IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

FSD 79 OF 2022 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF POSITION MOBILE LTD SEZC

Before:	The Hon. Justice David Doyle
Appearances:	Michael Wingrave and Jack Stringer of Dentons for Technology Investment Consortium LLC, the Petitioner/Applicant
	Stephen Moverley Smith KC, Peter Kendall and Will Waldron of Walkers for Genimous Investment (Hong Kong) Co., Ltd and Genimous Holding (HK) Limited, the Respondents
Heard:	28 September 2023
Draft transcript of Judgment circulated:	26 October 2023
Judgment delivered:	31 October 2023

HEADNOTE

Determination of second application for the appointment of joint provisional liquidators pursuant to section 104 of the Companies Act (2023 Revision)–consideration of relevant principles and guidance from the previous local Cayman case law

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JUDGMENT

Introduction

1. This is the second application made for the appointment of joint provisional liquidators ("JPLs") in respect of Position Mobile Ltd SEZC (the "Company") in these proceedings.

2. The first attempt was made *ex parte* and I declined to deal with it on an *ex parte* basis (see my judgment delivered on 7 April 2022; transcript of judgment approved 8 April 2022). I dismissed the application at an *inter partes* hearing held on 14 April 2022 and counsel have helpfully provided a transcript of the hearing and the *ex tempore* judgment I delivered that day. The latest attempt to have JPLs appointed is by way of Summons filed on 3 August 2023 (the "Summons").

3. In April 2022, Technology Investment Consortium LLC (the "Applicant" or "Petitioner") submitted it was necessary for JPLs to be appointed because:

   (a) it had been excluded from management and it had not been provided with all necessary financial information;

   (b) no new product was forthcoming and yet Spigot was receiving large amounts of money from the Company each month;

   (c) there had been serious mismanagement which was ongoing;

   (d) the apparent financial deterioration of the Company simply increases concerns and required investigation;

(e) there were real concerns in respect of dissipation of assets; and

(f) there was no proper explanation for the drop in rankings of the apps and the lack of revenue.

4. Such concerns did not persuade me to appoint JPLs in April 2022, and there was no appeal from the order made dismissing the application.

5. In its skeleton argument dated 22 September 2023, at paragraph 2, the Applicant listed its top two complaints in April 2022 as its fear that the Respondents would:

> *"a. Continue to exclude the PDs [Ryan Stephens and Cody Mahaffey] from management;*
>
> *b. Refuse to share management information with the PDs".*

6. In April 2022, I noted (1) the undertaking given by Genimous Investment (Hong Kong) Co., Ltd and Genimous Holding (HK) Limited (the "Respondents") not to cause the transfer of any of the Company's intellectual property for the duration of the winding up proceedings (the "Undertaking"), (2) that the court could not at that stage of the proceedings determine the factual disputes between the parties and (3) there was no strong and clear evidence to persuade the court that the necessity hurdle has been jumped by the Applicant. I mentioned the possibility of mediation and remarked that it may assist if there was a meeting of the full board of directors of the Company in the near future and if up to date full financial information was provided to those who were entitled to see it as soon as possible. I made an order for costs against the Applicant to be taxed on the standard basis in default of agreement.

7. In this judgment I refer to the directors of the Company appointed by the Petitioner, namely Ryan Stephens ("Mr Stephens") and Cody Mahaffey ("Mr Mahaffey") as the PDs. I refer to the directors of the Company appointed by the Respondents, namely Zhifeng (Tony) Chen, Deming He, John Lash and Huang Ying, as the GGDs, to the Respondents, Genimous Technology Co. Ltd and Genimous PE Fund, as the Genimous Group and to Spigot Inc, stated to be a wholly owned subsidiary of the Genimous Group as Spigot, to Eightpoint Technologies Ltd. SEZC, also stated to be a wholly owned subsidiary of the Genimous Group, as Eightpoint and to East End Technologies Ltd as EET. Zhifeng (Tony) Chen ("Mr Chen") is a director of Genimous Investment (Hong Kong) Co., Ltd, the Company, Spigot and Eightpoint.

What has happened since 14 April 2022?

8. So, what has happened since 14 April 2022? Has there been a material change of circumstances? The necessity hurdle was not jumped in April last year. Has it now been jumped?

9. I note all that is written in the Applicant's 37 page skeleton argument with no less than 60 footnotes, with a 7 page unagreed chronology attached and two heavy bundles of accompanying authorities and the robust and comprehensive oral submissions put before the court by Mr Wingrave on behalf of the Applicant.

10. Mr Stephens, at paragraph 87 of his fifth affidavit, says it is necessary for JPLs to be appointed for the 5 purposes he lists, namely to:

    (a) prevent mismanagement, dissipation of assets and oppression;

    (b) investigate the Company's relationship with Spigot and other subsidiaries of the Respondents and intellectual property misappropriation;

    (c) take action to limit the damage being done to the Company by misappropriation of its intellectual property by Eightpoint, Spigot and EET and to take action against those companies; and

    (d) take action against subsidiaries of the Respondents to recover losses suffered by the Company in the interests of all shareholders and to appoint new service providers.

11. Mr Stephens sets out various reasons at paragraph 96 as to why he considers it necessary now for JPLs to be appointed. He refers to, what he describes as, the continuing misappropriation of the Company's intellectual property and the marketing and distribution spend on the apps belonging to the Company falling to zero on certain applications belonging to the Company. The Petitioner says that by the time the Petition is likely to be determined, there will be nothing left within the Company. I recall similar submissions being made in April 2022 but have seen no evidence of the Petitioner taking vigorous steps to obtain an early hearing of its winding up petition.

12. Stripped of its detail and complexity, the Applicant's case appears to boil down to two particular incidents which occurred post 14 April 2022, and arguments in respect of amended agreements and the reduced marketing spend.

The First Incident

13. Since November 2022, the Applicant says that it has discovered "*two waves of intellectual property misappropriation by wholly owned entities of Genimous group (in which Rs sit)*". The first incident concerns what the Applicant says is "*the misappropriation of code belonging to the Company in an app released by EET and supplied by Spigot ...*" (the "First Incident").

The Second Incident

14. The Applicant also says that in mid-June 2023 it discovered another alleged "*intellectual property misappropriation by Spigot/EET and misuse of the Company's proprietary information*" (the "Second Incident").

The Amended Agreements

15. The Applicant says that the amended agreements (a research and development agreement stated to be entered into between Spigot and the Company on 1 October 2019 and amended on 1 January 2022 (the "R&D Agreement") and a marketing agreement stated to be dated 1 October 2019 and amended 1 January 2022 (the "Marketing Agreement")) represent further and stark examples of the Respondents and the GGDs treating the Company as their own and excluding the PDs from management and taking decisions not in the best interest of the Company. I refer to the R & D Agreement and the Marketing Agreement together as the Amended Agreements.

16. The Applicant accepts that the Amended Agreements appear to be historic but adds that they were only disclosed after the Summons was filed. The Applicant says that the PDs had never seen the amended agreements before service of the second affidavit of Mr Chen which appears to have been sworn on 29 August 2023.

The Reduced Marketing Spend

17. The Applicant also complains that the funding for marketing of the most successful apps of the Company fell "*to zero or near zero simultaneous with the release of EET's copycat apps.*" (paragraph 20 of the Applicant's skeleton argument).

The relevant law

18. I turn now to the relevant law in respect of applications for the appointment of JPLs.

Section 104

19. Section 104(1) of the Companies Act (2023 Revision) (the "Act") provides that the court may, at any time after the presentation of a winding up petition but before the making of a winding up order, appoint a liquidator provisionally.

20. Section 104(2) of the Act provides that an application for the appointment of a provisional liquidator may be made under sub-section (1) by a creditor or contributory of the company or, subject to sub-section (6) the Cayman Islands Monetary Authority, on the grounds that:

(a) there is a *prima facie* case for making a winding up order; and

(b) the appointment of a provisional liquidator is necessary in order to –

(i) prevent the dissipation or misuse of the company's assets;

(ii) prevent the oppression of minority shareholders; or

(iii) prevent mismanagement or misconduct on the part of the company's directors.

21. In the oft-quoted English case *Revenue and Customs Commissioners v Rochdale Drinks Distributors Ltd* [2012] 1 BCLC 748, [2011] EWCA Civ 1116 Rimer LJ referred, at paragraph [75], to section 135 of the Insolvency Act 1986 of England and Wales. Section 135(1) provides that:

> *"Subject to the provisions of this section, the court may, at any time after the presentation of a winding-up petition, appoint a liquidator provisionally."*

22. Section 135(2) provides that in England and Wales "*... the appointment of a provisional liquidator may be made at any time before the making of a winding-up order; and either the official receiver or any other fit person may be appointed.*"

23. Having considered these English statutory provisions, Rimer LJ stated the position under English law as follows:

> *"The power to appoint a provisional liquidator is, therefore, a broad and general one in the sense that, provided that the jurisdictional conditions in s135(1) and (2) are met, the section imposes no limitations upon, nor does it prescribe, the criteria to be adopted by the court when considering an application for such an appointment."*

24. It can immediately be seen that the statutory regime in England and Wales for the appointment of provisional liquidators is different to the statutory regime which prevails in the Cayman Islands. Section 104 of the Act does impose limitations upon, and does prescribe the criteria to be adopted by, Cayman courts when considering applications for the appointment of JPLs.

25. At this stage it may be useful to revisit Rimer LJ's judgment in *Rochdale Drinks* case in some more detail. At paragraph [76], Rimer LJ stated that the appointment of a provisional liquidator to a trading company is a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration. Rimer LJ referred to Plowman J's judgment in *Re Union Accident Insurance* and regarded the phrase "*good prima facie case*" as unsatisfactory. Rimer LJ at [77] stated:

> *"Given the potential seriousness of the appointment of a provisional liquidator, I consider that in the case of a creditor's petition the threshold that the petitioner must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition." (Rimer LJ's emphasis)*

26. Rimer LJ referred to the position in respect of disputed debts and at paragraph [80] stated that a company cannot just assert that it disputes the debt and then expect the winding-up petition to fail:

> *"It is not sufficient for the company merely to raise a cloud of objections. It has, in the old-fashioned phrase, to condescend to particulars by properly explaining the basis of the claimed dispute and showing that it is a substantial one."*

27. Rimer LJ at paragraph [86] stated that there was no doubt that HMRC's evidence raised serious questions as to the genuineness of the invoices and added "*If RDD was to challenge the basis of the petition, and therefore the appointment of the provisional liquidator, the burden was therefore upon it to show that it at least had a good arguable case that its claimed trade with all the disputed traders was genuine. It sought to do so, although, so it seems to me, by adducing evidence of breathtaking inadequacy*."

28. There was reference to the "*appalling state of RDD's accounting records*" and the fact that the judge had "*no evidence from any RDD directors who was in office during the time when the disputed trades were said to be happening ... The evidence supporting their genuineness was, overall, lamentable.*"

29. Rimer LJ at paragraph [87] stated:

> *"... the real question before the judge on the "missing trades" issue was whether RDD had shown by its evidence that, upon the hearing of the petition, it was likely to be able to show that in relation to all the alleged trades it claimed to have carried out it had a good arguable case that they were genuine ..."*

30. At paragraph [97] Rimer LJ referred to "*the risk of dissipation of assets in the meantime.*"

31. At paragraph [99] Rimer LJ, dealing with a creditor application, started:

> "*from the premise that RDD is insolvent, or is at least likely to be shown to be insolvent at the hearing of the petition; and that HMRC are likely to obtain an order for its winding up. That is not, I consider, sufficient without more to justify the appointment of a provisional liquidator. The usual basis on which such an appointment is sought is because of a risk of jeopardy to the company's assets, namely the risk of their dissipation before the winding-up order is made, with the consequence that their collection and rateable distribution between the company's creditors will be frustrated. Such risk does not refer to (or only to) "dissipation" in the sense in which that word is ordinarily used in the context of freezing orders, that is a deliberate making away with the asssets so as to frustrate the enforcement of a future judgment; it includes any serious risk that the assets may not continue to be available to the company* (see *Re a Company (No 003102 of 1991), ex p Nyckeln Finance Co Ltd* [1991] BCLC 539 at 542 per Harman J)."

32. Rimer LJ at paragraph [100] went on to say that, under the law of England and Wales, the circumstances justifying the appointment of a provisional liquidator are not confined to the particular jeopardy of dissipation but may include issues with the integrity of management and the quality of its accounting and record-keeping function and investigations into management:

> *"If there is any risk that, pending the hearing of the petition, records may be lost or destroyed, that will also found the basis for the appointment of a provisional liquidator,*

who will be able immediately to secure them and commence his own inquiries into the affairs of the company and the conduct of its management."

33. In the Cayman Islands, the grounds justifying the appointment of a provisional liquidator are confined to those set out in section 104(2) of the Act.

34. Lewison LJ stated:

"[109] The appointment of a provision liquidator is, as the phrase suggests, an interim remedy. It takes place before the facts have been found. Not only is it an interim remedy, it is one of the most intrusive interim remedies in the court's armoury. In many, if not most, cases its effect will be to stop the company trading; and to cause the company's employees to lose their jobs. In deciding whether to grant or refuse an interim remedy the overriding principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Among the matters which the court may take into account are the prejudice which the claimant may suffer if the remedy is not granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the remedy will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases: see *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16 at [17]-[18], [2009] 1 WLR 1405 at [17]-[18].

[110] If a business is shut down wrongly, the cross-undertaking is unlikely to provide adequate compensation to the company concerned, let alone to the employees who will have lost their jobs and to whom no cross-undertaking will usually have been offered. In addition once a provisional liquidator has been appointed the company's books and records will pass into his control; and will no longer be accessible, as of right, to the company's directors. This latter consequence may hamper the company and its directors in defending allegations made in the petition. I agree, therefore, with Rimer LJ (at [76]) that the appointment of a provisional liquidator requires the most anxious consideration.

[111] This leads on to the next point. Because the appointment of a provisional liquidator is so intrusive, an application for such an appointment made without notice needs to be justified by exceptional circumstances. A judge should not entertain an application of

which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the remedy (as in the case of a freezing or search and seizure order) or there has been literally no time to give notice before the remedy is required to prevent the threatened wrongful act. Any notice is better than none: see National Commercial Bank Jamaica Ltd v Olint Corp Ltd [2009] 1 WLR 1405 at [13]. Nor is the judge's task helped by the extraordinary volume of the evidence and exhibits to which Rimer LJ has referred (at [5]). In the present case the problem is worse. Although, as Rimer LJ has explained, HMRC had been investigating RDD for over three years before the application to Peter Smith J, in all his 126 pages Mr Mann gave no evidence at all to justify the making of the application without notice. I regard this as a serious omission before Peter Smith J; although by the time of the contested hearing before Floyd J it had lost its significance."

35. I will come to the local Cayman case law in much more detail shortly but in *ICGI* (Unreported, FSD 192 of 2021 (DDJ), Doyle J, 4 August 2021) I referred to the four main hurdles an applicant seeking the appointment of a provisional liquidator pending the determination of a winding up petition has to jump in the Cayman Islands:

(a) the presentation of the winding up petition hurdle;

(b) the standing hurdle;

(c) the *prima facie* case hurdle; and

(d) the necessity hurdle.

36. In *Grand State Investments Limited* (Unreported, FSD 11 of 2021 (RPJ), Parker J, 28 April 2021) Parker J at paragraph 82 referred to the need to satisfy a two stage test. First, is there a *prima facie* case for a winding up order? Second, if there is, is the appointment of a provisional liquidator necessary to achieve one or more of the purposes set out in section 104 (2)(b) of the Act?

37. In addition to the 4 hurdles the court must also consider how best to exercise its discretion (see Parker J in *Al Najah Education Limited* Unreported, FSD 119 of 2021 (RPJ), Parker J, 9 August 2021 at paragraphs 33 and 34). Each case, of course, depends on its own facts and circumstances but a court must take great care before in effect pressing the nuclear button and appointing JPLs at an interlocutory stage of the proceedings and before all relevant facts have been determined. It is

a serious step to appoint JPLs pending the determination of a winding up petition especially when the facts are disputed. There must be strong evidence which clearly jumps all four hurdles to justify taking such a serious step.

38. In this very case *Position Mobile* (Unreported, FSD 79 of 2022, Doyle J, 7 April 2022) I referred to authorities which stressed that the remedy is one of the most intrusive remedies in the court's armoury. Some of the authorities refer to it as the nuclear option.

39. In my costs judgment in *ICGI* (Unreported, FSD 192 of 2021 (DDJ), Doyle J, 10 August 2021) I made an order for costs against the unsuccessful applicant and at paragraph 12 added:

> *"A potential liability in costs should in future focus the minds of those thinking of taking the serious step of applying for the appointment of provisional liquidators before a winding up petition has been determined. Such a serious step should not be taken unless there are strong grounds justifying the taking of such a step and advisers should also keep these words in their minds when advising clients as to the position."*

40. Field JA in *Aquapoint* (Unreported, CICA 14 of 2022 (FSD 157 of 2021 (DDJ)), 4 October 2023) at paragraph 77 referred to (in his words) "*the new kid on the block*" namely the exempted limited partnership and left the door open to arguments that the expression "*just and equitable*" in section 36 (3) (g) of the Exempted Limited Partnership Act should be construed "*in an expansive and flexible way, taking full account of the special nature of an ELP and less account of the overseas jurisprudence*". I bear that wise thought firmly in mind, albeit in a different context, when considering section 104 (2)(b) of the Act which appears to be in terms unique to the Cayman Islands. I take into account the special specific provisions the Cayman legislature has seen fit to enact by way of section 104 (2)(b) of the Act. It does not appear to be replicated in the English statutory provisions in respect of the appointment of provisional liquidators. I therefore turn first to the Cayman statutory provisions and then to the local Cayman case law, some of which does take into account English law on the appointment of provisional liquidators. When considering the English law in this area we must always bear in mind the express unique provisions of section 104 (2)(b) of the Act. I accept however that the English case law dealing with general principles in respect of applications for the appointment of JPLs may be of some assistance and in particular in respect of the *prima facie* case hurdle, the risk of dissipation in respect of the necessity hurdle, and the position in respect of *ex parte* applications.

41. In the case presently before me it is only the necessity hurdle that is in issue.

42. The wording of section 104 (2)(b) of the Act which establishes the necessity hurdle is clear. The burden is on the Applicant to prove that the appointment of JPLs is "necessary" in order to prevent (i) the dissipation or misuse of the company's assets or (ii) the oppression of minority shareholders; or (iii) mismanagement or misconduct on the part of the company's directors.

Companies Winding Up Rules

43. Order 4 rule 3 of the Companies Winding Up Rules ("CWR") provides:

> *"3.(1) The applicant shall give an undertaking to the Court to pay –*
>
> *(a) any damage suffered by the company by reason of the appointment of the provisional liquidator; and*
>
> *(b) the remuneration and expenses of the provisional liquidator,*
>
> *in the event that the winding up petition is ultimately withdrawn or dismissed.*
>
> *(2) The Court may require the applicant to give security for his undertaking in such manner as the Court thinks fit."*

Financial Services Division Guide

44. The Financial Services Division Guide at page 53 provides some useful additional guidance in respect of applications by creditors or contributories for the appointment of JPLs. The guidance is as follows:

> *"C.81 Application by creditor or contributory*
>
> *C8.1(a) Summons and supporting affidavits*
>
> *An application for the appointment of a provisional liquidator may be made by a petitioning creditor or contributory on the grounds that there is a prima [facie] case for making a winding up order and the immediate appointment of a liquidator is necessary in order to prevent the dissipation or misuse of the company's assets or to prevent oppression of minority shareholders or to prevent mismanagement or misconduct on the part of the directors. It will not be necessary to make a provisional appointment if it appears to the Court that the*

same result can be achieved by the grant of an injunction. Any such application must be made by summons which may, and usually should, be issued at the same time as the presentation of the petition.

C8.1(b) Service

Under CWR O.4, r.1(2) the company is entitled to at least four (4) clear days' notice of any application to appoint provisional liquidators unless there is some exceptional circumstance which justifies an order being made without notice. Evidence that the directors are likely to dissipate the company's assets or oppress minority shareholders or otherwise mismanage the company's affairs may justify the grant of an ex parte interlocutory injunction but it cannot, by itself, justify making an ex parte provisional winding up order.

C8.1(c) Applicant's undertaking in damages

The Court will not make a provisional winding up order without requiring the petitioner/applicant to give an undertaking that he will pay (a) any damage suffered by the company as a result of the appointment and (b) the remuneration and expenses of the provisional liquidator, in the event that his petition is ultimately withdrawn or dismissed. CWO O.4, r.3 requires such an undertaking to be given in every case, but the jurisdiction to require security is a discretionary one.

C8.1(d) Form and content of order

See CWR O.4, r.4 and CWR Form No.7. A provisional liquidator's powers must be specified in the order. The Court will not make generalized orders to the effect that the provisional liquidator be empowered to exercise all the powers of the directors."

The local Cayman case law on section 104

Orchid Development

45. Andrew Jones J, just before the Christmas break, in *Orchid Development Group Limited* (Unreported, FSD 168 of 2012 (AJJ), Jones J, 21 December 2012) dealt with an application dated

17 December 2012 by a creditor for the appointment of JPLs pending the hearing of the winding up petition which was due to take place on 25 January 2013. At paragraph 5 Andrew Jones J stated:

> *"5. Prior to the enactment of the Companies (Amendment) Law 2007, the Court had a very broad discretion to make orders for the appointment of provisional liquidators which tended to be abused by petitioners, who would make ex parte applications for the appointment of their own nominees as provisional liquidators in the knowledge that it would be difficult, thereafter, for the main body of stakeholders to secure the appointment of an official liquidator of their own choice. This mischief was cured by the provisions of what is now section 104(2) of the Companies Law (2012 Revision) which sets out limited and very specific grounds upon which provisional winding up orders can be made on the application of a petitioning creditor. I have jurisdiction to appoint provisional liquidators only if it is necessary in order to prevent (i) the dissipation or misuse of the Company's assets or (ii) the oppression of minority shareholders or (iii) mismanagement or misconduct on the part of the Company's directors."*

46. In that case the application appears from the judgment to have been based on two grounds. Firstly the company's funder was not prepared to provide further gratuitous funding without the appointment of provisional liquidators. Andrew Jones J could see no justification for making a provisional winding up order so that liquidators can be nominated and a funding agreement be safely entered into. Secondly, it was suggested that the company's directors are or would be in a position in which their personal interests would conflict with their duties as directors of the Company. Andrew Jones J felt that such "maybe so, but section 104 (2) does not permit the Court to appoint provisional liquidators, effectively upon the application of these directors, as a means of relieving them from their duties for the next month" (paragraph 6).

Asia Strategic

47. The note to *Asia Strategic Capital Fund LP* at 2015(1) CILR Note 4 reads:

> *"In establishing whether a good prima facie case has been made for a winding–up order, as is required prior to the appointment of a provisional liquidator by the Companies Law (2013 Revision), s.104(2), it is not necessary to demonstrate that a winding-up order will be granted: a prima facie case is established if the allegations made in the petition for the appointment of provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing (In re*

Union Accident Ins. Co. Ltd., [1972] 1W.L.R. 640, considered). However, the requirement of a good prima facie case be unsatisfactory (Revenue & Customs Commrs. v. Rochdale Drinks Distrib. Ltd., [2012] BCLC 748, considered) and therefore case law regarding it is to be treated with caution."

48. Segal J in *Asia Strategic* at paragraph 39 of his judgment referred to *Re Union Accident* where he said Plowman J held "*that a good prima- facie case was established by showing first that the allegations in the petition were supported by evidence (at least to the extent of a good prima facie case) and secondly that it was not possible to say that the allegations had been disproved, bearing in mind that conflicts of evidence cannot be resolved until the substantive hearing of the petition.*" Segal J wisely stressed that *Union Accident* was not a decision directly on section 104 and had to be treated with caution. Segal J commented that Rimer LJ in the English Court of Appeal in the *Rochdale Drinks* judgment [2012] 1 BCLC 78 at [77] regarded the phase "*good prima facie case*" as unsatisfactory as it was elusive and substituted what Segal J regarded as the "*probably higher*" requirement that an applicant seeking the appointment of JPLs does have to demonstrate that he is likely to obtain a winding up order on the hearing of the winding up petition. On the facts and circumstances of *Asia Strategic* Segal J held that the prima facie case requirement had been satisfied.

49. Segal J in *Asia Strategic* went on to consider whether the appointment of JPLs was necessary in order to prevent dissipation or misuse of assets. At paragraph 44 Segal J, without disapproval, referred to counsel's reliance on an English authority and a comment by Harman J, in the context of an application to appoint JPLs pending the hearing of a creditor's winding up petition, to the effect that it is not dissipation in the asset freezing injunction sense of deliberately making away with the assets but any serious risk that the assets may not continue to be available to the relevant entity. At paragraph 45, Segal J added that on a contributory's petition (the case before him) it is sufficient if it is shown that the assets of the relevant entity (company or partnership) are being, or are likely to be, dissipated to the detriment of the petitioners.

50. Segal J, at paragraph 51, made the point that "*it is not possible to resolve conflicts of evidence before the hearing of the petition*".

51. In respect of mismanagement or misconduct, Segal J made the further important point at paragraph 54 of his judgment that:

> *"It is the future and not past mismanagement and misconduct which is relevant for these purposes (allegations of past misconduct are insufficient to justify the appointment of provisional liquidators)."*

52. I would only add that the past mismanagement and misconduct of management may be some guide as to future conduct and the court may, in some cases, have some regard to such matters but I entirely agree that it is to the future that the parties and the court must focus.

53. At paragraph 58, Segal J refers to "*strong evidence of other examples of mismanagement or misconduct by the General Partner, Mr Ferrigno and AMCC…*"

54. Segal J, at paragraph 59, added:

> *"It seems to me to be clear that these matters constitute evidence of past mismanagement and misconduct for these purposes. Nothing that Mr Ferrigno has said persuades me that this evidence should be treated as disproved. Furthermore, and importantly, the evidence suggests that there is a serious risk that if Mr Ferrigno and his companies were to be permitted to continue to seek to be involved in dealings with, or assert control over, the Partnership's assets and affairs in the period before the hearing of the Petition, similar conduct would be repeated. The risk of further failures of governance and breaches of applicable agreements, combined with the risk of further action which would be damaging to the interests of the Partnership and instead promote the separate interests of Mr Ferrigno and his companies, is established by the evidence and is sufficient in my view to satisfy the requirements of section 104(2)(b) (iii) of the Companies Law."*

55. At paragraph 60, Segal J says he does not need to decide whether section 104(2)(b)(iii) includes non-management or incapable of proper management but does add that it seems to him that mismanagement or misconduct:

> *"connotes culpable behaviour involving a breach of duty or improper behaviour that involves a breach of the Partnership's governing documents and governance regime. This could involve inaction where such inaction would give rise to a breach of duty and action was needed and possible to protect the interest of the Partnership. But I doubt that mere paralysis is sufficient where there is a dispute between the partners and uncertainties as to the authority of the general partner to act on behalf of the Partnership. Of course such a situation, as in the present case, can and often will give rise to a risk of assets being*

dissipated or misused and justify the appointment of provisional liquidators on the basis of section 104(2)(b)(i)."

Natural Diary

56. In *Natural Diary (NZ) Holdings Limited* (Unreported, FSD 186 of 2016 (NSJ), Segal J, 20 December 2016) Segal J referred to section 104(2)(b)(i) as the dissipation and misuse ground and section 104(2)(b)(iii) as the mismanagement or misconduct ground. At paragraph 19, Segal J stated that the company did not argue that there was not a *prima facie* case for making a winding up order and that the company's opposition to the appointment of provisional liquidators "*was solely based on the Petitioner's failure to demonstrate that the appointment was necessary or urgently required prior to the hearing of the petition.*" Segal J referred to the evidence in that case including serious concerns raised by regulatory bodies including the HKSE. Segal J concluded that the evidence in that case seemed to him "*to establish the need to appoint provisional liquidators to enable a proper investigation to be conducted and action taken to preserve and protect any rights of action which the Company may have. I accept the submissions made by Mr Snape that there is a material risk that limitation periods may expire, that action may be needed in the near future to protect the Company's position, that failure to take such action is mismanagement or misconduct under section 104(2)(b)(iii) of the Companies Law and that there is no evidence to demonstrate that the current board will take the required action. Accordingly the mismanagement and misconduct ground is made out*" (paragraph 23(g) of the judgment).

Bona Film

57. In *Bona Film Group Limited* (Unreported, FSD 215 of 2016, McMillan J, 13 March 2017) McMillan J considered section 104 of the Act and whether it was appropriate to appoint provisional liquidators on the facts and circumstances of that case and at paragraph 57 stated:

> *"Clearly in the context of section 104 the Court at this stage need not be satisfied that a winding up order will actually be made."*

58. In *Bona Film* there was an allegation by a contingent creditor that the company had failed to be transparent as to its financial position and there had been a series of corporate transactions consistent with a "*stripping away" of the assets of the Group and the Court accepted "the validity of the Petitioners' concerns*" (paragraph 58).

59. McMillan J, at paragraph 60, referred to the Petitioners relying on the comments of Segal J in *Asia Strategic* and McMillan J adopted the approach that:

> "*it is not necessary to demonstrate that a winding up order will be granted: a prima facie case is established if the allegations made in the Petition for the appointment of the provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing.*"

60. At paragraph 61 McMillan J referred to the company properly submitting that:

> "*… considerable care must be taken before making what is plainly a draconian order."*

61. At paragraph 69. there is reference to the principle in the English *Rochdale Drinks* case, to the effect that the appointment of a provisional liquidator is a most serious step to take. I should add that this was, of course, in the context of an active trading company. McMillan J quoted from Rimer LJ at paragraph [76] of *Rochdale Drinks*:

> *"It is not an order to be made lightly and its making require[s] the giving by the court of the most anxious consideration."*

62. At paragraph 71, there is reference to the court taking into account the evidence and the relevant principles of law and reminding itself that "*an order of the nature sought requires the most anxious consideration.*" McMillan J states:

> *"The Court must also hear in mind the potential prejudice to the Company of granting the order and the potential prejudice to the Petitioners of not granting it. On this occasion, the Court finds that the potential prejudice to the Petitioners outweighs that to the Company."*

63. At paragraph 73, McMillan J adds:

> *"... the Court considers both that there is no realistic alternative remedy available to the Petitioners and that the Petitioners are not acting unreasonably in not pursuing such a remedy (see comment of Chadwick P in Camulos Partners Offshore Limited v Kathrein and Company [2010] 1 CILR 303 at paragraph 77)."*

CW Group

64. In *CW Group Holdings Limited* (Unreported, FSD 113 and FSD 122 of 2018, Parker J, 3 August 2018) there were two applications for a winding up order and also for the appointment of JPLs. The company was of the view that the appointment of its proposed JPLs to pursue a restructuring was necessary. Some creditors had no confidence in the management of the company who it was alleged had been guilty of misconduct and mismanagement. The creditors argued that there was a need for JPLs to be appointed to protect the company's assets pending the determination of the winding up petitions. It was common ground that the company was "*demonstrably insolvent*" (paragraph 21 of the judgment). Parker J added that there was "*an urgent need for the relief sought.*"

65. Parker J referred to section 104 of the Act and the evidence before the court concerning dissipation and misuse of the company's assets and mismanagement. There was an alleged failure to disclose information which the company had agreed to provide creditors and the refusal to appoint PwC as independent financial advisers and issues with debtors, an unexplained and unjustified entry into an acquisition agreement to which the company's wholly owned indirect subsidiary had agreed to pay a substantial sum for a German company which it was suspected was connected to members of the company's management and which appears to have been significantly overvalued.

66. There was evidence that four out of the five Hong Kong creditor banks had lost confidence in the management of the company and that "*urgent investigation and protective steps*" were required. Parker J at paragraph 56 adds "*Mr Wong [the Chairman and Chief Executive Officer of the group] deals with these allegations in his evidence and refutes the case that there has been any misconduct or mismanagement by the directors or that there is any risk as to dissipation and/or misuse of company assets.*" Mr Wong referred to others trying to create "*spurious connections between management and third parties which are nothing more than usual business relationships.*"

67. Parker J stated:

> "60. *It is not possible for the court to resolve the many, varied and complex factual questions raised in the evidence submitted by BOC and explained and answered by the company at this stage. Having carefully reviewed this written evidence there are clearly genuinely held concerns about a number of issues concerning the management of the company where investigation may well be required regarding the events that have led to the financial distress of the company.*

61. The court however has to be satisfied at this stage that the relief sought in BOC's application is necessary (my emphasis) in order to prevent the dissipation or misuse of assets and mismanagement or misconduct by the directors within the meaning of section 104(2) of the Companies Law.

62. I am not so satisfied. It is a heavy burden that BOC seeks to discharge and there is no clear or strong evidence submitted to persuade me of the necessity. In particular what seems to me to be the central issues concerning the Brownstone transaction and the situation relating to the delay in the recoverability of aged receivables are satisfactorily dealt with by Mr Wong in his evidence.

63. I am not persuaded that the evidence shows that it is necessary to put in place JPLs with powers to oust existing management and take action to protect the assets of the company pending the determination of the winding up petitions and review the historic conduct of management, as BOC seeks to do.

64. Having reviewed the evidence in its totality I am not persuaded that there is a likely dissipation of assets applying the tests in Re Asia Strategic Capital Fund and Nyckeln. Nor do I find any risk that records will be lost or destroyed as was the case in Re Rochdale Drinks. Nor do I find strong evidence of mismanagement (applying the test adopted by Segal J in Re Asia Strategic Capital Fund) of 'culpable behaviour involving a breach of duty' or 'improper behaviour'.

Decision

65. The view I have come to on the evidence has the consequence that there is no basis for the appointment of a provisional liquidator under section 104(2) of the Companies Law and I therefore reject the application by BOC."

68. Parker J however appointed JPLs on the company's application to assist with a restructuring adding at paragraph 68:

"As is well known, if and when appointed, as officeholders, provisional liquidators are independent persons operating under the direction of the court – see BCCI SA [1992] BCC 83."

69. and at paragraph 69:

> *"Once appointed the joint provisional liquidators would act as officers of the court and in the best interests of all of the company's creditors and stakeholders, irrespective of who sought the appointment ..."*

Pacific Fertility

70. In *Pacific Fertility Institution Holding Company Limited* (Unreported, FSD 105 of 2019 (IKJ), Kawaley J, 17 July 2019) Kawaley J at paragraph 12 stated:

> *"And so in my view the grounds for appointing provisional liquidators have clearly been made out in this case. There is a prima facie case for winding-up and that does not mean that the Court would today make a winding-up Order. And there is clearly a risk of dissipation of assets because it appears that it is reasonable for the Court to be concerned that Mr Li might, directly or indirectly, be engaged with misconduct in connection with the Company's affairs. Most colourfully, he is described in a South China Morning Post article of the 18th of November 2018 as follows: "Man who escaped Hong Kong police through toilet ceiling is second-biggest shareholder in China Environmental Technology Holdings, sources say". The Petitioner avers that his true identity was not known and Mr Li's conviction apparently relates to identity misrepresentation issues."*

China Resources

71. In *China Resources and Transportation Group Limited* (Unreported, FSD 75 of 2021 (DDJ), Doyle J, 23 April 2021) at paragraph 29 I referred to the company "*facing serious financial difficulties*" but added:

> "*there was ... a heavy burden on the Petitioner to satisfy the court that the appointment of provisional liquidators prior to the hearing of the winding-up petition was necessary and the Petitioner has not discharged that heavy burden.*"

72. At paragraphs 23 and 24 I added:

> *"23. I leave open the question whether there has been established a prima facie case for the making of a winding up order, as even if I was satisfied in that respect I have concluded that I have not been satisfied that the appointment of provisional liquidators is necessary in order to prevent the dissipation or misuse of the Company's assets or to prevent mismanagement or misconduct on the part of the Company's directors.*
>
> *24. There is insufficient evidence before the court to take the serious step of appointing provisional liquidators. I do not accept Mr Milne's submission that the Court has been provided with "cogent evidence of mismanagement by the directors of the Company". I would describe the evidence on the mismanagement point as flimsy. It is little more than mere assertion. Furthermore, I do not accept Mr Milne's submission that there is an urgent need for an investigation into the affairs of the Company."*

73. And with a gentle nod to proportionality I stated:

> "25. *I note that no application was made for an asset freezing order. Indeed, the evidence filed in respect of this matter would not justify the granting of such relief either."*

Grand State

74. Parker J in *Grand State Investments Limited* (Unreported, FSD 11 of 2021 (RPJ), Parker J, 28 April 2021) at paragraph 81 stated:

> *"The appointment of JPLs to a trading company has serious implications for its business and requires careful consideration by the court."*

75. In that case Parker J concluded at paragraph 81 that the appointment of JPLs was not necessary or appropriate because the petitioner could not demonstrate a *prima facie* case for the making of a winding up. He added that the petitioner's allegations of risk of dissipation of assets and misconduct against the company's management did "*not meet the threshold test established by the authorities to appoint JPLs under section 104(2) of the Companies Act.*" Parker J at paragraph 82 referred to the need to satisfy a two stage test. First, is there a *prima facie* case for a winding up order. Second, if there is, is the appointment of a provisional liquidator necessary to achieve one

or more of the purposes set out in section 104(2)(b) of the Act. Parker J at paragraph 83 referred to Segal J's judgment in *Asia Strategic* and the "*prima facie case test*":

> "*It is not necessary to demonstrate that a winding-up order **will** be granted: a prima facie case is established if the allegations made in the petition for the appointment of provisional liquidators are supported by the evidence and have not been disproved, with any conflicts of evidence to be resolved at a substantive hearing*". (Parker J's emphasis).

76. At paragraph 84 Parker J referred to *Rochdale Drinks* and stated in that case the English Court of Appeal explained "*that the phrase prima facie case meant that it was necessary for the petitioner to show that it was **likely to** obtain a winding up order.*" (Parker J's emphasis).

77. At paragraph 87 Parker J referred to the second limb and stressed that the court must consider it is "necessary" to prevent (i) the dissipation or misuse of the company's assets and (ii) the mismanagement or misconduct by the company's management.

78. Parker J referred at paragraph 89 to the relevant test for establishing a risk of dissipation of assets as described by Segal J in *Asia Strategic* namely that the assets "*are being, or are likely to be, dissipated to the detriment of the petitioners*" and at paragraph 89 to a "*serious risk that the assets may not continue to be available.*"

79. Parker J at paragraph 90 referred to *CW Group* and stated that the threshold for establishing such a risk has been described as "*a heavy burden*" and as "*requiring clear or strong evidence as to necessity*."

80. At paragraph 94 Parker J referred to Segal J in *Asia Strategic* (at paragraph 60) agreeing that mismanagement or misconduct on the part of directors "*connotes culpable behaviour involving a breach of duty or improper behaviour that involves a breach of the governing documents and governance regime.*"

81. At paragraph 99 Parker J referred to allegations of "*dishonest or disingenuous conduct*" and added that if the petitioner had legitimate concerns regarding the management of the company "*one would have expected to see evidence which demonstrates*" a pattern. At paragraph 100 Parker J regarded the company's evidence in answer to the allegations of mismanagement as "*credible*".

ICGI

82. In *ICGI* (Unreported, FSD 192 of 2021 (DDJ), Doyle J, 4 August 2021) I referred to the four hurdles and endeavoured to briefly summarise the law on the *prima facie* case hurdle and on the risk of dissipation test. In that case I was not satisfied that the petitioner had jumped the necessity hurdle. I referred to the "*onerous burden placed upon him*". At paragraph 19 I referred to *Grand State* and *Asia Strategic* and the *prima facie* hurdle evidential test. At paragraph 20 I referred to *Rochdale Drinks* and the need for an applicant to demonstrate, nothing less, than the applicant was likely to obtain a winding-up order on the hearing of the petition. From paragraph 22 onwards I referred to *Grand State* and *CW Group* and the risk of dissipation test. From paragraph 25 onwards I referred to the position in respect of mismanagement or misconduct on the part of directors. I made reference to *Asia Strategic* and *Pacific Fertility*. At paragraph 30 I commented that I did not doubt that he had "*genuine and serious concerns over the activities*" of certain individuals and that a "*lot of the documentation does not paint a satisfactory or clear picture.*" At paragraph 32 I referred to the possible adoption of a "*more proportionate approach*" and asset freezing injunctions. I referred at paragraph 33 to allegations in respect of past management and the need to look to the future. I concluded:

> *"36. It is a very serious step to appoint provisional liquidators and there is a heavy and onerous burden on those who seek such orders.*
>
> *37. In my judgment for the brief reasons stated above Mr Baguley had not jumped the necessity hurdle and I was not satisfied that he had discharged the heavy and onerous burden upon him."*

Al Najah Education

83. In *Al Najah Education Limited* (Unreported, FSD 119 of 2021 (RPJ), Parker J, 9 August 2021) Parker J had before him allegations of fraud against management involving theft and forgery of company documents to cover up the fraud. It was also alleged that the members of the board had not investigated let alone pursued obvious claims that the company very likely had. There were allegations of a pattern of improper protection and enrichment of the company's management at the expense of its shareholders. Reference was made to a justifiable loss of trust and confidence in the board and the need for an immediate investigation for the benefit of shareholders.

84. Parker J referred to the approach to the legal tests (footnotes omitted):

> *"33. An Order to appoint provisional liquidators as an interim remedy during winding up proceedings against a company must always be viewed by the court as a serious step. The potential adverse consequences for the company are in most cases likely to be considerable, both in relation to its commercial operations and its business reputation more generally.*
>
> *34. The power to appoint provisional liquidators is a discretionary one. In relation to the balance of justice that needs to be weighed between a petitioner and a company, the discretion should be exercised in accordance with the overriding principle that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other.*
>
> *35. The application is made before all the facts have been found, but requires the likelihood, on the basis of a case established by allegations supported by evidence which have not been disproved at the interim stage, that the petitioner would obtain a winding up order on hearing of the petition.*
>
> *36. In addition, such an order must be necessary to prevent one or more of the risks set out in section 104 (2) (b), namely the dissipation or misuse of the company's assets, the oppression of minority shareholders, or the mismanagement or misconduct of the company's affairs.*
>
> *37. There must be evidence to show that there is a serious risk that one or more of these wrongs may well occur if provisional liquidators were not appointed. This court has recently emphasised that to discharge the burden of establishing such a risk requires clear or strong evidence as to necessity."*

85. Parker J "*on an interim basis*" concluded that he was not satisfied that the board connived or were complicit in or had any knowledge of the fraud at the relevant time and there were no findings of fraud against the company by the relevant regulatory authorities. New management appeared to have been put in place with a mix of shareholder representatives and independent directors. Parker J at paragraph 49 stated:

> *"There is no evidence of any on-going mismanagement at the Company or risk of future mismanagement."*

86. Parker J at paragraph 50 noted the petitioners' allegation that many of the independent directors had "*historic and current connections to companies the impugned Directors are linked with and are not truly independent*" and stated:

> *"These matters cannot be resolved at an interim hearing. On the available evidence and in view of the written evidence submitted by five of these directors personally, I am satisfied that they are independent and well aware of their fiduciary obligations."*

87. At paragraph 51 Parker J did not see a need for an investigation (footnotes omitted):

> *"I should add that the need for an investigation is not enough by itself to satisfy the statutory test under s.104(2). The Court only has jurisdiction to appoint JPLs if it is necessary to prevent one or more of the risks set out. There needs to be strong evidence to show that such an order is necessary for that purpose."*

88. Parker J refused to appoint provisional liquidators.

Principal Investing Fund

89. In *Principal Investing Fund I Limited* (Unreported, FSD 268, 269 and 270 of 2021 (DDJ), Doyle J, 27 September 2021) I took the exceptional step of appointing JPLs on an *ex parte* basis. From paragraph 17 onwards I referred to the relevant law including the four hurdles. At paragraph 40 I in effect decided that the necessity hurdle had been jumped. At paragraph 41:

> *"It is necessary to take this step of appointing provisional liquidators as no other more proportionate and reasonable alternatives are available to the contrary."*

90. On 19 April 2022 I refused to discharge the *ex parte* orders made on 17 September 2021. In refusing leave to appeal, Moses JA in reasons for decision 30 June 2022 at paragraph 5 supported the need to avoid a "mini-trial" in relation to the application to discharge the orders:

> *"5. I start with preliminary observations which cover the applications in relation to both orders. The judge was, rightly, astute to avoid a "mini-trial" in relation both to the application to intervene and to discharge the Provisional Liquidator Orders. It is beyond reasonable argument that Mr Wang's complaints were serious and, taken at face value,*

required the appointment of Receivers and Provisional Liquidators to hold the ring until those complaints could be properly investigated and litigated. I say "at face value" because, it ought to go without saying that they are only allegations, and could not be determined unless and until they were made good by evidence with a proper opportunity for challenge by those accused of misconduct. One would have thought that was trite. Yet these applications seem to me to be a renewed attempt by the applicants to obtain prelimninary rulings, before any factual issue can be determined, preventing any possibility of investigation or proof. The technique adopted is, amongst other things, to raise factual objections to what is alleged, in the guise of saying those factual objections which the Floreat Principals wish to raise ought to have been anticipated by Mr Wang and considered by the judge before he made the orders and, accordingly, there was a breach of the duty to make full and frank disclosure. Time and again (e.g. skeleton re Receivership [17] and [18] and skeleton re Provisional Liquidators [14] [15] [16]), the applicants complain there was "no sustainable basis" for the Judge's reasons. But the judge was properly focused on the allegations, well aware that in the light of their nature they were likely to be disputed and that any resolution of those issues would have to await a trial as to the disputed facts."

Seahawk China

91. In *Seahawk China Dynamic Fund* (Unreported, FSD 23 of 2022 (DDJ), Doyle J, 10 February 2022) I granted on an *ex parte* short notice basis an application for the appointment of JPLs. I was satisfied that the four hurdles had been jumped. I referred at paragraph 48 to the "strong evidence" presently before the court:

> "*There is clear and strong evidence that the necessity hurdle has been jumped in this case.*"

92. At paragraph 49 I held that the balance of convenience clearly weighed strongly in favour of the appointment of JPLs notwithstanding the fact that the company was solvent. I concluded that appointing JPLs was the course likely to cause the least irremediable harm (*Al Najah Education* at paragraph 34). I did not think that the limited scope of the injunction granted in Hong Kong dealt with "the concerns and clear risks in this case" and neither would the appointment of inspectors and the provision of limited undertakings (paragraph 51).

93. *Seahawk* is a good case study example of the difficulties faced by a court at the interlocutory stage when not all the evidence has been made available and deponents have not been cross-examined.

When the winding up petition came to be heard in June and July 2022 it was dismissed by judgment delivered on 9 August 2022. That case underlines the need of the court to exercise great caution at the interlocutory stage.

Position Mobile

94. In these proceedings in *Position Mobile Ltd SEZC* (Unreported, FSD 79 of 2022 (DDJ), Doyle J, 7 April 2022) I declined to proceed on an *ex parte* without notice basis in respect of an earlier application to appoint JPLs. The Applicant requested the appointment of JPLs "*to hold the ring pending the determination of the winding up petition*".

95. I referred to *Bona Film* and *Rochdale Drinks* and the reference to the interim remedy of the appointment of a provisional liquidator being "*one of the most intrusive interim remedies in the court's armoury*" and in "*deciding whether to grant or refuse an interim remedy the overriding principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Among the matters which the court may take into account are the prejudice which the claimant may suffer if the remedy is not granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the remedy will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases …*" Lewison LJ in *Rochdale Drinks* at paragraph 110 stated: "*If a business is shut down wrongly, the cross-undertaking is unlikely to provide adequate compensation to the company concerned ...*". At paragraph 7 I referred to the comments of Harman J in an English first instance case from 1997 referring to the court's power to appoint provisional liquidators as "*the nuclear weapon of the Companies Court, since it causes almost always an impossibility for the company to recover.*" In my judgment I referred to the affidavit of Mr Stephens as containing "*a lot of hearsay evidence and on occasions fails to mention the sources of the information*" and "*often uses the phrase "I understand" but does not always state the facts upon which that understanding is based.*"

Orient TM Parent

96. In *Orient TM Parent Limited* (Unreported, FSD 299 of 2021 (DDJ), Doyle J, 27 July 2022) I dismissed *ex parte* short notice applications to appoint JPLs with costs against the applicants on an indemnity basis. At paragraph 29 I noted that there had been no satisfactory explanation as to why

the Petitioners had not provided notice of the hearing when the application for the appointment of JPLs was lodged and added "*I wish to discourage tactical games and late notice.*" At paragraph 33 I stated "*I do not consider that there is any genuine urgency and in any event do not think it appropriate to proceed without proper notice.*"

Global Cord Blood

97. In *Global Cord Blood Corporation* (Unreported, FSD 108 of 2022 (IKJ), Kawaley J, 28 September 2022) Kawaley J was presented with an apparently forged document. At paragraph 12 Kawaley J stated:

> *"It is not necessary for me to conclude anything other than that there is in fact no cogent or convincing response to as serious an allegation as could ever be made against the Chief Financial Officer of a listed company."*

98. From paragraph 13 onwards Kawaley J referred to the relevant law including section 104 of the Act and at paragraph 14 states:

> *"... it seems to me that the Court has to make a practical appraisal, assuming that the prima facie case requirement is met, as to whether there is a risk of at least a misuse of the Company's assets (section 104 (2)(b)(i)) or whether there is a need to prevent mismanagement or misconduct on the part of the Company's directors (section 104 (2)(b)(iii)".*

99. At paragraph 19 Kawaley J concluded that it was "clear that a *prima facie* case has been made out." At paragraph 20 Kawaley J went on to consider "*Grounds for appointing provisional liquidators: preventing misconduct and/or mismanagement*". He felt there were two important considerations that he was bound to take into account:

> *"First of all, it is presently the case that the Petitioner has a seriously arguable case - - and at this point it is almost an irresistible case - - for setting aside the Order [discharging an injunction] that I made, albeit not perfected yet, on the grounds that it was procured by fraud."*

100. Noting at paragraph 21 that "*Courts can only make decisions based on the material before them at any point in time.*"

101. At paragraph 22 Kawaley J felt that there was clearly "*a risk of mismanagement*" flowing from the fact that the Chief Financial Officer of the company had misled the Court and put before the Court "*a false bank statement pivotal to the matters that the Court was adjudicating at the 13-15 July 2022 hearing.*"

102. At paragraph 23 Kawaley J referred to the "*other aspect of the mismanagement risk*" namely the "*silence, or paralysis, on the part of the independent directors in the face of these shocking allegations about forgery.*" At paragraph 24 Kawaley J felt that he was "*bound to find that there is a serious risk of mismanagement and misconduct by the Company's directors based on the material that is presently before the Court*".

103. At paragraph 25 Kawaley J felt that there was a "*slightly more nuanced consideration*" in respect of the "*risk of dissipation or misuse of the company's assets*" but added that it was "*impossible to look at that ground wholly detached from the forgery allegation*" as the money is no longer in the particular account it was previously said to have been in.

104. At paragraph 27 Kawaley J commented that looking at the evidence "*as a whole in a very straightforward and realistic way, it is difficult to imagine a stronger case for appointing provisional liquidators than the present situation.*"

Atom

105. In *Atom Holdings* (Unreported, FSD 54 of 2023 (IKJ), Kawaley J, reasons delivered 18 May 2023 released for publication on 15 June 2023) Kawaley J granted an *ex parte* without notice application to appoint joint provisional liquidators. From paragraph 8 onwards Kawaley J dealt with the relevant law in respect of when it was legally appropriate to grant relief on an *ex parte* without notice basis and at paragraph 9 commented that the most clear-cut generally applicable justification for proceeding *ex parte* without notice is when there is a risk that were notice to be given this would defeat the purpose of the application. At paragraphs 11 and 25 he referred to section 104 of the Act and the court's ability to dispense with a cross-undertaking in damages. At paragraph 26 Kawaley J stated:

> *"The pursuit of the statutory remedy is intended to be procedurally regulated by rules of Court, but the standing requirements and grounds for appointing relief are spelt out by the statute. The remedy is less easy to obtain than an injunction in that a prima facie case for winding-up has to be made out, but the importance of the remedy as a means of, inter alia,*

preventing the dissipation of assets on an urgent interim basis is broadly analogous to injunctive relief ... However, appointing a joint provisional liquidator in place of directors of a company may be in many cases a far more intrusive form of relief with more extensive and immeasurable potential damage risks than an injunction imposed on a single defendant ...".

106. At paragraph 31 Kawaley J stated:

"I have always assumed that Cayman Islands practice relating to the appointment of provisional liquidators is broadly similar to that in England and Wales ..."

107. At paragraph 31 Kawaley J referred to English first instance authority in 2015 which included the following statements:

"The court is naturally cautious about appointing a provisional liquidator to a trading company where the consequence is almost inevitably to bring the company's trading to an end. In some cases (for example, where the trading is believed to be in fraud of the public) this may be the object of the appointment, but the importance of treading warily is just the same ... In cases where such an appointment is to be made, the court's inclination will be to want to provide the company with some kind of protection in the event that it turns out that the appointment should not have been made. Extracting from the petitioner an undertaking in damages to the company as a term of the appointment is the obvious step to take and, in my experience, the course usually followed. In other cases, especially where there is nothing to suggest dishonesty on the part of those who control the company, the court will explore whether some lesser remedy, for example a freezing injunction or an order for the production of documents may suffice."

108. This led Kawaley J to state at paragraph 32:

"The English law approach is clearly broadly analogous to the interim injunction context, but more caution is required where the effect of the appointment would be to bring trading to an end and no matter what the grounds relied on may be."

109. Kawaley J added:

"The Court is essentially engaged in a risk assessment exercise which is flexible enough to dispense with the cross-undertaking requirement in appropriate cases based on the facts

of the relevant case. It is difficult to identify any tangible basis for concluding that the Cayman Islands legislative approach to this topic manifests an intention to adopt a materially different approach. It is true that section 104 departs from section 135 of the UK Insolvency Act by codifying the judge-made grounds upon which an appointment can be made under English law. But this legislative approach, favouring specificity over generality, makes it even more difficult to conclude that Parliament would have failed to express explicitly so surprising an intention as making the remedy created by section [104] unavailable to creditors and contributories of modest means."

110. At paragraph 33 Kawaley J referred to CWR Order 4 rule 3(1) and the words "*The applicant shall give an undertaking to the Court...*" and rule 3(2) "*The Court may require the applicant to give security for the applicant's undertaking in such manner as the Court thinks fit*" and at paragraph 35, no doubt to meet the justice of the case before him, concluded that the word "*shall*" in that context "*should be construed as directory only.*" Kawaley J felt the "*operational meaning*" of the word "*shall*" will likely be "*shall usually*".

111. Kawaley J reached the following conclusions:

(a) the petitioners "*had clearly overcome the first hurdle*" – the presentation of the petition hurdle (paragraph 36);

(b) the petitioners had standing as contingent creditors and it is clearly established under Cayman Islands law that non-contractual claims, such as damages for fraud, qualify for proof under section 139(1) of the Act (paragraphs 37 and 41) and concluded that "*the Petitioners had established their standing as non-contractual contingent creditors of the Company and surmounted the standing hurdle.*" (paragraph 44).

(c) Applying the somewhat stricter *prima facie* case test, the petitioners as per Parker J in *Grand State* at paragraph 84 and Doyle J in *ICGI* (at paragraphs 19-21) and *Rochdale Drinks* "*had surmounted the "prima facie case" hurdle both on the grounds of inability to pay debts and, more decisively, on the alternative just and equitable grounds because of the obvious (and seemingly incontrovertible) need for an investigation.*" (paragraph 46). Kawaley J emphasised Rimer LJ's statement in *Rochdale Drinks*:

> *"Given the potential seriousness of the appointment of a provisional liquidator, I consider that in this case of a creditor's petition the threshold that the petitioner*

must cross before inviting such an appointment ought to be nothing less than a demonstration that he is likely to obtain a winding-up order on the hearing of the petition."

(d) On the necessity hurdle Kawaley J concluded:

"The necessity hurdle was Mr Crane's 'slam-dunk' point, which the Petitioners were able to almost casually skip over. The need to prevent the dissipation of assets or mismanagement were jointly relied upon with the essence of a compelling case crisply summarised thus: "The Company's directors have either absconded with assets, including AAX users' assets or are incommunicado"."

Counsels' submissions on an evidential issue in respect of the necessity hurdle

112. Counsel were agreed, in the main, on the relevant applicable law including the four hurdles that the Petitioner had to jump with the main argument being rightly devoted to the necessity hurdle, as the Respondents had sensibly conceded that the prima facie hurdle had been jumped. The first two hurdles had been clearly jumped. A winding up petition had been presented and a winding up order had not yet been made. The Applicant had standing as it was a contributory. All that remained was the necessity hurdle. There was however one evidential issue in respect of the necessity hurdle upon which counsel were not in agreement.

113. Mr Wingrave placed considerable reliance on the observations of Segal J in *Asia Strategic*. In that judgment under the main heading "*Is the prima-facie case requirement satisfied*?" Segal J referred to *Re Union Accident Insurance Co Ltd* [1972] 1 All ER 1105 where, in the context of the English jurisdiction to appoint provisional liquidators, "*Plowman J ... held that a good prima-facie case was established by showing first that the allegations in the petition were supported by the evidence (at least to the extent of a good prima facie case) and secondly that it was not possible to say that the allegations had been disproved, bearing in mind that conflicts of evidence cannot be resolved until the substantive hearing of the petition*" (paragraph 39 of Segal J's judgment).

114. Segal J at paragraph 40 noted that *Union Accident* was not a "*decision directly on section 104*" and further noted that Rimer LJ in the English *Rochdale Drinks* case at [77] regarded the continued use of the phrase "*good prima facie case*" as unsatisfactory. Segal J concluded:

> *"Accordingly, the decision in Union Accident needs to be treated with caution and I refer to it only by way of illustration of an approach which has been adopted when deciding whether a (good) prima facie case for a winding-up order has been made out."*

115. Mr Wingrave went further and submitted that the *prima facie* case test was not only applicable to the *prima facie* case hurdle but was also applicable to the necessity hurdle and in effect that the Respondents had the burden of disproving the Petitioner's case on the necessity hurdle.

116. Mr Wingrave suggested that if it were otherwise it would be easy for any respondent faced with an application for the appointment of JPLs simply to defeat it by producing a lot of contentious evidence and arguing that as the court could not resolve the disputed evidence it should not appoint JPLs.

117. Mr Wingrave was right to caution the court to guard against abuse by respondents who provide contentious evidence in response and attempt to create a smokescreen over their mismanagement and misconduct or in the words of Rimer LJ in *Rochdale Drinks*, albeit in a different context, "*merely to raise a cloud of objections*". The court must take care that the wool is not pulled over its eyes. But as Kawaley J astutely recognised at paragraph 21 of *Global Cord Blood* "*Courts can only make decisions based on the material before them at any point in time.*" The court in considering an application to appoint JPLs must subject the evidence and material presented by the applicant and respondent to close scrutiny and do the best it can to deal with the application justly and fairly.

118. Mr Moverley-Smith for the Respondents, in effect, submitted that the burden remained on the Petitioner to jump the necessity hurdle.

119. Mr Moverley-Smith took me to the judgment in *Union Accident* which was plainly focused on whether the applicant had "*made out a good prima facie for a winding up at the hearing of the matter*" (page 1110 a). Plowman J at page 1110 f stated:

> *"Having regard to the conflict of evidence in regard what the present position is, a conflict which, as I have indicated can only be resolved on the hearing of the petition, it is impossible, I think, to say that the contrary has been proved at the present time. In these circumstances I am of opinion that the department had made out a good prima facie for a winding-up order."*

120. Plowman J did not refer to the necessity hurdle as it is a creature of Cayman statute.

121. Mr Moverley-Smith submitted that the Applicant had not satisfied the burden upon it and had not jumped the necessity hurdle.

122. Mr Moverley-Smith submitted that the Court is not in a position to resolve any issue of fact on an application for the appointment of JPLs. He added further, relying on *Coyne v DRC Distribution Limited* [2008] EWCA Civ 488; [2008] BCC 612 per Rimer LJ at [58], that where evidence is untested by cross-examination, as in this case, the Court is obliged to treat that evidence as true unless it is manifestly incredible. *Coyne* has recently been applied by Newey LJ in *Kireeva v Bedzhamov* [2023] Ch 45 at [34].

123. In *HEC International Ltd* (Unreported, FSD 318 of 2021 (DDJ), Doyle J, 10 July 2023), in a somewhat unusual context, I referred at paragraph 42 to *Kireeva v Bedzhamar* and accepted that the authorities:

> *"indicate that a court is not usually in a position to resolve conflicting statements on affidavit evidence without first having the benefit of the cross-examination of witnesses. The position seems slightly different when in effect considering the summary judgment test where the court does not need to take at face value and without analysis everything which Mr Yoshido says ..."*

124. At paragraph 23 I referred to the test for summary judgment and the need for the court not to conduct a mini-trial and I added:

> *"As has been emphasised in the cases (see for example paragraph 15 of King v Stiefel [2021] EWHC 1045 (Comm)) this does not mean that the court must take at face value and without analysis everything which a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents, or I would add not supported by contemporaneous documents. I bear all these points firmly in mind when considering Mr Yoshida's unsupported self-serving generalised statements (especially those at paragraph 92 of his second affidavit)."*

125. Mr Wingrave in his skeleton argument (paragraph 82) submitted that there was no credible evidence to undermine Dr Malek's opinions on the First and Second Incidents and "*the two Spigot*

Letters must be viewed as incapable of credible belief" and that "*Chen is not qualified to or capable of putting that right for Rs, even if his evidence is capable of being given credit, which is doubtful at best.*"

126. Mr Wingrave submitted that if Mr Moverley Smith's submission relying on *Coyne* was correct all a respondent would ever have to do is to record wordy denials in an opposing affidavit and the court would be faced with a conflict of evidence which it could not resolve without cross-examination resulting in the dismissal of the application. Mr Wingrave submitted that the principle in *Coyne* was not aimed at applications for the appointment of JPLs and that the correct test to be applied to the evidence before the court is the *Asia Strategic* test and the Respondents have to "*disprove*" the Applicant's case on necessity. There is arguably, at a stretch, some limited support for Mr Wingrave's submissions on this discrete point where at paragraph 59 of Segal J's judgment in *Asia Strategic*, in the context of the necessity hurdle and past management and misconduct, it is stated "*Nothing that Mr Ferrigno has said persuades me that the evidence should be treated as disproved.*" (my underlining). Obiter comments should not however be treated as statutory provisions and Segal J did go on to refer to a "*serious risk*" of future mismanagement and misconduct. Mr Wingrave added that it would be unsatisfactory for the court to apply different tests or approaches to essentially the same evidence on the same application albeit when considering different statutory hurdles. In effect, Mr Wingrave submitted that the evidential test relevant to the *prima facie* case hurdle should also apply to the necessity hurdle and the Respondents had the burden of "disproving" the Applicant's evidence on necessity, and as they had failed to do so JPLs must be appointed.

127. I reject Mr Wingrave's submission that the burden is on the Respondents to disprove the Applicant's allegations in respect of the necessity hurdle. To require the Respondents to disprove necessity would be to impermissibly reverse the burden of proof. The burden remains on the Applicant to prove its case on the necessity hurdle and to satisfy the court that the necessity hurdle has been duly jumped. That is, in my judgment, the correct legal position under section 104(2) (b) of the Act. The burden is not on the Respondents to disprove the Applicant's allegations on the necessity hurdle. In this case the Respondents have not just provided mere bare generalised denials. The Respondents have on some issues descended into the detail and the court must have regard to all the evidence before it.

128. In my judgment the *prima facie* evidential test does not apply to the necessity hurdle. Moreover, I think it too simplistic, in the present context, to in effect say when dealing with sworn evidence in

rebuttal on the necessity hurdle the court must accept it unless it is manifestly incredible. I think, in the present context, the evidential position is more nuanced than that. In considering whether an applicant has jumped the necessity hurdle the court considers all the evidence before it and must reach a conclusion as to whether the applicant has persuaded it on all the evidence before the court that the necessity hurdle has been jumped. The relief requested is draconian intrusive relief so the court needs to be satisfied that there is sufficient solid evidence to justify pressing the nuclear button at what is often an early stage of the proceedings and where many relevant facts are seriously in dispute. A director of a company cannot normally come to the court with a blanket on oath denial of all the allegations against management and say without cross-examination you have got to believe me and dismiss the application. Evidence in support of such denials needs to be put before the court, as was done in this case.

129. Each case will depend on its own facts and circumstances. In some cases it will be relatively obvious that relief should be granted – a "no brainer" as the Americans would say. For example in *Principal Investing Fund* on an *ex parte* basis I appointed JPLs over three companies pending the determination of the winding up petitions. The Court of Appeal refused to give leave to appeal against the continuation of the orders appointing the JPLs and the Grand Court, in due course, made winding up orders (see *Principal Investing Fund and others*, Unreported, FSD 268, 269 and 270 of 2021 (IKJ), Kawaley J, 27 July 2023). In other cases the position will be more finely balanced.

130. For example in *Seahawk China*, based on the evidence and submissions then before the court, I was persuaded to appoint JPLs on an *ex parte* short notice basis. At the full hearing of the winding up petition over 10 days in June and July in 2022, based on the evidence and submissions before the court, I dismissed the winding up petition (Unreported, FSD 23 of 2022 (DDJ), Doyle J, 9 August 2022).

131. At the interlocutory stage the court must simply do its best, often in urgent circumstances and without an abundance of time available, to apply the law to the limited evidence on the papers before it, taking into account all relevant submissions, and come to a just outcome in respect of applications to appoint JPLs. This is at a stage before all the evidence has been tested by cross-examination.

Summary of the relevant law

132. I now turn to a summary of the relevant law under various sub-headings for ease of reference.

133. I attempt to set out the principles and guidance provided by section 104 of the Act and the previous local Cayman case law as follows:

The significance and limitations of English authorities

(1) Section 104 of the Act contains statutory provisions (in particular section 104(2)(b)) that are not replicated in English legislation and care must therefore be taken when considering some English authorities in respect of applications for the appointment of JPLs (including *Rochdale Drinks*) but such authorities may provide some useful guidance (*Asia Strategic, Atom*);

The four main hurdles

(2) The four main hurdles that an applicant for the appointment of JPLs must jump are:

(i) the presentation of the winding up petition hurdle;

(ii) the standing hurdle;

(iii) the *prima facie* case hurdle; and

(iv) the necessity hurdle;

(*ICGI* , *Principal Investing Fund*, *Atom*);

The two stage process

(3) There is a two stage process. First is there a *prima facie* case for a winding up order? Second, if there is, is the appointment of provisional liquidators necessary to achieve one or more of the purposes set out in section 104(2)(b) of the Act? (*Asia Strategic, Grand State*);

Undertakings and security

(4) The applicant should usually provide an undertaking to the court to (a) pay any damages suffered by the company by reason of the appointment of JPLs and the remuneration and expenses of the JPLs in the event that the winding up petition is ultimately withdrawn or dismissed and the court may require the applicant to give security for the applicant's undertaking in such manner as the court thinks fit. The word "shall" in CWR Order 4, rule

3 (1) should be construed as "directory only" and the "operational meaning" of the word "shall" is "shall usually" (*Atom*, FSD Guide C8.1(c));

Intrusive remedy/heavy burden on applicants/ need for clear and strong evidence

(5) The appointment of JPLs is one of the most intrusive remedies in the court's armoury sometimes referred to as the "nuclear option" (*Position Mobile*). Such a serious step should not be taken unless there are strong grounds justifying the taking of such a step (*ICGI*, *Al Najah Education*). Considerable care must be taken before making what is plainly a draconian order. The court must give such applications "the most anxious consideration." (*Bona Film Group*). There is a heavy burden on applicants (*CW Group, China Resources*, *Grand State*). Clear and strong evidence is required (*CW Group, Grand State*, *Al Najah Education*, *Seahawk China*);

Ex parte applications

(6) Sometimes exceptionally, *ex parte* applications will be justified (*Principal Investing Fund, Seahawk China*, *Atom*). Normally however notice should be given. If the court is of the view that, in a case where there was no genuine urgency, as a matter of tactics no or only short notice was given by the applicant when greater notice could and should have been given it may dismiss the application with indemnity costs against the applicant (*Orient TM*). The company is entitled to at least four clear days' notice of the application unless there is some exceptional circumstance which justifies an order being made without notice (FSD Guide C8.1(b)).

Statutory grounds only

(7) There are limited and very specific grounds specified on section 104(2) of the Act for the appointment of JPLs and the court should not allow the remedy to be abused (*Orchid Development*). The need for an investigation although a ground for a winding up order (*Seahawk China,* Unreported, FSD 23 of 2022 (DDJ), Doyle J, 9 August 2022 at paragraphs 63-80) is not a ground for the appointment of JPLs (*Al Najah Education*). The court has to be satisfied that the appointment of JPLs is necessary in order to prevent any or all of the section 104(2) wrongdoings;

Proportionality

(8) The court should consider the principle of proportionality and if a lesser remedy can protect the applicant then JPLs should not be appointed (*Bona Film*, *China Resources*, *ICGI, Principal Investing Fund,* FSD Guide C81.(c));

Not possible to make findings of fact at interlocutory stage

(9) It is not possible at the interlocutory stage to make findings of fact on disputed factual issues (*Asia Pacific*, *CW Group*);

Prima facie case for winding up order

(10) In considering whether a *prima facie* case for a winding up has been made out the English authorities (including *Rochdale Drinks*) may offer helpful guidance. It is not necessary to demonstrate that a winding-up order will be granted. That would be setting the bar too high at the interlocutory stage. A *prima facie* case for making a winding up order is established if the allegations made in the petition for the appointment of JPLs are supported by evidence and have not been disproved, with any conflicts of evidence to be resolved at the substantive hearing of the winding up petition (*Bona Film, Asia Strategic*). The applicant has to satisfy the court that the applicant is likely to obtain a winding up order on the hearing of the winding up petition (*Asia Strategic*, *Grand State* referring to *Rochdale Drinks*, *ICGI*, *Al Najah Education*);

Evidence and the necessity hurdle

(11) The burden is on the applicant to prove that the appointment of JPLs is "necessary" in order to prevent (i) the dissipation or misuse of the company's assets or (ii) the oppression of minority shareholders; or (iii) mismanagement or misconduct on the part of the company's directors. The *prima facie* evidential test does not apply to the necessity hurdle. The burden is not on the respondent to disprove the applicant's allegations on the necessity hurdle but a respondent would normally be expected to provide detailed evidence in response rather than mere generalised denials. The court must consider all the evidence before it and taking a flexible risk assessment approach must reach a conclusion as to whether the applicant has satisfied the court that the necessity hurdle has been jumped. The court, in considering the necessity hurdle, is considering whether the risk which is

sought to be prevented is sufficiently serious to justify the appointment of JPLs. The court carefully considers the risks and any necessary preventative measures and reaches a conclusion on the evidence presented to it as to whether the applicant has jumped the necessity hurdle;

Dissipation/risk based approach

(12) In the context of an application to appoint JPLs the dissipation is not just dissipation in the asset freezing injunction sense of deliberately making away with the assets but also includes any serious risk that the assets may not continue to be available to the relevant entity (*Asia Strategic, ICGI*). The court must consider whether there is a "clear risk" of dissipation (*Pacific Fertility*). The court considers whether there is a "serious risk" that assets may not continue to be available (*Asia Strategic, Grand State*). There must be a "likely dissipation of assets". The court adopts a risk based approach. There must be clear and strong evidence to show that there is a serious risk that one or more of the wrongs identified in section 104(2)(b) may well occur if JPLs are not appointed (*Al Najah Education*). The court may consider undertakings and proposals from respondents as to future conduct and the appointment of additional or independent directors. The court considers whether any alternative remedies would suffice. The court considers the evidence before it and conducts a "practical appraisal" of the risks (*Global Cord Blood*). The court is essentially engaged in a flexible risk assessment exercise (*Atom*);

Future looking

(13) In respect of the necessity hurdle although the court may take note of apparent problems in the past it is essentially engaged with a process that looks to the future and the risks as to the specified section 104 (2)(b) wrongdoing. It is the future mismanagement or misconduct which is of prime relevance for the purposes of section 104(2)(b) (*Asia Strategic, ICGI*);

Mismanagement or misconduct

(14) Mismanagement or misconduct connotes culpable behaviour involving a breach of duty or improper behaviour that involves a breach of the relevant governing documents and governance regime. This could involve inaction where such inaction would give rise to a breach of duty and action was needed and possible to protect the interests of the relevant entity (*Asia Strategic*). The court may consider allegations of conflict of interests (*Orchid*

Development, CW Group). The court would normally expect to see evidence which demonstrates a pattern (*Grand State*). There must normally be a "real risk of mismanagement and misconduct" and "strong evidence" of mismanagement or misconduct (*Asia Strategic*);

Prejudice

(15) The court must bear in mind the potential prejudice to the company of granting the order and the potential prejudice to the applicant in not granting it. The court should exercise its discretion in accordance with the overriding principle that the court should take whichever course seems likely to cause the least irremediable prejudice to the one party or the other (*Bona Film, Al Najah Education*);

Discretion

(16) The power to appoint JPLs is discretionary (*Al Najah Education*). If there is no real urgency or if the hearing of the winding up petition is imminent it may be that the court will consider that the necessity hurdle has not been jumped and that the safest course would be to await the outcome of the hearing of the winding up petition;

Each case determined on its own facts

(17) Each case, of course, must be determined on its own facts and circumstances.

Determination

134. Having dealt with the relevant law I now turn to the determination section of this judgment.

135. I should stress that nothing I say in his judgment should be taken as prejudging the determination of the winding up petition. I keep, as always, a mind open to persuasion in respect of the winding up petition.

Two points raised in April 2022

136. The Applicant's principal top two concerns in respect of the previous application were that (1) the PDs were allegedly being excluded from management and (2) the PDs were allegedly not being provided with financial information.

137. In my judgment delivered on 14 April 2022 I referred to the Undertaking and remarked that it may assist if there was a meeting of the board of directors of the Company and if financial information was provided to those who were entitled to it.

138. It is important to note that the Respondents have taken steps since April 2022 to attempt to deal with those concerns.

Directors' meetings

139. Mr Wingrave accepted that the Applicant holds two board seats but added "*they have been frozen out of management and indeed out of all substantial business decisions made in connection with the Company since before the beginning of January 2022.*"

140. The Applicant says that it has "*attempted to hold board meetings, without any satisfactory respo*nse" (paragraph 15 of its skeleton argument). Mr Chen in his affidavit evidence has referred to attempts to hold board meetings. There was reference to a meeting of the Board on 14 December 2022 which the PDs failed to attend. I have considered paragraphs 43-52 of the third affidavit of Mr Stephens and also paragraph 33 of his fifth affidavit. Nowhere does Mr Stephens provide a satisfactory explanation as to why he failed to attend that board meeting. It is unwise of a director who is claiming to have been "*frozen out of management*" to fail to attend a board meeting. It is also unwise for a director to complain about what happened at a meeting at which he was given an opportunity to attend but failed to attend for no satisfactory reason.

141. In his third affidavit Mr Stephens refers to the correspondence between board members of the Company including his letter of 18 November 2022 and he says at paragraph 44 that he sought to convene a meeting of the directors. Mr Chen responded on 22 November 2022. There was then a battle of the agendas and a proposal for a meeting on 8 December 2022 and then a proposal for a meeting a week later. Mr Stephens said that on 12 December 2022, Mr Chen advised that a meeting on 14 December 2022 would be the only suitable date prior to Christmas. Mr Stephens says he responded on 15 December 2022 and adds that it appears that a meeting of the directors was held on 14 December 2022 and Mr Chen provided a copy of the minutes on 16 December 2022. Mr Chen refers to the events leading to the meeting of the Board on 14 December 2022. He says that "*Mr Stephens and Mr Mahaffey chose not to attend and have not subsequently sought to engage with the Company's board of directors since this time.*"

142. Mr Stephens, apparently keen to have a meeting, failed to attend the meeting on 14 December 2022. I asked Mr Wingrave to point me to evidence justifying Mr Stephens' lack of attendance. The best he could do was to refer me to paragraph 33 of Mr Stephens' fifth affidavit where he expressed concerns that the majority would vote down the PDs proposed resolutions and the meeting was at "*a wholly unsociable hour allegedly in order to accommodate an interpreter.*" I found it somewhat strange that a director who was crying out for a directors' meeting to be convened chose not to attend because he thought he would be out-voted and because the meeting was at an unsociable hour for him. On the face of it such lack of attendance detracts from a complaint that such director has been excluded from management and meetings of directors.

Information provided

143. Another of Mr Stephens' complaints was that the Company was not providing financial information. At paragraph 7e. of the Applicant's skeleton argument it says that its "*recent complaints*" include "*Instances where the GGDs failed to provide information to the Petitioner in general and the PDs in particular*" and at the first paragraph 16 it says that since April 2022 "it *has made a number of attempts to gain information from Rs/GGDs without success.*" Mr Chen says that the directors appointed by the Petitioner have continued to receive the annual forecasts and strategic plans and quarterly information. I asked Mr Wingrave to refer me to Mr Stephens' evidence where he disputes this. I was taken to no such evidence.

144. Mr Chen says that the PDs:

(a) have continued to receive the annual forecasts and strategic plans and quarterly information;

(b) failed to attend a board meeting which they had specifically requested; and

(c) continue to engage in email correspondence with the Board for the sole purpose of pushing the Petitioner's agenda.

145. Descending into the specifics in his second affidavit at paragraph 80 (a) at footnote 23 Mr Chen refers to an email from Cody Miller to the Board providing: (i) the Q3 2022 financial information on 21 October 2022 (ii); the Q4 financial information on 17 January 2023; (iii) the Q1 2023 financial information on 13 April 2023; and (iv) the Q2 financial information on 27 July 2023. There is also reference to the email from Cody Miller dated 1 February 2023 to the Board providing

the Company's Forecast & Strategic Plan 2023. It appears that the Company has provided some financial information to the Petitioner and the PDs and Mr Wingrave did not take me to any evidence that seriously disputed that.

146. The Respondents have produced some evidence in an endeavour to deal with the concerns I expressed at the last hearing in respect of meetings of directors and financial information and that is in their favour.

147. Before considering the Applicant's concerns in respect of the First Incident, the Second Incident, the Amended Agreements and the reduced marketing spend I should refer to the Applicant's failure to progress its winding up petition and its contempt application. I raised these concerns during the hearing.

Failure to progress the winding up petition

148. Mr Stephens perceptively acknowledges at paragraph 93 of his fifth affidavit that the court will have questions in respect of the timing of the present application "*when the Petition proceedings are on foot and proceeding towards trial.*" Mr Stephens refers to delays in the discovery process. He does not adequately explain the Petitioner's delays in progressing its contempt application or indeed its winding up petition. He seeks to blame the Respondents in respect of delays in the discovery process. I note that the Petitioner has not applied to the court for any relief in respect of the Respondents' alleged deficiencies in the discovery process.

149. The Winding Up Petition is dated 1 April 2022 – well over a year now. By consent order made on 12 January 2023 directions were given in respect of discovery and inspection, amended pleadings, expert evidence in respect of valuation and evidence of fact. By paragraph 14 of that Consent Order it was ordered that the Petition be set down for 3 days not before 9 August 2023 and counsel were specifically ordered "*to liaise with court administration in that respect.*" On its own admission, the Petitioner and its counsel have failed to do that.

150. I am concerned over the Petitioner's failure to promptly progress its winding up petition and I consider its second application to appoint JPLs in that context.

Failure to progress the contempt application

151. I am also concerned over the Petitioner's failure to promptly progress its contempt application. Mr Stephens in his sixth affidavit tries to explain away the Petitioner's failure to progress its contempt

application by saying that the Respondents have made no efforts to list their application for a stay. That is not a convincing explanation. In his first affidavit sworn on 27 July 2023 Mr Chen refers to a summons dated 3 May 2022 to adjourn the amended contempt application pending final determination of the winding up petition. There is also reference to a stay. The summons does not appear to have been progressed. Two wrongs however do not make a right. Mr Stephens says that the wrongdoing of the Respondents since the filing of the amended contempt application required the diversion of the Petitioner's "*resources to the instant application for obvious reasons*". He does not specify those reasons and no reasons are obvious to me. I find Mr Stephens' attempts to explain away the Petitioner's lack of action to progress its contempt application unconvincing.

152. It is unsatisfactory that the Applicant should file a contempt application and not progress it expeditiously. To file a contempt application is a very serious step to take. The contempt application in this case should either have been progressed expeditiously or withdrawn. After the length of time that has elapsed since the First Incident and the date of filing of the contempt application without proper attempts to progress it, it is probably best abandoned rather than further time and cost being wasted upon it. The parties should focus their time, attention and resources on progressing the winding up petition to a hearing, rather than engaging in further interlocutory skirmishes.

153. I now turn to the submissions and main concerns of the Applicant which it says justify the conclusion that the necessity hurdle has been duly jumped on the facts and in the circumstances of this case.

The necessity hurdle submissions

154. I have carefully considered all that has been written and said by Mr Wingrave in respect of the necessity hurdle. From paragraphs 113 to 123 and pages 34-36 of his skeleton argument Mr Wingrave focuses on the necessity hurdle.

155. Mr Wingrave submitted that the appointment of JPLs was necessary to prevent mismanagement and misconduct (as per *Asia Strategic*) dissipation or misuse of assets and oppression on the part of the GGDs.

156. Mr Moverley Smith in his concise but well focused 18 page undated skeleton argument at paragraph 12 referred to the evidence that under Article 99 of the Company's articles of association a director

may at any time summon a meeting of the directors and no attempt has in fact been made by the PDs to exercise their rights under the articles to call a board meeting.

157. Mr Moverley Smith refers to the Petitioner's Reply on 4 November 2022 in which it alleged that Spigot seemed wrongfully to have provided EET with computer code belonging to two Apps developed for the Company – Snow Roll and Scan QR – allegedly in breach of the R & D Agreement. In response to that allegation Spigot undertook an internal investigation and by 11 November 2022 had removed the Scan QR App from the Apple App Store.

158. Mr Moverley Smith referred to the letter dated 12 December 2022 from Spigot to the Company (the "First Spigot Letter") explaining the position and referring to its own internal investigation. He adds that on 23 June 2023 without any prior warning the Petitioner served Dr Malek's first report and on 11 July 2023 Dr Malek's second report was served. In light of further allegations Spigot conducted a further urgent investigation and reported its findings in a letter dated 10 August 2023 (the "Second Spigot Letter").

159. Mr Moverley Smith submitted that there was a high threshold to warrant the grant, at an interlocutory stage, of the "nuclear" remedy of provisional liquidation and in that respect relied on the observation of Parker J in *CW Group* at [62].

160. The Respondents accept that the winding up hurdle and the standing hurdle have been satisfied. In respect of the *prima facie* hurdle Mr Moverley Smith at paragraph 37 of his skeleton argument, relying on *Bona Film* at [60] says that this *prima facie* case hurdle is jumped "*if the allegations made in the Petition for the appointment of provisional liquidators are supported by evidence and have not been disproved, with any conflict of evidence being resolved at the substantive hearing.*" It is not necessary to demonstrate that a winding up order will be granted.

161. The Respondents note that the Petitioner in its Reply has supplemented its pleadings in regard to the quasi-partnership point and in such circumstances the Respondents are "*prepared to accept, solely for the purpose of the current application, that, whilst it denies that a quasi-partnership exists, a prima facie case has been made out*" (paragraph 39 of the Respondents' skeleton argument).

162. The Respondents say that having failed in respect of its first summons to discharge the heavy burden on it to show the necessity for the appointment of JPLs the Petitioner now seeks, as part of its ongoing pressure campaign to force a settlement, to have a second bite of the cherry.

163. The Respondents say that the principal allegation the Petitioner relies on is the alleged copying by Spigot of source code belonging to the Company. The Petitioner recognises that this is a highly technical area and it relies on expert evidence. The way in which the expert evidence has been produced is unsatisfactory and the court does not benefit from a joint report. The court should consider the First Spigot Letter, the Second Spigot Letter and the expert reports.

164. The Respondents refer to the fact that Spigot is not a respondent to the Petition and admitted errors made by Spigot in developing the EET Apps are not errors made by the Respondents. Moreover the Respondents at no point instructed Spigot to misappropriate the Company's intellectual property (Chen 1 at paragraph 25). The only substantive question in respect of the misappropriation allegations is whether the Respondents have dealt with Spigot appropriately in light of the allegations. When the allegations were made they were promptly investigated and Spigot provided explanations and any errors were promptly remedied and the Respondents commissioned an independent expert, Mr Ferrara, to obtain an independent opinion on the matters complained of by the Petitioner. Whether the Respondents should cause the Company to take action against Spigot and, if so, the form any such action might take, are not questions susceptible of only one right answer and a host of relevant factors must be considered including the terms of the R & D Agreement, the lack of any identifiable loss to the Company and the assurances given by Spigot as to future conduct. If the Petitioner truly believed that legal action should be taken against Spigot and ETT but was not being pursued by the Company it is open to it to bring a derivative action to achieve that result but it has taken no such steps.

165. The Petitioner's assertion that the Company should cease to pay Spigot for the services it provides is also fraught with problems given the Company's contractual obligations under the R & D and Marketing Agreements.

166. Mr Moverley Smith also points out that there is nothing to prevent the Respondents from developing Apps for other companies within the Genimous Group which might compete with Apps generated by the Company. Furthermore Spigot acts for a number of clients.

167. Mr Moverley Smith submitted that in all the circumstances the Petitioner had wholly failed to surmount the necessity hurdle.

168. During the hearing there was also reference to John Lash as one of the GGDs against whom complaint is made by the Applicant. Mr Moverley-Smith took me to the Board Resolutions passed on 8 November 2021 and signed by, amongst others, Mr Stephens and Mr Mahaffey the directors

of the Company appointed by the Petitioner whereby the Company referred to the entering into of a National Security Agreement with the US Government as of September 2021. Pursuant to that agreement the Company nominated John Lash to serve as its Security Director and the US Government on 5 November 2021 communicated its non-objection to the nomination.

169. In his first affidavit Mr Stephens at paragraph 74 stated that:

> *"Notwithstanding the appointment of Mr Lash on 8 November 2021, nothing has changed from our perspective concerning the conduct of Board business. Although Mr Lash now has the ability to act as the swing vote and, by reason of the CIFIUS Agreement, is supposed to be independent of the Genimous Group, he has shown no willingness to dissent against the GGD, or to allow the PDs back into management. This is particularly troubling because I have made Mr Lash aware of all the complaints of the Petitioner ..."*

170. In his reply, Mr Wingrave took me to an email from Mr Stephens to Mr Wingrave dated 4 July 2023 forwarding a message that same day to the directors and others stating at internal page 4:

> *"John Lash, I can only assume that you've been lied to this whole time. As a US citizen, an independent director, and the watchdog for the US government, it is hard to see any other reason you would have gone along with all of this ... This matter is now black and white and you need to choose whether or not you want to be complicit in it."*

171. I now turn to the First Incident and the Second Incident.

The First Incident and the Second Incident

172. I have considered all the evidence in respect of the First Incident and the Second Incident.

173. Mr Stephens says he is authorised by the Applicant to provide his third affidavit sworn on 9 March 2023. He says that on or around 2 November 2022 "we" discovered that an App known as "Scan QR Code" had been published by EET in the Apple App Store. Mr Stephens says he and Danny Miller determined it had been developed using intellectual property belonging to the Company. Mr Stephens does not accept the explanation of inadvertence from Spigot.

174. Mr Stephens refers to the Undertaking. Mr Stephens says that the nature of the most valuable assets being in the form of code means that compliance with the terms of the Undertaking was especially important. Mr Stephens believes that the Respondents and Spigot, described as a wholly owned

subsidiary of the Genimous Group, have set out to disclose proprietary codes. Mr Stephens refers to the communications between the legal representatives. There was reference by the Respondents to inadvertence.

175. In his fourth affidavit sworn on 23 June 2023, Mr Stephens refers to what he describes as expert evidence and seeks to argue various points in his affidavit. Affidavits should stick to the facts rather than contain comment and argument (as indeed Mr Stephens himself rightly recognises at paragraph 20 of his sixth affidavit).

176. In his fifth affidavit sworn on 2 August 2023, Mr Stephens claims that the Respondents have misappropriated the intellectual property of the Company, have set up in direct competition to the Company using its own intellectual property and have caused or permitted abandonment of marketing spend on certain of the Company's apps. The Petitioner says that it is not only the technical intellectual property of the Company that the Respondents misappropriated but also its marketing strategy, marketing channels, distribution know-how and strategic plans. The Petitioner's case is that these actions will likely have a devastating effect on the financial and competitive position of the Company if not remedied quickly.

177. Mr Stephens says that in June 2023 the Petitioner discovered not only that the intellectual property that the Respondents asserted had been removed from the EET app had been tweaked and reintroduced, but also that EET had published a book of apps mirroring the most successful of the Company's apps.

178. Mr Chen, in his first affidavit, deals with the alleged breach of the Undertaking. He says the alleged breach was remedied and an investigation carried out. It was denied that there had been any deliberate misappropriation of the Company's property. There are references to the explanations offered by Spigot. At paragraph 27 Mr Chen confirms that Genimous "*remains committed to ensuring compliance with the Undertaking pending the final determination of the Petition.*"

179. In respect of the First Incident, Mr Chen refers to Walkers letter dated 16 November 2022 and the First Spigot Letter and reiterated that there had been no deliberate misappropriation of the Company's property and that the Company had not suffered any prejudice or loss.

180. In respect of the Second Incident there was reference to the letter from Dentons dated 23 June 2023. The Respondents deny that there has been any intellectual property misappropriation. Mr Chen refers to the lack of supporting evidence and the allegations against him "*of lying to or misleading*

the Court ...". Mr Chen refers to Walkers letter dated 30 June 2023 and Dentons' response on 6 July 2023 and the reference to an intention "*to have the necessary evidence to prove the allegations available ... in a form that will be understandable to non-IT professionals in the coming days*." Mr Chen says that the evidence was never provided.

181. Mr Chen refers to Mr Stephens emailing the Board on 4 July 2023 enclosing the First Malek Report. Mr Chen lists numerous points in respect of the email. Mr Chen refers to the First Malek Report in respect of the First Incident. Mr Chen makes reference to Dentons' letter dated 11 July 2023 serving the Second Malek Report. Mr Chen also refers to the Spigot letter dated 10 August 2023 in respect of the Second Incident and the Second Malek Report.

182. Mr Chen in effect denies the allegations of know-how misappropriation and mismanagement (under the headings marketing spend; financial status; frozen out of the Company; actions of the directors of the Company appointed by the Genimous Group the GGDs).

183. I considered the expert reports *de bene esse*.

184. In his first report dated 5 September 2023 (originally dated 22 May 2023), Dr Malek says he has been asked (but does not say by whom and does not exhibit his letter of instruction) to provide his opinion as to:

(a) whether the Scan QR Code app of East End Technologies contains code that is copied from the Camera Scanner app of Position Mobile;

(b) whether the copied code could have been the result of an inadvertent decision or an unintentional mistake; and

(c) whether he can determine from the available information when East End Technologies began the development of the Scan QR Code.

185. Dr Malek refers to his professional experience in "the computing and technology industry."

186. In his conclusion he sets out his "determinations" rather than opinions as follows:

(a) almost the entire implementation of Scan QR Code consists of code that was copied from the implementation of Camera Scanner app;

(b) the code was deliberately copied and was not the result of an inadvertent mistake; and

(c) Spigot began the development of Scan QR Code at least as early as 4 April 2022.

187. Dr Malek confirms receipt of the FSD Guide and provides a statement of truth.

188. In his second report dated 5 September 2023 (originally dated 7 July 2023), Dr Malek says that he has been asked to provide his opinion as to whether the East End Technology (EET) mobile apps use the proprietary software design and code of Position Mobile (PM) mobile apps.

189. In his conclusion he says that he has identified numerous instances in which EET mobile apps use the proprietary design and code of PM mobile apps. He says that he has also identified remarkable similarities in design and code of EET and PM apps. He says that these similarities cannot be accidental and would not occur in a clean room development process. He says "*Therefore, I conclude EET mobile apps are largely based on PM mobile apps and EET is using PM's proprietary software technology in the implementation of the apps.*"

190. In his third report dated 5 September 2023, Dr Malek refers to the Second Spigot Letter and he says that none of his opinions and conclusions as stated in his prior two reports have changed.

191. Mr Ferrara in his affidavit sworn on 12 September 2023 refers to his instructions from Walkers for the Respondents "*to act as an independent expert in the area of copyright infringement, source code audits, intellectual property and trade secret misappropriation*". Mr Ferrara helpfully exhibits a copy of his Letter of Instruction and his report. He also refers to the FSD Guide, the General Requirements and provides a statement of truth.

192. Mr Ferrara says that he has been asked for his opinion on the "*allegations and findings of Dr Sam Malek*" in his first and second reports and whether the source code of the relevant apps, provided by Genimous, in any way contain/copy/use/misappropriate intellectual property belonging to apps of the Company.

193. Unhelpfully, Mr Ferrara does not provide a summary of his opinions and they have to be searched for in the density of his report. He does say at paragraph 24(b) that as an initial matter "*there are several methodological problems with Dr Malek's findings*." At paragraph 24(d), he says that Dr Malek's methodology for reaching the conclusion that the implementation of EET's ad server is the same as Position Mobile's ad server "*is unreliable*".

194. At paragraph 24(e) he says Dr Malek's analysis cannot even lead to a conclusion regarding whether EET's ad server API changed on or around April 6, 2023. At paragraph 24(g) he says Dr Malek

errs in stating that the identical parameters are "*neither publicly known nor industry standards.*" At paragraph 24(h) "*these methodological flaws render Dr Malek's conclusion in this regard unreliable.*" At paragraph 25(b) "*I determined that EET ad server is not copied from Position Mobile's ad server.*" At paragraph 25(g) "*the EET ad server is not copied from the Position Mobile ad server.*" At paragraph 27(b) Mr Ferrara says that Dr Malek's approach is flawed.

195. In respect of Dr Malek's opinions on the Scan QR Code and the Camera Scanner Pdf Mr Ferrara at paragraph 29(b) says "*Dr Malek's analysis is superficial and incomplete.*" At paragraph 34(c) Mr Ferrara says there are two methodological problems with Dr Malek's findings in respect of the Sally and Dadi services. In respect of Google Firebase remote configuration variable Mr Ferrara says that "*Dr Malek errs, as there are numerous examples of such configuration variables being commonly used in the industry.*"

196. Unfortunately, as I say, Mr Ferrara does not provide a short straightforward summary or conclusion in respect of his opinions on the specific issues he identified at the outset of his opinion. The real skills of an expert is making complex issues clear and straightforward for the judge. The expert evidence in this case was filed without the permission of the court. I do not benefit from a joint report of both experts outlining areas of agreement and disagreement and reasons following a meeting of the experts that would be usual. There has been no meeting between the experts in this case. Having considered the written reports of Dr Malek and Mr Ferrara I am uncomfortably a considerable distance away from crystal clear clarity on the issues they cover. I note however that the position of the Applicant is that the resolution of the issues between the experts should not determine the result of the Summons (paragraph 4 of the skeleton argument).

The Amended Agreements

197. Mr Stephens in his sixth affidavit refers to the Amended Agreements and comments on conflict of interest issues.

198. Mr Mahaffey in his first affidavit says that he was not consulted in respect of the amended R & D Agreement and the amended Marketing Agreement. Daniel Miller in his first affidavit says that he was "*both surprised and concerned to see that the R & D agreement governing the Company and Spigot's relationship had ostensibly been amended in January of 2022.*" He says that "*the agreement was signed in February 2022 and back-dated to January of 2022, almost immediately after I was fired from my position as CTO of Spigot ... To the best of my knowledge, I have never*

seen, nor been made aware of the existence or even the proposal of such an amendment before I saw the signed version in exhibit TC-2, a year and a half after it was originally signed."

199. Nicolas Jackson, who says he was employed as Spigot's chief marketing officer from March 2021 to January 2022, in his first affidavit also says that he "*was not consulted and was amending the documents ever brought up by Genimous in my discussions with Peter Wang or Tony Chen.*"

200. Mr Chen exhibits the R & D Agreement and the Marketing Agreement but does not provide detailed evidence explaining how the amendments came about or why he did not consider it necessary to refer to them previously. It is correct to state that certain questions in respect of the Amended Agreements and conflicts of interest remain unanswered.

201. Complaints are made that the GGDs paid and continue to pay Spigot hundreds of thousands of dollars each month, where Spigot has abandoned spending on the best aspects of the Company's business and where the Company sees no new or updated product. Similar complaints were made in April 2022 and insofar as I was unpersuaded by them in April 2022 I do not revisit them again.

202. At paragraph 116 of the Applicant's skeleton argument it is submitted that "*[o]n the better view of the documents, Spigot has been operating in breach of the agreements between the companies for some time*". The reference to "*the better view*" implies that the contrary is reasonably arguable, or at the very least that there is another view capable of consideration.

203. Mr Wingrave submitted that the Amended Agreements represent further and stark examples of the Respondents treating the Company as their own and excluding Mr Stephens and Mr Mahaffey from management and taking decisions not in the best interest of the Company.

204. Mr Wingrave submitted that Mr Stephens and Mr Mahaffey were not consulted upon the content or execution of and had never seen the Amended Agreements before service of Mr Chen's second affidavit, sworn on 29 August 2023.

205. The Applicant says that the provenance of the Amended Agreements is not clear and it does not accept that they are binding on the Company. The Applicant says that the Respondents rely on the documents to support the view that they entitle Spigot to be involved in business with competitors of the Company from early 2022 onwards. The Applicant submits that the court cannot conclude that the Amended Agreements could possibly operate in the best interests of the Company.

206. Mr Stephens at paragraph 11 of his sixth affidavit, apparently willing to wound but afraid to strike, says that the Petitioners do "*not accept that the Amended Agreements were validly entered into or that they were entered into when the respondents tell this honourable Court that they were entered into. This is not to be understood as an allegation that the documents are fraudulent, but rather as a requirement that the bona fides of the documents and the reasons behind them should be proved*" and, at paragraph 12, adds:

> *"In short, at no stage prior to the filing of Chen 2 has there been any suggestion that the Amended Agreements were in existence and we have absolutely no evidence concerning the circumstances under which they came to be executed or could possibly be valid."*

207. Mr Moverley Smith took me to BoD 1732 which states that the Amended R & D Agreement "*is effective as of January 1, 2022*" and is between the Company and Spigot. The recitals refer to a Back-Office Services Agreement dated October 1, 2019 and the statement that the Agreement revises the interest rate for past due payments. At paragraph 2.3 there is reference to the rate of 5.45% per annum. Clause 4.3 is headed No Conflict of Interest and Mr Moverley Smith referred to the words of last sentence "*Client acknowledges that the Agreement does not restrict Developer from engaging in competing business activities*." Mr Moverley Smith also took me to BoD 1696 a Research and Development Services Agreement "*effective as of October 1, 2019*" between the Company and Spigot. Clause 2.3 referred to "*the current LIBOR*". Clause 4.3 No Conflict of Interest is identical to clause 4.3 in the agreement referred to above without the additional last sentence as quoted above.

208. It is also interesting and informative to note Mr Wingrave's immediate answer to my question "*If appointed what would the JPLs do between now and the determination of the winding up petition?*" Mr Wingrave responded to the effect that the JPLs would conduct an investigation and likely appoint a different contractor to Spigot and he stressed that the Petitioner could provide those services in place of Spigot. Mr Wingrave did not appear to be concerned with the obvious point that such would be replacing one alleged conflict of interest situation, of which the Petitioner complained, with another potential conflict of interest situation of which no doubt the Respondents would complain.

The Reduced Marketing Spend

209. I note the evidence and submissions put forward on behalf of the Applicant in respect of the reduced marketing spend. Mr Chen seeks to rebut the Applicant's allegation that Genimous have "*caused*

or permitted abandonment of marketing spend of certain of the Company's apps, in favour of those published by EET" and that "*Spigot caused spending on marketing for the original Company apps to cease and begin spending on marketing for EET apps.*" Mr Chen asserts that these statements are "*replete with prejudicial and incorrect assertions*" and specifically notes that Spigot is a service provider and its use of funds on marketing for clients is responsive to the demands of its client and "*the insinuation that Spigot opted to spend marketing funds on EET instead of the Company is entirely misguided as these decisions are mutually exclusive.*" Mr Chen says that the reduction in the marketing spend was not caused by Spigot. Mr Chen says that "*the decision to reduce the Company's marketing spend was part of a plan to reduce investment as a result of the uncertainty created due to the existence of the Petition, as documented in the 2023 Strategic Plan, a copy of which was circulated to the Board by Mr Cody Miller on 1 February 2023*". Mr Chen notes that Mr Stephens did not raise any opposition to the plan.

Proportionality

210. I should also refer to proportionality. When a court is being asked to grant an intrusive draconian remedy it should always consider issues of proportionality and whether there are any reasonable lesser alternatives available.

211. At paragraph 114 of the Applicant's skeleton argument it is submitted that mismanagement and misconduct the GGDs "*will continue unless JPLs are appointed or the GGDs are otherwise restrained*". I note with interest the words "*otherwise restrained*" (my underlining). This implies that some other alternative relief could be available which would be more proportionate than the section 104 sledgehammer.

212. Mr Wingrave submitted that there was a clear risk that the GGDs would continue to dissipate and allow misuse of Company assets between now and the trial of the petition. He added that no undertaking offered to the court "*could possibly be accepted, given the failure to adhere to the past undertaking given to the Court on the last occasion.*" That seems a somewhat extreme and rigid position to adopt. It also appears to provide some support to the observation of Mr Chen at paragraph 16 of his second affidavit that "*it has been repeatedly demonstrated by the Petitioner and, in particular, Mr Stephens, that there is no action that could be taken that would satisfy the Petitioner*". At paragraph 118 of the Applicant's skeleton argument the following is added:

> "*There is no credible means of preventing the GGDs from continuing their course of conduct other than restrain (sic) or appointment of JPLs.*" (my underlining)

213. Again the Applicant is recognising that some other remedy ("*restrain*") less intrusive than the appointment of JPLs could credibly protect its position.

214. Mr Wingrave submitted that the Applicant was unable to escape the Company unless it accepted whatever figure the Respondents chose to offer it. At paragraph 123 of the Applicant's skeleton argument it is stated:

> *"There is a manifest risk that GGDs oppression of P will continue and indeed may worsen if JPLs are not appointed or they are not otherwise restrained. Accordingly, it is necessary to appoint JPLs to prevent further oppression of P.*" (my underlining)

215. Again a reference to "*or they are not otherwise restrained*" clearly implies that a less intrusive remedy to the "*drastic remedy*" (paragraph 124 of Applicants' skeleton argument) of appointing JPLs. Mr Wingrave submitted at paragraph 129 that "*a derivative action would do nothing to prevent the GGDs continuing mismanagement or prevent Rs generally from continuing their existing course of conduct using different entities*". He did however accept that "*some relief might be obtained in connection with some of P's concerns by means of a derivative action, it would not provide resolution of P's greater concerns and the wider problems of the Company.*"

216. Mr Stephens in an email dated 4 July 2023 attached Board Resolutions seeking amongst other things an immediate independent investigation by Grant Thornton, Deloitte or Teneo, suspension of payments to Spigot, Eightpoint and EET to cease making apps and "*pull them from the app stores*" and "*Failure to comply on the part of Spigot/Eightpoint/EET shall be met with immediate legal action in the form of lawsuits for damages and delivery up of intellectual property, supported by injunctive relief where necessary.*" Again it is interesting to note reference to relief less draconian than the appointment of JPLs, namely injunctive relief.

217. Mr Wingrave at paragraph 130 of his skeleton argument however submitted that there were "*no other remedies reasonably open to P in all the circumstances*" and at paragraph 131 invites the court "*to appoint JPLs*".

Conclusions

218. I have considered whether the 4 hurdles referred to in the case law have been jumped by the Applicant and whether this court should exercise its discretion to appoint JPLs pending the determination of the winding up petition. In the case presently before me the Respondents sensibly,

for present purposes, in effect concede that hurdles 1-3 have been jumped but take serious issue with hurdle 4 – the necessity hurdle.

219. I am not in a position to resolve the factual dispute between the parties. I note however the Respondents' explanations in respect of the complaints of the Applicant.

220. The Respondents have offered explanations in respect of the alleged breaches of their Undertaking and the First Incident and the Second Incident. The Applicant simply says in effect that they are unbelievable. I am not in a position to determine that factual dispute at this interlocutory stage. Suffice to say I do not regard Mr Chen's evidence as "*manifestly incredible*" and I note he has some support by way of expert evidence from Mr Ferrara. Mr Chen has stated on oath that the Respondents remain committed to ensuring compliance with the Undertaking pending the final determination of the Petition. The Applicant has not sought to bolster the Undertaking with injunctive relief.

221. I have focused on the events post 14 April 2022. Put simply, I have reached the conclusion that I am still not satisfied that the Applicant has jumped the necessity hurdle.

222. I am not satisfied that the evidence presented by the Applicant in support of the draconian relief it seeks is clear, solid, strong and compelling. Moreover, the relief it seeks is disproportionate and the way in which it has focused on a second attempt to appoint JPLs rather than progressing its winding up petition is unsatisfactory.

223. I do not think it just or proportionate to grant the extremely intrusive remedy sought by the Applicant and I am concerned over its motives in seeking such relief for the second time. It is, in its reliance on some issues which were ventilated at the hearing in April 2022, attempting to have a second bite of the cherry. Albeit this second attempt is now based on two main incidents post the dismissal of its first application in April of last year and allegations in respect of the Amended Agreements and the reduced marketing spend.

224. In April 2022 the Respondents gave the Undertaking. They have sought to explain the subsequent First Incident and the Second Incident. I am not in a position to summarily reject those explanations on the evidence presently before the court. Their expert evidence casts some doubt on the evidence of the Applicant's expert, although it is difficult to determine such issues solely on the basis of paper evidence. Mr Chen confirms on oath that the Respondents remain committed to ensuring

compliance with the Undertaking pending the determination of the winding up petition. No doubt vigilance will be employed by the Respondents in that respect.

225. The Applicant does not appear to have taken urgent steps in relation to an alleged breach of the Undertaking and it has not progressed the initial contempt application step it took. I do not suggest it do so at this late stage, but I note that the Applicant has not taken more proportionate steps such as an application for injunctive relief to bolster the Undertaking given. Instead it filed on 3 August 2023 yet another application for the appointment of JPLs largely based on two incidents which it alleges breached the Undertaking. The latest summons for the appointment of JPLs comes 9 months after the First Incident in November 2022 and yet the Applicant attempts to persuade me, yet again, that there is an urgent necessity for the appointment of JPLs pending the determination of the winding up petition.

226. The Applicant would be well advised to focus its efforts and resources on progressing towards the hearing of the winding up petition rather than engaging on these or any more pre-hearing skirmishes.

227. Before a judge can confidently press the nuclear JPL button he or she must have a considerable degree of comfort on the evidence presented in support of such a step. I do not presently have that comfort. Applications to appoint JPLs are open to potential abuse and the court must carefully guard against such.

228. I have considered the latest principal concerns of the Applicant as to:

(a) the conflict of interest of Mr Chen and other GGDs being directors of and interested in the Company, Spigot and entities within the Genimous Group and the conflict of interest allegations generally;

(b) the issues in respect of the Undertaking and the Company's intellectual property (in particular the First Incident and the Second Incident);

(c) the production of the Amended Agreements and the lack of explanation from the Respondents as to their provenance; and

(d) the reduced marketing spend.

229. The main question for the court is whether the Applicant's concerns are enough to justify the appointment of JPLs at this interlocutory stage? Put simply, are they enough to jump the necessity hurdle?

230. I have also considered the explanations put forward on behalf of the Respondents. The criticisms of inappropriate conflicts of interest justifying the appointment of JPLs are not accepted by the Respondents and evidence in defence of their position has been filed. Moreover when questioned as to what the JPLs, if appointed, would do Mr Wingrave somewhat tellingly answered sack Spigot and appoint the Applicant. In effect that would be placing one conflict of interest situation with another. The conflict of interest concerns do not justify the appointment of JPLs.

231. In respect of the intellectual property issues it is said on behalf of the Respondents that when these arose the Company investigated them, considered the Spigot letters and commissioned an independent expert (Mr Ferrara) to report on the position. They add that where necessary remedial steps were taken and they say that Mr Ferrara's report casts doubt on the validity of the conclusions of Dr Malek. It is quite impossible for the court to resolve the conflict between the experts especially as they have not been cross-examined. Mr Ferrara does however raise important questions as to the methodology adopted by Dr Malek. Again the intellectual property concerns do not justify the appointment of JPLs.

232. I note all that is written and said in respect of the Amended Agreements. When I asked Mr Moverley Smith what he had to say in respect of the Applicant's point that the Amended Agreements had been produced late in the day Mr Moverley Smith dismissed these concerns by saying there were a number of forensic points that could be taken but he did not develop them. I can see why the lack of reference to these Amended Agreements in prior evidence excites the suspicions of the Applicant but such suspicions are insufficient to persuade me to appoint JPLs. Certain questions remain unanswered in respect of the provenance of the Amended Agreements and the apparent conflict of interest but these concerns do not lead me to the conclusion that such would justify this court in taking the serious step of appointing JPLs.

233. It is somewhat surprising that there has been no evidence filed from Mr Lash, the independent director, but he will no doubt note the contents of this judgment and ensure that his independent voice is heard at future board meetings. The PDs should continue to be included in respect of future meetings of directors and they should continue to receive financial information in respect of the Company. Moreover those charged with compliance of the Undertaking should ensure that it is

complied with and put in place procedures to ensure that it is not breached inadvertently or otherwise.

234. In respect of the allegations of the reduced marketing spend I note the explanations provided on behalf of the Respondents and I am not in a position to summarily reject them at this interlocutory stage. Again such concerns do not justify the appointment of JPLs.

235. Having considered the concerns, the evidence in support and the evidence and explanations in rebuttal I am driven to the conclusion that the Applicant's concerns taken individually or cumulatively are insufficient to persuade the court to press the nuclear button and appoint JPLs.

236. I do not say that the Applicant's concerns are ill-founded or totally misconceived and it may be that at the hearing of the winding up petition and after cross-examination, the court could conclude that there is more to the Applicant's concerns than presently appears before the court or it may be that the court will conclude that there is insufficient in them to justify a winding up order. I stress, I keep a mind open to persuasion in respect of the determination of any relevant issues properly before the court at the hearing of the winding up petition. At this interlocutory stage of the proceedings my decision is based on the evidence (not subjected to cross-examination) and the submissions put before the court.

237. In respect of the issues properly before the court at this interlocutory stage of the proceedings I have concluded that there is simply not enough before the court to justify the appointment of JPLs.

238. In my experience if a party has a genuinely good case, even if it is complex, it is normally possible to put it forward expeditiously in clear, concise and compelling terms. To persuade the court to appoint JPLs there must be strong and solid evidence and the case for the appointment pending the determination of the winding up petition should be clear. The court requires a high degree of comfort and confidence before it can reach the conclusion that there is in effect no other reasonable and proportionate option but to appoint JPLs pending the determination of a winding up petition. I have not been so persuaded in this case.

239. I have not been persuaded to exercise my discretion in favour of appointing JPLs in the circumstances of this case. I, therefore, dismiss the latest summons of the Applicant filed on 3 August 2023.

240. All parties, in accordance with the overriding objective, should now constructively co-operate to bring the winding up petition on for hearing as soon as possible.

Order

241. Counsel should, within 5 days of the delivery of this judgment, file a draft order reflecting the dismissal of the Summons.

Ancillary applications

242. Any ancillary applications such as costs may be made within the next 14 days by way of the filing and serving of concise written submissions (no more than 5 pages) and draft orders, with any concise submissions in opposition (again no more than 5 pages) and draft orders to follow within 14 days thereafter. I intend to determine the same on the papers without a further hearing.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT