Application by liquidators under s 426 of the Companies (Guernsey) Law 2008 for Court approval to a transaction. General principles applicable to s 426 applications.

[2020]GRC064

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

THE ROYAL COURT OF GUERNSEY ORDINARY DIVISION

Civil Matter 2119

IN THE MATTER OF CANARGO LIMITED (in liquidation)

AND IN THE MATTER OF PART XV, XXII AND XIV OF THE COMPANIES (GUERNSEY) LAW 2008

Between:

BENJAMIN ALEXANDER RHODES and ALAN JOHN ROBERTS as Joint Liquidators of CanArgo Limited (in liquidation)

Applicants

-and-

MND GEORGIA BV

Respondent

-and-

(1) ACHERNAR ASSETS AG

(2) ACHERNAR PARTNERS LIMITED

(3) NINOTSMINDA OIL COMPANY LIMITED

(4) MARTKOPI OIL COMPANY LIMITED

Joined Respondents

Before: Her Hon. Hazel Marshall QC Lt Bailiff

Sitting alone

Hearing dates 1st, 2nd, 29th July, 12th and 27th August, 16th September 2020

Judgment handed down: 23rd October 2020

Before: Her Hon. Hazel Marshall QC, Lieutenant Bailiff

Sitting alone

Applicants	**Advocate J A Tee**
Respondent	**Advocate S Dingle (1, 2, 29 Jul, and 12, Aug)**

	Advocate M C Newman (27 Aug)
1st and 2nd Joined Respondents:	**Advocate A C Williams**
3rd and 4th Joined Respondents	**Advocate M D P Jones**

Cases, texts and legislation referred to:

Legislation

(a) Guernsey
The Companies (Guernsey) Law 2008 ss 251, 406, 426

(b) England and Wales
Insolvency Act 1986 s 195
Small Business and Employment Act 2015

Cases

(a) Guernsey
Re Amazing Global Technologies Ltd (in liquidation): 11th June 2012, Royal Court Judgment 29/2012,
Re F: (unreported) Guernsey Court of Appeal, 29 June 2013
Re AAA Children's Trust: Royal Court Judgment 29/2014,
Re Providence Investment Funds PCC Ltd (in administration) (2017) Royal Court Judgment 44/2017
In re CanArgo Limited (21st February 2018): Royal Court Judgment 13/2018

(b) England and Wales
Re Agricultural Industries Ltd [1952] All ER 1188
Re Edennote Ltd [1996] 2 BCLC 389
X v A [2000] 1 All ER 490
Public Trustee v Cooper [2001] WTLR 901
Re Longmeade Ltd [2016] EWHC 356
Re Nortel Networks UK Limited [2016] EWHC 2769 (Ch)

(c) Australia
Re Idoport Pty (in liquidation) [2015] NSWSC 1412

Text books

McPherson & Keay *The Law of Company Liquidations*, 4th Ed, 9.044

JUDGMENT

Background and the Application

1. CanArgo Limited ("**the Company**") was placed in compulsory liquidation by this court on 6th February 2018: see *In re CanArgo Limited* (21 February 2018) Royal Court Judgment 13/2018. This is an Application made by its Joint Liquidators on 11th October 2019 under s 426 of the Companies (Guernsey) Law 2008, ("**the Companies Law**"). It was supported at the outset by an affidavit from one of the two Joint Liquidators, Mr Rhodes, together with exhibits. Further supplementary evidence has been filed for the later hearings. Ultimately, Mr Rhodes has sworn eight affidavits.

2. The Application raises certain points of legal principle about the scope of s 426 applications, and the principles which the Court will apply.

3. The Company was ordered to be compulsorily wound up under s 406 of the Companies Law on the application of CanArgo (Cayman) Limited ("**CCL**"), a 25% shareholder in the Company and the *alter ego* of Mr Clifford Isaak. The gateway grounds for such compulsory winding up were that the Company had failed to supply statutorily required information, namely financial accounts, to a member as required by s. 251 of the Companies Law. However the Company is, and clearly also was at the time, insolvent or verging on insolvency.

4. By the original Application, the Joint Liquidators asked for the court to approve a contract called a Conditional Asset Purchase Agreement ("**the CAPA**") which they had entered into with the Respondent, MND Georgia BV ("**MND**"), a Dutch company, for the sale to MND of the Company's 50% shareholding in, and Loan Notes issued to it by, three subsidiary companies ("**the Assets**"). These three companies are the Third and Fourth Joined Respondents (respectively, "**Ninotsminda"** and "**Martkopi**" which was previously known as Canargo (Norio) Ltd) which companies are incorporated in Cyprus, and Nazvrevi Oil Company Limited ("**Nazvrevi**"), which is incorporated in Guernsey. MND is, in each case, the other 50% shareholder in the subsidiary company, and it is convenient to refer to these three companies collectively as "**the JV subsidiaries**".

5. The proposed sale would be effectively a sale of the Company's undertaking, as it is almost, but not quite, a sale of the entirety of the Company's assets.

6. The CAPA was conditionally entered into with MND by the Joint Liquidators on behalf of the Company on 4th October 2019. The condition (see Clause 5) is the obtaining, before the Long Stop Date of 4th October 2020, of this Court's approval of the Liquidators' decision to enter into the CAPA and to complete it. Failing this, (or an agreed extension, which, in the event, has apparently occurred) the CAPA will lapse save for certain provisions declared to remain in force despite the termination of the agreement.

7. The Application is supported (unsurprisingly) by MND. It is also supported by Ninotsminda and Martkopi. Nazvrevi has not taken part.

8. The Application is opposed by the First and Second Joined Respondent parties (to whom I will refer collectively as "**Achernar**" where it is convenient), who claim to be substantial creditors of the Company under two separate claims. I say "claim to be" because, in accordance with Guernsey liquidation practice, their claims as creditors have been recorded following the order for liquidation, but have not as yet been adjudicated before the Commissioner so as to establish the two Achernar entities' status as creditors and the quantum of their debts. It is accepted, however, that insofar as their claim is for a debt which is acknowledged in a debt agreement made by the Company with Achernar Assets AG, for some $2.5Mn plus interest, Achernar Assets would presumptively be creditor for some 71.6% of the Company's debts by quantum, and that if the second of the Achernar claims were upheld in full, (this being $100Mn as the estimated value of future royalty entitlements claimed to be due to Achernar Partners Limited from the Company but which will not be paid) Achernar's combined total debts exceed 99% of the Company's debts.

History

9. The history of the Company and its operations is quite complicated. The detail is not fundamental to the points of legal interest which arise in the case, but some description is necessary for an appreciation of the situation which has confronted the Joint Liquidators. I will therefore give a simplified outline, drawn mainly from the evidence of Mr Rhodes.

10. The Company was incorporated in Guernsey on 25th July 1997. Its objects were oil and gas exploration and exploitation in Georgia. At that time, it owned 100% of the three JV subsidiaries, which operate

under licences from the Georgian government. That government takes an on-going interest in the JV subsidiaries' operations, both through its regulatory powers and because it holds the benefit of certain "Product Sharing Contracts" with each of the JV subsidiaries. The JV subsidiaries' affairs were managed and carried on by an operator company. This was formerly CanArgo Georgia Limited, another wholly owned subsidiary of the Company, but it is now another entity, which is apparently not connected, Kura Basin Operation Company LLC ("**Kura**").

11. In 2012 the Company itself was wholly owned by Blake Oil & Gas Limited ("**Blake"**). In July 2012, the Company sold 50% of its shares in all three JV subsidiaries to MND under a Share Purchase and Funding Agreement (the **"SPA**") which was made between the Company, MND and MND Group BV, (the holding company of MND). The SPA provided for a lump sum initial consideration of $4.9Mn for the purchase (which was paid) and for further "deferred consideration" as explained below.

12. Simultaneously, and as part of the sale transaction, provision was made for the business of each JV subsidiary to continue under three Joint Venture and Operating Agreements ("**JVOAs"**) made in similar form, each made between (1) the Company, (2) MND, (3) the relevant JV subsidiary, (4) CanArgo Georgia Limited and (5) MND Group BV. The required funding for pursuing each of the JV subsidiaries' "Committed Operations" as defined, up to a certain specified amount, was to be provided equally by the Company and by MND (with the latter being guaranteed by MND Group BV) upon formal "Finance Requests" being made to each of them by the JV subsidiary in question. The mechanism was that a Finance Request triggered an obligation on the Company and on MND to subscribe to a Loan Note from the JV subsidiary, to be issued on specified terms. However, any uncalled balance of the agreed total funding was to be provided one week after a final long-stop Funding Date of 31st January 2015, on which date a final Finance Request was automatically deemed to be made under the JVOA. This long-stop date was later extended to 31st January 2016.

13. Upon receipt of a Finance Request, each of the Company and MND was to provide its 50% share of the funding instalment required. However, under the SPA, it was stipulated that the Company's obligation to meet such Finance Requests should in fact be met and provided by MND, as "deferred consideration" for the share purchase. MND was to pay this share directly to the relevant JV subsidiary but it was deemed to do so on behalf of the Company. It was also provided by the SPA and the JVOAs that default in the payment of either joint venturer's share of funding provision was to bring about the consequences of a "Committed Financial Default" under that JVOA. It was yet further provided that the Company itself was not to be treated as being in default unless and until both MND and MND Group (as guarantor) had failed to pay the Company's liability in respect of the relevant Finance Request, in accordance with the documented agreements.

14. On 19 November 2015, Blake sold its 100% shareholding in the Company to Parsimony Ltd, a company registered in Jersey, under an agreement between Blake, Parsimony and the Second Respondent, Achernar Partners Limited (which was then named SEP African Ventures Limited). Parsimony then immediately sold its 100% shareholding on to companies controlled respectively by Messrs David Ramsay (taking 75%) and Clifford Isaak (taking 25%). At the same time, the Company, by three similar Royalty Deeds, granted to Parsimony a royalty of 6.75% of the net revenue generated by each of the three JV subsidiaries. This transaction was also stated to form part of the "consideration" for the sale of the shares in the Company. Parsimony then immediately assigned the benefit of the Royalty Deeds to Achernar Partners Limited. One deduces that these elaborate arrangements were driven by tax mitigation considerations.

15. The Royalty Deeds contain an obligation on the Company to ensure that, upon any disposition of its interests in the shares of the JV subsidiaries, the acquirer should enter into a similar Royalty Deed with Parsimony or its successor.

16. It appears that MND were unaware of these transactions until after the commencement of the liquidation of the Company.

17. In November 2016 and in June 2017 the Company was served with Finance Requests under two of the JVOAs, from Ninotsminda and Martkopi. These were not paid to (apparently) the aggregate sum of $245,000, and Funding Request Breach Notices were served on the Company by MND on 29th November 2016 and 3rd July 2017.

18. In addition, upon becoming aware of the Royalty Deeds mentioned in Paragraph 14, on 6th April 2018, MND served a Breach Notice on the Liquidators asserting that the Royalty Deeds constituted a breach of disposition restrictions contained in the JVOAs.

The Liquidation

Assets

19. The Joint Liquidators have ascertained that the only assets of the Company appear to be:

    (1) its interests in the three JV subsidiaries and their Loan Notes,

    (2) its ownership of CanArgo Georgia Limited, the former Operator company, and

    (3) a claim against MND for non-payment of deferred consideration under the MND SPA in respect of final Finance Requests in respect of Martkopi (the "**Funding Claim"**).

    This last has assumed particular importance in the circumstances, as will appear later.

20. The Company has no cash, although Mr Rhodes states that it was provided with about £17,000 in funding by CCL, the shareholder who applied for the winding up order, to fund the liquidation. Plainly this does not go very far.

21. As to the value of the assets:

    (1) the value of the Company's 50% interest in the JV subsidiaries, and its beneficial entitlement to their Loan Notes, is problematic. No accounts have been prepared for them since 2016. The Joint Liquidators have obtained limited information from Kura to the effect that only Ninotsminda generated any significant revenue during the years 2017 and 2018, and that all three JV subsidiaries have been loss-making. The Joint Liquidators have been unable to obtain any more detailed information, owing to lack of available funds with which to pursue the obtaining of such information and/or Company documents;

    (2) CanArgo (Georgia) Limited is dormant with no available or apparent assets and is thus effectively worthless;

    (3) The value of the Funding Claim is also something of an unknown. It should theoretically be at least $9Mn, being one half of the uncalled balance of the total funding provision contracted under the SPA, which was the Company's obligation but which had not been paid over by MND on behalf of the Company prior to the funding long stop date, augmented by a further claim in respect of MND's failure to pay its own obligation of $9Mn into Martkopi. However, the Funding Claim has been rejected out of hand by MND, in correspondence, as being "non-existent". This was prior to the first hearing of this Application, and was without explanation of the reason or arguments for this assertion. Later, MND have provided a brief explanation to the Joint Liquidators and to the Court, but, for reasons which will appear, they have refused to disclose this information to Achernar. The Joint Liquidators have been unable, again owing to lack of resources, to investigate the merits of the Funding Claim independently, to any satisfactory extent.

Liabilities

22. As to the liabilities of the Company, these have been recorded by the Joint Liquidators, at this stage, as comprising

(1) the two Achernar claims noted in Paragraph 8 above,

(2) claims from Ninotsminda, and Martkopi for a total of $245,000 plus interest, assigned to Kura, in respect of Funding Debts,

(3) a claim from Ninotsminda and Martkopi for $727,647plus interest, assigned to Kura, for the reversal of improper intercompany charges which had been discovered, and

(4) a claim of £17,236.34, supported by invoices, from Hauteville Trustees Limited in respect of company administration services provided to the Company in Guernsey.

23. A previous unparticularised and unsubstantiated claim for $1Mn from Ninotsminda, notified at the outset of the liquidation, has apparently not been pursued.

The negotiations

24. Following their appointment, and having ascertained the above facts, the Joint Liquidators sent a circular email letter dated 23rd March 2018 to the various "Stakeholders" in the liquidation, ie the creditors, shareholders, directors and co-shareholders in the Company. They set out the Liquidators' position, the facts which they had ascertained (broadly those above), their lack of available finance, their recognition that it was the underlying assets of the Company which had value for the Stakeholders, and their wish, therefore, to conduct a sale of the Company's assets and business for best value. They sought offers from the various perceived stakeholders for the assets of the Company which they would wish to purchase. The invitation to treat indicated that if the Liquidators received more than one offer, they would evaluate these to identify the best value offer. They said that in view of the disputatious background circumstances, they might well require legal and/or valuation advice, and possibly even an order of the Court, to implement any acceptable offer, and that this would have to be funded out of a non-returnable deposit, or offer, from the successful bidder. Offers should therefore include proposals in respect of such a deposit and/or willingness to fund the Joint Liquidators' costs and expenses, and also as to any financial indemnity against future costs or damages claims in which the Joint Liquidators might become embroiled, as well as (obviously) any other material advantages which could be offered.

25. There then followed a process of eliciting competitive bids. The fact of this is material although the exact details are not, except insofar as they illustrate the competitive dispute which developed between MND and Achernar as to who should be able to acquire the shares in the JV subsidiaries and their Loan Notes, and the arguments which each has used to support its own position and undermine the claims of the other.

26. Mr Rhodes compiled a short chronology of offers and negotiations which took place over the following months. In brief, and greatly simplified, the Joint Liquidators initially received three offers in response to their March 2018 letter. The kernel of the first, from CCL, was an offer of $200,000 for the Company's assets. That of the second, from MND was an offer of $400,000 for the assets. The third, from Achernar, was different in that it was essentially a "credit" offer, namely to forgive the two claims asserted by Achernar against the Company, (allegedly amounting to approx. $102.5Mn in total), in return for transfer of the JV subsidiary shares and Loan Notes. The offer from each party did include some offer with regard to funding legal costs and expenses and/or indemnities.

27. The Joint Liquidators then engaged in two further rounds of seeking improved bids, in April and May 2018. Whilst improved offers from all parties, including CCL, were submitted, the real contest which developed was between MND and Achernar. Whilst marginally improving its financial offer, MND drew attention to the rights which it claimed to enjoy as a result of breaches by the Company of the SPA and the JVOAs, the effect of which, it claimed, was to prevent the Company from validly selling the JV subsidiaries' shares to anyone but itself. Achernar countered these propositions by (i) denying the alleged breaches but also (ii) asserting that any such breaches were reduced to mere financial claims in the liquidation and therefore did not prevent an effective share transfer by the Joint Liquidators. Achernar's own bid, however, remained problematic in that, being a "credit" bid, (ie an offer to forgive asserted indebtedness) its implementation would offend the principle of *pari passu* distribution of the net

realisations of an insolvent company's assets between its creditors, because it would effectively pay off Achernar in preference to other creditors, who would not be paid to the same extent, if at all.

28. This problem had been recognised earlier, when the Joint Liquidators were initially minded to regard Achernar's bid as the best value. In seeking to resolve the position, they had obtained improved offers from Achernar, which varied in detail but the terms of which were not entirely clear. Ultimately, a revised offer came from Achernar which involved their adding a sufficient cash amount to their bid to enable the Joint Liquidators to pay a dividend to the other creditors at least equal to the amount which those creditors would have received if the next best alternative cash bid had been accepted.

29. However, at this time, Achernar also took legal advice, which they then drew to the Joint Liquidators' attention. This appears to have been somewhat of a reversal of their previous attitude and assertions made to the Joint Liquidators (see Paragraph 27) in that it was to the effect that approaching the matter of realisation through a competitive bidding process was flawed in itself, because the liquidation of the Company had automatically triggered a pre-emption provision in the JVOAs requiring the Company's shares in the JV subsidiaries' to be valued and offered to MND, as the co-joint venturer, at that valuation price, and only failing MND's acceptance of this could the assets then be offered to a third party. This pre-emption process had not happened, but Achernar asserted that it raised the question of the true value of the shares, and funding for obtaining the required valuation. The complications of such a valuation exercise in the face of MND's and Achernar's competing assertions of their respective rights were then considered and perceived to be appreciable. The position was further complicated by Ninotsminda and Martkopi intervening - seemingly on the side of MND - to dispute the entitlement of the Company to receive any payments from them whilst it was allegedly in breach of the JVOAs.

30. The Joint Liquidators have pointed out that, although faced with these competing contentions and claims, they had no funds available to take their own legal advice as to the position, and the merits or effects of MND's and Achernar's competing assertions. In any event, they suggest, the obtaining of any such opinion on their part would have been most unlikely to be accepted by any party to whose interests it was adverse. They would therefore, they say, have been left, still, with a situation of dispute, which they would have no means of resolving definitively, and which would potentially have placed them under attack themselves.

31. In January 2019 a third party, Block Energy plc, appeared on the scene, expressing interest in acquiring the Company's assets. This interest from an independent third party was entirely unsolicited, and does show (as I would have expected to be the case) that persons with an interest in this industry sector other than the immediate stakeholders in the Company's affairs had gained knowledge of the potential availability of the assets owned by the Company. The Joint Liquidators pursued Block's interest. They invited Block to negotiate with Achernar, with regard to the question of the Royalty Deeds. However, this did not bear fruit and by March 2019 Block's interest fell away. The Joint Liquidators rely on this as evidence that outside interest in acquiring the Company's assets was (and still is) likely to be deterred by the legal complexities of the situation.

32. The Joint Liquidators thus summarise the position at this time (ie early 2019) as follows. There had been a bidding process which had taken almost a year; they had carefully evaluated the offers which had been made; they were obliged to implement the *pari passu* principle of distribution; and they had no funds with which either to undertake a valuation exercise of the Company's assets, or to obtain legal advice as to the Company's position, so as to take their knowledge of the value of their assets further. Getting a proper and reliable valuation would in any event be an almost impossible task in the light of the competing assertions with regard to the Company's ability to sell the JV Assets or to obtain payment of the Loan Notes. Any valuation of the Company's assets would be deeply discounted to reflect the legal uncertainties. There was also, on any basis, a very limited pool of potential purchasers for such specialist assets. Examination of such financial information with regard to the three JV subsidiaries' affairs as was available showed clearly that their respective financial positions were, *prima facie*¸ "deeply negative". Realistically, there was never going to be outside interest in the purchase; only those already involved with the enterprise would have any interest in making an offer.

33. Having reached this point, the Joint Liquidators say that they therefore came to the view that the cash offer of MND to purchase the JV Assets on the terms of the CAPA was the best course, and was appropriate to be accepted by them in accordance with their duties as Liquidators. The terms were a purchase price of £312,000 (being as to £53,000 a non-refundable deposit, and a further £259,000 as Completion Consideration) with a further provision to claw back "Additional Consideration" if MND should (in effect) sell or otherwise dispose of the relevant assets to a third party at a profit within 9 months of completion. (It has emerged later that there had also been an agreement whereby MND had provided the Joint Liquidators with £50,000 free cash to enable them to incur the fees and expenses necessary to negotiate the terms of the CAPA, but this was seen by the Joint Liquidators as being separate from the CAPA itself). The whole CAPA was subject to obtaining this court's approval, as to which the Joint Liquidators agreed to take reasonable action to obtain this approval, and agreed not to negotiate with any other potential purchaser during the period whilst such approval was sought and the CAPA therefore either became binding or lapsed.

34. The CAPA had been entered into accordingly. By the Application, the Joint Liquidators therefore, (and I understand with funding provided by MND), sought the required order of the Royal Court approving their implementing the CAPA.

35. I need to refer to one more matter. Achernar say that, right from the outset, they drew the Joint Liquidators' attention to the Funding Claim (ie the claim mentioned in Paragraphs 19 (3) and 21 (3) above) which they say the Company has against MND as a potentially valuable asset, and they were told that the Joint Liquidators would investigate this. That had, (they understood) been the Joint Liquidators' position ever since; they had never withdrawn from this position, even though the Joint Liquidators now say that, in practice, their investigation proved impossible to pursue owing to lack of information and lack of funds to do so. The Joint Liquidators say that they made their lack of funds clear to everyone in correspondence early on. They (the Joint Liquidators) did not specifically link the two points however, and Achernar say that they remained under the impression that the Funding Claim was being considered by the Joint Liquidators, and that they were not aware that lack of resources was preventing this. Having also been under the impression that they were the preferred bidder, Achernar simply waited, and they say that the matter went quiet in early 2019 until, suddenly, they were informed that the Joint Liquidators had decided to sell the Assets to MND and not to them, and had entered into the CAPA.

36. When they were made aware of the CAPA, Achernar took the view that it would prejudice potentially large realisations under the Funding Claim, and they pointed this out to the Joint Liquidators. They even went so far as to instruct English Leading Counsel to prepare a draft Statement of Claim in respect of the Funding Claim to demonstrate that such a claim could be formulated and pursued, even on only the information currently available.

37. With this Application already having been initiated, the Joint Liquidators sought to accommodate this point by agreeing with MND that both of them would formally agree that the CAPA should not affect the Company's Funding Claim, so that it would therefore be preserved as an asset in the hands of the Joint Liquidators, notwithstanding the CAPA, and that they would seek to do this in a form which allayed Achernar's concerns. Whilst MND were apparently agreeable, in principle, to some such wording, it then proved impossible to agree wording which satisfied Achernar. The attempt was, therefore abandoned, and this Application proceeded.

The arguments

38. The effect of the CAPA on the Funding Claim has therefore assumed central importance in Achernar's opposition to this Application, on its merits. I will trace, below, the various ways in which this opposition has been put over the course of the five hearings which have taken place. This will mean dealing with the various legal points which have arisen, and having given my decision on the particular case, I will finally draw these together into a set of propositions.

39. At the first hearing on 1st and 2nd July 2020, Advocate Williams, appearing for Achernar, opposed the Application on two grounds, set out in his skeleton argument. The first was that the Court can and should only make such an order if it is satisfied that the proposed transaction (ie the implementation of the CAPA) is in the best interests of "the Company and its creditors", meaning, of course, the general body of the unsecured creditors of the Company. The Court, he submitted, could not be so satisfied because of the likely effect of making such an order, on the Funding Claim. (More accurately, this is an allusion to the effect of the proposed transaction, rather than any order, but the point is clear).

40. The second ground was a more general submission that the Court should not, in any event, "*grant orders the main purpose of which appears to be to absolve the Applicants of responsibility for making a commercial decision*". It is convenient to take this second ground first.

Is the Application competent?

41. The Application is made under s 426 of the Companies (Guernsey) Law 2008. That section is extremely broadly drafted. It reads

> *"426 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".*

This is plainly very wide, but it is not quite unlimited. There appear to be two identifiable limitations.

42. In *Re Amazing Global Technologies Ltd (in liquidation)* 11th June 2012, Royal Court Judgment 29/2012, McMahon DB (as he then was) held that the section was not apt to permit a liquidator to apply for an order, in effect declaring that the liquidation had been completed, discharging him from his office and granting him his release. He held, at [39] that

> "*…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."*

43. Section 426 is thus aimed at assisting the liquidator to conduct the liquidation. It also envisages "*directions*" being given to the liquidator as a result of such an application. Although the second limb of the section authorises the court to make any "*order*" in completely general terms, this word must be construed as an "*order*" in the context of seeking "*directions*", and it does not enlarge the scope of the section beyond that function.

44. The order sought in this case, argued Advocate Williams on behalf of Achernar, is not an order for "directions" at all, but is expressly an order seeking the court's "approval" of the Applicants' decision to enter into the CAPA; it is not a "direction" to complete the transaction contained in the CAPA. In practice, the giving of the court's approval would trigger the unconditionality of the CAPA and thereby give it dispositive effect; it would be liable to be completed as a matter of contract, but that is an indirect consequence of the order sought, and it is not the same as the court "directing" the Joint Liquidators to complete of the transaction.

45. Given the limitation on the scope of s 426 which was pointed out in the judgment of the Deputy Bailiff in the *Amazing Technologies* case above, I have therefore asked myself whether this Application is within the ambit of s 426 at all. In the end, I have concluded that it is, although the machinery which the Joint Liquidators have adopted in relation to the CAPA does seem to me to cause some other potential problems, which I will mention later.

46. Section 426 contemplates there being "directions" regarding the future course of the conduct of the liquidation, and whether the liquidator can or cannot, or should or should not, do something (and possibly,

what) in the future. It would therefore have been within the scope of the section for the Liquidators to bring a draft of the CAPA before the Court and to ask for the court's direction as to whether they should follow their inclination to execute it. Instead, the mechanism adopted has been to execute the document subject to a condition subsequent that it will not take effect, as to its substance at any rate – obviously there are ancillary provisions, such as those obliging MND to provide funds for making this Application, which are not conditional in this sense – unless and until the Liquidators obtain the court's approval of the transaction. To obtain that approval, the Joint Liquidators have to explain to the Court their decision to enter into the conditional agreement in the first place, and the Court's approval of the agreement therefore amounts to an approval of that decision. In my judgment there is no material difference of substance between these two positions, ie seeking the court's approval of a prospective agreement to be entered into, and seeking the court's approval of an agreement entered into conditionally upon the obtaining of the court's approval, and the commercial advantage of adopting the latter course can be easily appreciated. Although it is in a sense retrospective, this is in an entirely different way from seeking the subsequent endorsement of transactions entered into unconditionally, as was sought in *Amazing Technologies*, and in my judgment it does not step over the line which was there observed by the then Deputy Bailiff. In any event, though, it also appears to me that as the Joint Liquidators are appointed by court order, the court would have an inherent jurisdiction to direct and assist its officers in the performance of their duties.

47. I conclude, therefore, that the Application is within the scope of the general operation of s. 426, or alternatively that it validly invokes the inherent jurisdiction of the court, in principle. This, though, still leaves the question of the substantive limits of that operation or jurisdiction.

48. That point is the essence of Advocate Williams' submission that the court will not "*grant orders the main purpose of which appears to be to absolve the Applicants of responsibility for making a commercial decision*". His submission is that the Joint Liquidators are not seeking the Court's approval that they can or could carry out their intentions with regard to the proposed transaction, but rather whether they <u>should</u> do so, and that is not an approval which the court can, or should, give.

49. Advocate Williams submits, and in my judgment rightly, that s. 426 does not enable the liquidator to surrender his discretion to the court, just because he finds himself having to make a difficult decision, or he simply feels that he "does not know what to do". That is not seeking "directions" at all, but abdicating responsibility. It is the very function of a liquidator to make commercial decisions with regard to the proper conduct of the winding up. Doing that is what his office entails, and what he is remunerated to do. It follows that the directions, or the order, which the Court will "*think fit*" to make under s 426, or under any inherent jurisdiction are most unlikely to be an order which in effect means that the court is taking the commercial decision itself. Advocate Williams cites the Australian text book *The Law of Company Liquidations*, by McPherson & Keay, 4th Ed at paragraph 9.044 for the proposition that a liquidator should not use an application for directions as a means of getting the court to make a difficult commercial decision on his behalf.

50. I unhesitatingly accept this submission. Indeed, I have some difficulty in envisaging any situation in which the court would ever be likely to accept the surrender of a liquidator's discretion. What the Court will do, rather, is to assist the liquidator in carrying out his functions, by giving him directions as to the appropriate *process* to follow in order to enable him to make the decision himself, and provide him with the comfort that, if he follows the court's directions, he will be protected from subsequent attack or criticism by any aggrieved person. Of course, in the course of carrying out this function, the court can, if necessary or appropriate in the particular circumstances (and always with any appropriate parties joined) make determinations of fact or right or legal principle, but this will be as part of the function of assisting the liquidator to discharge his own functions as liquidator. The objective of s 426 is to assist the liquidator to make liquidation decisions, and not for the court to take over the conduct of the liquidation.

51. As already indicated, I accept the proposition that a liquidator cannot use an application to the Court to get the court to take over making a difficult decision on his behalf. However, Advocate Williams then submits that that is what the Joint Liquidators are doing by this Application, and that is a proposition which I do not accept.

52. As has really emerged in the course of argument, and as Advocate Tee on behalf of the Joint Liquidators submitted, what the Joint Liquidators are in fact doing is asking the court to "bless" a decision which they have already made, and evidenced by entering into the CAPA. They do this by analogy with the invocation of the jurisdiction of the court in trust cases under the second category of trustee applications identified in *Public Trustee v Cooper* [2001] WTLR 901 at 922-4. Whilst this might not appear to fall literally within the word "directions", the objective of such a "blessing" application, and its ultimate effect, is, in my judgment, very similar to that of seeking directions, and indeed, when the mechanism which is applied to such a "blessing" application is properly understood, it can fairly be equated to an application for directions, as I will explain later.

53. Support for the proposition that this is an available exercise of the court's jurisdiction in a liquidation context is to be found in the English case of *Nortel Networks UK Limited* [2016] EWHC 2769 (Ch). That case concerned a company administration, but this is entirely similar to a liquidation context. In that case, the Administrators of a group of 19 related companies in the Nortel Group applied for an order that they should "*be at liberty to perform and procure that the companies perform a global settlement*" of the vast majority of disputes that had arisen regarding the affairs of the group and distribution of the proceeds of sale of its assets. Although this formulation is more nearly in the nature of an application for a direction, as it was formulated with reference to future conduct, the similarity in substance to the present application is obvious.

54. Whilst noting that the Administrators clearly had power to implement the settlement, Snowden J held that it could be appropriate for them to seek the court's prior approval to a prospective course of action, under the English equivalent of s 426 of the Guernsey Companies Law, if there were a "particular reason" for doing so. He held that such a "particular reason" could be found in the decision fairly being seen to be in the "momentous decision" category recognised in *Public Trustee v Cooper,* ie where the decision was of particular significance for its size or its gravity.

55. The material similarities of function between a trustee on the one hand and a liquidator or administrator, on the other are, in my judgment, clear. The latter are office-holders whose function is to administer assets (always in accordance with the purpose of the office) for the benefit of others, but they do so in a situation in which they may incur personal liability for maladministration (in a general sense). Their position in this regard is clearly analogous with that of a trustee, and the court's powers in trustee cases provide, in my judgment, a helpful guide to the proper scope of the court's functions when its powers of assistance are invoked by such an office-holder. In a company administration or liquidation context, the court's powers will therefore include a power to "bless" a decision of a liquidator or administrator in a similar way to the power available in a trust context.

56. There must, of course, be a proper and particular reason for invoking the court's jurisdiction, because the liquidator has the power - and is expected to have the firmness of purpose - to make decisions on his own account. Nonetheless, where particular circumstances make it reasonable to seek the court's "blessing" of a particular course of action the court can assist. Of course, if the power were invoked without good reason, this might have personal costs consequences for the liquidator.

57. What will amount to such a "particular reason", on the basis of analogy with the "momentous decision" principle of *Public Trustee v Cooper* is probably easier to recognise as a matter of impression than to define. It is fact-sensitive. The example given by Hart J in *Public Trustee v Cooper* was that of selling off the major asset of a trust estate. However, since the very purpose of a liquidation is to sell off the company's assets, that feature would hardly justify the description of "momentous" without more. The mere size of a transaction has sometimes been held to render it "momentous" in a trust context, but is not necessarily a justification on its own, and probably even less so in a liquidation context than a trust context. The transaction in the *Nortel* case was certainly large, but was also being proposed in extremely complex circumstances, which justified its being seen as "momentous". However, another feature which, in my judgment, could be significant enough to render a sufficiently momentous as to justify a "blessing" application would be where the decision appears likely to be contentious, and subject to attack which could

well lead to litigation. This is especially so where such an attack is likely to arise from some quarter, whatever decision the liquidator is inclined to make. Recognition of this as a reasonable ground for a liquidator to seek the protection of the court's directions is to be found in the Australian case of *Re Idoport Pty (in liquidation)* [2015] NSWSC 1412 at [7]. In my judgment that is the position here, as will appear.

58. The effect of a liquidator seeking and obtaining the court's approval of his proposed action will be to "validate" that action and protect both the transaction and the liquidator from subsequent attack by an aggrieved party. It is correct that it is, therefore, a form of insurance (as Advocate Williams commented). That, however, is not the same as saying that the liquidator is seeking to "*absolve himself from responsibility for making a difficult decision*", and that point is important. This can be seen from accurate examination of the true basis on which the court actually gives its "blessing" to a transaction proposed by a trustee (or liquidator), and the implications of its doing so, or not doing so. This brings me, therefore, to Advocate Williams' other ground of objection to this Application.

The test to be applied

59. The first ground on which Advocate Williams objected, and has continued to object throughout the series of hearings which has taken place, to the Court's granting relief to the Joint Liquidators is expressed as being

> "*that the Court cannot be satisfied, on the present evidence, that the decision to implement the CAPA is in the best interests of the Company's unsecured creditors, given its claimed effect on the Funding Claim*."

60. As formulated, this submission proposes that the court should apply its own judgment to "second guess" the merits of the decision which the Joint Liquidators are asking the court to approve. For reasons which will have appeared in general terms above (see Paragraphs 47-49) that would not be a proper function of the court, but – and also for reasons given above – I do not consider that that *is* what the Court is being asked to do. What the court is being asked to do is to "approve" a decision which the Joint Liquidators have determined, albeit provisionally in the circumstances, to be a "proper" one. This means, in my judgment, examining the decision in a similar way to the approach to a *Public Trustee v Cooper* application, and that means examining the process by which the Joint Liquidators have in fact arrived at their decision. It does not involve examining, or passing judgment on, the merits of the decision itself.

61. Ultimately, I did not understand Advocate Williams to dissent from this proposition. He submitted that, for the Joint Liquidators to satisfy the court that it should exercise its powers under the "momentous decision" jurisdiction to approve the CAPA, they must satisfy the court that they were acting as "reasonable liquidators". Broken down, he submitted, this meant four things:

    (1) They were properly advised,

    (2) They were acting only on the basis of (a) rationality and (b) propriety,

    (3) They had taken into account all relevant facts, and

    (4) They had excluded any irrelevant fact.

62. I accept the broad thrust of this submission. Its effect is that what the court does is to determine that the relevant decision which the liquidator intends to implement is the product of a competent and comprehensive consideration of all relevant facts and matters, but only relevant facts and matters, and that it is not illogical, irrational or perverse. If so satisfied, the court will pronounce the decision to be "reasonable", in the sense that it has been properly arrived at. It does so by scrutinising the materials and the process of investigation and reasoning by which the decision has been made, but apart from the possibility that the proposed decision might appear to be so wayward as to be perverse, the court does not make any value judgment about the merits of the decision, nor does it duplicate the process of taking it.

Taking this approach therefore simultaneously respects the fact that the power to make the decision has been confided to the liquidator, and that he is expected to exercise that power with due care and propriety.

63. It is from this principle that the evidential requirements of a *Public Trustee v Cooper* application have been derived. The same requirements will therefore apply to a similar application made by a liquidator under s 426. The applicant must put before the court, making full disclosure, all the materials which have been taken into account (or consciously left out of account) by him in reaching the decision in question, and he must explain to the court the process of reasoning which has led him to the decision itself. This enables the court to test and judge the scope and comprehensiveness of the decision making process, and its rationality and lack of perversity. It does not involve the court endorsing the decision directly, but only the validity of the process by which it has been reached, or, in other words, that the trustee, or liquidator, has done his job properly, in all the circumstances.

Application of the proper test

64. The issue before the court on this Application therefore is, or at least initially was, whether the court could endorse and approve the process by which the Joint Liquidators took the decision to enter into the CAPA, and that is where the argument focused at the first hearing. Advocate Williams, for the Achernar parties, submitted that the Court could not do so. Advocate Tee, for the Joint Liquidators, submitted that it could and should. Advocate Dingle for MND and Advocate Jones, for Ninotsminda and Martkopi, support Advocate Tee.

65. Advocate Williams founded his submissions squarely on the proposition that, even on their own evidence, the Joint Liquidators did not give any consideration, let alone any proper consideration, to the Funding Claim as an asset of the Company, and the damage which the CAPA could or would do to this asset or its value if it were put into effect.

66. I need to digress slightly here to record that Achernar's arguments with regard to the detrimental effects of the CAPA on the Funding Claim were not revealed in open court on this Application. Argument on the first day proceeded on the basis that the Joint Liquidators asserted that they had taken steps to preserve the Funding Claim by obtaining acceptable assurances from MND that they (MND) would not seek to assert that the CAPA affected the Funding Claim. Indeed, a director of MND had sworn evidence that, whilst MND disputed the substance of the Funding Claim (to which it is, of course, the prospective defendant) he confirmed, on behalf of MND, that the provisions of the CAPA were without prejudice to the mutual rights, claims and obligations of the parties to the CAPA and did not prevent either party from pursuing any claim against the other except for certain claims specifically mentioned.

67. Achernar had, in correspondence, asserted that this confirmation was not good enough to deal with its concerns, and had invited the Joint Liquidators to review their (Achernar's) arguments to this effect on a confidential basis. However, having already entered into the CAPA conditionally, the Joint Liquidators were bound by provisions in the CAPA to the broad effect that they would use reasonable endeavours to obtain the court's approval of it, with MND funding the costs of the necessary Application (Clause 5.4 of the CAPA), and also that they would not hold discussions or negotiations with any other party with regard to the "Assets" whilst the CAPA was awaiting completion or until the Long Stop Date (the "Exclusivity" Clause: Clause 11). Not wishing to jeopardise the prospects of the CAPA becoming binding, the Joint Liquidators were therefore unwilling, voluntarily, to take the step of holding discussions with Achernar.

68. I observe, here, that the restrictions which I have mentioned are, of course, commercial terms of a common type, and undoubtedly terms with the Joint Liquidators had power to enter into as a commercial matter. However, their effect, in the particular circumstances of this case, has been to constrain the Joint Liquidators' freedom of action with regard to taking further steps which might be necessary to provide the court with evidence to satisfy the court of the competence and comprehensiveness of the decision-making process behind the CAPA. This is a point which Liquidators or others, faced with any similar position in the future, might do well to bear in mind when considering contractual terms; fettering their discretion or freedom of action may not be advisable.

69. The upshot was that at the beginning of the second day of the hearing, Achernar's arguments on this topic (ie potential prejudice to the Company's Funding Claim if the CAPA went ahead) were made to the Court - and for the first time to the Joint Liquidators - *in camera*, and in the absence of the legal representatives of MND, Ninotsminda and Nazvrevi. These matters were fairly regarded as confidential for commercial sensitivity. Those parts of materials referred to during that period of the hearing which were not thus sensitive were subsequently disclosed, by me, to those counsel on their return to the hearing. I considered this procedure to be appropriate, as both having regard to the nature of the application being made to me and serving the interests of justice. It is also appropriate to record the fact that I considered that the points which were made in private session by Advocate Williams, explaining Achernar's concerns and contentions on this subject, (namely that if the CAPA were implemented, it would have a detrimental effect on the Funding Claim), were not without substance.

The decision to be "blessed"?

70. To return to the arguments: on the basis that the Application had now metamorphosed into an application under the *Public Trustee v Cooper* principle, in contrast, (Advocate Williams submitted) to the original Application simply to approve the transaction itself, Advocate Williams observed that the decision which the Joint Liquidators were requesting the court to "bless" was taken on 4th October 2019, ie at the point when they signed the CAPA conditionally. On that basis, he submitted, the evidence was perfectly clear that the Joint Liquidators had not then taken into account the points which Achernar had now made to them (and to the Court) in camera, with regard to the effects of the CAPA on the Funding Claim. They had not even appreciated these - as they had effectively admitted - at the time they executed the CAPA. He submitted that for this simple reason alone, the Application must then be dismissed, because it was that decision which the Court was being asked to "bless", and it was clear beyond peradventure that one highly material fact or matter had not been considered in reaching it.

71. I rejected that submission, based, as it was, on the narrow point that the court can only look at the facts as they pertained on 4th October 2019. In my judgment, even if the original decision made at that time had been arrived at without considering a material point, that defect would be capable of being cured. If the Applicant is apprised of some new fact which he has not taken into account but clearly ought to, and at a later stage he therefore revisits the decision taking due account of the new matter, but then responsibly and dispassionately concludes that the original decision should be endorsed even in the light of the new matter, the applicant can still ask the court to give its blessing to his decision. Of course it would be necessary for the liquidator, (or trustee) to give evidence and an explanation of any such process, sufficient to satisfy the court that such a reconsideration had taken place, but that is an obvious evidential requirement.

72. I reach this conclusion, first, because it seems to me that to hold the court's consideration rigidly to the initial decision, even when matters have realistically moved on, is undesirably technical, and unduly promotes form over substance. The qualifying test for the court's blessing is not whether particular hoops were gone through by a particular time, but rather whether, in substance, the implementation of the relevant decision would be implementing a decision properly arrived at in the light of all the circumstances known at the time when the court is asked to make its determination.

73. Second, I am fortified in this approach by judicial recognition that, in a trust context, the *Public Trustee v Cooper* application itself may give rise to "*a dialogue"* between the court and the trustee by which a decision on the proposed course of action may be changed, in the light of the court's comments, and thus may be "blessed" in a different form: see *Re AAA Children's Trust* , Royal Court Judgment 29/2014, at [53] citing *Re F* (unreported) Guernsey Court of Appeal, 29 June 2013 at [11]. This seems to me to be a similar situation, and to recognise that the "blessing" process is aimed at achieving an outcome, and is not just a rigid declaration as to a state of affairs at a particular moment which is by then of no more than historic interest.

The place of "proper advice"

74. Advocate Williams' second argument was, therefore, that the court still could not approve the CAPA, because the Joint Liquidators had (still) not given "proper consideration" to the effects of the CAPA on the Funding Claim, because this meant, he emphasised, being properly advised with regard to the matter in question. He pointed out that the Joint Liquidators had not obtained any legal advice either as to the merits (and therefore the value) of the Funding Claim, or as to the potential effects of the CAPA on that Claim. He submitted that that fact, on its own, must prevent the court from exercising its power to "bless" the decision to enter into the CAPA; a material factor had not been taken into proper account.

75. In support of this proposition, he referred me to *Re Edennote Ltd* [1996] 2 BCLC 389, a case in which the applicant creditor applied to the court to set aside the liquidator's assignment to a Mr Venables of certain rights of action held by the company. The Court granted this application on the grounds that the liquidator had not (but ought to have) taken into account the fact that the applicant creditor might well have been willing to make a better offer for the assignment than had Mr Venables, because of the advantage which taking such an assignment would potentially have for it with regard to its own interests in a pending lawsuit between it and Mr Venables. The liquidator had made no inquiry as to this, having (he said) no inkling at the time that the applicant might be interested in making a better offer. The liquidator argued that a proper judgment of his actions must depend on how a reasonable liquidator would have acted in the circumstances prevailing at the time according to the facts known to the actual liquidator, not with the wisdom of hindsight, and the liquidator's action in making the assignment had not been unreasonable, viewed in that way. However, at 396*b*, Nourse LJ said that these submissions

> *"…overlook an important point. A reasonable liquidator must be taken to be one who is properly advised…… a reasonable liquidator must be taken to be one who has such advice where he needs it".*

Advocate Williams resting firmly on this proposition, submitted that the admitted absence of legal advice to the Joint Liquidators with regard to the merits of the Funding Claim and the effect of the CAPA on these, was fatal to the Joint Liquidators' Application, which could therefore only be dismissed.

76. For the Liquidators, Advocate Tee argued that the absence of legal advice could not be determinative in the way suggested, because it was simply not open to the Joint Liquidators to obtain any such advice, as they had no funds with which to do so. The effects of Advocate Williams' arguments would be that a liquidator without funding, but faced with options which would undoubtedly disappoint a disputatious party, would never be able to make an application to the Court to protect himself or the transaction from attack at a later date, but would simply have to take a risky decision without comfort. That could not be right, and that, he said, was what had happened in this case. Both subjectively and objectively, the Liquidators had made the best decision they could in all the circumstances as were then known to them, taking into account their practical limitations.

77. The general similarities of the *Edennote* case and the present situation are obvious. However, and as I noted in argument, there did not appear to be any lack of funds in *Re Edennote.* What had happened there was that the availability of a possible "better offer" for the rights in question had not been appreciated, and was therefore left out of account in the decision-making process. That was the fatal flaw. The fact that this availability had not been appreciated because the Administrators had not thought they needed or ought to take legal advice which would have revealed it was only incidental to the fatal flaw itself, and, unlike this case, there would have been no financial impediment to such legal advice being taken. On analysis, the decision in *Edennote* is not, therefore, a decision that a failure to take legal advice may vitiate a decision, but only that a failure to appreciate a consequence which legal advice would have revealed may vitiate a decision in a case where such advice could have been taken.

78. In principle, I accept Advocate Williams' submission that, *all other things being equal*, a proper decision would have to be one which had taken into account potentially relevant legal advice, and that a failure to take such advice therefore *could* vitiate the decision, or, more accurately make it impossible for the court to exercise its power to "bless" a decision which had been reached but not yet implemented. However, in my judgment, this principle cannot be rigidly taken to the extreme. In a case where the liquidator

appreciates the desirability of taking legal (or indeed, other) advice to assist him with his decision, but is simply unable to do so because he does not have the necessary funds, then, in my judgment, he would have to take his own decision, acting as best he could on the information available. He could still bring this decision before the court for approval if it were felt to be "momentous" so as to justify seeking the court's blessing, and the fact that legal advice would have been desirable but could not be obtained, and that the decision had therefore had to be made as best it could be without it, would be material matters to be put before the court. Then, the absence of such advice would not, without more, prevent the court from "blessing" such a decision in an appropriate case.

79. The Joint Liquidators have submitted that proceeding without taking legal advice was, in all the circumstances, reasonable and responsible, but in support of this view they add the fact that, in any event, their obtaining legal advice was judged unlikely to put an end to the competing claims and assertions being advanced by MND on the one hand and Achernar on the other. They have submitted that this supports the view that it was reasonable that they should simply make the best decision, as they saw it, on the basis of the facts, including any uncertainties about some facts, which appeared to them at the time.

80. Considering this second point first, I do not accept it, at least in the context of the present case, though I would accept that this is a fact sensitive matter. I do not accept it because it seems to me that, whether or not the parties could be expected to accept the Liquidators' independent legal advice as settling their differences – and I accept that this is unlikely here – the obtaining of such advice would be a factor which would be likely to assist the Liquidators to make the "best" decision in the circumstances. That point therefore does not, in my judgment, add any weight to the main point, which is whether a decision taken without the benefit of admittedly potentially helpful legal advice is *ipso facto* sufficiently flawed that it cannot be blessed, or whether the absence of resources to take such legal advice removes that flaw.

81. Translating that last formulation into the question of factors properly taken into account or left out of account, the position is that legal advice was left out of account because the Joint Liquidators took into account their perception that they had no funds to obtain such legal advice. The question then becomes whether that assumption itself was accurate and reasonable (ie correctly taken into account).

82. What the Joint Liquidators actually did not do, at the time they entered into the CAPA, was to inquire directly whether either of the effectively competing parties was willing to fund them to obtain their own independent legal advice on (in particular) the point on which this Application had come to focus namely the merits of the Funding Claim and the potential effects of the CAPA upon this as a valuable asset of the Company. This omission is highlighted by recent correspondence from Achernar to the Joint Liquidators. In a letter dated 27th May 2020, Achernar recorded the impossibility of reaching an agreement with MND which gave Achernar adequate (in their view) reassurance that the CAPA could not be used to prejudice the Funding Claim in the hands of the Company/the Joint Liquidators, and then made a "subject to contract" offer to the Joint Liquidators, which was, in essence, that if the Joint Liquidators would abandon the CAPA (both as to this Application or voluntarily outside it) and would retain the Assets (ie the shares and the Loan Notes in all three JV Companies) until after the determination of the Funding Claim, then Achernar would pay the £312,000 purchase price fixed in the CAPA, to the Joint Liquidators, which would enable all other creditors to be paid as much as if the CAPA had been implemented, and they (Achernar) would also fund the pursuit of the Funding Claim. This offer was rejected by the Joint Liquidators by a letter from their Advocates, of 3rd June 2020, (one imagines, after consultation with MND). However, a readiness to discuss Achernar's funding of the Funding Claim as an independent matter was expressed. By this time, MND had, I understand, agreed not to take any point that the Joint Liquidators' communications with Achernar would breach the Exclusivity Clause in the CAPA.

83. Thus, submitted Advocate Williams, the possibility of effectively getting legal advice on the Funding Claim and the strength of Achernar's arguments that the CAPA would adversely affect these, was sufficiently on the table, at least by the time of the first hearing of the Application, for the Joint Liquidators to be unable to say to the court that the obtaining of suitable legal advice was just not possible. By analogy with *Edennote*, they simply had not fully investigated the possibility of obtaining that advice, and thus of receiving advice which could well change their view as to the best way forward for the liquidation,

and in particular as to their expressed view that the CAPA would not affect the Funding Claim in the hands of the Joint Liquidators.

84. I accept the force of Advocate Williams' submissions. More to the point, at the end of the second day of the hearing, those submissions, and the points which they raised caused me to conclude that I could not grant the court's approval of the CAPA as sought by the Joint Liquidators at that time, because the possibility of obtaining legal advice which might well materially inform the decision to proceed (or not) with it had simply not been adequately investigated or pursued.

Subsequent progress of the Application - further hearings

85. The alternatives at that stage were therefore either that Advocate Tee decided to press the Application, in which case I would have to dismiss it (which would, in practice, prevent the CAPA becoming effective at all unless both parties waived its conditionality, but that would be a decision which the Joint Liquidators would have to take on their own initiative without the comfort of the court's blessing) or, having now heard the points which Achernar wished to make about the Funding Claim and the potential effects of the CAPA on its strength or merits, Advocate Tee could ask for an adjournment (which I was perfectly willing to grant) to allow investigation of the availability of funding from Achernar to enable the Joint Liquidators to take their own legal advice on the Funding Claim, and the potential effects of the CAPA upon it, and factor such advice into their decision making process.

86. The hearing was therefore adjourned for four weeks, with MND accepting that the "merits" arguments with regard to the Funding Claim and the effects of the CAPA, which had been revealed to the Court and to the Joint Liquidators, were matters which were, and should remain confidential as between Achernar and the Joint Liquidators, and also accepting that the intended discussions between Achernar and the Joint Liquidators with regard to these matters should not be argued by them to be any breach of the "Exclusivity" terms of the CAPA.

87. It would be overburdening this judgment to describe, in detail, the course of the proceedings throughout the four further hearings which took place. A broad summary and noting of salient points will therefore suffice.

88. Following the first hearing, Achernar did fund the obtaining by the Liquidators of legal advice regarding the possible detrimental effects of the CAPA on the Funding Claim, from English leading counsel. As a result of this, the Joint Liquidators consulted with MND about possible variation of the CAPA to meet these concerns. Achernar had not had time properly to consider a suggested variation at the time of the second hearing (on 29th July), and this was therefore adjourned for a further two weeks.

89. By the time of the third hearing, on 12th August 2020, a further revised version of the CAPA known as the "**Third CAPA**" had been agreed between the Joint Liquidators and the other parties, and was now the subject of the Joint Liquidators' application to the Court, with Achernar having had time to consider it.

90. The revisions made to the CAPA were prompted by the fact that the Funding Claim against MND was a claim belonging to Martkopi. The Third CAPA therefore provided that, rather than MND purchasing the shares in all three JV subsidiaries for £312,000, MND would purchase, for the same sum, only the shares in Ninotsminda and Nazvrevi, leaving the shares in Martkopi (formerly Norio) with the Company and thus remaining an asset of the Company under the control of the Joint Liquidators. The object of this was that the Funding Claim would then be able to be pursued by the Joint Liquidators with the Company still holding the shares in Martkopi, provided always that pursuit of the Claim could be funded - which Achernar had indicated that they were willing and wishing to do. This appeared to protect the value of the Funding Claim within the Joint Liquidator's control, and enable Achernar to facilitate the realisation of the value of that claim, for the benefit of the liquidation, of which they claimed to be the majority beneficiary.

91. However, at the third hearing, Achernar maintained that the Third CAPA still had detrimental effects on the Funding Claim, which would prejudice its value even if the Joint Liquidators retained the shares in Martkopi. These arguments were, once again, raised in camera with only the Joint Liquidators and Achernar present in court. These arguments Achernar said, once again, had not been considered, and they urged, once again, that the Application should therefore be dismissed without further ado. At the same time, they repeated their own proposals that the Joint Liquidators should retain all the shares in the JV subsidiaries, and should pursue the Funding Claim - which they were prepared to fund - from that position.

92. With the position now being almost a repeat of the position at the first hearing, the Joint Liquidators requested a further adjournment to investigate the practical possibility of their being able to take legal advice on Achernar's arguments with regard to these further concerns, and also to consider the competing proposals which were coming from Achernar as to their willingness to pay the Joint Liquidators the equivalent of the consideration fixed under the CAPA (or, by then, the Third CAPA) provided the Joint Liquidators instead retained all the shares and agreed to pursue the Funding Claim with Achernar's support.

93. I granted this adjournment (and later a fourth adjournment), contrary to submissions of Achernar each time as to why I should not do so but should dismiss the Application. I did so, in each case, to enable the Joint Liquidators to consider the matter further, possibly by managing to seek legal advice to see if that made a difference to their views as to the appropriate way forward, but also to enable them to explore the proposals being put to them by Achernar, with regard to Achernar's willingness to fund the Joint Liquidators' pursuit of the Funding Claim if the Joint Liquidators did retain all the shares. In other words, the adjournments were granted to enable the Joint Liquidators to satisfy themselves, (and therefore ultimately the court) that they had taken all the steps they reasonably could to provide themselves with all available information upon which to make a decision which they would be able to put before the court as their preferred course of action, and why.

94. Achernar were not willing to provide funding for more legal advice for the Joint Liquidators. MND, however, were willing to release some of the funds from the otherwise refundable deposit of £53,000 being held by the Joint Liquidators in respect of the proposed sale of the shares under the CAPA. It is not appropriate for me to say anything about the terms of that advice in this judgment, except to record that it shed helpful light on Achernar's expressed concerns.

95. At the fourth hearing, I decided that it was appropriate to hear the Joint Liquidators in private to consider the appropriate further course for the Application, although I had not done this previously. Whilst the previous *in camera* hearings had been dictated by considerations of commercial sensitivity between two opposing parties (MND and Achernar), I regarded the course of excluding both/all outside parties as being not only possible, but quite appropriate, bearing in mind the basic nature of the Liquidators' application to the court being a request for directions from the court as a supervising body, and thus being similar to a *Beddoe* application in a trust context. I told the Joint Liquidators that the current uncertainty could not continue, and they should aim, at the following hearing, to present the court with an account of the options open to them, and whatever decision they had made, for whatever reasons, in the light of what ought, by then, to be the fullest information available to them.

96. During the fourth hearing itself, I reminded the parties that whilst Achernar's legal arguments with regard to the positive merits of the claim against MND had been a prominent matter in the hearing, because of the focus on these through their being taken into private session, just as MND were not aware of these legal arguments, so also Achernar were not aware of the legal basis of MND's contention that the Funding Claim was misconceived. This was contained in a redacted paragraph of a letter to the Joint Liquidators which MND were not prepared to reveal to Achernar. Therefore, everyone needed to be aware that whilst both the Joint Liquidators and the Court were aware of both sides of these arguments, each of MND and Achernar necessarily could not have the full picture of the material available to the Joint Liquidators, and which would inform their decision and the court's attitude to it.

97. A further point emerged at the fourth hearing which I need to mention. In an affidavit for the purposes of the fourth hearing, Mr Rhodes had given an account of the Joint Liquidators' fees and expenditure, as requested. Within it there was a reference within the Joint Liquidators' having used £10,000 "out of a deposit" from MND for the purpose of taking legal advice.

98. This caused yet another argument from Advocate Williams at the fourth hearing. This was to submit that there clearly had not been full and frank disclosure by the Joint Liquidators to the court, because the Joint Liquidators had been asserting to the court that they did not have money to obtain legal advice (because the deposit of £53,000 under the CAPA was refundable and could not be used), when there had in fact been funds available for this purpose. This, he submitted, meant that there had been a breach of the "golden rule" of full and frank disclosure to the court, such that the Joint Liquidators' Application should be dismissed outright, on that ground alone. Advocate Tee said that this was a misunderstanding of the position, but as this was not in the evidence, and as I was reluctantly going to grant a further adjournment in any event, I said that this apparent inconsistency should be explained, if it could be, by the Joint Liquidators in evidence for the next hearing, which I strongly hoped could be the final one.

Position at the final hearing

99. At the fifth hearing, on 16th September 2020, therefore, the position was as follows. First Mr Rhodes had sworn a further affidavit which exhibited the entirety of the correspondence which had taken place between the Join Liquidators and MND in the course of negotiating the CAPA. This ran to about 250 pages, and included many amended" travelling" drafts of the CAPA. The affidavit explained that whilst there had indeed been a £53,000 deposit under the CAPA itself, which was intended to be refundable (although it was in fact now depleted to £47,000 as MND had recently consented to £6000 of it being used to obtain the latest round of legal advice) part of the negotiations had also required the outright deposit by MND of £50,000 with the Joint Liquidators for use by them in negotiating the CAPA itself. The reference to part of this (in fact, £40,000) being used to pay for legal advice was a reference to fees for legal advice in the course of such negotiation, and was taken from that £50,000, which had ultimately all been used up. The statement that the Joint Liquidators therefore had no funds, at and from the later stage at which the point arose, with which to seek legal advice with regard to the effect of the CAPA on the Funding Claim was therefore true and correct; there had been no intention to mislead the court or anyone; the correspondence which had now been disclosed to the court had not been thought material to the Application at the time, and was not included so as not to overburden the paperwork before the court, which was already being bulky because of the need to include several lengthy commercial agreements. Mr Rhodes apologized for the error saying that there was no intention to mislead the court, or misstate matters.

100. I fully accept the explanation, and the apology - although I think there is barely any need for this, as the misunderstanding was quite understandable. There had been clear reference in the documents which had been put before the court originally to the requirement of the Joint Liquidators that bidders should provide the wherewithal to enable the Joint Liquidators to negotiate with them, but this was a completely separate matter. Parties do need to exercise some judgment about limiting the paperwork before the court in these days where it can become all too massive and cumbersome. It is certainly a "golden rule" that a party seeking to induce the court to exercise its discretionary powers in that party's favour must place all relevant materials before the court, even those which may not be entirely supportive of its position, but a fair and proper judgment of what is material can be exercised and should not be discouraged.

101. In this case I am perfectly satisfied that the original materials were in fact no less than it was proper to put before the court, and the suggestion that they had not been was, in the event, entirely unfounded. I reject Advocate Williams' subsequent description of this incident as "selective disclosure" which undermined the Joint Liquidator's assertions of insufficient funding to take legal advice at the relevant time, as an extravagant, and opportunistic, mischaracterisation.

The parties' ultimate contentions

102. Mr Rhodes then proceeded to explain to the Court that the Joint Liquidators had now obtained basic legal advice from English leading counsel with regard to the adverse effects on the Funding Claim which Achernar asserted would still follow from the Third CAPA taking effect. This had cost £6,000. He accepted that they had not obtained legal advice on the merits of the Funding Claim itself. The quoted fee for this advice was £20,000 and there was no source of funds for this. (Advocate Tee observed that, somewhat ominously, the fee quotation had dramatically risen once the full set of instructions containing all information known to the Joint Liquidators with relevance to the merits of the Funding Claim had been sent to Leading Counsel.) The Joint Liquidators had considered the advice which they had been able to obtain. They had also considered Achernar's proposals, noting that these did not involve an actual purchase of any of the shares, though, if the CAPA did not go ahead, it did involve the payment of £312,000 into an escrow account. As the shares would be left with the Liquidators, they had considered the effects of any liabilities which would potentially be incurred, if the shares were retained. These included both the possibility that the Georgian authorities would lose patience and terminate the JV Subsidiaries' licences, for non-activity, and the potential incurring of liabilities to remediate the land. They had sought to explore Achernar's offer with regard to payment of the £312,000 and to provide funding for any necessary litigation to pursue the Funding Claim, but they had been unable to reach an acceptable position with regard to this.

103. Having considered all these things, including the competing claims and assertions of the parties, and in the light of such advice as they had been able to take, they had confirmed their view that it was, at this point, in the best interests of the liquidation to pursue the Third CAPA, thereby both obtaining the £312,000 purchase price for (now) only the shares in Ninotsminda and Nazvrevi, and also preserving the Funding Claim of Martkopi available for pursuit with the assistance of Achernar as it might wish. This was because (a) this was a step in realising the Company's assets and progressing the liquidation, which they regarded as being their basic task; (b) Achernar's competing offer was not unconditional, and was therefore not capable of acceptance at this time; and (c) if the Company retained all the Assets, as Achernar wanted the Joint Liquidators to do, there were potential liabilities which might be incurred, which would be obviated at least in part if the Third CAPA was implemented. It was observed, incidentally, that there was no mechanism in Guernsey law enabling a liquidator to disclaim onerous property, and if faced with what they regarded as an impossible situation the Joint Liquidators would have no choice but to resign.

104. In open court, Advocate Williams stated that Achernar still contended that the Joint Liquidators' decision-making process was flawed, but that he would deal with that *in camera*, as it would require looking at confidential legal points. He pointed out, however, in open court, that his clients were presumptively at least 71% of the unsecured creditors by value of the Company, and if the contingent Royalty Claim were upheld, this was over 99%. It was their wish that the Joint Liquidators did not complete the CAPA agreement, on any basis, because of their view that this would prejudice the value of what they regarded as the Company's major asset, comprising the Martkopi Funding Claim, with a potential value of at least $9Mn and possibly $18Mn, and that therefore the wishes of his clients as to the right course to take, in and about the realisation of the Company's assets, should be given great weight by the Liquidators. Indeed, I think he was inclined to submit, that it should be virtually determinative of the matter.

105. At this point, Advocates Newman and Jones withdrew from the Court. Advocate Newman reminded the Court that he was being kept in ignorance of the points being made against his clients because of the *in camera* continuation of the hearing, and, whilst he accepted that this was a proper way to proceed, he requested the Court to be alert to any points affecting MND's interests in his absence, so that he could be given an opportunity to deal with them if appropriate.

106. Advocate Williams then reiterated his submissions (some made previously in open court) that the decision-making process which had been conducted by the Joint Liquidators was flawed (as he submitted it had been flawed all along). He pointed out that the Joint Liquidators had made a decision to implement the original CAPA, but Achernar's intervention had already revealed that the potential legal effects of this had simply not been appreciated or considered at all, let alone adequately. The amended CAPA which had now been substituted provided that MND would pay the same price for only two out of the three sets of

shares. This, he said, cast doubt on whether the true value of the Assets had been obtained in the first place and, indeed whether even the current purchase price reflected this true value. These doubts meant that the court should not, even could not, grant the Joint Liquidators' Application.

107. In addition, the subsequent production of the materials with regard to the "second deposit" had not been disclosed at the outset of the Application, even though (he submitted) it was obvious that they had played a part in the Joint Liquidators' decision-making process. Even if the court were of the view that this did not amount to sufficiently culpable non-disclosure as to require the Application to be dismissed out of hand, it still raised doubts as to whether the Joint Liquidators had disclosed all materials affecting their decision to the court, and thus whether the decision-making process had been reliable and could be implicitly approved. He submitted that these doubts must be such as to cause the court to refuse to give its blessing to the Joint Liquidators' present decision, since this would provide them with an insurance policy and immunisation from any future claim or challenge in relation to it. They could, of course, proceed with the Third CAPA without the court's blessing if they remained confident of the propriety of their decision, but that would be a matter for them. The authorities counseled that the court should be "cautious "about acting so as to provide such an insurance policy, and if in any doubt, should decline to do so.

108. I reject both these points as being of little, if any, influence or evidential weight in this matter. The first merely shows that the Purchaser (MND) could be induced to pay (in effect) a higher price when presented with a previously unexpected adverse change of circumstance. To my mind it simply illustrates the effect of changes of circumstance on a party's negotiating attitude, and I do not see that it shows anything about any real flaws in the decision making process on the part of the Joint Liquidators. The second point is, in my judgment, a very insubstantial argument about credibility, which I do not regard as standing up at all in the context of the wholly credible explanation proffered by Mr Rhodes.

109. Moving to Advocate Williams' more direct and substantial objections, the following can, I think, be distilled as being his main contentions. First, and overarchingly, the Joint Liquidators' decision to pursue the Third CAPA rather than the offer now on the table from Achernar was, in effect, perverse, having regard to the latter's obvious (he submitted) merits and advantages. Second, there was no evidence justifying the Joint Liquidators' professed concerns about future liabilities if they retained the assets. Third their objection that Achernar's offer to fund the pursuit of the Funding Claim by a suggested Litigation Funding Agreement was still subject to conditions could be satisfactorily and definitively resolved by the court if necessary. Fourth, as the overwhelming majority unsecured creditor, Achernar were entitled to have their views as to the better way forward (as between the choices facing the Joint Liquidators) respected and implemented, or at least treated as having a presumption in favour of their implementation, the strength of which could not be displaced in the present case. It is appropriate to leave this last point to separate consideration, as that is the way in which the final hearing developed.

110. Elaborating as to his first contention, reminding the court of the course of this Application, mentioned above, Advocate Williams took the court through the effects on contractual rights which he said would still ensue from the implementation of the Third CAPA. It is not appropriate to set these out in this open judgment, but his submission was that these effects would clearly have a depreciatory effect on the value of the Funding Claim as an asset of the Company, in the hands of the Joint Liquidators. Why, he asked rhetorically, would you take a step which would have the effects which he pointed out, when the alternative was the offer which Achernar had now made, namely to pay the same £312,000 figure to the Joint Liquidators to retain the Assets (he confirmed that Achernar were not offering to buy the Assets themselves) and then to enter into an agreement with the Joint Liquidators as to funding the pursuit of the valuable Funding claim itself, in addition? In answer to the court's comment that this was coming perilously close to second guessing a commercial decision, he responded that if the legal and commercial implications were properly considered, the decision was so outlandish that it could not be regarded as a decision that a reasonable liquidator could make. In other words, and as he accepted, his submission was that the overall decision was (in shorthand) *"Wednesbury* unreasonable".

111. As to the second main reason, namely the Joint Liquidators' concerns about future events which could deplete the value of the Company's Assets (ie the value of the shares in the JV Subsidiaries), the first was

that the Georgian authorities could, at any time, revoke the JV Subsidiaries' licences, given these companies' lack of activity. He submitted that that fear was not borne out by any evidence, because the authorities had obviously not done so during the last three or four years, nor was there any threat, nor sign of any such intention. As to the second fear, which was that of incurring potential liabilities for remediation, the only evidence proffered in support of this was a statement that, in respect of Ninotsminda, a report estimating such potential liability at about $3.7Mn had been obtained. This, he submitted was at least a second hand account, and so vague and untestable by any method, as to be worthless as any form of evidence. Therefore, he submitted, these fears were exaggerated and unjustified.

112. As to his third reason, he disputed the validity of the Joint Liquidators' contention that Achernar's offer could not be accepted, because it had not proved possible to agree acceptable unconditional terms with regard to their funding of future litigation to realise the value of the Funding Claim. Advocate Williams submitted that such reservations could and should be dismissed, because, even whilst contending that those proposals were perfectly proper, his clients had made it clear that if there were any problem or disagreement, they would be willing to "*fall on the sword of the court*" and let the court decide what should be appropriate terms. That, he submitted provided a perfectly sound, certain and workable basis for proceeding with Achernar's proposals, which it was unreasonable to reject.

113. In response, Advocate Tee argued, on the general point, that the Joint Liquidators had, in effect, now come to the end of all available practical means of informing themselves on all relevant matters. Having done so, they were faced with two competing courses of action, namely to pursue approval of the Third CAPA, or to pursue further negotiations (as it in effect was) with regard to Achernar's current proposals. Having considered the merits of both possible courses, and all other relevant factors, they had made their decision, which was to prefer the former route. They had explained their reasoning. It included their evaluation of the likely course of events if they did proceed with Achernar's proposals, as to which some, at least, of the evidence available to them, and their thinking, was in the confidential exhibits and confined to the totally private part of the hearing before the court. They did not want to become involved in any way in managing the Company's business, which they felt Achernar's proposals were drawing them into doing; they regarded this as not being feasible nor beneficial, quite apart from being inappropriate. Knowing everything material, it could not be said that the Joint Liquidators' decision as to their preferred course was irrational, or so unreasonable that no reasonable liquidator in their position could properly come to that decision (ie to elect to go down the CAPA route rather than continue talking to Achernar with a view to pursuing its preferred route). That was really an end to the matter. The court could, and should, conclude that the Joint Liquidators had done their job properly in arriving at this conclusion and should bless their decision.

114. Elaborating on the particular points made by Advocate Williams, the Joint Liquidators' concerns over potential liabilities were not to be dismissed. They had explained cogently why their lack of funds and the physical situation of the information required prevented their obtaining any more substantial evidence than they had, but in any event, their conclusions accorded with common sense and commercial experience. It was not to be forgotten that there was no power for a liquidator to disclaim onerous property in Guernsey Law.

115. With regard to Achernar's proposals, these were not, even now, in the form of an offer which was *prima facie* capable of immediate acceptance, and the Joint Liquidators had significant reservations as to whether the proposed terms could properly be entered into by them, in principle. One reason for this I will not recount in this open judgment because it alludes indirectly to the commercially sensitive and confidential materials. Otherwise, their concerns were to do with whether the terms proposed by Achernar could be properly accepted, having regard to the principles of permissible Litigation Funding Agreement terms, as considered and laid down in *Re Providence Investment Funds PCC Ltd (in administration)* (2017) Royal Court Judgment 44/2017 . It was not accepted by the Joint Liquidators that any of their concerns could be resolved in the manner suggested by Achernar, because it was doubtful if the court would accept jurisdiction to act as an umpire or arbitrator between the Joint Liquidators and Achernar over the terms of an agreement between them. But in any event, this was not a course which the Joint Liquidators viewed as attractive, or even as appropriate to be entered into by them, in the performance of their office.

116. In short, the Joint Liquidators' decision as to the best way forward, in all (and he emphasised "all") the circumstances of the case was to accept and pursue the Third CAPA, which was clear and certain, financially perhaps even a better deal than the original CAPA, accommodated what had appeared to be Achernar's main and arguable concern about potentially devaluing a company Asset in the shape of the Martkopi Funding Claim. The Achernar proposals were not clear, or certain, and the Joint Liquidators had formed the view that they were not really in accord with the due progress of the *liquidation* of the Company to best advantage. It could not be said that this genuinely and conscientiously formed decision was perverse, or irrational; on the contrary, its rationality was apparent from the explanation given.

117. With regard to the above arguments I prefer and accept those of Advocate Tee. If the matter were to be decided at this point, therefore, I would think it appropriate to grant the Application in whatever worded form would be appropriate to give the court's blessing to the Joint Liquidators' decision to proceed with the Third CAPA. However, I have not dealt with Advocate Williams' fourth and final point, and it is one which has troubled me somewhat.

118. This submission is as to the effect of the fact that his clients claim to be at least 71.6% and possibly even over 99% majority unsecured creditors in the liquidation, and what weight must or ought therefore to be accorded to their views and wishes by the Joint Liquidators, and therefore whether the Joint Liquidators have actually given this fact sufficient weight, according to any established authoritative principles. This was a point which had really only been focused on firmly at the fifth hearing. I suspect that this was because, up to that point, Achernar had been concentrating on other bases for defeating the Joint Liquidators' Application, whether technical or on substantive merits. At the fifth hearing, however, when this point was canvassed, amongst others, I was not satisfied at the conclusion of the hearing that I had received full enough argument upon it, to make my decision. I therefore requested written submissions from the Joint Liquidators (who were the last to address me on that occasion) with an opportunity to other parties – obviously in particular Achernar – to reply within 7 days thereafter.

119. In the event, Achernar's reply ranged more widely than this one point, and prompted a request from the Joint Liquidators to be allowed to respond on the further new points which they said were raised. I allowed them to do so, since they were, as Applicants, potentially entitled to the last word. However, nothing really turned on this further material, and I return to the particular point under consideration, namely the degree of respect or deference which ought to be accorded to a majority creditor's views, if known or sought, with regard to decisions in a liquidation.

120. Essentially, Advocate Williams argues that, with his clients constituting the vast majority creditor of the Company on any basis, they are the party with a similarly weighty interest in the fruitful conduct of the liquidation and, in those circumstances, their views and wishes as to the best approach to any particular aspect of that task must carry great weight and, indeed, he would submit, sufficient weight in effect to carry the day, at least in the absence of a compelling reason to the contrary. In rejecting Achernar's proposals, the Joint Liquidators therefore had not, and could not have given the weight which should have been given to those views. For that reason the court cannot and should not bless the Joint Liquidators' current decision, bearing in mind that this will, in effect pre-determine any objection that Achernar might otherwise be able to make to his decision after the event, and prevent any claim they might otherwise have in regard to it.

121. Advocate Tee, on behalf of the Joint Liquidators, concedes that the known views of majority creditors must carry some weight and should be taken into account, but he submits that there is no rule, or even presumption (certainly in Guernsey law) that they must be decisive of the matter. The Joint Liquidators have taken the views and wishes of Achernar - which have been all too obvious in practice - into account, through involving them in the bidding process and ascertaining their response, giving them opportunities to make their views and response known at various times, taking their objection to the originally proposed CAPA into account and procuring its modification and, latterly, taking their further objections and proposals into account in exploring with them what they could offer. However, their views - which can so obviously be deduced from their pressing of their own case, such that formally seeking consultation

with them as a separate exercise would be superfluous - do not appear to the Joint Liquidators to present a more advantageous option than the one they have preferred. Having considered all aspects, including giving due weight to the fact of Achernar's apparent majority status, they are of the view that they do not represent the best way forward to progress the liquidation in the interests of the potential unsecured creditors of the Company, viewed as a general class. They therefore prefer to go with (now) the Third CAPA.

122. I was referred at the hearing to certain authorities, and in particular *Re Longmeade Ltd* [2016] EWHC 356 a recent decision of Snowden J, in the English courts. However, it was a textbook reference to *BCCI International SA (No 3)* [1993] BCLC 1490 BCLC, as authority for the proposition that the views of the majority of creditors should carry significant weight unless there were "special circumstances", but without stating what such circumstances might be, or were in that case, which caused me to request further written submissions.

123. Advocate Williams argues, first, that whilst there is no provision in the Companies Law equivalent to section 195 of the English Insolvency Act 1986, which expressly authorises a liquidator to have regard to the wishes of creditors of a company in liquidation according to the value of their respective debts, the liquidation process in Guernsey is sufficiently similar that this must be impliedly authorised. I accept that general point. However, it does draw attention to the fact that English liquidation procedure is still somewhat different from that in Guernsey, in that in England creditors' debts are established (proved) at an initial stage, and thereafter there are statutory requirements and provisions for creditors' committees to be appointed and to be consulted, and to guide the liquidation under a formally established structure, thus showing clear recognition of the place and influence of the views of creditors in liquidation decisions. Previously, some actions by liquidators in England actually required, by law, formal sanction from either the court or the liquidation committee, but those rules have been recently relaxed in relation to small enterprises, by the *Small Business and Employment Act* 2015 removing the requirement for such sanctions. This makes the situation with regard to such decisions more like that in Guernsey, where a liquidator's decisions are taken entirely on his own account, and are thus, in effect commercial decisions. However, this difference of context and history needs to be borne in mind when considering the influence of English authority in any particular Guernsey situation.

124. Advocate Williams refers first to *Re Agricultural Industries Ltd* [1952] All ER 1188 as a clear foundation of the principle of recognition of the majority creditors' wishes. That was a dispute between contributories rather than creditors, but he contends that the principle – that the liquidation should be conducted in accordance with the wishes of those with the majority interest in the outcome, and on the assumption that they are likely to know best what *is* in their interests – is the same. In that case, the court considered that it was unsatisfactory to deny the majority the opportunity to pursue a particular course which they wished to have pursued, even if it might mean "throwing good money after bad". (see 1190 at D-E). That authority was cited, it seemed to me, for the notable strength which this quotation would appear to confer on the principle of respect for the majority interest views, in English law.

125. Advocate Williams then cites *Re Longmeade Ltd* [2016] EWHC 356 as authority for the proposition that the liquidators should follow the views of the majority in value of the creditors unless there are "special circumstances" that dictate otherwise, or the relevant majority is "influenced by extraneous factors" or "extraneous considerations". At [51] Snowden J said

> "*If creditors are not promoting a view based on their capacity as such, but are doing so as the result of extraneous factors which are not shared by or are even contrary to the interests of the remainder of the class, then, such views should be discounted or not given effect."*

Advocate Williams submits that there are no such special circumstances or extraneous factors to be found here.

126. As regards "special circumstances", having had the opportunity of reading the *BCCI* case (above), I note that it is an extremely complex case, involving an application to the court to approve compromise

agreements in respect of claims over the assets of a conglomerate of companies, the mechanisms of which were opposed by large numbers of creditors, and which were also challenged on the grounds that they were ultra vires for purporting to effect results which could only properly be achieved by Scheme of Arrangement processes, or which infringed the *pari passu* distribution rules. The court did approve the compromise arrangements, despite the above objections, and, in doing so, held that, it would have been practically impossible to hold conventional creditors' meetings, as generally required by statute.

127. Advocate Williams submits that that last point was the "special circumstances" in that case. I do not think it was quite so simple as that, as it seems to me that pragmatic considerations (which can largely be distilled down to the fact that the liquidators had been working extremely hard on a huge and complex liquidation to disentangle the affairs of the (several) companies involved, and the proposed agreements made some significant concrete progress in the liquidation) were at work, even if only as background. I accept that the practical difficulty of holding meetings was a factor mentioned, and that it is not applicable in this case. The *BCCI* case is, though, so very different from the present situation – and indeed so notorious – that I do not find it to be of great help, except that it does, to my mind, show that even in the English, more formally structured, jurisdiction, if the court considers that what the liquidators wish to do is the best practical way forward, they will be disinclined to let objections from creditors, even significant creditors, prevent such progress.

128. Founding on the general principles, however, Advocate Williams submits that the wishes of the Achernar parties really must be allowed to carry the day, (and that this prevents the court from blessing the Third CAPA) because of their overwhelming majority position and the motivation this gives them to ensure realisation of the Funding Claim to best advantage, which is for the benefit of all the general class of the Company's unsecured creditors. He submits further that the Joint Liquidators did not, in fact, canvas Achernar's views about proceeding to deal with MND (as they should therefore have done) and that they have never really done so. Nor did they canvas Achernar's views and knowledge about the strength and validity of the Funding Claim, which Achernar's previous relationship with MND has given them, and this is a further flaw in the decision making process, which means that it should not be "blessed".

129. The Joint Liquidators dispute the accusation of not having consulted Achernar or considered their views, pointing to the whole history of their approach to the liquidation, as outlined above, as inevitably involving consideration of Achernar's views, in the context of seeking offers from the parties - and they point out that, apart from these being highly specialist Assets, owing to contractual terms which remain in operation, there is scarcely a wide market for them, and Achernar and MND are actually the only realistic purchasers of the Assets.

130. With regard to *Re Longmeade* (above) seemingly the main plank of Achernar's objections on score, they refer me, in particular to [66] where Snowden J sets out his distilled general principles as to the weight to be given to creditors' views where these are simply a matter which may be taken into account by a liquidator in making a commercial decision, as applied both in that case and in this. Among these, at [66] and referring to a decision entrusted to the liquidator without the requirement for formal creditor or court sanction (which is the position here) Snowden J says:-

> *"….*
>
> *(ii) the liquidators may, but are not obliged to, consult the creditors… who have an interest in the estate;*
>
> *(iii) in taking that decision, the liquidators should act in what they believe to be the best interests of the insolvent company and all those who have an interest in its estate;*
>
> *(iv) the liquidators should normally give weight to the reasoned views of the majority of such creditors … provided that they are uninfluenced by extraneous considerations;*
>
> *(v) if all those who are interested in the insolvent estate are fully informed and are unanimously of the same view, the liquidators should ordinarily give effect to their wishes…*"

131. Advocate Tee points out that it is therefore only where the views of the creditors are unanimous that these become determinative, and even then, this is only "ordinarily". In this case, whilst Achernar are a very significant majority creditor, the other unsecured creditors support the Joint Liquidators' decision, or have expressed no view (Hauteville). He also points out that even significant majority views are not to be taken into account if they are influenced by "extraneous considerations" (ie leaving aside any question of "special circumstances") and he challenges Advocate Williams' assertion that Achernar were expressing their views merely as creditors of the Company. Having regard to their conduct, and to their past history of involvement in the projects, he suggests that there appears to be a strong extraneous factor at work, in the shape of an underlying contractual or commercial contest between Achernar and MND. (Advocate Williams' response to this latter point is that, if that is the case, then apart from Hauteville, the minority creditors are quite plainly, partisan as well.)

132. The Joint Liquidators' submission is, in summary, that they are charged with winding up the Company. *Prima facie*, their commercial judgments must be respected; they have an asset to sell, and, in effect, a duty to sell it. They have given what they regard as due weight to Achernar's views, as embodied in Achernar's original offers, comments and proposals, and it is to be noted that Achernar are not proposing to buy the Assets themselves. The Joint Liquidators have concluded that the best, if not the only, way to progress with the liquidation of the Company, in the interests of the general body of creditors as a class, is to enter into (now) the Third CAPA. With regard to the question of the weight to be given to majority creditors' views, whilst accepting the general proposition that these should be given weight, the Joint Liquidators contend that, at the end of the day, those views do not have to be decisive, and where, as here, they perceive good commercial reasons for not implementing them as they have explained, their decision cannot be overruled on account of its not implementing the majority wishes, but only on the grounds of perversity.

Decision

133. Having considered the further arguments, and all the circumstances as they have emerged and developed in this case, I am satisfied that the Joint Liquidators cannot be said to have failed to give due weight as required by law to Achernar's views, nor to have failed to consider them insofar as they otherwise ought reasonably to do, and that their final decision cannot be characterised as perverse.

134. I would endorse the view that Achernar's views do not appear to be those of a totally disinterested creditor. Advocate Williams in fact argued that their views should be accorded particular respect because of their greater knowledge, acquired through their previous involvement with the projects. This, however, is a double-edged argument, as it does raise the question whether that previous involvement suggests that factors outside the mere recovery of a debt may be at work. Indeed, Achernar's whole conduct in respect of this Application, in taking every available point, technical or otherwise, to seek to have it dismissed, at every juncture, has been so remarkable as to suggest a wider interest in its outcome than simply improving their perceived prospects of maximising recovery of their claimed debt.

135. In the end the additional final factor that the Joint Liquidators' decision defies the wishes of an apparent majority creditor, even of the magnitude of Achernar's claim, does not cause me to doubt that the Joint Liquidators have given due consideration to all material facts, including that one. I will, therefore, grant the Application in its most recent amended form, and grant approval to the Third CAPA.

136. I would add just one final point on this last aspect. It seems to me that the Joint Liquidators are not, in making their decision as to the way they think it best to progress the litigation, obliged to ignore entirely their own interests in this. As Liquidators, they in fact do have their own interest in the estate of the Company, in that their proper fees and expenses are recoverable from it, and even in priority, in the liquidation itself. Even a trustee is not obliged totally to ignore his own interest in a trust estate arising from his trustee's lien to recover his costs (and by the same token, his proper remuneration) when making investment decisions on behalf of the trust, even though he must still, of course, act reasonably and evenhandedly as between any and all competing beneficial interests in the trust estate, including such as he may have himself: see *X v A* [2000] 1 All ER 490 at 495b. The extent or effect of this proposition in a

liquidation context was not canvassed in argument, but it seems to me, if anything, to reinforce the weight which could properly be attached to the Joint Liquidators' own commercial view of the better way forward, to enable them to conclude their commission.

137. As stated, therefore, I will grant the amended Application and "bless" the entering into of the Third CAPA. I would propose that the question of costs be dealt with on the basis of written submissions, unless any party considers that an oral hearing is necessary.

Conclusion - principles

138. I conclude, therefore, with comment on some general principles which have arisen in this case:-

(1) Section 426 of the Companies Law (Guernsey) 2008, whilst authorising a liquidator to seek the court's "directions," is wide enough in its scope to include an application to the court to approve a liquidator's intended course of action, either by persuasive analogy with the English decision on the equivalent English companies jurisdiction as exemplified in *Re Nortel Networks UK Limited* [2016] EWHC 2769 (Ch) or, if necessary, under the court's inherent jurisdiction.

(2) Such an application will be considered on the same principles as a request by a trustee to "bless" a momentous decision, according to the second category of trustee applications recognised in *Public Trustee v Cooper* [2001] WTLR 901 at 922-4, but, naturally, taking account of the different purposes of a trust and of a liquidation. The apparent serious likelihood of the liquidator's decision provoking litigation may well be enough to make the decision sufficiently "momentous" to justify such an application.

(3) The application is analogous to a *Beddoe* application, and can be conducted in private between the court and the applicant. However if it is sought to bind any party to the result of the application, that party will need to be convened and heard on the matter.

(4) The nature of the exercise on such an application is all-important. It is to satisfy the court that the liquidator's decision has been properly taken (or to seek directions as to how to take it properly); it is not for the court to give direct approbation of the merits of the decision. The court will not do this, as this would effectively remove the decision-making power from the office-holder to whom it has been confided. The court's "blessing" simply provides the office-holder with a judicial determination that, *on the evidence put before the court at the relevant time*, (this is to be emphasised) the decision which he took was a proper decision because it was taken in a proper way, and within the general bounds of what could be a reasonable decision in the circumstances. In other words, the decision-maker had shown that he had taken into account all, and only, relevant facts and his decision was not illogical or irrational. That determination provides the decision-maker, (the office-holder) with comfort in the form of evidence which he can rely on in the future. As regards any party to the application, it will create a *res judicata* on the relevant facts.

(5) Although a "proper" decision must mean a properly and fully informed decision, there is no absolute rule that a failure to take potentially helpful legal (or other professional) advice would cause the court to refuse to "bless" the decision. If the possibility of doing so had been genuinely investigated and it had been found impossible or impractical, eg through lack of available funds or funding, the Court could accept that the decision was the best which could be taken in the material circumstances, including lack of such advice.

(6) If the court does not give its "blessing", this does not mean that the particular decision cannot be implemented by the liquidator if he chooses to do so. It merely means that the liquidator would have to defend such decision, if it came to it, without the benefit of the court's endorsement that he had been found to have acted properly in the situation disclosed to the court at the relevant time. This does not mean that the transaction, if proceeded with, would inevitably be found to be wrong or improperly taken. There could be many reasons why a court might decline to give its formal

stamp of approval - such as gaps in the factual background, or suchlike - for a transaction which, on closer subsequent examination, turned out to be perfectly reasonable in fact.

(7) To obtain the "insurance policy" of the court's blessing, the liquidator must, of course, fully explain the situation, the facts and matters which have been considered, and his reasoning process in arriving at the decision which he asks the court to bless. This material will all need to be put into evidence to the court. Since the applicant is taking advantage of the court's powers he must act in good faith and is required to make full and complete disclosure to the court of any matters which might be germane to the decision taken, even if these might apparently be adverse. The court would need to know, and is entitled to know, why the applicant still regards the relevant decision as being the appropriate way forward, despite any such factors.

(8) Three particular points may need consideration, therefore, arising from the above requirement, especially where the issue relates to a commercial transaction:-

i. If a liquidator enters into a contractual obligation to endeavour to obtain the court's approval to a proposed transaction (as here), the liquidator should be careful to ensure that this is worded so as not to impede his obligation and ability to make full disclosure to the court, rather than place himself in any difficulty as future circumstances may emerge;

ii. Similarly, the liquidator should take care to ensure that any contractual obligations such as "exclusivity of dealing" clauses are framed so as not to fetter his possible obligation to consider and act on all possible information, or indeed opportunity, which may come to him, and which he may therefore be required, as a matter of duty to the court, to put before the court when asking the court to bless his actual decision.

iii. If relevant material comes to the liquidator's knowledge only on a confidential basis, then the liquidator must at least reveal this fact to the court, and that such material has had an effect on his decision. The court will then have to consider whether it can, in those circumstances, "bless" the decision without knowledge of the content of the confidential material, or not. If not, then the difficulty may be capable of resolution by the party to whom the confidence is owed agreeing to its disclosure to the court alone, or by certain parts of the hearing or argument being conducted in private or with particular parties asked to withdraw.

139. In summary, the applicant liquidator (or other similar office-holder) needs to bear in mind, in preparing evidence for the court in such an application, that its objective is to take the court through the whole of the decision making process which he has himself taken, so as to satisfy the court that this has been careful, comprehensive and rational, according to the particular circumstances, and thus that the decision which he has made, but which remains his own decision, has been reasonably made.

Hazel Marshall QC
Lieutenant Bailiff

23rd October 2020