862 UK Act reproduced here have been taken from www.irishstatutebook.ie.

26. Section 143 of the same Act provided:

“143. The liquidators shall make a return to the registrar of such meeting having been held, and of the date at which the same was held; and on the expiration of three months from the date of the registration of such return the company shall be deemed to be dissolved: If the liquidators make default in making such return to the registrar, they shall incur a penalty not exceeding five pounds for every day during which such default continues.”

27. The corresponding provisions of the Companies Act (2022 Revision) (the “Act”) also fall into category (b) as there is no express power to set aside a dissolution following a voluntary liquidation. Firstly, section 127 provides:

“Final meeting prior to dissolution

127. (1) As soon as the company’s affairs are fully wound up, the liquidator shall make a report and an account of the winding up showing how it has been conducted and how the company’s property has been disposed of and thereupon shall call a general meeting of the company for the purpose of laying before it the account and giving an explanation for it.

(2) At least twenty-one days before the meeting the liquidator shall send a notice specifying the time, place and object of the meeting to each contributory in any manner authorised by the company’s articles of association and published in the Gazette.

(3) The liquidator shall, no later than seven days after the meeting, make a return to the Registrar in the prescribed form specifying —

(a) the date upon which the meeting was held; and

(b) if a quorum was present, particulars of the resolutions, if any, passed at the meeting.

(4) A liquidator who fails to call a general meeting of the company as required by subsection (1) or fails to make a return as required by subsection (3) commits an offence and is liable on conviction to a fine of ten thousand dollars.” [Emphasis added]

28. Section 151 then provides:

“Dissolution following voluntary winding up

151. (1) The Registrar shall, within three days of receiving a liquidator’s return under section 127(3), register such return.

(2) Upon the expiration of three months from the registration of the return the company is deemed to be dissolved.

(3) Notwithstanding subsection (2), the Court may, on the application of the liquidator or any other person who appears to the Court to be interested, make an order deferring the date at which the dissolution of the company is to take effect to such date as the Court thinks fit.

(4) An application under this section shall not be made after the company is deemed to have been dissolved.

(5) An order of the Court made under this section shall be registered with the Registrar within seven days of the date upon which it was made.” [Emphasis added]

29. Although the life of a voluntary winding-up may be extended before dissolution is occurred, the right to do so post-dissolution is expressly excluded. In substance therefore, the statutory position under Cayman Islands law post-dissolution is analogous to that under the Companies Act 1862 (UK) as considered in the cases mentioned above. The question remains the same under Cayman Islands law as regards an application for an order setting aside the dissolution of a company which has occurred under sections 127 and 151 of the Act. What forms of non-compliance with the clearly mandatory substantive statutory requirement that the affairs of the company should be “*fully wound up*” should Parliament

be deemed to have intended should result in the purported winding-up and consequential dissolution being regarded as a nullity?

30. In my judgment the answer ought not simply to be, reflexively, “fraud”, because James LJ posited this as a “*possible case*” in 1878 and 1879 where the applications to set aside the dissolutions were refused. Rather, the answer ought to be that any forms of non-compliance which so undermine the legislative purpose of sections 127 and 151 that the Act may be construed as providing by necessary implication that such circumstances amount to not simply an imperfect winding-up, but rather amount to no winding-up at all. A winding-up that has been conducted fraudulently may, depending upon the nature and extent of the fraud, constitute the most straightforward basis for seeking a declaration that the dissolution should be viewed as a nullity and set aside. However, there may conceivably be other exceptional circumstances, not involving fraud as such, which might justify the same conclusion. After all, James LJ in *In re Pinto Mining* premised his opinions as to the finality of the liquidator’s return on the following key assumption:

“Where there has been a de facto winding-up; liquidators appointed; the accounts of the liquidators laid before a meeting, as required by the Companies Act, 1862, s. 142; a return duly made to the Registrar, and the statutory period of three months elapsed, it would need a great deal of argument to satisfy me that the Court can go behind the return.” [Emphasis added]

31. Where there has not been a *de facto* winding-up at all, but the formalities have been purportedly complied with resulting in a company being dissolved, it may perhaps be possible to formulate grounds for setting aside the dissolution without having to establish that the winding-up was vitiated by fraud. Qualifying circumstances would likely have to be strikingly unusual indeed. After all, the dominant legislative purpose of sections 127 and 151 is, as Smellie CJ at first instance and Collett J in the Court of Appeal both convincingly opined in *Schramm and Hiscox Syndicate 33 v Financial Secretary*,

achieving finality and avoiding uncertainty when a company is voluntarily wound-up and dissolved under Cayman Islands law. In other words, these *dicta* suggest, a conscious public policy decision was made in the Cayman Islands to make Cayman Islands companies more user-friendly as investment vehicles by affording investors greater security than in other jurisdictions that upon the conclusion of a solvent voluntary winding-up the investors would not have to linger under the shadow of a statutory right to apply on broad discretionary grounds to set the dissolution aside. This finality feature is buttressed by the flexibility afforded to investors to decide who to appoint as a voluntary liquidator in the solvent liquidation context; there no restrictions imposed in terms of qualifications or residence are far as voluntary liquidators are concerned.

32. However, as Smellie CJ in *Schramm* and Doyle J in *Porton Capital* both tacitly acknowledged, sections 127 and 151 of the Act cannot sensibly be construed as excluding altogether any application to set aside a dissolution. A fraudulent winding-up process is the most obvious ground upon which a purported dissolution may be declared to be void, not simply because “fraud unravels all”, but more fundamentally because the statutory scheme cannot sensibly be construed as intended to validate liquidation processes which have not taken place in good faith and/or which have been used as an instrument of fraud. Viewing sections 127 and 151 in the wider context of Part V and the Act as a whole, it is obvious that the legislative policy underpinning the wider statutory scheme seeks to implement higher level public policy imperatives that have a “*yin and yang*” quality to them.
33. The Act seeks to balance the potentially conflicting forces of facilitating the establishment of business-friendly corporate vehicles with putting in place protections for the benefit of persons contracting with such vehicles against corporate abuse. These potentially conflicting policy objectives may be viewed as complementary to the extent that all *bona fide* founders and/or managers, on the one hand, and outside investors and/or creditors, on the other hand, would reasonably expect the statutory scheme to be implemented, whether in the voluntary winding-up context or otherwise, in a fundamentally honest and

commercially rational way. The most important statutory precondition for a valid dissolution following a voluntary liquidation is that “*the company’s affairs are fully wound up*” (section 127(1)). This is the main substantive precondition for a voluntary liquidator concluding the liquidation process and taking the various formal steps (preparing a final report, convening final general meeting and preparing and filing a final return with the Registrar) which culminate in the company’s dissolution. It can only be sensibly viewed as imposing a mandatory statutory requirement. Substantial compliance must require that reasonable efforts have been made to identify and pay all creditors and ascertain the rights of all contributories and make such distributions to contributories which appear on a good faith analysis to be due to them. Where queries are raised about the extent of any rights, such queries should (subject to costs and proportionality concerns) be investigated. The liquidation process, in short, must have some substance to it and must obviously have been conducted in good faith. This would to my mind meet the requirements of what James LJ in *In re Pinto Silver Mining Company* (1878) 8 Ch. D. 273 at page 283 described as a “*de facto winding up*”, taking into account his subsequent views on the meaning of “*fully wound up*” in *In re London and Caledonian Marine Insurance Company* (1879) Ch. D. 140 at 143-144. In the latter case James LJ stated:

“We are of the opinion that these words ‘as soon as the affairs of the company are fully wound up’ ...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... 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 do to wind up the company...and has done all that he can do in winding up the affairs, so that he has completed his business as far as he can, and is functus officio. Then it is his duty to call a meeting, give in his account of the affairs of the company, and to make a return to the Registrar under the Act...”

34. The manifest purpose of sections 127 and 151 (consistent with the way the foundational 1862 UK provisions were construed by the English Court of Appeal over 140 years ago) is to ensure that solvent companies are so far as is reasonably possible wound-up in a way that gives effect to the legal rights of the stakeholders. The legislative purpose is not to permit voluntary liquidations to be used as an instrument for confiscating stakeholders' rights, and disappointing their reasonable commercial expectations. This interpretative approach finds further support in various elementary canons of construction, including:
- the presumption favouring a purposive construction;
 - the presumption favouring construction against evasion; and
 - the presumption against absurdity.

Legal character and source of the remedy

35. Justice Indra Charles of the Bahamian Supreme Court is the only judge known to have had to positively decide what the source of the jurisdiction is and she confidently concluded (*In the Matter of Soothsayer Limited (Dissolved)*, at paragraph 36) that the Court's "*inherent jurisdiction*" could be deployed. This was because in a case which was in other respects contentious, the source of the Court's jurisdiction to grant relief was "*common ground*". In the present case relief was sought on an ex parte basis and so it is more important to be clear that the Court is on sound jurisdictional ground.
36. The source of the jurisdiction to set aside a dissolution following a voluntary winding-up on the grounds of e.g. fraud was seemingly not explicitly discussed in the 19th century English cases which first identified the limited jurisdiction in this regard. Nor was it considered in *Schramm*. This is unsurprising as the jurisdiction was not exercised in any of those cases and there was an understandably confident assumption that a remedy for fraud must be available. The topic was the subject of only limited argument before Justice David

Doyle in *In the Matter of Porton Capital Inc. and Porton Capital Ltd*, FSD 226/2022 (DDJ), Judgment dated 24 March 2022 (unreported). It was:

“common ground that this court has jurisdiction to restore a company to the register when it has been dissolved following a voluntary liquidation if an applicant for such relief can prove that there was a fraud in respect of the liquidation (Schramm and Hiscox Syndicate 33 v Financial Secretary 2004-05 CILR 39 Chief Justice Smellie applying Pinto Silver Mining Co. (1878) 8 Ch. D. 273 dicta of James LJ and Cotton LJ and London and Caledonian Marine Ins. Co. (1878) 11 Ch. D 140 dicta of James LJ and on appeal [2004- 05 CILR 104] considering Pinto, London & Caledonian and Russian & English Bank v Baring Brothers & Co Ltd [1936] A.C. 405). I therefore determine that this court has jurisdiction to grant the relief claimed if satisfied that a fraud in the liquidations has been proved.”(Paragraph 15)

37. Doyle J only found it necessary to decide, as he ultimately concluded that he should not exercise the jurisdiction, that: *“It is not a statutory jurisdiction...However the jurisdiction is described it is a jurisdiction which a court must exercise with much caution...”* (paragraphs 16-17). Counsel variously described the jurisdiction as *“general or inherent”* and *“equitable”*. For the purposes of the present case, the relief sought had the following elements to it. The Petitioner sought:

(a) a declaration that the Company’s dissolution was void on the grounds that the statutory winding-up process was vitiated by fraud; and

(b) consequential relief by way of implementation of the declaratory relief pursuant to provisions of the Act applicable to companies in voluntary liquidation.

38. Only the first limb was subject to any potential doubt. In my judgment the most straightforward way of characterising the first limb of this jurisdiction in light of the

authorities is as follows. The Court has a statutory ‘inherent’ jurisdiction to grant a declaration that a dissolution pursuant to sections 127 and 151 of the Act under section 11 (2) of the Grand Court Act (2015 Revision). Section 11 of the Grand Court Act provides:

“11. (1)...

(2) *Without prejudice to subsection (1), the Court shall have and shall be deemed always to have had power to make binding declarations of right in any matter whether any consequential relief is or could be claimed or not.*”

39. In *In the Matter of Polarcus Limited*, FSD 31/ 2022 (IKJ), Judgment dated July 6, 2022 (unreported) this Court found that this statutory jurisdiction was available in relation to companies in liquidation. I considered section 11(2) in *Polarcus* earlier on the same day that I determined the present application. It is perhaps unsurprising that this point was common ground in the only case cited where this jurisdiction was previously actually exercised, *In the Matter of Soothsayer Limited (Dissolved)*, Commonwealth of Bahamas Supreme Court, 2017/CLE/gen/00684, Judgment dated November 7, 2017. Rather than viewing the Court as granting equitable or common law relief for fraud, it is in my judgment more straightforward and legally precise to characterise an application for a declaration that a dissolution is void as being an application for a declaration as to the status of a creature of statute under the statute which created it.
40. An alternative statutory basis for the jurisdiction to grant both limbs of the relief sought by the Petitioner did not form a conscious basis for my decision in the present case and is merely mentioned for future consideration. Admittedly, section 129 is primarily designed to be deployed during the pendency of a voluntary liquidation and it clearly arguable that it ceases to be available after a company has been dissolved. If this section is available, the full breadth of the remedial jurisdiction conferred by section 129(2) would of course, in the post-dissolution context, only be properly engaged and available once the Court has

determined that a purported dissolution is in fact null and void. Nonetheless, section 129 of the Act provides (in relation to voluntary liquidations):

“Reference of questions to Court

129. (1) 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 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.

(2) 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 thinks fit, or make such other order on the application as it thinks just.

(3) The voluntary liquidator shall, within seven days of the making of an order under this section, forward a copy of the order to the Registrar who shall enter it in that person’s records relating to the company.” [Emphasis added]

Factors relevant to the exercise of the discretion

41. Ms Lardner’s submissions in fulfilment of her client’s duty of full and frank disclosure, helped to elucidate factors potentially relevant to the Court’s discretionary jurisdiction to grant relief in a case where *prima facie* grounds for granting relief have been established. They include:
- (a) the applicant’s standing to seek relief;
 - (b) the merits of the applicant’s case for obtaining relief from a reopened liquidation;
 - (c) whether the applicant has been guilty of acquiescence or delay.

42. As Smellie CJ noted in *Schramm* (at paragraph 44(1)), it is impossible to infer a legislative intent to permit a dissolution to be set aside at the instance of any interested person merely because a new assets has been discovered unconstrained by any standing requirements or limitation period. Those observations were made to support his conclusion that the statute did not confer an unfettered jurisdiction on this Court to set aside a dissolution. In contrast, Justice Indra Charles in the *Soothsayer Limited* case reached the following findings in relation to standing on an application made by beneficiaries of the trust the assets of which the company formerly held, who complained of fraud:

“68... At common law, any person who can show an interest in making the application for restoration can do so. Therefore, it cannot be demurred that the Plaintiffs are interested parties. In addition, the former liquidator of the Company, Bukit Merah Limited, the 3rd Defendant in this application, unequivocally supports the application for restoration. On any view, whether at common law or under the inapplicable IBC Act, 2000 and its subsequent amendment in 2010, the liquidator is a proper party.”

43. I concur with that flexible approach to standing insofar as a basic standing test is concerned. But the flexibility of the basic standing test does not mean that a qualifying person’s ability to obtain substantive relief will not be affected by the nature of their interest in reopening the liquidation. How important standing is will clearly vary from case to case; and since the jurisdiction to set aside a post-voluntary winding-up dissolution (based on substantial non-compliance with the statutory regime) is an exceptional one, an applicant whose standing is doubtful may well face difficulties in obtaining relief. For similar reasons, an applicant must have to show that there is clearly merit to their case that setting aside the dissolution will result in their obtaining practical relief. As the legislative policy of sections 127 and 151 heavily favours finality, or letting sleeping dogs lie, even a victim of fraud must generally demonstrate (a) a strong probability that are indeed a victim of fraud and (b) a realistic prospect that some practical benefit is likely to flow from setting aside the impugned dissolution. According to the Supreme Court Practice 1999 (at paragraph

15/16/2): *“Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and insubstantial and would not give him ‘relief’ in any real sense i.e. relieve him from any liability or disadvantage or difficulty...”*

44. The legislative policy of finality underpinning the voluntary winding-up and dissolution regime also means that acquiescence and/or delay may be important considerations in setting aside a dissolution which is otherwise liable to be set aside. Failure to act promptly before the dissolution has occurred may be fatal where the applicant has been given notice of the fact that the winding-up is at an end and that the dissolution is imminent. After all, the inconvenience and expense to which parties who had ‘closed their books’ in relation to the dissolved company from having the matter reopened could (in many if not most cases) clearly be very considerable indeed.

Findings: directions dispensing with service and advertisement

45. The Petition primarily sought a declaration that REFF’s dissolution be declared to be void, and consequential relief in the form of granting a Supervision Order (under section 131 of the Act) and appointing the JOLs. As regards the substantive application, it was appropriate for the proceedings to be commenced by Petition if it was characterised as an originating application under Part V of the Act: Companies Winding Up Rules (“CWR”) Order 24. Order 24 provides in salient part as follows:

“(1) Every originating application under Part V of the Law shall be made by petition.

(2) The general provisions of GCR Order 9, and GCR Order 18, rule 19 and Order 20, rule 7 shall apply to every petition presented under these Rules...”

46. Order 15 rule 3(4) of the Rules empowers the Court to require and dispense with service and advertisement of section 131 petitions. The Rules do not appear to require service or advertisement of originating applications under Part V of the Act generally. However, GCR Order 9 confers a broad discretion on the Court to give directions in relation to service and to dispense with service. As regards paragraph 1 of the prayer to the Petition, the Court had jurisdiction under GCR Order 9 corresponding to that under Order 15 rule 3 of the CWR as regards the consequential relief sought pursuant to section 131 of the Act. It was only in this latter respect that the need to consider advertisement of the Petition arose at all. The Petitioner's evidence established:

- (a) the appropriate persons to be served with the Petition were the Company's former Voluntary Liquidator and the Registrar of Companies. The Registrar was duly served and the former Voluntary Liquidator, a corporation, could not be served because it had been dissolved;
- (b) in default of serving the former Voluntary Liquidator, the most appropriate persons to bring the Petition to the attention of were the former principals of the Company and the Voluntary Liquidator. The former principals could not easily be found. The Petition was served on the Company's registered office;
- (c) the Petitioner was by far the majority stakeholder in the Company whose wishes were likely to trump any opposing minority views. It seemed likely that that any minority stakeholders were the Company's former principals or persons or entities linked to them;
- (d) the Petitioner was likely a victim of the Syndicate's fraud, the final limb of which fraud probably included causing REFF to be swiftly wound-up and dissolved, allowing GM Seychelles to be struck-off the register and making the principals of REFF and GM Seychelles difficult to serve with legal process.

47. In these circumstances it was clear that justice required service and advertisement of the Petition to be dispensed with and for the Petitioner to be permitted to seek substantive relief as soon as possible.

Findings: application for a declaration that the dissolution of REFF was void

Findings: standing to seek relief

48. The Petitioner as an 88.8% participating shareholder of REFF clearly had standing to seek both the substantive and ancillary relief set out in the Petition. The Petitioner's counsel very properly raised the potential argument of acquiescence or delay. In my judgment the Petitioner cannot be criticised for failing to participate in the voluntary liquidation of REFF advertised in December 2018 because:
- (a) the Petitioner was at all material times controlled by the Syndicate and AXA (as its main economic stakeholder) had no apparent legal means to cause the Petitioner to prove in the REFF liquidation as AXA was not itself a REFF participating shareholder;
 - (b) AXA was not 'sleeping on its rights'. It was taking steps gain control over the Petitioner which it succeeded in doing just under two weeks before REFF was dissolved on May 27, 2019;
 - (c) after the Petitioner's JOLs had fully investigated the suspected fraud and then obtained approval to consummate a litigation funding agreement in April 2022, the JOLs moved swiftly to present the Petition.
49. In all the circumstances, I found no basis existed for declining relief on the grounds of acquiescence or delay on the Petitioner's part.

50. Assuming the Petitioner made out a case for setting aside the dissolution, it might still be open to the Court to decline to grant that relief because it was clear that no practical benefit was likely to flow from granting such relief. Here, officers of this Court had sworn (based on their own investigations and advice) that they believed the Petitioner had viable claims which could be pursued by REFF against its former controllers. It was a matter of record that the Petitioner had received litigation funding support in this regard. I found no basis for declining to relief on what might be described as futility grounds.

Findings: merits of application to set aside the dissolution of REFF

51. Having determined under what circumstances it is legally open to this Court to set aside the dissolution of a company which has been purportedly voluntarily wound-up pursuant to sections 127 and 151 of the Act, the merits of the Petitioner's application were remarkably clear in the unusual circumstances of the present case. The Petitioner satisfied me on the balance of probabilities that:

- (a) the 90% loss reported to AXA in relation to its investment through the Petitioner in REFF was attributable to its assets being misappropriated by the controllers of REFF and (until May 16, 2019, the Petitioner itself), referred to in the papers as 'the Syndicate';
- (b) the impugned transactions included selling a subsidiary at an undervalue on May 11, 2018 to the wife of a Syndicate member and buying the 'SGOCO Note' from a Syndicate member's mother-in-law for an inflated price in July 2018. REFF's Board purportedly approved the fairness of paying US\$26.4 million for the Note although a valuation report suggested a value of US\$1.72 million;

- (c) Giant Management Seychelles, the Management Shareholder also controlled by the Syndicate, placed REFF into voluntary liquidation on November 1, 2018 and appointed itself as REFF's Voluntary Liquidator;
- (d) the authorised signatory for the Management Shareholder as regards the winding-up resolution and liquidation notices was the same individual ("Ms Sudjono") who was the sole director of REFF. Ms Sudjono was the REFF signatory in relation to both the sale of the subsidiary at an undervalue and the purchase of the SGOCO Note for an inflated price;
- (e) the notice advertising the commencement of the voluntary liquidation of REFF sent to the Cayman Islands Gazette Office and signed by Ms Sudjono on behalf of the Voluntary Liquidator listed Ricky Sun as the "*Contact for Enquiries*";
- (f) the Syndicate as controllers of the Petitioner and the Voluntary Liquidator had notice of AXA's concerns about its investment in the Petitioner and the significant drop in net asset value from a letter from Kennedy's dated January 23, 2019;
- (g) the Syndicate as controllers of the Petitioner and the Voluntary Liquidator had notice of AXA's concern to investigate the status of its indirect investment in REFF and its desire to liquidate the Petitioner from a Walkers letter dated February 26, 2019 and the fact that AXA presented a winding-up petition against the Petitioner on February 28, 2019;
- (h) as the dissolution of REFF took effect by operation of law on May 27, 2022, three months after the registration of the liquidation return, the Voluntary Liquidator must have filed its return on or about February 27, 2022, seemingly shortly after AXA communicated its concern about its indirect investment in REFF;

- (i) an independent liquidator acting in good faith with a view to fully winding-up the affairs of REFF would not have closed the liquidation of REFF and caused (or permitted) the Company to be dissolved while winding-up proceedings were pending against its 88.8% majority participating shareholder at the instance of an indirect investor who had expressed concerns about its underlying investment in REFF;
- (j) the Voluntary Liquidator was not independent, did not act independently and did not act in good faith and its sole director had in the months preceding the voluntary winding-up an active participant in two impugned transactions and it was controlled by the same parties who perpetrated what appears on the presently available evidence to have been a blatant pre-liquidation fraud. The affairs of REFF were quite obviously not “fully wound-up” when the Voluntary Liquidator purportedly convened the final meeting and filed the requisite return. This was not an incomplete or imperfect process, or one which was carelessly carried out. It was in substance not a winding-up at all. The only reasonable inference was that the Voluntary Liquidator brought the liquidation to a premature end with a view to impeding the investigations which would inevitably follow after the Petitioner was wound-up on May 16, 2019 on the petition of REFF’s main ultimate investor.

52. I accordingly accepted the following submission in the Petitioner’s Skeleton Argument as to what the evidence established, a point which was emphasised by Ms Lardner in oral argument:

“39. The effect of the voluntary liquidation was of course, ultimately, for REFF to be dissolved on 27 May 2019, thereby preventing contributories or creditors from petitioning the Court to wind up REFF so that its affairs could be investigated by an independent insolvency practitioner under the supervision of the Court. This was plainly contrary to the interests of REFF’s contributories and creditors.”

- 40. In the circumstances referred to above, it is submitted that the dissolution of REFF by way of voluntary liquidation was the final part of the fraud committed against it and was for the purpose of defrauding its contributories and creditors. REFF was drained of its assets and then wound up by its sole director, also being a party related to the Syndicate and without supervision by independent insolvency practitioners or the Court. There are accordingly features of conduct in the liquidation of REFF which are consistent only with dishonesty.”*
53. In my judgment it was ultimately clear that the only rational legal consequences from such a total failure to wind-up the affairs of the Company by the Voluntary Liquidator, before it caused the Company to be dissolved (rather than taking steps to remediate the substantial loss suffered by the holder of the majority ultimate economic interest) was complete invalidity of the dissolution. This extraordinary combination of factual circumstances met the high threshold required for granting a declaration that the Company’s dissolution following a voluntary winding-up (which is not ordinarily capable of being impugned if a credible winding-up has occurred) should be declared to be void.
54. The Petitioner satisfied me that it was very strongly probable that the winding-up and dissolution of REFF was carried out in such a fraudulent way as to not amount to a winding-up at all. Prior to the conclusion of the winding-up, AXA had raised queries about the reasons for the dramatic decline in the value of its direct investment in the Petitioner and its indirect investment in REFF. The presently available evidence suggests that the reason for the investment loss was quite simply that the invested assets were stolen. As AXA sought to take remedial action by gaining control of the Petitioner (obtaining a winding-up order on May 16, 2019), the perpetrators of the fraud (having effectively abandoned the Petitioner) caused REFF to be wound-up by a corporate liquidator they also controlled on May 27, 2019 without investigating AXA’s concerns.

55. The winding-up process which occurred was seemingly compliant with the formalities of a voluntary winding-up. But that process in substantive fell so far short of what section 127 requires a full winding-up to be (having been misdirected to serve fraudulent ends) that the dissolution which purportedly occurred must be viewed as null and void. Section 127 can only sensibly be construed as providing, by necessary implication, that such a dramatically distorted caricature of what a *bona fide* winding-up should be has the legal consequence of completely invalidating the purported winding-up and dissolution. The legislative purpose underpinning Parliament's decision to promote finality when companies are dissolved following a voluntary winding-up cannot sensibly be construed as a legislative intention to facilitate winding-up processes which are so lacking in substantive credibility and honesty that a company is dissolved (in effect) without its affairs being wound-up at all, let alone "fully" as section 127(1) requires.

Findings: application for Supervision Order and appointment of JOLs

56. Having decided to grant the primary relief sought setting aside the dissolution of REFF, the consequential relief was all but a formality. The purpose of the declaratory relief was to permit the Petitioner to apply for a Supervision Order and appoint the JOLs to seek to recover the misappropriated sums. It was self-evident that the Voluntary Liquidator must be replaced and straightforward to accept the proposition that the Petitioner's JOLs were the most appropriate candidates to be REFF's joint official liquidators. The best available evidence suggested that no other stakeholders had the right to have their wishes in this regard trump the wishes of the 88.8% participating shareholder in any event. Accordingly, I granted the Supervision Order substantially on the terms sought.

Conclusion

57. For the above reasons on July 6, 2022 I granted the Petitioner's application for:

- (a) a declaration that the Company’s purported dissolution on May 27, 2019 was void; and
- (b) appointed the Petitioner’s Joint Official Liquidators as JOLs of the Company.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT