



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

FSD CAUSE NO: FSD 168 of 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)

**IN THE MATTER OF GLOBAL FIDELITY BANK, LTD (IN VOLUNTARY
LIQUIDATION)**

Appearances: Tony Heaver-Wren and Heather Froude of Appleby (Cayman) Ltd for Adam Keenan and Michael Pearson of FFP Limited, the Petitioners;

Mark Goodman and Katie Logan of Campbells LLP for Ascentra Holdings, Inc (in voluntary liquidation)

Before: **The Hon. Justice David Doyle**

Heard: **22 July 2021**

Decision: **22 July 2021**

**Draft Reasons
Circulated:** **16 August 2021**

**Reasons
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HEADNOTE

In an insolvency situation where one major creditor has raised an objection to the proposed joint official liquidators on the ground of a perceived lack of independence, said to arise out of a prior relationship with the insolvent company, the court should take account of the views and wishes of the creditor, giving them significant weight where appropriate, and adopt a 3-stage approach namely (1) identify the relationship;(2) determine whether it is capable of impairing the appearance of independence and if so (3) whether it is sufficiently material to the liquidation in question that a fair-minded and informed stakeholder would reasonably object to the appointment of the nominated practitioners in question



REASONS

Introduction

1. On Thursday 22 July 2021 I granted relief requested by Adam Keenan and Michael Pearson (the “Petitioners”) of FFP Limited (“FFP”) in a petition dated 16 June 2021 and made an order that:

- (1) the voluntary winding up of Global Fidelity Bank, Ltd (in voluntary liquidation) (the “Bank”) be continued subject to the supervision of the Grand Court under the provisions of the Companies Act (2021 Revision) (the “Act”); and
- (2) the Petitioners be appointed as joint official liquidators (“JOLs”) of the Bank.

I now provide my reasons for such decisions.

2. The first part of the requested judicial relief in respect of the supervision order was not contentious. The directors had not provided a declaration of solvency pursuant to section 124(1) of the Act. It was sensible and appropriate that the liquidation of the Bank, which had been granted a Class B Bank License on 31 October 2014, be continued subject to the supervision of the court and I made an unopposed order to that effect.
3. The second issue as to who should be appointed as JOLs of the Bank was however contentious.
4. The Petitioners had been appointed joint voluntary liquidators (“JVLs”) of the Bank prior to the supervision order being made. The Petitioners did not advocate for their own appointment as JOLs (but were willing to act if appointed) and they stated that they took no position in respect of the opposition from one significant creditor to their appointment as JOLs. The Petitioners did however provide the court with useful information and evidence which greatly assisted the court in the fair and just determination of the petition.
5. Ascentra Holdings, Inc (in voluntary liquidation) (“Ascentra”) is one of the Bank’s largest creditors. It holds over US\$8 million in its account with the Bank. Ascentra did not oppose the making of a supervision order but vigorously opposed the appointment of the Petitioners as JOLs. Ascentra initially sought the appointment of Ms Margot MacInnis



and Mr John Royle of Grant Thornton Specialist Services Limited as official liquidators but once conflicts became apparent Ascentra promptly filed alternative consents to act from Ms Elizabeth Mackay and Ms Paula Richmond of Kalo (Cayman) Limited (“Kalo”).

6. I should record that no other creditors opposed the appointment of the Petitioners as JOLs. Indeed, on the eve of the hearing a significant development occurred in that a letter dated 21 July 2021 from Bedell Cristin Cayman Partnership was filed with the court indicating that Sterling Trust (Cayman) Limited in its capacity as trustee of the CS Irrevocable Trust (“Sterling”), holding deposits to a value in excess of \$8 million with the Bank, expressly did not object to the Petitioners being appointed as JOLs.
7. It is also important to note that the hearing of the petition was advertised on 14 and 16 July 2021. Moreover, in advance of the public advertisements, the Petitioners had sent communications to all account holders including one on 15 June 2021 in respect of the voluntary liquidation and one on 13 July 2021 in respect of the application for a supervision order and the appointment of JOLs which specifically brought to their attention the fact that “a depositor in the Bank has opposed our appointment and is seeking to have its nominees appointed in our stead.” The creditors knew that a challenge was on in respect of the identity of the JOLs but, other than Ascentra, not one creditor chose to oppose the Petitioners’ appointment and Sterling, another significant creditor, expressly brought its non-opposition to the attention of the Petitioners who subsequently, as they were duty bound to do, brought it to the attention of the court.
8. The Cayman Islands Monetary Authority (the “Authority”) agreed that a supervision order should be made and remained neutral as to the identity of the JOLs. I am grateful to Menelik Miller and Marilyn Brandt (representatives of the Authority) who attended the hearing as observers and without making any formal appearances or making any submissions maintained their position of neutrality on the main disputed issue before the court.

The Petitioners’ prior connection with the Bank

9. Before turning to the basis of Ascentra’s opposition to the appointment of the Petitioners as JOLs and their preference for Kalo it will be helpful to consider in some detail the prior connection between the Petitioners and the Bank. In cases such as this the authorities



stress that the court must first identify the relationship in respect of which complaint is made.

10. On behalf of Ascentra it was in effect submitted that the prior connection of the Petitioners with the Bank disqualified them from being appointed JOLs. Mr Graham Robinson the voluntary liquidator of Ascentra in his affidavit sworn on 8 July 2021 referred to the correspondence between Ascentra, the Bank and the Petitioners. The correspondence with the Bank from 2 June 2021 onwards culminated in Campbells LLP (for Ascentra) writing to the Bank on 11 June 2021 threatening the presentation of a winding up petition immediately after close of business on 11 June 2021 and without further notice if the payment of US\$8,084,358.15 was not remitted to their client in full. The amount was not remitted. No winding up petition followed from Ascentra. The Petitioners' petition for a supervision order was filed on 16 June 2021.
11. Adam Keenan in his affidavit sworn on 16 June 2021 indicated that on 14 June 2021 he was appointed as joint voluntary liquidator of the Bank together with Mr Michael Pearson. This followed a short 4-day period of having been engaged by the Bank to review limited financial records and to produce an independent financial review of the Bank. Adam Keenan and Michael Pearson are stated to be of FFP. Mr Keenan stated that he understood from the directors that they were advised to seek a report on the financial status of the Bank. Accordingly, on or around 4 June 2021, FFP had been approached by the directors with a request that FFP conduct the independent financial review of the Bank and prepare a report setting out its findings (the "FFP Report").
12. A letter of engagement between the Bank and FFP was signed on 10 June 2021. It was agreed with the directors that the FFP Report would be prepared by 14 June 2021. The limited work undertaken by FFP can be seen from the letter of engagement which is exhibited in the evidence and from the short confidential report dealing with the issues raised in the letter of engagement. The scope of services referred to a review of the Bank's current financial position including:
 - summary of the most recent audited financial statements;
 - review and comments on the most recent unaudited balance sheet including any adjustments that are proposed or which should be made;



- review and comments on the most recent unaudited profit and loss account/income statement including any adjustments that are proposed or which should be made; and
- review and comments on any forward-looking financial projections including any adjustments that are proposed or which should be made.

It was expressly stated for the avoidance of any doubt that the work would not constitute an audit performed in accordance with generally accepted accounting principles.

13. Mr Keenan said in order to prepare the FFP Report, FFP reviewed the Bank's audited financial statements for the year ended 31 December 2018 (being the latest audited financial statements available as the audits for 2019 and 2020 had not been finalised) and the Bank's internal management accounts for the period 1 January 2021 to 31 March 2021.
14. Mr Keenan said that the FFP Report was prepared on a limited and urgent basis. The scope of the FFP Report was limited to reviewing and commenting on the management accounts, unaudited profit and loss account/income statement and forward-looking financial projections including any adjustments to the same as proposed by the Bank's management. It was Mr Keenan's view that his role and FFP's role in their preparation of the FFP Report had not affected his independence vis-à-vis the Bank. It is, of course, helpful for Mr Keenan to express such a view but the issue, as he no doubt appreciated, was ultimately one for the court to determine taking into account all relevant factors.
15. Mr Keenan stated that on 14 June 2021 FFP sent a final draft of the FFP Report to the directors of the Bank. The FFP Report was then finalised and issued on 16 June 2021. There were no substantive changes between the version circulated to the directors on 14 June 2021 and the final version issued on 16 June 2021.
16. Mr Keenan stated that on receiving the final draft of the FFP Report on 14 June 2021 the directors resolved by unanimous written resolution to place the Bank into voluntary liquidation and to appoint Mr Pearson and Mr Keenan as JVLs. On 14 June 2021 the shareholders unanimously passed a special written resolution that the Bank be placed into voluntary liquidation and an ordinary written resolution that Mr Pearson and Mr Keenan be appointed JVLs.

17. It can be seen from the evidence that the Petitioners' prior involvement with the Bank was extremely limited in terms of the work they undertook, the issues they were to and in fact considered, and the very short time duration over which such work was undertaken. They were engaged by engagement letter dated 9 June 2021 and produced the final draft on 14 June 2021 and the FFP Report was finalised and issued, without significant amendment, on 16 June 2021. The scope of their engagement was extremely limited. They did not give any advice to the management of the Bank. They simply objectively reported on the financial position of the Bank from the Bank's own records. In view of the deteriorating financial position of the Bank liquidation was inevitable and the Petitioners were subsequently appointed JVLs. The evidence showed that in the knowledge that no declaration of solvency would be forthcoming from the directors, the Petitioners immediately and correctly applied for a supervision order. The Petitioners' prior limited involvement with the Bank was far removed from the facts and circumstances of the other cases brought to the attention of the court where a perception of a lack of independence properly and objectively arose.

The basis of Ascentra's opposition

18. What then was the basis of Ascentra's opposition to the appointment of the Petitioners as JOLs? In summary and in substance it was as follows:
- (1) Before turning to the actual grounds of opposition, Ascentra submitted that the Petitioners must take a neutral role as to the identity of the JOLs and in effect invited the court to place little weight on the Petitioners' submissions in respect of the identity of the JOLs especially where these became partisan and crossed the line of professed neutrality;
 - (2) Ascentra prayed in aid the background to the appointment of the Petitioners as JVLs and their prior involvement with the Bank, its directors and management;
 - (3) Ascentra indicated that the Petitioners agreed with Ascentra that a thorough investigation into the conduct of and decisions taken by the directors and the Bank's management was required;
 - (4) the JOLs should not only be independent but should be seen to be independent;



- (5) because of the way in which they had been appointed (and without any criticism of them personally) Ascentra had no confidence in the Petitioners' independence;
- (6) Ascentra is a "very substantial creditor" of the Bank and has a real economic interest in the outcome of the liquidation;
- (7) in the circumstances of the failure of the Bank it should not be allowed to choose its own liquidators;
- (8) if the Petitioners are appointed JOLs they would be required to investigate the very individuals who appointed them and this creates "an unavoidable and irremediable appearance of partiality towards the Directors attached to Messrs. Keenan and Pearson, resulting from their original engagement and eventual appointment." (paragraph 21 of Ascentra's skeleton argument dated 15 July 2021);
- (9) much reliance was placed on *Re Asia Private Credit Fund and Re Adamas Asia Strategic Opportunity Fund Limited* 2020 (1) CILR 134 and the need to take on board the views of the economic and financial stakeholders, the importance of perception and confidence in those who are appointed JOLs and for the court to be on guard in respect of partiality attaching to the Petitioners resulting from their appointment by those whose activities need to be investigated by the JOLs;
- (10) the appearance of partiality and lack of independence will make the Petitioners less effective and will undermine the credibility of any investigations they undertake in relation to the directors;
- (11) if the court is satisfied that an appearance of partiality and lack of independence attaches to the Petitioners then the court is required by Regulation 6 of the Insolvency Practitioners' Regulations 2018 not to appoint them as JOLs (Jones J in *Re Hadar Fund (in voluntary liquidation)* 2013(2) CILR Note 4; 13 August 2013 at paragraph 21); and
- (12) the fact that the Petitioners have undertaken work to date does not justify their appointment in the face of opposition from Ascentra and in view of their perceived lack of independence. In any event there would be minimal wasted



costs/knowledge in the circumstances of this case and the need to maintain confidence in independent JOLs outweighed any savings in costs/knowledge.

The relevant law

19. I set out the relevant law as follows.
20. The appointment of JVLs as JOLs is not usually a contentious process in the Cayman Islands. The relevant statutory and case law context is well established.
21. Section 124(1) of the Act provides that where a company is being wound up voluntarily its liquidators shall apply to the court for an order that the liquidation continue under the supervision of the court unless, within twenty-eight days of commencement of the liquidation, the directors have signed a declaration of solvency in the prescribed form.
22. Quin J in *OVS Capital Management (Cayman) Limited* 2017 (1) CILR 232 at paragraph 37 stated:

“The court has discretion, after reviewing all the facts and surrounding circumstances, to decide whether or not to make a supervision order. Furthermore, if the court had no discretion one would expect to find some mandatory language contained in s. 124 of the Companies Law removing the court’s discretion. The primary purpose of a supervision order is to ensure that an insolvent company is brought under the supervision of the court so as not to allow the insolvent company to continue in the voluntary unsupervised process. Insolvent companies should not be allowed to wind down voluntarily.”
23. Order 15 of the Companies Winding Up Rules 2018 (the “CWR”) concerns applications for supervision orders and Order 15 rule 2(2) provides that an application for a supervision order under section 124 shall be made by petition. It is plainly envisaged by Order 15 rule 2(3) (e) and (f) that if the voluntary liquidator is a qualified insolvency practitioner, complies with the independence requirement and is willing to act that his consent to being appointed as official liquidator should be stated in the petition and filed with the court, which is exactly what happened in this case.
24. Order 15 rule 5(4) of the CWR provides that any member or creditor of the company may appear on the petition and be heard upon the question of who should be appointed as



official liquidator provided he has given notice of his intention to do so and has complied with the requirements of Order 3, rule 8(3).

25. Order 3 rule 8(3) of the CWR provides that if a creditor intends to oppose the appointment of the petitioner's nominee he must (a) nominate an alternative qualified insolvency practitioner who is willing to act as official liquidator if so appointed by the court; (b) file a supporting affidavit; and (c) serve his notice of appearance and supporting affidavit upon (i) the company; (ii) the petitioner's attorneys; and (iii) in the event that the company is carrying on a regulated business, the Authority, not less than 3 days before the hearing date.
26. The requirements of the Insolvency Practitioners' Regulations 2018 (the "Regulations") in respect of the liquidator's professional qualifications, residency in the Cayman Islands, insurance and independence must be met. It is also provided that a foreign practitioner who meets the independence and insurance requirements of the Regulations may be appointed by the court as an official liquidator of a company jointly with a qualified insolvency practitioner (but not as sole official liquidator) and a foreign practitioner need not meet the residency requirements. Importantly regulation 6(1) of the Regulations provides that:

"A qualified insolvency practitioner shall not be appointed by the Court as official liquidator of a company unless he can be properly regarded as independent as regards that company."

27. Regulation 6(2) provides:

"A qualified insolvency practitioner shall not be regarded as independent if, within a period of three years immediately preceding the commencement of the liquidation, he, or the firm of which he is a partner or employee, or the company of which he is a director or employee, has acted in relation to the company as its auditor"

28. In a different country and in a different statutory context Harman J in the High Court of England and Wales in *Re Medisco Equipment Ltd* [1983] BCLC 305 (with a youthful Michael Todd appearing for the opposing creditors) commented at page 306 that the case raised "questions of importance as to the rightful attitude of a voluntary liquidator" where a petition is subsequently presented to wind up the company compulsorily. Harman J reviewed some of the previous cases "showing varying positions as to the matter" and at pages 307-308 concluded as follows:

“a voluntary liquidator ... can, and, indeed, perhaps should, give evidence of what he has found and what the present position is for the assistance of the court, and can properly appear by counsel, but he should not press a view one way or the other; he should merely be there to assist”

29. Harman J in *Re Roselmar Properties Ltd* [No.2] (1986) 2 BCC 99,157 again held that it was wrong for a voluntary liquidator to appear and oppose a petition for a compulsory winding up order. The voluntary liquidator was in a position to supply the court and any other parties with information, and was entitled to appear, and would be allowed his costs of appearing, for the purpose of assisting the court in that way. The voluntary liquidator should not take sides and should not give any appearance of taking sides. The voluntary liquidator should remain impartial.

30. Before turning to some of the relevant cases in detail it may be useful to refer to a textbook namely Charles Hollander QC and Simon Salzedo QC *Conflicts of Interest* 6th edition (2020). Chapter 17 covers accountants. The position in respect of conflicts of interest and accountants acting as provisional liquidators and liquidators is covered starting on page 309 section 17C under the heading: “Office-holder previously involved in advising Company or other interested parties”. The authors at paragraph 17-024 deal with insolvency cases where the accountant has previously been involved with a company including by investigating it and is then appointed as an office-holder in an insolvency procedure. From the commentary it appears that the situation is not unusual in a number of jurisdictions worldwide. The authors correctly indicate that there can sometimes be a conflict between the interests of the insolvent company or its creditors and the possible interests of the accountant or auditor in supporting the competence of his own previous work and the correctness of the conclusions he previously reached. At footnote 81 the authors say the risk can also be manifested as a concern that the accountant as office-holder may not be impartial as between the competing interests of different creditors, shareholders and others. There is reference to the Institute for Chartered Accountants of England and Wales providing a Code of Ethics for Insolvency Practitioners which requires insolvency practitioners to consider how to deal with the potential conflict of interests that may arise where a “significant relationship” has existed with the entity or someone connected with the entity. No hard and fast guidance is given but it is stated (referring to the same time period as is used in regulation 6(2) of the Regulations albeit that regulation is expressly limited to work as auditor) that “It is likely that greater threats will arise (or may be seen to arise) where work has been carried out within the previous three years”.

31. The authors refer to the well-known English case of *Re Maxwell Communication Corp Plc* [1992] BCLC 465 where the directors of the company petitioned for the appointment of administrators seeking the appointment of partners in the firm of Touche Ross, who had prepared a report under rule 2.2 of the Insolvency Rules 1986. A group of banks who were unsecured creditors of the company agreed that administrators should be appointed, but sought the appointment of partners in Price Waterhouse who had investigated the affairs of the company on behalf of a group of creditors for some 18 days. The directors argued that Price Waterhouse had a conflict of interest because they had audited a US corporation which was a joint venture between a subsidiary of the company concerned and another company. There was no evidence that the audit was open to criticism but it was said to be possible and that it would have to be investigated. Hoffmann J held that this was “no more at the moment than a mere distant possibility”. He appointed Price Waterhouse on the ground that they had a substantial head start in terms of knowledge of the company as a result of their investigative role. As to the potential conflict, Hoffmann J held that it could be dealt with as and when it arose, perhaps by the appointment of an additional administrator from another firm to deal with any matters in respect of which Price Waterhouse would be embarrassed, as was done in *Re Polly Peck International PLC* [1991] BCC 503.
32. The authors at paragraph 17-026 also refer to the judgment of David Richards J in *Wade v Poppleton & Appleby* [2004] 1 BCLC 674. In that case partners in a firm of accountants were instructed to advise an insolvent company and its owners. Three days later they accepted an appointment from a bank creditor of the company as administrative receivers. David Richards J held that there was no breach of fiduciary duty because: “Their acceptance of the appointment did not affect or undermine the work they had previously done or in any way create a conflict with the performance of their duties”. Having considered this textbook commentary let us consider some of the cases in more detail.
33. Hoffmann J (as he then was) in *Re Lowerstoft Traffic Services Ltd* [1986] BCLC 81, in the context of English legislation, considered an existing voluntary winding up and converted it into a court ordered compulsory winding up.
34. It was held in that case that in deciding whether to exercise its discretion to make a winding up order where a company was already being wound up voluntarily, the court should take into account the number, value and quality of the creditors who favoured a winding-up order as opposed to those who did not. An appropriate discount could properly be made in weighing the views of opposing creditors who were closely

associated with the management of the company, particularly when it is said that the main reason why there should be an order for compulsory winding up is the necessity for an independent investigation into their management. Hoffmann J at page 84 stated:

“... it is important that where there are matters to be investigated the liquidator should do so with competence and integrity ... I think it is also in the public interest that the creditors should have confidence in his independence. It is well known, and a matter of frequent public scandal that directors of insolvent companies occasionally succeed in transferring the assets and goodwill to a new company, often at the same premises, and start up in business again as if nothing had changed, leaving their creditors unpaid. Where it appears that something of that kind may have happened, and where, as in this case, there is prima facie evidence of a serious case of fraudulent trading by those directors I think that the public interest requires that the liquidator should not only be independent, but be seen to be independent. Certain criticisms have been made of the way in which Mr Edgar has so far conducted this liquidation. There does not seem to me to be anything to show that Mr Edgar has failed in his duties as liquidator. Nonetheless, through no fault whatsoever of Mr Edgar himself, the circumstances in which he was appointed understandably cause disquiet to the petitioning and supporting creditors, and I think that it would be wrong for that state of disquiet to continue. If an order for compulsory winding up is made, it may be (and I am not making any suggestions one way or the other) but in view of the knowledge which Mr Edgar has already acquired of the affairs of the company, the creditors may think it right, with the protection of the committee of inspection to have Mr Edgar continue as liquidator. On the other hand, they may not. That, I think, is a matter for them. It has been pointed out to me that the fees to which the Official Receiver would be entitled as liquidator mean that his employment in that office would add a substantial additional burden of expense to this liquidation. That is something that the creditors might wish to bear in mind. But for the moment I think that the right exercise of my discretion, taking into account the matters to which I have referred, is to make an order for the compulsory winding up of this company.”

35. In that case the creditors had proposed the appointment of a member of Cork Gully to be liquidator. Mr Pretty, the chairman of the meeting and a director of the company, proposed instead Mr Edgar, a certified accountant. Mr Edgar had been introduced to Mr Pretty by a consultancy company who had previously advised the company as to the re-structuring of the business and action was taken pursuant to such advice which would have a considerable personal advantage for the directors in enabling a bank to be paid in reduction of what they might be called on to pay under their personal guarantees. Hoffmann J appears to have felt that the matter was finely balanced but left it to the creditors to sort out.



36. Henderson J in *Philadelphia Alternative Asset Fund Limited* 2006 CILR Note 7 (Grand Court judgment 22 February 2006) referred to one of the long-established purposes of a liquidation being the investigation of the company's affairs and set out the comments of Robert Walker J in an English case as follows:

“Fairness and commercial morality may require that a substantial independent creditor (in this case investor) which feels itself to be prejudiced by what it regards as sharp practice should be able to insist on the company's affairs being scrutinized by the process which follows a compulsory order. Such a creditor is entitled to an investigation that is not only independent but can be seen to be independent. This may be so even where the voluntary liquidation is already well advanced and a compulsory order may cause further expense and delay.”

37. Quin J in *DD Growth Premium Master Fund* 2009 CILR Note 11 in a judgment delivered on 8 April 2009 dealt with the position where the parties agreed that it would be just and equitable for the master fund to be wound up but were in dispute over the identity of the liquidators to be appointed. Three banks as the major creditors of the master fund opposed the appointment of the petitioners because of the potential conflict of interest arising from their dual roles as liquidators of the feeder and master funds. It was held that the application of the petitioners would be rejected and the creditors' suggested liquidators would be appointed. It was important that those with the economic interest in proceedings were assured that the liquidation would be carried out independently and in their best interests. Since there was a potential for a conflict between the interests of the master and feeder funds and there would be little advantage in the saving of costs and time because of any familiarity with the liquidations, it would be in the best interests of the creditors to avoid it by appointing their chosen liquidators who would carry out the liquidation independently and impartially. This would also, in the circumstances of that case, be likely to save costs and prevent delays prejudicial to the interests of the creditors which would otherwise probably result in any conflict.

38. Jones J in *Hadar Fund Limited (in liquidation)* 2013 (2) CILR Note 4 stressed at paragraph 17 of his judgment that the independence of insolvency practitioners as regards any particular company in liquidation depends upon the existence or non-existence of professional or economic relationships which are regarded by the court as creating a situation in which the appearance of complete impartiality is compromised. Appearances matter. It is not sufficient that the practitioners be honest and capable. It is not good enough to say that the practitioners can be relied upon to perform their duties properly. At paragraph 18 of his much-quoted judgment Jones J set out the position as follows.



When determining whether a particular professional or economic relationship will lead to a conclusion that an insolvency practitioner can or cannot be properly regarded as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of ways. The court must first identify the relationship and determine whether it is capable of impairing the appearance of independence and, if so, whether it is sufficiently material to the liquidation in question that a fair-minded stakeholder would reasonably object to the appointment of the nominated practitioner in question.

39. The transcript of the judgment Jones J reveals the following additional detail at paragraph 19:

“In this case it is accepted that PwC Cayman does not itself have any pre-existing professional relationship with any of the stakeholders. However, it is well established in this Court that the existence of a professional relationship between a stakeholder and some other PwC firm is capable of leading to the conclusion that the Cayman firm cannot be regarded as independent. The fact that one or more PwC firms are currently doing advisory work for companies owned by or associated with the Pavels and two of the Investors with such a relationship. The question is whether or not these client relationships are material in the circumstances of this liquidation and I must answer this question on the basis of the evidence before the Court. The mere fact that Messrs Walker and Stoker have considered the matter and come to their own conclusion that it is not material is relevant evidence which I have taken into account, but it cannot be conclusive. ...”

40. At paragraph 20 Jones J concludes “that these client relationships are material, in that a fair-minded stakeholder would reasonably object to the appointment of PwC Cayman.”

41. At paragraph 21 Jones J added:

“Having concluded that Messrs Walker and Stoker (and PwC Cayman) cannot be regarded as being independent as regards the Fund, regulation 6 mandates that the court *shall* not appoint them as official liquidators. The fact that they have done an enormous amount of work over a two month period in their capacity as voluntary liquidators is irrelevant. Since there is no objection to the only other candidates, I therefore appoint Messrs Tammy Fu and Gordon MacRae of Zolfo Cooper (Cayman) Limited as joint official liquidator of the Fund”

42. Jones J in *AJW Master Fund II Limited* 2011 (1) CILR 363 at paragraph 10 stated:

“An important policy underlying the amendments of Part V of the Companies Law, which came into force on March 1 2009, is that



insolvent companies must be liquidated by qualified insolvency practitioners acting under the supervision of the court. Solvent companies can be liquidated without reference to the court and their shareholders can decide for themselves who should be appointed as voluntary liquidators... s.124 of the Law imposes a duty upon every voluntary liquidator to make application for a supervision order if the directors fail, for whatever reason, to make and deliver a valid declaration of solvency to him within the prescribed period...It follows that the decision to bring an insolvent voluntary liquidation under the supervision of the court is often a formality, but the choice of official liquidator is not a formality. In this regard, the court is exercising a discretion in respect of which it should take into account the views of the stakeholders.”

43. Foster J in *Tangerine Investment Management Limited* 2013 (1) CILR 375 dealt with issues concerning potential conflicts of interest and the impact of a conflict being outweighed by benefits as to costs and efficiency. Foster J at paragraph 22 stated:

“...In my view, the court must always consider the particular circumstances of the case and it may well be that the benefits to be achieved by having common liquidators or receivers of more than one company outweigh the disadvantage of a potential future conflict of interest, particularly if there are workable means of dealing with the latter.”

44. Chief Justice Smellie in *Bay Capital Asia Fund LP (in voluntary liquidation)* in a judgment delivered on 1 October 2015 dealt with a petition which sought an order for the voluntary winding up of the fund to continue under the supervision of the court. Pricewaterhouse Coopers (“PwC”) sought an adjournment to present some further evidence. The court had to deal with an allegation that the JVLs who were employees of PwC were irreconcilably conflicted in their role as liquidators of the fund having been engaged to advise having advised Military Mutual Aid Association (“MMAA”) as majority equity shareholder in relation to its investment in the fund. It was also suggested that PwC had been engaged by MMAA in relation to the removal of Bay Capital as the former general partner and such was a very contentious issue. There was also reference to the resolution which removed Bay Capital indicating that the advisory work undertaken by PwC to date to protect the interests of MMAA was valuable in terms of allowing a subsequent appointed liquidator to best protect the interests of the fund. Chief Justice Smellie stated:

“17. These circumstances are, in my view, sufficient to cause fair minded stakeholders in the positions of Bay Capital and Ms. Yang to be reasonably concerned whether PwC now operate under a real conflict of interest on account of their former role as advisor to MMAA and their current role as JVLs. That is in

essence, the test to be applied by the court in resolving a question like the present, which is whether liquidators who are fiduciary officeholders operating under the aegis of the court, should be allowed to continue when a challenge to their independence is raised on grounds of conflict of interest.”

45. The Chief Justice helpfully set out the test at paragraph 21 stating:

“... The test is whether the court considers that the investors are reasonably concerned that the liquidators operate under a conflict of interest. As Justice Jones declared in *Hadar* (above):

“Whether or not any kind of professional or economic relationships would lead to the conclusion that an insolvency practitioner can or cannot be properly regarded as independent must depend upon the factual circumstances of each case which will vary in an infinite variety of ways. The Court must first identify the relationship and determine whether it is capable of impairing the appearance of independence. If the answer is yes, the Court must then consider whether its existence is sufficiently material and the factual circumstances of the liquidation question that a fair minded stakeholder would reasonably object to the appointment of the nominee in question””

46. At paragraph 24 the Chief Justice added:

“...the Court must be guided primarily by what is in the best interest of those having the real and ultimate economic interest in this Fund, namely the creditors; not by what was in the best interests of PwC as the prospective liquidators”

47. The Chief Justice referred to a clear prima facie conflict of interest which PwC had had an ample opportunity to explain away and concluded that it would be inappropriate to adjourn the petition simply for allowing them a further opportunity to do so.

48. In *Zinc Hotels (Holdings) Ltd* [2018] EWHC 1936 (Ch) Henry Carr J at first instance, in the context of an English administration, held that the existence of a prior relationship between an administrator and creditors was not a bar to the administrator taking appointment. In that case, in a different legislative context, it was also held that the contingency planning exercise undertaken by the administrator for the lender was neither unusual nor out of the ordinary. The administrators were in compliance with the relevant provisions of their Code of Ethics.

49. As can be seen from paragraph [3] of the judgment, the principal allegation in the *Zinc Hotels* case was that the administrators lacked independence due to their previous

engagement by, and allegedly close relationship with, the secured creditors in particular because they had been engaged in some contingency planning. At paragraph [13] of the judgment it is indicated that prior to the appointment of the administrators AlixPartners had been engaged by the lenders to undertake a contingency planning exercise, including preparing to accept an appointment as administrators of companies in the Zinc Group, if that proved to be necessary. In that case it was the shareholders who complained of a conflict of interest on the part of the administrators. At paragraph [74] of the judgment Henry Carr J stated that it was “well established that the existence of a prior relationship between an administrator and creditors is not a bar to the administrator taking appointment”. The learned judge referred to Hoffmann J’s judgment in *Re Maxwell Communications Corporation plc (No1)* [1992] BCC 372 where it was stated that Price Waterhouse sought to be appointed administrators on the grounds that they were already in possession of a great deal of information and that they would be able to carry out the administration more cheaply, effectively and quickly on account of their existing knowledge of the company and that this was in effect an advantage over other nominees namely, Touche Ross. At paragraph [76] Henry Carr J refers to some other authorities and a quotation to the effect that the question of whether the insolvency practitioners could be relied upon to act impartially and in accordance with their duties required an assessment of all the circumstances. Henry Carr J at paragraph [77] referred to a submission from counsel that in most insolvencies of any size and complexity the proposed office-holders will have been engaged prior to the commencement of the insolvency proceedings by one or more creditors, or the directors, or a regulator. The judge noted the submission of counsel that it would be unusual for office-holders to take any appointment without a prior engagement of some kind, which would have allowed them to do the necessary preparatory work. There was reference to a well-known text book by Lightman & Moss at paragraph 6-006:

“The proposed administrator will ordinarily undertake an investigation of the company’s affairs and financial position, and consequently offer advice before being appointed, which will include advice on the timing and manner of appointment.”

50. Henry Carr J at paragraph [78] indicated that this approach was now recognised in the insolvency legislation of England and Wales in that specific provision was made for disclosure in the statement of proposals of pre-appointment costs incurred by the administrators and for the recovery of those costs from the administrators’ estate. Henry Carr J at paragraph [79] referred to evidence to the effect that the contingency planning exercise undertaken by AlixPartners for the lenders was neither unusual nor out of the ordinary. It was stated that no advice was provided to the lenders in respect of the preferred

types of insolvency process and the lenders were made fully aware of the duties which the administrators would be under as administrators. The administrators were under no continuing duties to the lenders which conflicted with their duties as administrators. The fact that AlixPartners had some prior involvement was fully disclosed and at paragraph [80] of his judgment Henry Carr J concluded as follows:

“In these circumstances, in my judgment, there was no reason on the evidence before me for the Administrators to decline the appointment as a result of a conflict, and no reason for the Administrators to regard themselves as being under any kind of conflict which would justify the Court granting relief against them.”

51. Closer to home, Chief Justice Smellie in a judgment delivered on 23 February 2018 in *Alpha Re Limited (in voluntary liquidation)* dealt with another challenge to the identity of the appropriate liquidators. The Chief Justice considered concerns raised by major creditors and referred again to the applicable principles. At paragraph 47 the Chief Justice stated:

“In the context of a petition like the present, such an outline of the position taken or likely to be taken by creditors is an important factor for the Court to consider. This is because in an insolvency, the real economic interests are those of the creditors (not shareholders) and the Court will ascribe appropriate weight to the views and wishes of the creditors, depending on relevant considerations, not least of all, the extent of their claims.”

52. Further on in the judgment under the heading “The law on the independence test” at paragraph 65 the Chief Justice stated “the relevant legal principles are simple and straightforward and are not the subject of disagreement.”
53. At paragraph 66 the Chief Justice added that the appointment of JVLs to be JOLs is intended ordinarily to be a non-contentious process. Once the requirements of Part II of the Regulations are satisfied the court will ordinarily not need to second guess the qualifications or suitability of practitioners to be appointed as JOLs.
54. In a case where independence is in issue the Chief Justice stated at paragraph 72 that “the Court ought to ensure that such a challenge is based upon a *bona fide* concern that the requirements of the [Regulations] for independence have in fact, not been met”.

55. At paragraph 73 the Chief Justice indicated that there was ample guidance in the case law for the determination of this question and that unsurprisingly the test was an objective one.

56. At paragraph 74 the Chief Justice referred to Jones J in *Hadar Fund Ltd in voluntary liquidation* 2003 (2) CILR Note 4 and at paragraph 75, with concise clarity, helpfully stated:

“To be emphasized is the importance of the objective assessment to be undertaken by the Court – the test is whether the relationship in question could objectively be seen as impairing independence and whether the cause for objection is such as to lead a fair -minded and objective stakeholder to object.”

57. At paragraph 76 the Chief Justice added:

“And appearances matter as much as the realities where the realities are not clearly established- if the appearances leave reasonable and objective cause for concern, the test would not be satisfied.”

58. The Chief Justice at paragraph 90 stated:

“While the wishes of the creditors are not necessarily determinative of an issue like the present, they must be given proper weight and consideration. Going forward, it will be of crucial importance that the JOLs enjoy the full confidence and support of those having the real economic interests of the outcome of the liquidation.”

59. The Chief Justice at paragraph 91 noted that there was no reason to question either the competence or integrity of the JVLs but there were “regrettably unresolved questions of perception arising from their connection to GT Cayman. These are such in my view, as could objectively give cause for concern whether they would be independent in any review of the work done or any advice given by GT Cayman in relation to Alpha Re at the crucial time just prior to Alpha Re being put into voluntary liquidation.”

60. The Chief Justice at paragraph 92, again rightly stressing the importance of objectivity, reached the conclusion that the objections in the circumstances of that case were “objectively sustainable”.

61. Parker J in *CW Group Holdings Limited* (Grand Court FSD; 3 August 2018) dealt with an application for the appointment of joint provisional liquidators made by the directors



of the company on its behalf. The company's application was filed simultaneously with a winding up petition presented by a creditor who requested different joint provisional liquidators. A submission was made that one set of joint liquidators were not independent in view of the roles played at meetings with certain banks. Parker J disagreed with the submission stating at paragraph 67 that it made sense to use entities from the same group to allow for better coordination and communication between creditor banks and others in Singapore and Hong Kong which was likely to be of value to the company as they further engaged with creditors and sought to propose and implement a restructuring. Parker J added that following the approach of Hoffmann J in *Re Maxwell Communications Corp Plc* [1992] BCC 372 it also seemed to him that it made more sense to "choose a firm which is already in possession of a great deal of information with which to carry on acting in the interests of efficiency and economy".

62. Parker J added at paragraph 68:

"As is well known, if and when appointed, as officeholders, provisional liquidators are independent persons operating under the direction of the court ..."

63. Parker J at paragraph 69 added:

"Once appointed the joint provisional liquidators would act as officers of the court and in the best interests of all of the company's creditors and stakeholders, irrespective of who sought the appointment. I have no doubt that those proposed by the company would do so in this case."

64. In *Asia Private Credit Fund and Adamas Asia Strategic Opportunity Fund Limited* 2020 (1) CILR 134 the Court of Appeal of the Cayman Islands dealt with appeals which concerned section 131(b) of the then Companies Law (2018 Revision) rather than section 124(1) and it is important to consider such authority in its proper context. Under section 131 a liquidator or any contributory or creditor may apply to the court for a supervision order notwithstanding that a declaration of solvency has been made, on the grounds that (a) the company is or is likely to become insolvent; or (b) the supervision of the Court will facilitate a more effective, economic or expeditious liquidation of the company in the interests of the contributories and creditors. This authority is a significant Court of Appeal authority and helpfully reiterated the requirement of a court to consider and place significant weight on the views of stakeholders in a liquidation. It also dealt with issues as to the identity of liquidators when there are competing candidates for appointment.

65. Field JA (with whom Morrison JA and Beatson JA agreed) at paragraph 96 recognised that following the establishment of a jurisdictional threshold under section 131(b), the choice of which liquidators are to conduct the supervised liquidation is an exercise of discretion properly so called and, where the petitioner is the sole stakeholder in the liquidation, Field JA agreed with the view of Kawaley J, at first instance, that the petitioner’s choice of liquidator(s) ought generally to be respected.
66. Field JA at paragraph 100 noted, in a section 131(b) context, “that the court can take into account the view of the stakeholders in the liquidation that they desire a supervised liquidation and that a threshold requirement for a supervision order has been met, but not at the expense of failing to undertake a full and careful assessment of all the objective factors that are in play in the application. Where these objectives are finely balanced, the wish of the stakeholders to have a supervised liquidation may tip the decision in favour of their wish. But where those objective factors stand in clear contrast to the view of the stakeholders, it would be wrong for the court to accept the stakeholders’ views as a reason for making a supervision order”. Again, albeit in the context of considering the views of stakeholders as to whether a supervision order should be made, the Court of Appeal is stressing the importance of considering “all objective factors.”
67. Field JA at paragraph 109 referred to McMillan J’s comment that it was inappropriate to replace the JVLs with the Petitioner’s nominees, “given the serious loss of knowledge and expertise” that a replacement would represent and stressing that it is “necessarily the court which conducts the supervision”.
68. In circumstances where the court had set aside McMillan J’s judgment dated 27 February 2009, his order appointing the FTI liquidators in addition to the BDO liquidators also fell away. It therefore fell to the Court of Appeal to make its own decision as to who should be the liquidators in charge of the supervised liquidation.
69. Field JA at paragraph 111 stated that the court should appoint the FTI liquidators in place of the BDO liquidators for the following reasons:

“First the court should accede to the wishes of the Petitioner who is the sole stakeholder in the liquidation. Secondly, the appointment of the BDO liquidators would undermine the effectiveness of the supervised liquidation caused by an appearance of partiality attaching to the BDO liquidators resulting from their appointment by the manager whose role



in and conduct of the affairs of APCF will be one of the matters investigated.”

70. Field JA went on to consider whether the judge had erred in law in exercising his discretion to appoint all four liquidators and concluded that there had been an error at first instance. Field JA at paragraph 113 provided four reasons for this conclusion:

“First, the judge failed to have regard to the line of authorities supporting the proposition that liquidation proceedings, whether solvent or insolvent, should be conducted in the interests of those persons who are financially interested in the liquidation process, here the petitioner which was the sole stakeholder in the liquidation. Secondly, he failed to take into account the negative impact on the effectiveness of the supervised liquidation caused by an appearance of partiality attaching to the BDO liquidators resulting from their original appointment by the manager whose role in and conduct of the affairs of APCF was to be investigated. Thirdly, he failed to take into account the increased costs of having four liquidators rather than two. Fourthly, these failings taken together also meant that the judge’s decision to appoint all four liquidators to conduct the supervised liquidation was manifestly outside the margin of appreciation available to him”

71. Some further information as to the role of the manager and the involvement of the BDO liquidators can be gleaned from the judgment.
72. In respect of the second appeal, Field JA at paragraph 118 rejected a submission that the judge had erred in giving pre-eminent weight to the views of the petitioner, as sole stakeholder in the liquidation, as to the identity of the liquidators. Field JA agreed with Kawaley J that there was “an abundance of authority for the proposition that liquidation proceedings, whether insolvent or solvent, should be conducted in the interests of those persons who are financially interested in the liquidation process.”
73. For the sake of completeness, I should also add that Kawaley J in *Adamas Heracles Multi Strategy Fund and Adamas Asian Origin Fund SPC* (Grand Court FSD; judgment 23 July 2021) recently quoted paragraph 118 of Field JA’s judgment and disapproved of the attempt in the case before him of “management” seeking to prefer their views over those of stakeholders in that case. Kawaley J at paragraph 9 of his judgment recorded his distinct impression “that management wished to subtly obstruct rather than facilitate an efficient liquidation process, presumably because of anxieties as to where that process will lead”. At paragraph 14 Kawaley J referred to an entity being “the most substantial economic stakeholder before the Court and its views would, all other considerations being equal, be entitled to considerable deference.” Kawaley J at paragraph 4 had also expressed the view

that: “It generally makes sense to have the same JOLs appointed over an entire group of companies in liquidation on the understanding that any conflicts arising in relation to inter-group claims can be dealt with by appointing additional liquidators.”

74. In *Malone v Mitchell as liquidator of Prophecy Pension Trustees Ltd* 2014 MLR 10 (High Court of the Isle of Man) ,wearing a Manx judicial wig as First Deemster and Clerk of the Rolls, I applied the first instance English authority of *Re York Gas Ltd* [2010] EWHC 2275 (Ch) in respect of the appointment of “conflict liquidators” and also referred to *Parmalat Capital Finance Ltd v Food Holdings Ltd (in liquidation)* [2008] UKPC 33 at paragraphs 12-16 in respect of conflicts of interest and liquidators. In that case the Board stressed that whether the judge should have appointed the Cayman liquidators rather than the candidates proposed by the other creditors was very much a matter of discretion for the judge at first instance. The Board, like Kawaley J in *Adamas Heracles* at paragraph 4, felt that it was not unusual for the same liquidators to be appointed to related companies, even though the dealings between them may throw up a conflict of interest. It avoids the expense of having different liquidators investigate the same transactions. The attitude of the courts is that any conflicts can be dealt with by the court (on the application of the liquidators) when they arise.
75. In *Isle of Man Financial Services Authority v The Eco Resources Fund PCC PLC* (High Court of the Isle of Man; unreported judgment 14 July 2017) I had to decide between competing choices for liquidators. I referred to authorities involving England and Wales, the Cayman Islands, Bermuda and Australia, all internationally well-regarded common law jurisdictions. At paragraph 48 I endeavoured to set out the common law test as to independence of liquidators:

“The court must consider the independence and impartiality of the proposed candidate. A liquidator, as an officer of the court, should be independent and above suspicion. There must not be any bias, nor any appearance of bias. Where the circumstances might predispose a person to favour particular interests, those circumstances must be taken into account and the possibility of unconscious partiality must not be overlooked.”

At paragraph 49 I added:

“The court must carefully consider whether the proposed liquidator is independent and impartial and is untainted by any inappropriate “baggage”, for example previous dealings with the company or those connected with the company...I accept that on occasions an individual’s



previous dealings with, or experience of, the company prior to it going into liquidation may be appropriate “baggage” and may in some cases be regarded as a positive factor in favour of appointing that person as liquidator. In other cases such previous dealings and experience with the company... may be inappropriate “baggage” and would be regarded as a negative factor militating against that person being appointed as liquidator, in particular where there is a more suitable candidate who does not have the disadvantage of such inappropriate “baggage.””

Summary of the relevant law

76. Let me now attempt to draw all the judicial threads together to produce a summary of the relevant law.
77. The issue before the court was in effect whether the Petitioners or the Kalo nominees should be appointed JOLs. The issue arose in the context of Ascentra’s position that in view of the background to the Petitioners’ appointment as JVLs and their prior involvement with the Bank in this respect, there was a lack of perceived independence and impartiality in respect of the Petitioners. I endeavour to summarise the relevant law as follows:
- (1) a qualified insolvency practitioner (the “practitioner”) should not be appointed by the court as an official liquidator unless the practitioner is and can be properly regarded as independent of the company in respect of which the practitioner is to be appointed an official liquidator;
 - (2) the practitioner cannot be regarded as independent if within a period of three years immediately preceding the commencement of the liquidation, he, or the firm of which he is a partner or employee, or the company of which he is a director or employee, has acted in relation to the company as its auditor;
 - (3) other than acting as auditors within the previous three years, there could be other circumstances which could be indicative that the practitioner cannot be properly regarded as independent;
 - (4) when there is a challenge to the appointment of JVLs as JOLs, the JVLs should take a neutral stance but they may appear and be represented and assist the court by the provision of evidence, information and neutral submissions to enable the



court to come to a fair and just determination of the issue before it. The JVLs would normally be allowed their costs of such involvement;

- (5) there needs to be confidence in the independence of JOLs;
- (6) when determining whether a particular personal, professional or economic relationship may lead to a conclusion that an insolvency practitioner cannot be properly regarded as independent previous case law stresses that the court must (i) identify the relationship and (ii) determine whether it is capable of impairing the appearance of independence and, if so, determine (iii) whether it is sufficiently material to the liquidation in question that a fair-minded stakeholder would reasonably object to the appointment of the nominated practitioner in question. Mr Heaver-Wren is right to stress that it is a 3-stage approach and an objective analysis is key;
- (7) Mr Goodman is right to stress that the views of those with an economic interest in the proceedings should be considered (and where appropriate very significant weight attached to them) but they cannot alone dictate to the court how the issue as to who should be appointed JOLs is determined. The court should, of course, take into account what would be in the best interests of those having the real economic interest in the company and also the reputation of the Cayman Islands as a well-respected leading international financial centre. In an insolvency situation the focus will be on the best interests of the creditors rather than the contributories;
- (8) the court takes into account the subjective views of all stakeholders including, where relevant, creditors and contributories. The court also undertakes a full and careful assessment of all the circumstances of the case and all the objective factors that are relevant to determining who should be appointed JOLs. The court may, despite the subjective views of significant creditors, conclude that on an objective analysis no reasonable perception of lack of independence has been established. On an issue such as the identity of the JOLs subjective views of one, albeit significant, creditor cannot dictate the correct legal result for the court. The court of course takes into account the subjective views of the creditors but the court must consider the law and the facts and circumstances of each case and reach the appropriate determination as to the identity of the JOLs itself;

- (9) it is important to stress, as other judges have done in the past, that the correct approach includes an objective element. It is not the subjective views of the stakeholders that are determinative. Such views, even from significant stakeholders, will carry little weight if they are irrational or not held in good faith or on reasonable grounds. It is the reasonable views of a fair minded and informed hypothetical stakeholder that are important. The courts have rightly emphasised the importance of liquidations being conducted in the best interests of the relevant stakeholders but when it comes to determining the identity of the JOLs (when there are a couple of alternative hats in the ring) if the subjective views of the stakeholders are not based upon bona fide, reasonable concerns they will carry little, if any, weight;
- (10) when considering whether a particular personal or professional relationship would lead to a perception of lack of independence and impartiality the court should consider the issue from the perspective of a reasonable, fair minded and well-informed stakeholder;
- (11) in some cases, previous involvement with the company may be an advantage (provided the candidates can still be properly regarded as independent) in that time and costs may be saved and knowledge already built up utilised further. In other cases, previous involvement (even if time and costs would be saved and existing knowledge utilised) will be a disadvantage and will disqualify the candidates from appointment as JOLs;
- (12) in some cases, the appointment of the same JOLs over several connected companies will be desirable but in other cases separate appointments or at least an additional conflict liquidator may be necessary;
- (13) in summary whether or not any kind of personal, professional or economic relationship and prior involvement with the target company would lead to the conclusion that a practitioner cannot be properly regarded as independent from such company either in reality or in perception depends upon the factual circumstances of each case. As the previous case law makes plain, the court is engaged in a 3-stage process. The task of the court is first to identify the factual circumstances of the relationship and prior involvement and then secondly, to come to a conclusion as to whether its existence and the circumstances of the case



are such that they are capable of impairing the appearance of independence. Perception is just as important as reality in these cases. Thirdly, if the court reaches such a conclusion, the court then needs to come to a conclusion as to whether it is sufficiently material to the liquidation in question that a fair-minded stakeholder would reasonably object to the appointment of the nominated practitioner in question. I note the comment of Jones J in *Hadar* at paragraph 17 that it is “not good enough to say that these particular individuals can be relied upon to perform their duties properly” but in my judgment a fair-minded stakeholder would also be well-informed and aware that once appointed JOLs act as officers of the court and have duties to act in the best interests of all the company’s stakeholders irrespective of who sought their appointment;

- (14) overall the court should not lose sight of the well-established proposition that liquidation proceedings whether solvent or insolvent should be conducted in the best interests of those persons who are financially interested in the liquidation process; and
- (15) the reputation of the Cayman Islands in respect of the appointment of independent official liquidators to deal with the liquidation process appropriately also plays an important part in the court’s determination. There needs to be continuing justifiable confidence in those appointed as JOLs to fulfil their onerous duties independently as officers of the court.

Determination

- 78. In my judgment the issue before the court was not finely balanced. I have referred above to the 3-stage approach initially laid down by Jones J in *Hadar* and subsequently applied by Chief Justice Smellie in *Bay Capital* and *Alpha Re*. I have identified above the limited prior connection between the Petitioners and the Bank. It was not a relationship which lasted long. It was not a significant prior relationship that could reasonably cast proper doubt on the independence of the Petitioners to act as JOLs. In my judgment such limited connection was not reasonably capable of impairing the appearance of independence and even if it was it was not sufficiently material to this liquidation such that a fair-minded stakeholder would reasonably object to the appointment of the Petitioners as JOLs.

79. The Petitioners' prior involvement with the Bank did not disqualify them from being appointed as JOLs. Their limited prior involvement did not strip them, as well-regarded professionals, of their actual or perceived independence. Reasonable stakeholders could have confidence that the Petitioners would comply with their duties as officers of the court and there was no actual or perceived conflict or lack of independence.
80. In my judgment the opposition of Ascentra to the Petitioners appointment as JOLs of the Bank was not based on solid or reasonable grounds. Mr Goodman at paragraph 11 of his skeleton argument dated 15 July 2021 stated that “ the test is straightforward and long established; the Court should exercise its discretion having regard to the views of the parties with the real economic interest in the liquidation, which in this case is the Bank’s independent creditors”. At paragraph 15 of his skeleton argument Mr Goodman added:

“... the question for the Court is straightforward: is there any legal basis or other reason why the wishes of the shareholders should be given any sufficient weight or take precedence over the wishes of the Bank’s creditors, in circumstances where the Bank is heavily insolvent?”

That, with respect, was not the only question to ask and it ignored, or at least seriously underplayed, the well-established 3-stage approach which the court should adopt in these types of cases. I accept, however, that in an insolvency situation the main focus of the court is on the interests of the creditors rather than the contributories (as Chief Justice Smellie stated in *Alpha Re* at paragraph 47; and see Dillon LJ at pages 252-253 in *West Mercia Safetywear Ltd (in liquidation) v Dodd* [1988] BCLC 250 in the context of the duties of directors). The court, of course, has regard to the wishes of the creditors but there are other factors to consider when applying the 3-stage approach, as the authorities make plain.

81. I note the well-expressed observation of Kawaley J, who has a wonderful way with words and is well regarded both locally and internationally for his expertise in financial services cases, at first instance in *Adamas Asia Strategic Opportunity Fund Limited (in voluntary liquidation)* in his judgment delivered on 23 July 2019 at paragraph 49 that:

“The proposition that liquidation proceedings, whether insolvent or solvent, should be conducted in the interests of those persons who are financially interested in the liquidation process may be viewed as the golden thread which runs through liquidation law in those parts of the world whose statutory winding-up concepts have been transplanted from British legal soil.”

However, this particular golden thread must be considered as part of the overall tapestry that has been knitted together over the years by legislators and judges in this area of the law. Another important thread that holds that legal tapestry in place is, as the Court of Appeal made plain in the *Adamas* appeal, the need for the court to consider all relevant “objective factors” that are in play in the liquidation context of the issue for determination of the court. In this case those “objective factors” are in play in the context of the applicable 3-stage approach.

82. In this case the proposed appointment of the Petitioners as JOLs had been advertised and the creditors notified. Only one creditor, namely Ascentra, opposed the appointment of the Petitioners. Another very significant creditor namely Sterling, with knowledge that the issue of the identity of the JOLs was in dispute, had expressly stated its non-opposition to the appointment of the Petitioners. No other creditors had communicated their positions. None of the creditors, other than Ascentra, had expressly opposed the appointment of the Petitioners. The main two creditors who had expressly made their positions plain to the court were Ascentra and Sterling. On proper analysis there is nothing of substance in Mr Goodman’s, initially superficially attractive, point that the court should place more weight on Ascentra’s position as it was in a more informed place than Sterling. Sterling, who had engaged legal assistance, must be taken to be aware of the position as outlined in the communications to the account holders which highlighted that the identity of the JOLs was in dispute. Sterling would not have provided its letter confirming no opposition to the appointment of the Petitioners as JOLs lightly. Sterling was also a significant creditor and it was right for the court to take into account its position.
83. The Authority took a neutral stance on the identity of the JOLs. If the Authority had any real concerns in respect of the appointment of the Petitioners as JOLs the court would have expected the Authority to make those concerns clear.
84. To an objective stakeholder there can be no reasonable appearance of partiality attaching to the Petitioners resulting from their limited prior involvement in the hasty production of a brief report on the financial position of the Bank and their subsequent appointment as JVLs for a very short period of time and whose activity once appointed JVLs is outlined in Mr Keenan’s second affidavit sworn on 13 July 2021. It included initial investigations into the management of the Bank and culminated in the Petitioners correctly applying for a supervision order and the appointment of JOLs. The Petitioners agreed that a thorough

investigation into the conduct of, and decisions taken by, the directors and the Bank's management was required.

85. I was not persuaded that the prior and very limited (by way of duration and activity) connection of the Petitioners with the Bank made them unsuitable to be appointed as JOLs or could raise in the minds of fair-minded and informed stakeholders a reasonable perception that they lacked independence. Mr Heaver-Wren was correct when he, in effect, submitted that the circumstances in which the Petitioners were appointed as JVLs in this case were "wholly plain vanilla". Moreover, the mere fact that the Bank's management appointed the JVLs, supported by the contributories, could not of itself reasonably give rise to a perception of a lack of independence in the minds of fair-minded stakeholders.
86. Ascentra criticised the Petitioners for allegedly becoming partisan and crossing the line of their professed neutrality on the issue as to who should be appointed JOLs. I should make it clear that this court makes no criticism whatsoever of the responsible position adopted by the Petitioners in respect of the petition for a supervision order and their appointments as JOLs. The Petitioners provided the court with useful information and evidence to ensure that the court was in a position to come to an informed, fair and just determination as to the identity of the appropriate JOLs. Indeed, without this assistance (in the form of Mr Keenan's affidavit sworn on 13 July 2021) there would have been a risk that Ascentra's original nominees (Grant Thornton) could have been inadvertently appointed with the court remaining oblivious to their clearly conflicted position. If the Petitioners had not raised the conflict issues and the inappropriateness of Ascentra's first chosen nominees (Grant Thornton) as JOLs the court could have been misled into making the wrong order. I am grateful to the Petitioners for the reasonable stance they adopted in respect of the identity of the JOLs and for their assistance to the court.
87. Although the subjective perceptions and beliefs of Ascentra, a major creditor albeit not the sole stakeholder, are worthy of consideration they do not in my judgment represent what could properly be described as the reasonable perceptions of an objective stakeholder. In my judgment Ascentra cannot (to adopt the language used by Chief Justice Smellie in *Bay Capital* at paragraph 21) be reasonably concerned that the Petitioners operate under a conflict of interest.

88. Standing back and looking at the position overall, any objective stakeholder could not reasonably conclude that there were adequate grounds for a perception of lack of independence on the part of the Petitioners. Certainly, no actual conflict existed in this case and viewed objectively no perception of an appearance of any lack of independence reasonably arose. In my judgment the appointment of the Petitioners as JOLs will be in the best interests of those persons (including Ascentra and Sterling) who are financially interested in the liquidation process and Kawaley J's golden thread in liquidation matters as introduced in *Adamas* will be strengthened not weakened.
89. As other judges (including Parker J and Hoffmann J, as he then was) have previously recognised, in certain circumstances a prior connection which has resulted in the acquisition of knowledge can be an advantage rather than a disadvantage or disqualifying factor. In this particular case the circumstances strongly suggest that the Petitioners' legitimate prior involvement with the Bank will produce some cost savings and efficiencies and they will be able to make use of the knowledge they have already gained in respect of the work they had previously undertaken. This does not weigh heavily in the balance and I entirely accept that if liquidators are not independent, in reality or perception, the fact that a lot of their experience and knowledge will be lost is not a good reason for appointing them. I think, in view of the wording of the Regulations and the observations of Jones J in *Hadar* at paragraph 21, that Mr Goodman may well be right when he persuasively submits that if the proposed candidates do not satisfy the independence requirement they cannot be appointed no matter how much knowledge they have built up. However, in the circumstances of this case the JVLs' prior knowledge and experience, albeit built up over a very short period of time, is not to be completely ignored when weighing up all relevant factors. This is especially so where I have held that there is no reasonable perception of lack of independence in the circumstances of this case.
90. It is right to acknowledge that no questions have been raised as to the undoubted competence, integrity, skill and experience of the Petitioners to act as JOLs. The stakeholders and this court can take some comfort from the fact that the Petitioners are professional people who no doubt wish to preserve their professional reputations in the minds of the court and others. It is not naïve, wishful thinking or unrealistic to state that confidence can reasonably be placed in them to undertake their tasks professionally and independently. I have no doubts in that respect just as Hoffmann J had no doubts in *Re Maxwell Communications* at page 467 that the appointees "would act independently as office holders appointed by the court" and at page 469 would "act as independent officers

of the court”. If there was a perceived lack of independence this point may have little, if any relevance, but in this case there is no reasonable perception of lack of independence.

91. I entirely accept the importance of all stakeholders and indeed existing and future internal and external investors worldwide having confidence in the liquidation process of insolvent companies in the Cayman Islands and competent, skilled, cost effective and independent official liquidators have an important role to play in that process and the justifiable confidence placed in it. The courts should do all they can to maintain that confidence. I also appreciate that these days perception is just as important as reality.
92. The appointment of the Petitioners (formerly JVLs) to be JOLs, on the facts and circumstances of this case, should not through the eyes of an objective, fair-minded and well-informed stakeholder result in a reasonable perception that the Petitioners will somehow be impaired from conducting a proper investigation into the prior management of the Bank in which all stakeholders can have confidence. The Bank’s creditors should have confidence that the Petitioners, as professional JOLs and as officers of the court, will fearlessly and independently get on with their job and take whatever action is considered appropriate in the best interests of the creditors. Any investigations will be independent and should be seen by objective stakeholders as independent. Moreover, the liquidation will be under the supervision of the court.
93. It was for these reasons that I was content to appoint the Petitioners, previously JVLs, as JOLs in this case.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT