

**Judgment 29/2012**

**Amazing Global Technologies Limited  
and Kingston Management (Guernsey)  
Limited  
Royal Court  
Civil Action File No 1537  
11<sup>th</sup> June 2012**

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**Liquidation: application for orders declaring two companies to be dissolved.**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY**

The 11<sup>th</sup> day of June, 2012 before Richard James McMahon, Deputy Bailiff sitting alone

**IN THE MATTER OF AMAZING GLOBAL TECHNOLOGIES LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF KINGSTON MANAGEMENT (GUERNSEY) LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE COMPANIES (GUERNSEY) LAW, 2008  
(AS AMENDED)**

**IN THE MATTER** of two applications of “the Liquidator” of Kingston Management (Guernsey) Limited (“KMGL”) and also of Amazing Global Technologies Limited (“AGTL”), dated 27<sup>th</sup> March, 2012 for orders declaring both of the companies be dissolved, pursuant to Section 420(1) of the Companies (Guernsey) Law, 2008,

**AND UPON** the further application of the Liquidator for an Order, pursuant to Section 426 of the 2008 Law, in respect of each company that “*upon dissolution of the Company the Liquidator be discharged and released from all liability both in respect of his acts or omissions and otherwise in relation to his conduct as Liquidator of the Company, save to the extent, if any, that he has in relation to the Company been fraudulent, reckless or grossly negligent or has acted in bad faith whilst he was Liquidator of the Company*” (“**the Discharge and Release Applications**”),

**AND UPON** the application from the Guernsey Financial Services Commission to be given leave to make submissions in respect of the Discharge and Release Application relating to KMGL only, formerly an entity regulated by the GFSC, and

**WHEREAS** on 2<sup>nd</sup> May, 2012, the Court heard thereon Advocate M C Newman, Counsel for the Applicants and Crown Advocate J Hill, Counsel for the Guernsey Financial Services Commission.

**THE COURT** this day handed down written judgment in the terms attached hereto and:

**DISMISSED** the GFSC's application to make submissions relating to KMGL with no order as to costs;

**DISMISSED** the Liquidator's Discharge and Release applications in respect of AGTL and KMGL with no order as to costs.

S J COLLINS  
Her Majesty's Deputy Greffier

**Approved Text  
11.06.2012**

**IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY  
(ORDINARY DIVISION)**

**IN THE MATTER OF AMAZING GLOBAL TECHNOLOGIES LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF KINGSTON MANAGEMENT (GUERNSEY) LIMITED  
(IN LIQUIDATION)**

**AND**

**IN THE MATTER OF THE COMPANIES (GUERNSEY) LAW, 2008  
(AS AMENDED)**

**Hearing date: 2<sup>nd</sup> May 2012**

**Judgment handed down: 11<sup>th</sup> June 2012**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Advocate for the Applicant: Advocate M C Newman**

**Advocate for the GFSC: Advocate J Hill**

**Introduction**

1. Alan Roberts (hereafter referred to as “the Liquidator”) is the liquidator of Kingston Management (Guernsey) Limited (hereafter referred to as “KMGL”) and also of Amazing Global Technologies Limited (hereafter referred to as “AGTL”). The date of his appointment in respect of AGTL was 27 May 2009 and in respect of KMGL was 31 May 2010.
2. The Liquidator has made two applications to the Court in similar form dated 27 March 2012. Pursuant to section 420(1) of the Companies (Guernsey) Law, 2008, he applied for orders declaring both of the companies to be dissolved. Further, pursuant to section 426 of the 2008 Law, he applied for an order in respect of each company that “*upon dissolution of the Company the Liquidator be discharged and released from all liability both in respect of his acts or omissions and otherwise in relation to his conduct as Liquidator of the Company, save to the extent, if any, that he has in relation to the Company been fraudulent, reckless or grossly negligent or has acted in bad faith whilst he was Liquidator of the Company*” (hereafter referred to as “the discharge and release applications”).

3. Advocate Newman appeared on behalf of the Liquidator on 13 April 2012 and I granted the declarations of dissolution in respect of both companies. I initially adjourned the discharge and release applications for hearing on 27 April 2012 and directed Advocate Newman to lodge written submissions on behalf of the Liquidator in support of what he agreed were novel applications in advance of that hearing. A Skeleton Argument and materials were duly lodged by him on 20 April 2012.
4. On 26 April 2012, Advocate Hill lodged a Skeleton Argument and materials on behalf of the Guernsey Financial Services Commission (hereafter referred to as “the GFSC”) purporting to oppose the Liquidator’s discharge and release applications. This step was unsolicited by the Court and not accompanied by any application. Advocate Newman voluntarily lodged Reply Submissions dated 27 April 2012.
5. At the adjourned hearing on 27 April 2012, Advocate Hill appeared on behalf of the GFSC and I queried with him the GFSC’s entitlement to be heard. In any event, there was insufficient time available to the Court at that sitting to hear the Liquidator’s discharge and release applications and Advocate Newman indicated he was unavailable had I adjourned into the afternoon. Accordingly, I further adjourned the hearing to 2 May 2012 and directed that, if the GFSC wished to be joined, it should lodge a formal application by 4 pm on 30 April 2012, accompanied by such material in support as advised, and gave leave for the Liquidator to lodge any response prior to the resumption of the hearing.

### **GFSC application**

6. At the hearing on 2 May 2012, the first matter I dealt with was an application from the GFSC to “*be given leave to make submissions*” in respect of the discharge and release application relating to KMGL only. The reason for confining the application to KMGL was that it had formerly been an entity regulated by the GFSC, whereas AGTL had not been. Having listened carefully to both Counsel, I dismissed the GFSC’s application to make submissions, briefly outlining my reasons for doing so, but reserving my full reasons for this written judgment, which now follow.
7. In order to determine whether the GFSC’s application to be heard should be granted, it is essential, in my judgment, to place that application into the context of the Liquidator’s discharge and release application and the submissions that the GFSC wished to advance in opposition to that application. The Liquidator’s application is made pursuant to section 426 of the 2008 Law, under which a liquidator “*may seek the Court’s directions in relation to any matter arising in relation to the winding up of the company*”. The Liquidator’s discharge and release application raises a narrow issue for determination, albeit with potentially far-reaching effects. The GFSC sought to make submissions relating to statutory construction, but in respect of legislation for which the GFSC is not specifically responsible. Overall, I regard the compass within which the Liquidator’s application is made as being quite limited.
8. By way of background, I understand from Counsel that the Liquidator did not formally serve a copy of his application on the GFSC. However, the Director-General of the GFSC, and indeed others, became aware informally that the discharge and release applications were being pursued as a result of Advocate Newman mentioning them whilst attending a course. Advocate Newman then provided copies of the applications to the Director-General out of courtesy. Having perused the discharge and release applications, the GFSC instructed Advocate Hill on 26 April 2012.

### *Joinder as a party*

9. The GFSC’s application was expressly couched in language designed to avoid any suggestion that the GFSC was seeking to be joined as a party. Rule 37(1)(b) of the Royal Court Civil Rules, 2007, which deals *alter alia* with adding a party, provides:

“The Court may in any proceedings order that –

...

(b) any person –

(i) who ought to have been added as a party, or

(ii) between whom and any party to the proceedings there exists a question or issue arising out of or relating to or connected with any relief or remedy claimed in the proceedings which, in the opinion of the Court, it would be just and convenient to determine as between him and that party as well as between the parties to the proceedings, shall be added as a party.”

10. Advocate Newman, opposing the GFSC’s application to be heard, also drew my attention to the way in which r. 37 had been applied in *HM Revenue and Customs v Gresh* 2009-10 GLR 239 and, in particular, the guidance drawn from the description of the approach taken to a similar rule in English law given by Kerr LJ in *Sanders Lead Co. Inc. v Entores Metal Brokers Ltd* [1984] 1 WLR 452, 460 (at [23]):

“In my view the rule requires some interest in the would-be intervener which is in some way directly related to the subject-matter of the action. A mere commercial interest in its outcome, divorced from the subject matter of the action, is not enough. It may well be impossible, and would in any event be undesirable, to attempt to categorise the situations in which the interests of would-be interveners are sufficient to satisfy the requirements of the rule. The authorities show that the existence of a cause of action between the intervener and one of the parties is not a necessary prerequisite for this purpose. But they also go no further than to show that there must be some direct interest in the subject matter, such as an alleged infringement of a patent, trademark or copyright with which the intervener is concerned (see *Tetra Moletric Ltd v Japan Imports Ltd* [1976] RPC 547 and *Rexnord Inc. v Rollerchain Distributors* [1979] FSR 119) though even in such cases the interest of the intervener must raise an existing issue and not merely a contingent one: see *Pelling Goldberg Productions Inc. v BPC Publishing Ltd* [1981] RPC 280.” [Emphasis supplied.]

He further argued that r. 37 was the only mechanism under which the GFSC could apply to be joined as a party (and so heard) because the rule relates to “any proceedings”.

11. Advocate Hill conceded, as I think he had to, that no question or issue exists between the GFSC and the Liquidator in respect of the conduct by the Liquidator of the winding-up of KMGL, meaning that r. 37(1)(b)(ii) was not engaged. He emphasised that the GFSC’s application was not brought under r. 37 because the GFSC did not seek to be joined as a party, but rather wished to make submissions. However, the application for leave to make submissions in respect of the Liquidator’s discharge and release application also sought (under paragraph 2 thereof) an order that the Liquidator’s application be dismissed. This suggests to me that the GFSC wished actively to oppose the discharge and release application. I struggle to understand how the GFSC could participate in this way without being joined in some capacity as a party. However, because Advocate Hill was adamant that the application was not pursuant to r. 37, I have proceeded to determine the application to make submissions on the basis that the GFSC does not seek to be joined as a party, meaning that r. 37 is not engaged at all.
12. Advocate Hill further suggested that involvement by the GFSC was more akin to being heard as *amicus curiae* or *partie publique*. However, he also acknowledged that the Court would be more likely to approach the Law Officers of the Crown than the GFSC if it wished to have assistance from an *amicus* and that it would be incumbent upon the Law Officers, and not the GFSC, to take any initiative as *partie publique*.

13. Because Advocate Hill did not seek to rely on r. 37, I do not need to reach a decision as to whether the GFSC can properly be joined as a party in accordance with its terms. For the reasons that follow, had I been required to conclude whether the GFSC “*ought to have been added as a party*” under r. 37(1)(b)(i), I would have rejected such an application. This is not a case in which the GFSC was needed as a party in the sense that the relief actually sought in the proceedings would impact on it. Further, because I was not invited to decide whether the GFSC should be a party, I also do not need to reach a conclusion on Advocate Newman’s submission that r. 37 deals exhaustively with situations in which a person can be added as a party. However, I do find some assistance in the approach taken in the 2007 Rules and the guidance to which I have referred in determining whether the GFSC should be permitted to make submissions in a capacity other than as a party.

*Basis of application*

14. The GFSC’s application was brought under provisions contained in the Financial Services Commission (Bailiwick of Guernsey) Law, 1987, as well as section 34 of the Regulation of Fiduciaries, Administration Businesses and Company Directors etc. (Bailiwick of Guernsey) Law, 2000 and/or r. 81 of the 2007 Rules. I note that r. 81 only relates to the mode of making application to the Court, rather than the substance of any such application, and can deal quickly with section 34 of the 2000 Law before turning to the central tenet of Advocate Hill’s submissions on the effect of the 1987 Law providing the foundation for the GFSC’s application.
15. Section 34 of the 2000 Law makes provision for the GFSC to apply to the Court for the winding-up of a licensed fiduciary or a former licensed fiduciary or where a Bailiwick company, whether licensed or not, is guilty of a contravention of section 1, 36, 37 or 40, or of a direction under section 12 or 17, or of a direction or regulation under section 20, of the 2000 Law. The grounds for doing so are also set out in section 34.
16. The difficulty for the GFSC is that its present application is not an application to wind up KMGL. It is not even a wish to be heard on an application by another person to wind up KMGL. In that regard, section 409 of the 2008 Law requires applications to be served on the GFSC in advance of the hearing where the application is for the compulsory winding up of a supervised company, a company engaged in a financial services business or a company of other classes or description prescribed by the GFSC. The GFSC is then entitled to make representations to the Court on the winding-up application. Accordingly, I regard section 34 of the 2000 Law as conferring an explicit power on the GFSC to take action in respect of a company it considers needs to be wound up and does not offer assistance to the GFSC, even by way of analogy, in support of the present application. The application to make submissions against the Liquidator’s discharge and release application in respect of KMGL cannot, in my judgment, be made relying on section 34 of the 2000 Law.
17. The heart of Advocate Hill’s submission was that the provisions of the 1987 Law require the GFSC to apply to be heard in respect of the Liquidator’s discharge and release application. This requirement arises because of the overarching supervisory function of the GFSC. Although the GFSC was making no comment about the Liquidator’s performance of the winding-up of KMGL, any order granting discharge and release would potentially have an impact on the future conduct of liquidations of regulated entities. This was a matter of concern for the GFSC. In short, the breadth of the GFSC’s general functions is such that it should seek to be involved when any order is made affecting regulated entities.
18. The main provision on which Advocate Hill relied is section 2(2)(a) and (e) of the 1987 Law, as amended, which provides:

*“The general functions of the Commission are –*

- (a) *to take such steps as the Commission considers necessary or expedient for the ... effective supervision of finance business in the Bailiwick,*
- ...
- (e) *to take such steps as the Commission considers necessary or expedient for –*
  - (i) *maintaining confidence in the Bailiwick’s financial services sector, and*
  - (ii) *the safety, soundness and integrity of that part of the Bailiwick’s financial services sector for which it has supervisory responsibility”.*

The GFSC’s application also refers to section 2(4), which does not provide a standalone basis for making the application, but needs to be read in conjunction with section 2(2), and provides:

*“In the exercise of its ... functions the Commission may take into account any matter which it considers appropriate, but shall in particular have regard to –*

- (a) *the protection of the public interest, including the protection of the public against financial loss due to dishonesty, incompetence or malpractice by persons carrying on finance business, and*
- (b) *the protection and enhancement of the reputation of the Bailiwick as a financial centre.”*

19. The final provision of the 1987 Law referred to in the GFSC’s application is section 8(1), which provides generally that *“the Commission may do anything which appears to it to be conducive to the carrying out of its functions or to be incidental to their proper discharge.”* This is similarly a supportive provision rather than providing a substantive basis for bringing an application to make submissions. Accordingly, I take the view that I must have primary regard to the content of section 2(2) in order to decide whether, in pursuance of either or both of those general functions, the GFSC’s application to make submissions can be granted.
20. Advocate Hill contended that, having regard to these provisions, the test I should apply is whether they demonstrate that the GFSC has a *“sufficient interest”* in the discharge and release application to give the leave sought. He did not seek to support that submission by reference to any authority. Although putting the test in this way creates echoes of public law standing questions, I am prepared to proceed on the basis that I should be seeking to identify a level of interest in the subject-matter of the proceedings which is lower than the level required before a person can properly be joined as a party. In doing so, I regard it as necessary to consider what interest the GFSC has in the Liquidator’s application and then, if appropriate, to assess whether that level of interest merits hearing from the GFSC in respect of that application.

#### *Position of the GFSC*

21. The GFSC is a creature of statute, having been established by, and in accordance with the provisions of, the 1987 Law. It derives its functions and powers from statute. The general functions of the GFSC are set out in section 2(2), the two paragraphs on which the GFSC relies having been quoted above, and the statutory functions in section 2(3). By section 3 of the 1987 Law, specified statutory functions allocated by the legislature to the former Advisory and Finance Committee of the States of Guernsey and exercisable at that time by that Committee were transferred to the GFSC. Other statutory functions have been conferred upon the GFSC since it was established in accordance with section 2(3)(b). These include a number of functions set out in the Companies (Guernsey) Law, 2008.
22. I regard it as significant that the provisions of the 2008 Law do not envisage the GFSC having a wider-ranging brief to make representations in the context of companies being wound up

than is already provided by section 409. Had the States of Deliberation wished to do so, they could readily have made express provision enabling the GFSC to be heard whenever the Court is seized with an application relating to one of the types of company specified in section 409(2), rather than confining that entitlement to when an application for the compulsory winding up of a company is being made. An alternative approach would have been to confer such an entitlement in each of the Sector Laws for which the GFSC has responsibility, including the 2000 Law. Accordingly, I draw a loose inference that it was not regarded as necessary to expand the functions of the GFSC in this manner.

23. Although Advocate Hill submitted that section 2(2)(e) of the 1987 Law offers greater support to the GFSC's application than section 2(2)(a), I disagree. In the context of the Liquidator's discharge and release application, made at the end of a company winding-up, I do not understand the basis for asserting that the GFSC needs to be heard in order to maintain confidence in the Bailiwick's financial services sector or even for the safety, soundness and integrity of that part of it regulated under the 2000 Law. It is arguable that maintaining confidence in the financial services sector was achieved by ordering the compulsory winding up of KMGL. Once appointed, the liquidator serves as an officer of the Court. If the company in liquidation is a regulated entity, the GFSC continues exercising its supervisory capacity over the affairs of the company whilst those affairs are being wound up. These procedural safeguards already provide the means for maintaining public confidence in the financial services sector and for ensuring the safety, soundness and integrity of the relevant part of the Bailiwick's financial services sector. In my judgment, especially bearing in mind the limitations of the Liquidator's application to which I have already referred, section 2(2)(e) of the 1987 Law does not support the GFSC's application to make submissions because a ruling on the Liquidator's discharge and release application in respect of KMGL will not affect the matters dealt with in that paragraph.
24. Turning to section 2(2)(a) of the 1987 Law, I accept that the general function of the GFSC is a broad one of exercising supervision of finance business in the Bailiwick, which must, because of the importance of that sector to the economy, be effective. However broad that paragraph might appear, I must first remind myself of the context in which the Liquidator's discharge and release application has been made. That application has been made at the conclusion of the liquidation and in combination with an application for a declaration that the company in liquidation be dissolved. Because KMGL has been wound up and declared to be dissolved, section 420(2) of the 2008 Law indicates that it may not undertake business. The consequence, therefore, is that KMGL is no longer conducting any finance business in the Bailiwick and the function of the GFSC in respect of such business under section 2(2)(a) no longer applies.
25. I have also looked at the provisions contained in Parts XXIII and XXIV of the 2008 Law to see whether there is any indication that it was the intention of the legislature to provide a wider rôle for the GFSC in relation to ongoing liquidations, whether generally or of a particular type. In addition to section 409, to which I have already referred, I note that section 410 of the 2008 Law enables the Commission (or the Commerce and Employment Department of the States of Guernsey) to apply to wind up a company on the ground that it is desirable to do so "*for the protection of the public or of the reputation of the Bailiwick*". I consider that section 410, as well as the specific provisions in the various Sector Laws for which the GFSC is responsible, provides a "bridge" between the general functions set out in the 1987 Law and those other enactments enabling the GFSC to take appropriate steps to bring matters of concern before the Court. The 2008 Law does not make any other provision for the GFSC's involvement in liquidations. This supports my conclusion that the legislature did not contemplate the GFSC being entitled to seek to make submissions or, in the language of section 409, "*representations*" in the context of an application under section 426.
26. For these reasons, in my judgment, the reliance of the GFSC on the general functions prayed in aid from section 2(2) of the 1987 Law in support its application to make submissions in the

Liquidator's discharge and release application in respect of KMGL is misconceived. In deciding the level of interest, if any, the GFSC has in the Liquidator's application, the time at which it was made is of significance. By that time, KMGL was no longer a business in the financial services sector and the GFSC had no supervisory functions in respect of it. I have, therefore, concluded that the GFSC's interest is too far removed from the subject-matter of the Liquidator's specific application in respect of KMGL, which is all that the Court is required to determine, to be regarded as sufficient to entitle the GFSC to make submissions in respect of it.

27. In reaching that decision, I have taken into account the outline of the submissions to be made, which were set out in the Skeleton Argument lodged by Advocate Hill on 26 April 2012. The focus was principally on how section 426 of the 2008 Law should be construed. I do not consider that the GFSC has an interest (of the type suggested by Advocate Hill as being needed to afford a person the opportunity to make submissions before the Court) entitling the GFSC to seek to be heard on the issue of how the Court should construe section 426. This is because its functions do not extend to making unsolicited submissions to the Court on applications for directions made by liquidators. The GFSC's application to make submissions is, therefore, dismissed.

#### *Costs*

28. On 2 May 2012, I made no order as to costs in respect of the GFSC's application. Advocate Newman sought an order that the costs thrown away in opposing the GFSC's application should be met by the GFSC for the benefit of KMGL in liquidation. However, he had also explained that paragraph 4 of the Liquidator's applications of 27 March 2012, applying for the costs of each application to be costs in the liquidation, was academic because there was no money in the liquidation from which such costs could be paid. As a consequence, and further because the Liquidator had attempted to resist the GFSC's application by reference to r. 37 of the 2007 Rules, which was not the basis on which the GFSC had mounted its application, I decided that this was a case in which it was appropriate to make no order, leaving both parties to bear their own costs.

#### **Discharge and release applications**

29. Having dismissed the GFSC's application to be heard, I proceeded to hear Advocate Newman's submissions in support of both of the Liquidator's discharge and release applications. At the end of the hearing, I reserved my decision.

#### *Background*

30. Both of the Liquidator's discharge and release applications were supported by affidavits in similar form sworn by Luke Olivier on 27 March 2012. The relevant material in those affidavits confirms, to the best of Mr Olivier's knowledge, information and belief, that he is "*not aware of any circumstances that would give rise to a claim against Mr Roberts in his position as liquidator of the Company. The Liquidator has confirmed to me that he is also not aware of any such claims against him either.*"
31. In respect of AGTL and KMGL (and two companies associated with KMGL and two unrelated companies), the Liquidator was originally jointly appointed with Adrian Rabet, who then resigned as joint liquidator on 30 November 2010. On that date, the Ordinary Court ordered that upon Mr Rabet's resignation from office "*he shall be discharged and released from all liability both in respect of his acts or omissions in each liquidation and otherwise in relation to his conduct as a Joint Liquidator of the Companies, save to the extent, if any, that he has in relation to a Company been fraudulent, reckless or grossly negligent or has acted in bad faith whilst he was one of the Joint Liquidators of such Company*". The Court noted Mr Rabet's resignation and permitted Mr Roberts to continue to hold office as sole liquidator of

AGTL. In relation to KMGL, Mr Rabet was replaced as joint liquidator with Mr Roberts by John Pirouet. The applications were made pursuant to sections 396(1)(a) and/or 416 and/or 426 of the 2008 Law. The costs of the application were apportioned between the companies affected as part of the costs and expenses of the liquidation of each company.

32. On 12 July 2011, the Ordinary Court approved Mr Pirouet's resignation from the office of joint liquidator of KMGL (and the two associated companies) and permitted Mr Roberts to continue to hold office as sole liquidator. The Court also made an order discharging and releasing Mr Pirouet in comparable terms to the order made in respect of Mr Rabet on 30 November 2010. The applications were similarly made pursuant to sections 396(1)(a) and/or 416 and/or 426 of the 2008 Law. However, the costs of this application were ordered to be borne by Begbies Traynor (Channel Islands) Limited.
33. The significance of those two earlier orders is that they demonstrate that the Court was amenable to granting the relief sought when a joint liquidator resigned from office. They are prayed in aid by Advocate Newman to support his submission that the situation of the Liquidator at the conclusion of the liquidations of the two companies is in substance no different, enabling him to invite me to follow those examples.

*Scope of section 426*

34. The discharge and release applications have been made pursuant to section 426 of the 2008 Law, which provides:

*"The liquidator of a company may seek the Court's directions in relation to any matter arising in relation to the winding up of the company and upon such an application the Court may make such order as it thinks fit."*

Apart from the deletion of a semi-colon, section 426 re-enacts section 110 of the Companies (Guernsey) Law, 1994. The predecessor to section 110 of the 1994 Law was section 23(2) of the Companies (Guernsey) Law, 1990, which provided:

*"The liquidator of a company may apply to the Court in relation to any matter arising in the winding-up of the company and shall act in accordance with any directions given by the Court upon such an application."*

The first consideration, therefore, is whether section 426 confers an appropriate jurisdictional basis for the Liquidator's applications to be determined.

35. Advocate Newman submitted that section 426 is a wide provision enabling the Liquidator to make the discharge and release applications. He further argued that the change in wording between the 1990 Law and 1994 Law, as re-enacted in section 426, supports the Liquidator's contention that a discharge and release application is within the ambit of section 426. Had such an application been made in the early 1990s, I take the view that the wording at the end of section 23(2) of the 1990 Law would have presented an insurmountable hurdle for the Liquidator. The inference was that the Liquidator would have had something to do as a result of obtaining directions from the Court. The substance of the discharge and release applications is quite different because, if granted, the Liquidator would have nothing further to do in respect of the liquidations.
36. Although the final words from section 23(2) of the 1990 Law have been modified, the opening words of the provision remain the same as they were. This begs the question of what difference to the breadth of the directions-seeking jurisdiction, if any, was created by the 1994 Law changes.
37. To assist in construing section 426, Advocate Newman helpfully drew my attention to a commentary on a similar provision in the Insolvency Act 1986 contained in *McPherson's Law of Company Liquidation*, 2<sup>nd</sup> ed., by Andrew Keay. Section 168(3) of the 1986 Act provides that *"The liquidator may apply to the court (in the prescribed manner) for directions in relation to any particular matter arising in the winding up."* The commentary (at para. 9.027)

draws on a range of Australian cases which “*may well be of use in determining issues coming before the courts in the UK*” and offers the following guidance:

*“Section 168(3) may be traced back to s.23 of the Companies (Winding up) Act 1890 which was derived from s.89 of the Bankruptcy Act of 1883. The role of the section is to provide a procedure for a liquidator to obtain some guidance from the court in conducting a liquidation and so as to give protection against a claim for breach of duty. The provision is essentially concerned with action which is future at the time of the application being heard and it provides an administrative non-adversary proceeding. This course is so frequently taken that little purpose would be served by attempting a catalogue of all the situations in which such an application may be made. Some examples which may be mentioned are where the liquidator wishes: to know whether to postpone the sale of certain assets; whether testamentary gifts to a charitable company that had gone into liquidation were ineffective; how to deal with a claim of a creditor; to institute proceedings for misfeasance; to admit a particular debt or claim to proof in the winding up; to make payments out of the assets; to levy calls on contributories; to seek guidance on how to deal with the affairs of two related companies whose affairs are intermingled; to obtain guidance on questions of law; to seek guidance on the sale of a cause of an action; to know how litigation should be conducted; and to seek resolution of issues of legal procedure. Although a direction given on such an application does not amount to a judicial determination raising an estoppel, the advantage of using this procedure is that, having obtained and followed the advice of the court with respect to a particular matter, the liquidator is then protected against any possible allegations of breach of duty which might subsequently be made against him by the creditors or contributories of the company on the basis that the proceedings were not properly incurred.” [Emphasis supplied.]*

38. On the basis of some of these examples, particularly the references to seeking guidance on questions of law and resolution of issues of legal procedures, Advocate Newman submitted that section 426 of the 2008 Law is fairly limitless on the situations in which it can be used. He highlighted that the passage from *McPherson* continues by giving two examples of when a liquidator should not use an application for directions, neither of which applies to the Liquidator here. By implication, because there was nothing in this work indicating that an application for directions could not be entertained in the situation in which the Liquidator finds himself, it means that the application has been properly made. Further, the ability to seek directions is not just to obtain prospective protection, but to afford a liquidator protection more generally, including at the conclusion of the liquidation.
39. Although I accept that the wording of section 426 is potentially broad, in my judgment, the section is not broad enough to enable a liquidator to apply for the type of order envisaged by the Liquidator’s discharge and release applications. In my opinion, the natural meaning of the words enable a liquidator to seek assistance from the Court in relation to how to deal with something that has arisen during the course of the winding up of the company in question and which the liquidator has to resolve as part and parcel of the liquidation.
40. I find support for that conclusion in the guidance in *McPherson* and note in particular the assertion that the type of directions capable of being sought “*is essentially concerned with action which is future at the time of the application being heard*”. The Liquidator’s discharge and release applications are not seeking assistance from the Court as to something the Liquidator needs to do in the future in the context of ongoing liquidations. What the Liquidator is seeking is effectively a final order determining his position vis-à-vis potential claimants rather than seeking some directions about how to conduct a particular aspect of the liquidations.
41. I also take the view that there is a substantive difference between making an application to give a liquidator who retires or resigns from office his discharge and release, where the continuing liquidator assumes sole responsibility for the ongoing conduct of the liquidation

and is party to that application, or where he is joined by a new joint liquidator, and the Liquidator's current position as sole liquidator having completed his functions as such. The previous applications to the Court relating to AGTL and KMGL were not made solely under section 426 of the 2008 Law. The terms of section 416 show that where a liquidator in a compulsory liquidation resigns from office (and section 396 makes provision in respect of a voluntary winding up) there is potentially the involvement of the Court in filling that vacancy. Where the suggestion is that a former joint liquidator continues as sole liquidator, seeking directions from the Court as to whether the liquidation can properly be continued in that way and, if so, on what terms is an appropriate step to take. It is consistent with the guidance offered in the extract from *McPherson* set out above. In those contexts, section 426 was capable of being used by the liquidators to re-allocate liability for any acts and omissions in the liquidation, both past and future.

42. Accordingly, the Liquidator's discharge and release applications are dismissed as being beyond the scope of section 426 of the 2008 Law. However, if I am wrong about the scope of section 426, I will also set out the reasons I would give for dismissing the substance of those applications.

*Judicial development of the law*

43. As Advocate Newman acknowledged, there are no provisions in the 2008 Law making provision for the discharge and release of a liquidator. He was, therefore, inviting the Court to fill that gap in the Guernsey statute and doing so principally by reference to the position in English law on the basis that Guernsey liquidators are generally English-qualified insolvency practitioners who might expect to secure their release in this way. Section 413 of the 2008 Law provides that applicants seeking the compulsory winding up of a company may nominate a liquidator and, subject to the Court being satisfied as to whether the applicant's nominee is qualified to be appointed, the Court shall appoint the person so nominated. If no nomination is made, the Court appoints such person as it thinks fit to the office of liquidator. Because Guernsey does not have the equivalent of the English Official Receiver, all liquidators are private practitioners and, he suggested, this means that there is inevitably a read-across to English insolvency practice.
44. Although Advocate Newman submitted that he was not advancing an argument that the principles set out in *Morton v Paint* (1996) 21.GLJ.61 applied, because the relief the Liquidator seeks would amount to a development of Guernsey's statutory regime on corporate insolvency by reference to developments that have occurred elsewhere in arguably comparable situations, I take the view that the five aids to navigation adopted from Lord Lowry's speech in *C v DPP* [1996] 1 AC 1 do merit consideration and should not simply be ignored in this case. Those aids to navigation are:

*“(1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.”*

*English law position*

45. Under Chapter VII of Part IV of the Insolvency Act 1986, liquidators are entitled to their release. Section 173 makes provision in the case of a voluntary winding up and section 174 makes provision in respect of a winding up by the court, which is what would apply to the position of AGTL and KMGL were those provisions to be translated into Guernsey law, with any modifications necessary. Section 174(4) and (6) provides:

- “(4) *A person other than the official receiver who has ceased to be a liquidator has his release with effect from the following time, that is to say-*
- (a) *in the case of a person who has been removed from office by a general meeting of creditors that has not resolved against his release or who has died, the time at which notice is given to the court in accordance with the rules that that person has ceased to hold office;*
  - (b) *in the case of a person who has been removed from office by a general meeting of creditors that has resolved against his release, or by the court or the Secretary of State, or who has vacated office under section 172(5) or (7), such time as the Secretary of State may, on an application by that person, determine;*
  - (c) *in the case of a person who has resigned, such time as may be prescribed;*
  - (d) *in the case of a person who has vacated office under section 172(8)-*
    - (i) *if the final meeting referred to in that subsection has resolved against that person’s release, such time as the Secretary of State may, on an application by that person, determine, and*
    - (ii) *if that meeting has not so resolved, the time at which that person vacated office.*
- (6) *Where ... a liquidator ... has his release under this section, he is, with effect from the time specified in the preceding provisions of this section, discharged from all liability both in respect of acts or omissions of his in the winding up and otherwise in relation to his conduct as liquidator ...*  
*But nothing in this section prevents the exercise, in relation to a person who has had his release under this section, of the court’s powers under section 212 (summary remedy against delinquent directors, liquidators, etc.).”*

46. I have quoted section 174(4) in its entirety to place the provision into its full context, although Advocate Newman relies only on paragraph (d)(ii). The scheme of the subsection shows that a liquidator may be removed from office by a general meeting of creditors and the timing of his release then depends on whether that meeting resolves against his release or does not do so. Under the 2008 Law, the creditors of a company in liquidation do not have these powers. The scheme also shows that the process of obtaining release, with the consequence of being discharged from most liabilities, is conferred on liquidators through the statute. The court plays no rôle, although in some circumstances application may be needed to the Secretary of State, who then determines the time from which release should be granted.

47. Section 174(4)(d)(ii) of the 1986 Act only operates following a final general meeting of the company’s creditors. Such a meeting is summoned by a liquidator who is not an official receiver in accordance with section 146(1). Section 146(1)(b) expressly provides that the final general meeting “*shall determine whether the liquidator should have his release under section 174*”. Rule 4.125 of the Insolvency Rules 1986 (SI 1986/1925) sets out further detail relating to such a final meeting. By virtue of section 172(8) of the 1986 Act, to which reference is made in paragraph (d), the liquidator then vacates office “*as soon as he has given notice to the court and registrar of companies that the [section 146] meeting has been held and of the decisions (if any) of the meeting*”.

48. The provisions of the 2008 Law in this regard are different. When the liquidator has realised the company’s assets, section 417 requires him to apply for the appointment of a Commissioner to examine his accounts and to distribute the funds derived from the company’s assets. The Commissioner is obliged to arrange a creditors’ meeting and

publications are made in La Gazette Officielle giving notice of it. Through these arrangements, there continues to be a closer connection with the Court rather than placing decisions in the hands of the creditors. However, the Commissioner's creditors' meeting is not required, or even entitled, to determine whether the liquidator should have his release. Accordingly, in relation to AGTL and KMGL, the Commissioners' meetings did not address this issue. Whilst this means that at both meetings there was no resolution against the liquidator's release, implying that the position set out in section 174(4)(d)(ii) can be treated as if it were engaged, I take the view that section 174(4)(d) deals exhaustively with the two options available to the final general meeting of creditors and that seeking to put such a construction on section 174(4)(d)(ii) in the way in which Advocate Newman has sought to rely on it strains the language beyond breaking point. He has sought to construe the provision in isolation rather than in context.

49. In my judgment, these differences indicate that the English law insolvency regime cannot be compared like for like with the Guernsey law regime under the 2008 Law. In relation to AGTL and KMGL, the issue of release (with consequential discharge) has not been considered by the creditors of the companies because it was not, and in my view could not be, an item of business at the Commissioner's creditors' meeting. The gaps in Guernsey's insolvency legislative framework appear to me to be larger than Advocate Newman suggested.

*The Flightlease principles*

50. In support for his contention that this Court could develop Guernsey's insolvency framework by drawing from principles established in English law, Advocate Newman referred me to *Flightlease Holdings (Guernsey) Limited v Flightlease (Ireland) Limited* 2009-10 GLR 38 and, in particular, to two passages in para. 91 of the judgment of Southwell LB:

“(2) *since its importation into Guernsey law in the 1880s, it has naturally been appropriate to look to English law to help in the solution of problems concerning companies which are not covered by Guernsey statutes or customary law; ...*

(7) *Guernsey, as a significant centre for financial services of many kinds, needs to develop its commercial laws in ways which provide just solutions in the relatively complex situations which arise, for example, in liquidations of commercial companies. English law provides, in my judgment, a more developed system of insolvency law for use by analogy, than the relatively undeveloped solutions in similar situations in Scots law.”*

51. I have no hesitation in endorsing those conclusions of Southwell LB as being sound guidance of general application. As Advocate Newman noted, para. 91(7) was referred to by Judge Finch in *Manches LLP v Inter Global Financial Limited* 2009-10 GLR 283 to support his approach under the Judgments (Reciprocal Enforcement) (Guernsey) Law, 1957 on whether or not to follow the more circumscribed Jersey law approach when considering the enforcement in Guernsey of judgments of superior courts in England and Wales. However, I have reached the conclusion that these principles do not assist the Liquidator in his discharge and release applications to import the outcome provided for by section 174(4)(d)(ii) of the 1986 Act into Guernsey law.
52. The *Flightlease* case concerned whether or not the principle of English law often referred to as the rule in *Cherry v Boulton* (1839) 4 My & Cr 442; 41 ER 171 should be adopted into Guernsey law. The issue, therefore, was not about adopting something set out in the English legislative framework on insolvency but rather an equitable principle supplementing that legislative framework. Southwell LB concluded (at para. 91(6)) that “*such an equitable principle can sensibly be adopted in Guernsey law because it is in no way incompatible with Guernsey statutes or customary law, and it adds to Guernsey law concerning insolvent*

*companies the element of fairness and équité*". As I have already pointed out, section 417 of the 2008 Law sets out what has to be considered at a Commissioner's creditors' meeting and this does not extend to determining whether the liquidator should have his release, unlike in England and Wales under section 146(1) of the 1986 Act. Accordingly, because there is a different approach at the respective creditors' meetings, there is an incompatibility of the type to which Southwell LB was referring or an inconsistency of the type referred to by Clarke JA in *Stuart-Hutcheson v Spread Trustee Co. Ltd* (2002, unreported, at [20], quoted at para. 86 of the judgment in *Flightlease*). Such an incompatibility or inconsistency militates against developing Guernsey's insolvency regime so as to provide for a liquidator to have his discharge and release at the conclusion of the liquidation.

#### *The legislature's involvement*

53. I also regard it as relevant that the 2008 Law was only enacted comparatively recently. The States Reports debated prior to its enactment, submitted by the Commerce and Employment Department and contained in Billets d'État Nos. XI and XXII of 2007, were not extensive policy documents. However, as noted in the first Report dated 26 January 2007, in addition to consolidating existing provisions, the Department proposed "*substantial legislative changes taking into account the results of extensive consultations within the Island alongside consideration of developments in other jurisdictions.*" The level of thought and work that had been put into developing the new Companies Law was self-evident. However, at para. 9.2 of that States Report, under the heading "Insolvency Law Review", the Department explained as follows:

*"The current companies law deals with corporate insolvency. The Department intends to bring forward proposals to amend corporate insolvency and also to amend the law relating to personal insolvency.*

Those proposals are still awaited. The provisions on corporate insolvency in the 2008 Law are a consolidation of the provisions that existed prior to its enactment.

54. If only by way of comparison, section 385 of the 2008 Law deals with the release and consequential discharge of an administrator appointed in accordance with Part XXI of that Law. Section 385 re-enacted section 77K of the 1994 Law, which had been inserted by section 4 of the Companies (Guernsey) (Amendment) Law, 2005. The absence of something comparable for liquidators implies that, at the time of enacting the 2008 Law, the legislature can be regarded as having had the opportunity to legislate, but chose to defer making any decision on whether a liquidator should be able to obtain his release and discharge.
55. The reform of Guernsey's legislative framework on insolvency is, therefore, something that the Department of the States of Guernsey responsible for such matters apparently has in hand. In those circumstances, even if there were no other hurdles for the Liquidator to overcome of the type to which I have already referred, having regard to the second of the aids to navigation adopted in *Morton v Paint*, I would be cautious about purporting to develop an area of the law where the States of Deliberation have been informed that a Department of the States of Guernsey intends to bring forward proposals for amendment. If the Liquidator, or indeed anyone else, wishes to advocate that something along the lines of the English law regime for release and consequential discharge is the right way forward, an appropriate approach to the Commerce and Employment Department may be more fruitful than these applications to this Court.

#### *Conclusion*

56. Had I not dismissed the Liquidator's discharge and release applications because they do not fall within the ambit of section 426 of the 2008 Law, I would still have dismissed them because of the differences between the English law and Guernsey law arrangements for

creditors' meetings. Alternatively, I would have dismissed them because of the need to exercise caution where there is a clear indication that the legislature is going to be asked to amend the corporate insolvency legislative framework. These were novel applications and I am grateful to Advocate Newman for the helpful way in which he addressed the issues raised by them.

## Costs

57. Under paragraph 4 of the applications dated 27 March 2012 the Liquidator seeks orders that "*the costs of this application be costs in the liquidation.*" The applications pursuant to section 420(1) of the 2008 Law, which I granted on 13 April 2012, were necessary steps for the Liquidator to have taken and so I order that the costs of that aspect of the applications be costs in the liquidation, even though Advocate Newman has indicated that the issue is really academic because there are no funds available from which they could be met. However, in the light of my conclusions on paragraph 3 of the applications, relating to the Liquidator's release and discharge, I do not consider that section 418 of the 2008 Law applies, because these costs were not properly incurred, so there will be no order as to costs in respect of that aspect of the applications.