IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 79 OF 2022

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)
AND IN THE MATTER OF POSITION MOBILE LTD SEZC

Appearances: Michael Wingrave of Dentons for Technology Investment Consortium LLC

Before: The Hon. Justice David Doyle

Heard: 7 April 2022

Date Ex Tempore Judgment delivered: 7 April 2022

Draft transcript of Judgment circulated: 7 April 2022

Date transcript of Judgment approved: 8 April 2022

HEADNOTE

Court declining to proceed on an ex parte without notice basis in respect of an application to appoint joint provisional liquidators

JUDGMENT

Introduction

1. There is before the court an application in the form of an "Ex Parte Summons Without Notice for the Appointment of Joint Provisional Liquidators" (the "Application") recently filed by Technology Investment Consortium LLC (the "Applicant" or the "Petitioner") for the appointment of joint provisional liquidators ("JPLs") of Position Mobile Ltd SEZC (the "Company"). The application at paragraph 2 specifies that the JPLs shall have powers exercisable with the sanction of the court and sets out all the Schedule I powers and paragraph 3 simply sets the Schedule II powers exercisable without the sanction of the court. The remaining areas of the Application concern agents, remuneration, disbursements and costs. There is no specificity in respect of the powers of the JPLs, simply generalisations. The draft order mirrors the summons. If and when we come to consider powers focus will have to turn to *UCF Fund Limited* 2011 (1) CILR 305 and the reminder I gave at paragraph 78 of my judgment delivered in *GTI Holdings Limited* (FSD judgment unreported 15 March 2022).

2. Put very briefly, in this case the Applicant says that it is a contributory of the Company holding 49% of the shares with the remaining 51% being held by the "Genimous Group". There appears to be a dispute between the Applicant and the Genimous Group and the Applicant has filed a petition seeking the winding up of the Company on the just and equitable ground.

3. The Applicant requests that the Application for the appointment of the JPLs to hold the ring pending the determination of the winding up petition be heard as a matter of urgency *ex parte* without notice to the Company. The first issue to deal with therefore is as to whether it is appropriate to proceed *ex parte* without notice. To consider this issue in its proper context it is necessary to consider the relevant law, the evidence, the nature of the relief sought and the Applicant's submissions.

Law

4. McMillan J in *Bona Film Group Limited* (unreported FSD judgment 13 March 2017 at paragraph 61) on a with notice application for the appointment of provisional liquidators accepted that "considerable care must be taken before making what is plainly a draconian order."

5. Rimer LJ in the oft-quoted English case of *HMRC v Rochdale Drinks Distributors Ltd* [2013] BCC 419 at paragraph 76, in the context of the law of England and Wales and trading companies, stated:

> "The appointment of a provisional liquidator to a trading company is, however, a most serious step for a court to take. It is likely in many cases to have a terminal effect on the company's trading life. It is not an order to be made lightly and its making requires the giving by the court of the most anxious consideration."

6. Lewison LJ added some footnotes to Rimer LJ's comprehensive judgment:

> "109. The appointment of a provisional liquidator is, as the phrase suggests, an interim remedy. It takes place before the facts have been found. Not only is it an interim remedy, it is one of the most intrusive interim remedies in the court's armoury. In many, if not most, cases its effect will be to stop the company trading; and to cause the company's employees to lose their jobs. In deciding whether to grant or refuse an interim remedy the overriding principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. Among the matters which the court may take into account are the prejudice which the claimant may suffer if the remedy is not granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an

award; and the likelihood that the remedy will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases: see *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16; [2009] 1 W.L.R. 1405, [17], [18].

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

111. This leads on to the next point. Because the appointment of a provisional liquidator is so intrusive, an application for such an appointment made without notice needs to be justified by exceptional circumstances. A judge should not entertain an application of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the remedy (as in the case of a freezing or search and seizure order) or there has been literally no time to give notice before the remedy is required to prevent the threatened wrongful act. Any notice is better than none: see *National Commercial Bank Jamaica Ltd v Olint Corp Ltd* [2009] UKPC 16; [2009] 1 W.L.R. 1405, [13]. Nor is the judge's task helped by the extraordinary volume of the evidence and exhibits to which Rimer L.J. has referred ([5]). In the present case the problem is worse. Although, as Rimer L.J. has explained, HMRC had been investigating RDD for over three years before the application to Peter Smith J., in all his 126 pages Mr Mann gave no evidence at all to justify the making of the application without notice. I regard this as a serious omission before Peter Smith J.; although by the time of the contested hearing Floyd J. it had lost its significance."

7. Harman J in *Re a company (No 007070 of 1996)* [1997] 2 BCLC 139 at page 142 stated:

> "I have been referred to authorities on the question of the appointment of provisional liquidators – a power in the court sometimes referred to as the nuclear weapon of the Companies Court, since it causes almost always an impossibility for the company to recover."

8. In *ICGI* (FSD unreported judgment 4 August 2021) I referred to section 104(2) of the Companies Act and the four hurdles that an applicant for the appointment of provisional liquidators must jump.

9. In *Cathay Capital Holdings III L.P.* (FSD unreported judgment 24 August 2021) I reviewed the legal principles to consider when a court is asked to proceed *ex parte*/without notice. I referred to *National Commercial Bank Jamaica Limited* v *Olint Corp. Limited* [2009] UKPC 16 at paragraph 13, the Financial Services Division Guide B1.2(a) and the position under English law. In the circumstances of that case I was not persuaded to proceed with the hearing on an *ex parte* basis.

10. In the context of the case presently before the court I note that Order 4 Rule 1 (2) of the Companies Winding Up Rules 2008 provides that the company is entitled to at least 4 clear days' notice of the application for the appointment of a provisional liquidator "unless the court is satisfied that there is some exceptional circumstance which justifies the application being made ex parte."

The Evidence

11. In his first affidavit sworn on 1 April 2022 Ryan Stephens ("Mr Stephens") says that he is a Manager of the Applicant and is a director of the Company. The affidavit, which runs to some 25 pages has sections dealing with the parties, general factual background, the term sheet, the Company and early operation, mid/late 2020 onwards, CFIUS, Whistleblower

information, damage to the product of the Company, Trust and Confidence/Lack of Probity, Investigation, Alternative Remedy, Necessity, Urgency and Lack of Notice and Full and Frank Disclosure.

12. The following is taken from the affidavit:

(1) Mr Stephens confirms the truth of the winding up petition which relies on the just and equitable ground. It is stated that the Applicant is the holder of ordinary shares in the Company "having acquired those shares on 1 October 2019". It is added that the Applicant "acquired 2,450,000 shares in the Company in return for US$50,000.00, amounting to 49% of the issued share capital. The remaining 51% are owned by Genimous Group. The Company is solvent, such that the [Applicant] has a significant material interest therein". The Applicant defines the Genimous Group as Genimous Investment (Hong Kong) Co Ltd and Genimous Holding (HK) Limited;

(2) the Applicant seeks the appointment of JPLs "to prevent dissipation or misuse of the Company's assets and/or misconduct on the part of certain of the Company's directors [unnamed] pending the hearing of the Petition. That application is made on an urgent, ex parte basis without notice for reasons that will be dealt with in detail below [in the affidavit]." (para 6 of the affidavit);

(3) the Applicant refers to "a number of concerns that have arisen during the past 12 – 24 months, which when taken with more recent actions on the part of the majority of the Board serve to reinforce the Petitioner's loss of trust and confidence in the management of the Company and/or the breakdown of mutual trust and confidence between the two parties behind the Company, the Petitioner being one of those two parties. The Petitioner has

through its members sought to address their concerns with the Company, but those attempts have only resulted in the exacerbation of the Petitioner's concerns …" (para 7 of the affidavit);

(4) in January 2018 Mr Stephens and "other members of the Petitioner (Cody Mahaffey, Nicholas Jackson, Daniel Miller and Justin Lee) were working for Spigot [Inc ("Spigot") a company incorporated under the laws of Nevada USA] in various capacities having sold that business in its entirety to Genimous Group in May 2016" (paragraph 13);

(5) there is reference to an indication in 2017 of the desire of the Genimous Group to move into the mobile application market and Mr Stephens being approached to see if he could assist them and the Genimous Group proposed a new joint venture company to be called Position Mobile to focus on the mobile business and a 51/49 equity split. Mr Stephens refers to this as the "handshake deal." (paragraphs 15 to 18);

(6) Mr Stephens says that Spigot and Eightpoint Technologies Ltd SEZC ("Eightpoint"), which appears to be a Cayman Islands' company, were responsible for producing desktop products for the Genimous Group and wholly owned by it and were the entities with which the Petitioner worked. Mr Stephens says that once the "hand-shake deal" had been achieved in January 2018 "work on the new mobile business began immediately, within Spigot and Eightpoint." (paragraph 17);

(7) Mr Stephens refers to the Term Sheet and I deal with the contents of that important document in more detail later in this judgment;

(8) Mr Stephens says that the Company was brought into operation on 1 October 2019 and refers to the Amended and Restated Memorandum and

Articles of Association of the Company and in particular Article 79 in respect of the make up of the board of directors (paragraph 28);

(9) Mr Stephens gives further detail as to the early operation of the Company at paragraphs 29 to 39 of his affidavit;

(10) Mr Stephens then covers the period of mid/late 2020 and onward referring to an approach in December 2020 by the Genimous Group to purchase the Petitioner's shares in the Company for US$5 million which he says fell short by a significant margin of the envisaged level (paragraph 42). Mr Stephens refers to attempts at negotiation and various threats (paragraph 42);

(11) I note that in the "Board of Directors Meeting Minutes" held on 13 August 2020 at paragraph 6 it was resolved unanimously that the Company will hold Board of Directors meetings quarterly and that "The Company will regularly report financial results of the Company to all Directors of the Borad and in such reporting will include information on the Company's performance compared to key performance indices described in the term sheet agreed between Genimous and TIC" and that "The shareholders of the Company will hold a separate meeting to discuss Genimous purchasing TIC's equity in the Company." It was noted that "TIC would be willing to sell its equity in the Company to Genimous at a fair price …"

(12) Mr Stephens refers to his concern in respect of the "possibility that the Company was being overcharged by Spigot" (paragraph 47);

(13) it is stated that in November 2021 Peter Wong who had been hired by Genimous as the CEO for Spigot in "the third quarter of 2021" (paragraph 49 of the affidavit) "came to the Petitioner to re-ignite talks for purchase of the Petitioner's shares in the Company" (paragraph 52) with an offer of

US$5.5 million (paragraph 53). The Petitioner rejected the offer (paragraph 54). Mr Stephens makes the serious allegation that Mr Wong said that "Genimous Group would see to it that intellectual property would be stripped out of the Company, that they would essentially destroy the value in the business and that Mr Miller and Mr Jackson would be terminated from their positions within Spigot in order to reduce the Petitioner's insight and input into and its control of the mobile business from the Spigot side." (Paragraph 54);

(14) Mr Stephens refers to his email dated 5 January 2022 to Mr Wong describing "multiple corporate governance deficiencies" (paragraphs 58 and 59 of this affidavit);

(15) Mr Stephens refers to an email from Mr Newell , who is described in that email as "Senior Director & Counsel, Legal & Tax Spigot Genimous Company," on 12 January 2022 asking for a copy of the "operating agreement" which Mr Stephens understood to be a reference to the Articles (paragraph 60);

(16) Mr Stephens refers to emails from Mr Jackson dated 17 and 19 January 2022 to Spigot and the Board of the Company "spelling out the dangers of the approach it was feared the Genimous Group would adopt" (paragraph 62). Mr Stephens says that on 19 January 2022 "Mr Miller and Mr Jackson were terminated as employees of Spigot" (paragraph 63);

(17) Mr Stephens refes to a request made on 1 February 2022 for financial information in order to further a potential sale of the Petitioner's shares to third parties (paragraph 65). Certain information was shared on 11 February 2022. Mr Stephens regards an email of 9 March 2022 as "particularly concerning given that it amounts to a refusal to provide the PDs with internal financial information for the Company …" Mr Stephens says that

this was "this was the first occasion on which the Petitioner had seen the budget and strategic (sic) for 2022…" (paragraph 67); and

(18) Mr Stephens from paragraph 68 onwards refers to CFIUS. I will refer to this and the "Whistleblower Information" in more detail in a moment.

13. Mr Stephens at paragraph 21 of his affidavit states:

> "… the parties finally signed what was described as a non-binding term sheet (the "Term Sheet") in late July 2019, back dating the document to 11 April 2019."

14. The Term Sheet seems to envisage the setting up of the Company and the "entering into a definitive agreement covering the relationships and transactions contemplated in this Term Sheet and other customary terms." At paragraph C2 it is stated that "The parties shall develop a memorandum and articles of association (the "Operating Agreement") for [the Company] on mutually acceptable terms to be executed concurrent with the capital contributions." Paragraph E3 states:

> "Genimous and TIC [the Applicant] will discuss and reach a definitive agreement with all terms within six months after the completion of this Term Sheet."

15. I note paragraph G Corporate Governance.

16. Paragraph H1 provides:

> "Except for Section H, which shall be binding on the Parties, the Parties do not intend to be bound by this Term Sheet until they enter into definitive agreements regarding the subject matter of this Term Sheet. Each Party agrees to negotiate the definitive agreements in good faith and to use best efforts to consummate the transactions contemplated by this Term Sheet."

17. Paragraph H2 is a confidentiality clause and paragraph H3 provides:

> "This Term Sheet and the definitive agreement shall be governed by the laws of the State of Florida, USA. In case of any dispute which cannot be resolve (sic) by the Parties through negotiation, either Party may submit the dispute for arbitration in Hong Kong. The arbitral award shall be final and binding on the Parties."

18. I note also that Mr Stephens signed what he refers to as the CFIUS Agreement and resolutions of the Board although it appears he felt time pressured in so doing and he says that subsequently Jing Sun and Scott Yu were removed from the Board and replaced with Zhifeng Chen and John Lash (paragraphs 66 – 72 of his affidavit). Mr Stephens adds that Mr Lash "has shown no willingness to dissent against the GGDs or to allow the PDs back into management". GGDs are defined as directors appointed by Genimous Group and PDs are defined as directors appointed by the Petitioner/Applicant.

19. Under the heading "Whistleblower Information" Mr Stephens says at paragraph 75 of his affidavit that certain individuals have informed him of certain matters. He does not name these individuals and he does not give dates as to when he received the information. Mr Stephens is concerned that the Genimous Group are seeking to avoid paying the Applicant a fair price for its shares (paragraph 76 of his affidavit).

20. From paragraph 78 onwards Mr Stephens provides evidence under the heading "Damage to the Product of the Company". Mr Stephens at paragraph 81 refers to a "threat" from Genimous Group and is concerned that it will take steps to "wrongfully divert revenue that properly belongs to the Company to other entities." At paragraph 82 Mr Stephen refers to a generalised "understanding" that "Genimous Group has shown a willingness to improperly allocate cost to the Company to the advantage of other entities."

21. Mr Stephens deals with the Petitioner's position in respect of "Trust and Confidence/Lack of Probity" at paragraphs 83 – 85, "Investigation" at paragraph 86, "Alternative Remedy" at paragraph 87 and "Necessity" at paragraph 88.

22. Mr Stephens at paragraph 88 says "There is real risk that the GGDs/Genimous Group will continue to conduct the affairs of the Company in a manner amounting to mismanagement and/or that they will dissipate or misuse the assets of the Company and/or that they will continue to oppress the Petitioner as a minority shareholder, such that the appointment of joint provisional liquidators is necessary." He asks that the JPLs be appointed "to hold the ring pending the argument of the full Petition" and says he is "not aware of any other step that is reasonably or proportionately open to the Petitioner."

23. The affidavit of Mr Stephens contains a lot of hearsay evidence and on occasions fails to mention the sources of the information (for example the section headed "Whistleblower Information"). Moreover there are no references to the dates when it is said this information was provided to Mr Stephens. Mr Stephens often uses the phrase "I understand" but does not always state the facts upon which that understanding is based. He refers to Mr Miller and Mr Jackson and I note no direct evidence is provided by them.

24. For present purposes it is worth setting out paragraphs 89 – 92 in their entirety. They read as follows under the heading "Urgency and Lack of Notice":

> "89. This application for joint provisional liquidators is urgent. Upon the events that took place in January to March of this year, the Petitioner has paused only to explore its options and determine the proper way forwards. While I am not able to share the identities of the persons within the Company and/or Spigot that feed us information, it is tolerably clear to us that the Genimous Group intends to follow through on all of its threats and we are fearful that the current mismanagement and deliberate devaluation of the Company will continue to occur, if not be accelerated if provisional liquidators are not put in place to hold the ring ahead of the full

hearing of the Petition. If the threatened steps are not already in process, all the evidence suggests that they will take place very soon.

90. We are particularly concerned that the Genimous Group has entities within the Peoples Republic of China and elsewhere that might render recovery of any assets transferred out of the Company challenging or impossible. If this application does not come on for determination urgently and is not granted, it seems probable that Genimous Group will move the assets of the Company, perhaps beyond recovery, and will certainly damage its financial position. Furthermore, each day that passes the Apps published by the Company fall further into decline, leading to serious deterioration of revenue, ultimately damaging the Petitioner's interests.

91. This application is made without notice to the Company because the above described conduct of the Genimous Group and GGDs strongly suggests that, if made aware of this application, they will simply accelerate their threatened conduct. If the past communications/attempts to reason with the GGDs and Genimous Group appointees have shown anything it is that on each occasion where there is dissent or where issues as to governance are raised, they respond to tightening their grip on control and freezing the Petitioner further out of the business of the Company. There seems to be no reason to believe that the Genimous Group would permit the Company to remain in the condition that it is, assuming it has not already been stripped, while an on notice provisional liquidation application passes through the Courts. Rather, the position of the Petitioner can only reasonably be protected by an urgent *ex parte* hearing of its application for joint provisional liquidators.

92. Accordingly, I ask the Court to conclude that there are exceptional circumstances justifying the making of this application on an ex parte without notice basis."

Applicant's submissions on *ex parte* without notice point

25. Mr Wingrave, who appears on behalf of the Applicant, deals with the relevant law in respect of the Applicant's request to proceed *ex parte* without notice at paragraphs 27 – 29 of his skeleton argument filed yesterday. At paragraph 29 he states that it is for the Applicant "to show that exceptional circumstances exist such that [it] is just to proceed on a without notice and ex parte basis."

26. In his skeleton argument, Mr Wingrave deals with the Applicant's submissions on this *ex parte* without notice point as follows:

> "49. P submits exceptional circumstances exist in this matter, justifying the hearing of this application ex parte and without notice. The concise reasons why are:
>
> a. The GGDs appear to be engaged in a course of conduct either deliberately designed to damage or they are otherwise negligently damaging the value of the Company and the shares that P owns. Thus, the assets of the Company have been reduced or otherwise dissipated within the meaning of *Nyckeln* and *Asia Strategic*;
>
> b. The above conduct is entirely suspicious in light of the threats that the Genimous Group made following the refusal of its offer to purchase P's shares and should, P submits, be seen the lens of Genimous Group's willingness to follow through on its threats to terminate Messrs Miller and Jackson;
>
> c. The GGDs and the Genimous Group are operationally capable of transferring intellectual property away from the Company without P

being made aware of that fact and without the PDs having any insight into where those assets might be sent;

d. The PDs have been entirely excluded from management simultaneous with Genimous Group's threats, which would appear to strengthen the suggestion that they intend to follow through on their threats;

e. Each attempt to engage with Genimous Group concerning corporate governance and / or P's complaints led only to Genimous Group tightening their group on control and freezing P further out of the Company and taking yet further steps to reduce P's visibility into the business and / or to reduce its influence over the business;

f. It is to be concluded that were the Company or more accurately the GGDs and the Genimous Group to be made aware of this application, notice would likely serve only to accelerate the above conduct, to complete whatever process is currently in train or to move assets yet further beyond P's (or the Company's) reach;

g. This application is made to maintain the status quo, rather than to change any rights or finally determine any matter, pending the full hearing of the petition. It is submitted that the Company would retain the right to challenge the Order sought in the future and that its right to be heard on the issues is not extinguished by the *ex parte* without notice of this hearing, rather those rights would be, for good reason, merely delayed;

h. In any event, the interference with the right of the Company to be heard on this application is entirely proportionate to the gravity of the conduct of Genimous Group and the exceptional disregard shown for P's rights whether as shareholder or via the PDs as directors, in all the circumstances."

27. In his oral submissions Mr Wingrave on the *ex parte* without notice point referred to the contents of the Power Point presentation made by Mr Wong, the CEO for Spigot, in November 2021. Under the heading "Limitations and Restrictions" it reads:

- "TIC, as a minority shareholder, has limited rights
- No external buyer will show interest for TIC holdings
- Any divestiture requires Genimous approval
- Genimous has first right to acquire
- Genimous can dictate buy out terms
- PM growth limited to existing portfolio only
- Any new mobile initiatives will likely live under SPE"

28. Mr Wingrave also took the court to graphs showing the fall in rankings of the Company's Apps. Mr Wingrave at paragraph 48b. vi of his skeleton argument stated: "The GGDs caused, permitted or allowed Apps it owns to fall dramatically in rankings, indicating either a deliberate or negligent failure to properly maintain and/or market those Apps, resulting in a loss of revenue." Mr Wingrave submitted that it was not until relatively recently (mid March) that the Applicant became aware of the significant loss in revenue and it appears that the GGDs are carrying out their threats to devalue the Company and to prevent new product going to the Company.

29. Mr Wingrave submitted that the Applicant's desire to proceed *ex parte* without notice arises from its very real concerns that assets will be stripped from the Company imminently. Mr Wingrave submitted in effect that the mismanagement is now being converted into deliberate wrongful conduct and there are real concerns in respect of the Company's intellectual property. Mr Wingrave asks me to bear in mind that the party being shut out from a Company will always be on the back foot when it comes to obtaining direct evidence to support its case.

Conclusions on the *ex parte* without notice issue

30. I have carefully considered all that Mr Wingrave has written and said on behalf of the Applicant. Despite the considerable eloquence of Mr Wingrave I have concluded that it would not be fair or just, in the particular circumstances of this case, to proceed *ex parte* without notice. Frankly, I am not convinced as to the alleged urgency. I have not been persuaded that the Application is so urgent that no notice can be given. The disputes between the parties appear to have been brewing for many months. The evidence does not provide precise recent dates when issues of concern were raised by unnamed individuals. The Company and the GGDs already appear to be on notice as to the serious concerns of the Petitioner and have been so aware for some considerable time.

31. Mr Stephens refers to concerns over the past 12 – 24 months. I appreciate that those concerns seem to have increased recently throughout January to date. The evidence does however not support an argument that this is one of those rare genuinely urgent cases where absolutely no notice, not even short notice can be given. Moreover the evidence does not support the argument that there is such an imminent threat to assets that notice would defeat the purpose of the application. I have not been persuaded on the evidence and arguments presented that the giving of notice would enable the Company to take steps to defeat the purpose of the Application. The Company and/or the GGDs, on notice of the Application, would be very foolish indeed to engage in misconduct which would then come under the spotlight of the court proceedings. The evidence and arguments presented to me have failed to persuade me that exceptional circumstances exist such that it is just and fair to proceed on an *ex parte* without notice basis. The Applicant has failed to discharge the heavy burden upon it in this respect. I am therefore duty bound to adjourn this hearing in order that proper notice may be given.

32. Generalised pleas that the Company or rather the directors of the Company appointed by the Genimous Group will continue to engage in mismanagement, continue to reduce the Applicant's influence over the business and reduce the value of the Company and

generalised allegations of potential dissipation of assets and concerns over potential recovery of any assets which may be transferred to the People's Republic of China and elsewhere, are quite insufficient to persuade this court to take the exceptional step of proceeding *ex parte* without notice to hear an application for the appointment of JPLs. I have no hesitation in concluding that such would not be fair or just. I am not willing to hear and determine the Application on an *ex parte* without notice basis.

33. The facts and circumstances of the case presently before me are very different to the facts and circumstances of *Principal Investing Fund I Limited* (FSD unreported judgment 17 September 2021) and *Seahawk China Dynamic Fund* (FSD unreported judgment 16 February 2022) where I was persuaded to take the rare and exceptional step of proceeding to hear an application for the appointment of joint provisional liquidators on an *ex parte* without notice basis.

34. In the case presently before the court, I am not persuaded that there are "good reasons" or "exceptional circumstances" that would justify this court taking the serious step of hearing and determining the application for the appointment of provisional liquidators without proper notice being given.

35. I do not belittle the concerns of the Applicant but it is a very serious step to proceed *ex parte* without notice and I have not been persuaded in this case that it would be justifiable for the court to take such a step.

36. Moreover, I am concerned over the lack of reference to any undertaking on behalf of the Applicant. Order 4 rule 3 of the Companies Winding Up Rules concerns applications for the appointment of provisional liquidators and provides:

> "(1) The applicant shall give an undertaking to the Court to pay –
>
> (a) any damage suffered by the company by reason of the appointment of the provisional liquidators; and
>
> (b) the remuneration and expenses of the provisional liquidator,

in the event that the winding up petition is ultimately withdrawn or dismissed.

(2) Court may require the applicant to give security for his undertaking in such manner as the court thinks fit."

I record that no such undertaking has been given and no security has been offered, so the issue as to a secured undertaking is also outstanding.

37. For the reasons stated in this relatively short ex tempore judgment I adjourn this hearing to 11.30 a.m. on Thursday 14 April 2022. The Applicant should give notice of that hearing today to the Company, the directors appointed by Genimous Group and to the 51% shareholder and serve all the papers on the Company forthwith and in any event no later than 10 a.m. tomorrow.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT