

[2022 Gib LR 191]

**IN THE MATTER OF INSPIRATO FUND No. 2 PCC
LIMITED (cells E, F & G in administration)**

SUPREME COURT (Dudley, C.J.): June 23rd, 2022

2022/GSC/16

Companies—protected cell companies—liquidation—appropriate to appoint liquidator where cellular assets likely insufficient to discharge creditors’ claims (Protected Cell Companies Act 2001, s.19(1)(a)) and very unlikely that continued administration would be more advantageous

Companies—protected cell companies—liquidation—liquidator should not be nominated by party against whom company or cell might have adverse claim

A cell administrator applied to be appointed liquidator.

In 2021, JW had been appointed cell administrator of three cells of Inspirato Fund No. 2 PCC Ltd., a company incorporated in 2011 under the former Companies Act 1930 but governed by the Protected Cell Companies Act 2001 (“the PCC Act”).

The applicant in the original application to appoint a cell administrator was XCAP Nominees Ltd. (“XCAP”), a company previously owned by Hume Capital Securities plc (“Hume”). In 2014, XCAP had invested £2,735,000 in the cells and was the legal owner of all the shares in the cells. It held the shares as nominee for the beneficial owner, Quilter International Isle of Man Ltd. (“Quilter”). Inspirato was managed by the Castle Group of companies. According to JW, one of the directors, SK, was the ultimate beneficial owner of the Castle Group. JW asserted that SK had said that a Mr. Keith Bayliss, who had been a director of Inspirato from 2017 to 2019, was the architect and promoter of the cells. According to JW, payments amounting to £2,735,000 were paid into the cells by Hume (for XCAP) and in turn £2,560,000 was used by the cells to purchase fixed rate 6% loan notes from the KB Foundation with the balance of £175,000 mainly paid by way of fees to the Castle Group, SK and another director. JW believed Keith Bayliss to be the settlor of the KB Foundation, which was a Gibraltar trust of which CTMS was the sole trustee. SK was the beneficial owner and director of CTMS. The loan notes were secured by debentures granted over assets of the KB Foundation. The loan notes had not been repaid.

The cells had not received any return on their investment and, as at the date of JW's appointment as administrator, the Castle Group continued to claim and accrue fees and costs for services they claimed to be performing. JW asserted that SK had insisted the KB Foundation had value and that it was SK's failure to deal with questions and to provide documentary evidence which Quilter considered to be reasonable which led to XCAP seeking the appointment of an administrator.

SK proposed that negotiations should be commenced between the cells, CTMS as trustee of the KB Foundation and Keith Bayliss. The proposal was underpinned by a deed of settlement in 2021 by which Keith Bayliss agreed to pay certain sums to CTML as trustee of the KB Foundation. No payments appeared to have been received by the KB Foundation.

SK applied to be appointed liquidator. She considered that, based on her professional experience and judgment, there was no reasonable basis upon which the statutory purposes of the administration could be achieved. She relied in particular on the failure by Keith Bayliss to make any payments under the deed; that the cells had no other source of income; that the KB Foundation appeared to have only a cash balance of £4,000; that creditors were owed money, including the Financial Services Commission; that Inspirato and the cells were in breach of regulatory requirements in that there were not in place the two required EIF directors as stipulated by the Financial Services (Experienced Investor Funds) Regulations 2020; and that there was no prospect of an annual audit as also required by those Regulations.

SK, Castle Fund Administrators Ltd. and Castle Secretaries Ltd. claimed to be by value the majority creditors of the cells ("the purported creditors"). They sought an order that the administration order not be discharged but that a Mr. Stoneman, a licensed insolvency practitioner, be appointed in place of JW (or alternatively jointly with JW), alternatively if the court were minded to accede to JW's application for the appointment of a liquidator, that Mr. Stoneman be appointed liquidator instead of JW (or alternatively jointly with JW). The purported creditors opposed JW's appointment as sole liquidator because they considered that (a) she had already concluded that there was no prospect of recovery, without proper investigation and without any regard for the purported creditors; (b) she had little real interest in the position of the purported creditors; and (c) the relationship between SK and JW had been difficult and had resulted in litigation including an appeal to the Court of Appeal with JW alleging that SK had not cooperated.

Held, ruling as follows:

(1) It was appropriate to make an order for the appointment of a liquidator. The statutory test in s.19(1)(a) of the PCC Act for making a cell liquidation order, namely "that the cellular assets attributable to a particular cell . . . are likely to be insufficient to discharge the claims of creditors in respect of that cell," was made out. As regarded the administration, there was no prospect of the cells being saved as a going concern. Moreover,

payments by Keith Bayliss to the KB Foundation not having materialized, it was very unlikely that the continued administration of the cells would result in “the more advantageous realization of the business and assets of or attributable to the cell . . . than would be achieved by a cell liquidation.” The cells were not engaged in ordinary trading activities but rather were investment vehicles and regard was also to be had to the protection of investors. The primary purpose of a liquidation was to pay the claims of creditors, although evidently, in the event that after paying for the costs of winding up and the claims of creditors the fund collected by a liquidator was in surplus, contributories were then entitled to a distribution of that surplus. In circumstances in which the purported creditors were officers of or concerned in the management of the cells and their conduct likely fell to be inquired into, the court afforded their views less weight than would otherwise be the case (paras. 24–25).

(2) JW would be appointed as the liquidator. As a matter of principle, a liquidator should not be nominated by a party against whom the company (or a cell) might have an adverse claim. Not only was the control and management of Inspirato and the cells inextricably linked with SK and the Castle Group companies but so was that of the KB Foundation. Irrespective of whether they were able to prove their claims in due course, it was clear that a liquidator of the cells would inevitably have to inquire into the conduct of SK and the Castle Group entities and therefore the purported creditors should play no part in the nomination of the liquidator. There was no basis upon which it could properly be said that JW would not discharge her duties as liquidator properly and professionally or that she would hesitate to bring proceedings against such entities or individuals who might be liable to the cells in respect of the losses they had suffered. Moreover, it was instructive to note that according to SK’s affidavit, the purported creditors’ commitment to fund Mr. Stoneman was limited to meeting “the initial funds required to move this process forward.” That posed the very practical question as to what would happen if Mr. Stoneman were appointed and the purported creditors decided not to fund the liquidation beyond the initial stage. It was wholly appropriate that JW be appointed as liquidator. This would allow for there to be continuity in respect of the work already undertaken to investigate the affairs of the cells; there was no legitimate basis upon which her professionalism or impartiality could be challenged; and she had funding available to discharge her duties, which funding did not affect her impartiality (paras. 29–32).

Cases cited:

- (1) *Avant Garde Invs. Pty. Ltd. v. Cheema*, [2020] FCA 98, considered.
- (2) *Fielding v. Seery*, [2004] BCC 315, referred to.
- (3) *Power v. Petrus Estates Ltd.*, [2008] EWHC 2607 (Ch); [2009] 1 BCLC 250; [2009] BPIR 141, considered.

Legislation construed:

Protected Cell Companies Act 2001, s.19: The relevant terms of this section are set out at para. 21.

s.24(4): The relevant terms of this subsection are set out at para. 21.

s.27(1): The relevant terms of this subsection are set out at para. 21.

W. Buck with *A. Rose* (instructed by INCE) for Ms. Joanne Wild, the administrator of cells E, F and G in administration;

D. Feetham, Q.C. with *R. Pennington-Benton* and *D. Martinez* (instructed by Hassans) for Steven Knight, Castle Fund Administrators Ltd. and Castle Secretaries Ltd.

1 **DUDLEY, C.J.:** This is the judgment on:

(i) an application by Ms. Joanne Wild (“JW”) by which she seeks to be appointed liquidator of Inspirato Fund No. 2 PCC Ltd. [cells E, F and G in administration]; and

(ii) an application by Steven Knight (“SK”), Castle Fund Administrators Ltd. (“CFA”) and Castle Secretaries Ltd. (“CSL”) who claim to be, by value, the majority creditors of the cells (“the purported creditors”). They seek an order that the administration order of June 9th, 2021 not be discharged, but that Andrew Stoneman, a licensed insolvency practitioner, and Managing Director of Kroll (Gibraltar) Ltd. (“Kroll”) be appointed in place of JW (or alternatively jointly with JW) or alternatively if the court is minded to accede to the application of JW for the appointment of a liquidator, that Andrew Stoneman be appointed liquidator instead of JW (or alternatively jointly with JW).

Background

2 The background to the application is somewhat convoluted and certainly, as regards the involvement by various individuals and their authority to act in the manner it is alleged that they did, contentious. I endeavour to limit myself to providing an overview in neutral terms or, where factual assertions may be disputed, I indicate the source of the assertion.

3 By order dated June 9th, 2021, JW was appointed cell administrator of cells E, F and G (“the cells”) of Inspirato Fund No. 2 PCC Ltd. (“Inspirato”) which is a protected cell company incorporated pursuant to the Protected Cell Companies Act (“the Act”).

4 The applicant in the original application to appoint a cell administrator of the cells was XCAP Nominees Ltd. (“XCAP”) a company previously owned by Hume Capital Securities plc (which is now in special administration) (“Hume”) and which is now part of the Kingswood Group.

5 In December 2014, XCAP invested £2,735,000 in the cells by acquiring shares in these and is the legal owners of all the shares in the cells. It holds

the shares as nominee for the beneficial owner of the shares, Quilter International Isle of Man Ltd. (“Quilter”).

6 Inspirato was incorporated as a protected cell company in 2011 although the cells the subject of these proceedings were formed in December 2014. Inspirato is managed by the Castle Group of companies (“Castle Group”). The fund administrators of Inspirato are CFA and the company secretary is CSL. The board of directors comprise First Management Ltd., a corporate director which is said to be provided by Castle Trust and Management Services Ltd. (“CTMS”), another company which is within the Castle Group, and two professional experienced investment fund directors, namely SK, and the late Mr. Joseph Tavares, who resigned in March 2021. According to JW, SK is the ultimate beneficial owner of the Castle Group. SK, Mr. Tavares and the relevant Castle Group entities were at all material times licensed by the Gibraltar Financial Services Commission (“GFSC”) to undertake their respective activities.

7 It is JW’s evidence that SK has held out that a Mr. Keith Bayliss (who was a director of Inspirato from April 7th, 2017 until what is said to be his purported resignation on July 10th, 2019) was the architect and promoter of the cells.

8 According to JW each cell had a separate private placement memorandum, each with an independent long-term objective which went towards furthering what is referred to as “the local authority model,” which is partnering with local authorities under joint ventures for private investment into regeneration projects, affordable housing *etc.* The short-term strategy if required, centred around investment in short-term cash equivalents until sufficient capital had been received for the long-term strategy to be implemented.

9 Also according to JW, by reference to client account ledgers of CFA and CTMS, she has established that payments amounting to £2,735,000 were paid into the cells by Hume (for XCAP). In turn the sum of £2,560,000 was used by the cells to purchase fixed rate 6% loan notes (“the loan notes”) from the KB Foundation with the balance of £175,000 in the main paid by way of fees to the Castle Group, SK and Mr. Tavares.

10 Relying upon a document which is exhibited to a report produced by Kroll dated January 7th, 2022 (“the Kroll report”) and which was commissioned by CTMS as trustee of the KB Foundation, JW expresses the belief that Mr. Bayliss is the settlor of the KB Foundation. Further said by JW, that the KB Foundation is a Gibraltar trust of which CTMS is the sole trustee. She emphasizes that SK is the beneficial owner and director of CTMS.

11 The loan notes were secured by debentures granted over assets of the KB Foundation and each had a repayment date defined as “the date which is 3 months after the date of issue of a certificate for that Note, unless otherwise agreed between [the KB Foundation] and the relevant Noteholder.” As regards the debentures, it is said by JW that at the time that these were granted, the KB Foundation held KBFR Holdings Ltd., which according to the most recent balance sheet dated December 31st, 2018 has no value. And, that she established that another asset that the KB Foundation claims to own, namely KBF Holdings (Asia) Ltd., was struck off on November 24th, 2021 for failure to file annual returns.

12 It is not in dispute that the cells have failed to receive any return at all on their investment, and that as at the date of JW’s appointment, the Castle Group continued to claim and accrue fees and costs for services they claimed to be performing.

13 JW asserts that SK has been insistent to Quilter, KPMG (the former auditors of Inspirato), AMS audit (the current auditors of Inspirato) and this court that the KB Foundation had value in the form of ongoing projects pursuant to the local authority model. That in the event it was SK’s failure to deal with questions and to provide documentary evidence which Quilter considered to be reasonable which led to XCAP seeking the appointment of an independent cell administrator.

14 It is JW’s position that SK has been uncooperative with her in her capacity as cell administrator. It is an assertion which SK disputes. In the event, JW made an application within the administration for the private examination of SK on oath. The merits of that application were not considered as submissions before Restano, J. were confined to the preliminary issue of whether the court had jurisdiction to order any such examination. Restano, J. found in favour of JW on the issue of jurisdiction and by judgments of the Court of Appeal of May 31st, 2022 of Sir Maurice Kay, P., Sir Colin Rimer, J.A. and Sir Patrick Elias, J.A. (dissenting) the court upheld the judgment below and dismissed SK’s appeal (reported at 2022 Gib LR 141).

15 JW relies upon the Kroll report for the purposes of providing what she describes as “a very high level” history of the relationship between the cells and the Foundation, subject to the caveat that she only accepts those parts of the report which are substantiated by independent evidence, and reserves her position on the remainder. That history is set out at para. 7 of her second affidavit, as follows:

“7.3.1 Mr. Keith Bayliss wanted to purchase the Kingdom Bank with Mr. Robert Jarrett, using the Foundation as the vehicle to do so (referred to in some documents as the ‘Bank of Jarrett’). The KROLL Report suggests that the Cells were not contemplated at the time.

- 7.3.2 Mr. Jarrett was repaid his investment of circa £10 million (with interest) in September/October 2014, leaving the Foundation, apparently, significantly indebted to various third parties—I make no comment on whether or not those debts were reasonable or otherwise, save as to say they were clearly not the liability of the Cells, which had not even been formed.
- 7.3.3 Due Mr. Jarrett’s withdrawal from the transaction, the purchase of the Kingdom Bank was no longer possible, and Mr. Bayliss reached the conclusion that Hume was a suitable acquisition target. He advised the Foundation (essentially Mr. Knight and the Board of CTMS) of that on 31 October 2014.
- 7.3.4 The significantly indebted Foundation did not have sufficient capital to purchase Hume.
- 7.3.5 The Cells were formed in December 2014, and XCAP (which I remind the Court was, at that point in time, a subsidiary of Hume) used its discretionary fund management powers to cause Quilter to invest £2,735,000 in the Cells.
- 7.3.6 Within a matter of days, Mr. Knight, as EIF Director, signed off on a loan of £2,510,000 to the Foundation.
- 7.3.7 In turn, CTMS (the Trustee of the Foundation, controlled to the best of my belief by Mr. Knight) issued the Loan Notes.
- 7.3.8 On 22 December 2014, Mr. Bayliss recommended to CTMS that it use the cellular moneys that had been loaned to the Foundation to provide working capital loans to Hume which could be converted to equity once the change of control of Hume was approved. The KROLL Report states that the Foundation used proceeds of the loans to settle debts claimed against the Foundation, including ‘consultancy fees’ charged by Hume executives, apparently including David Barrow and Ben Ticehurst.
- 7.3.9 That same day, 22 December 2014, Mr. Bayliss advised CTMS that Hume was suffering liquidity issues. Despite this clear indicator that there were issues, CTMS nevertheless caused the Foundation to use the loaned cellular monies for the purpose of working capital on 23 December 2014 (and did so on two further occasions).
- 7.3.10 Despite this funding, Hume was placed into Special Administration less than 3 months after the purchase of the Loan Notes.
- 7.3.11 Ward Hadaway, a legal firm based in the United Kingdom, returned large sums to the Foundation between February and

March 2015 but a further loan was made to KBF Holdings Limited from the Foundation in 2016 and £126,000 was transferred to CTMS. Monies were transferred out to third parties.

7.3.12 A further £50,000 of cellular monies were used to purchase two more Loan Notes from the Foundation one month later (April 2015), and it appears that that money was also paid out.

7.3.13 Allowing for fees etc of the Castle Group and minor expenses, the cellular money was consumed entirely.”

16 In a comprehensive affidavit dated May 12th, 2021 by Mark Callow, a former senior manager for Quilter authorized to swear the affidavit on Quilter’s behalf and filed for the purposes of supporting the application for the administration order, Mr. Callow expresses the view that that application arose from a probable fraud committed against Quilter and 73 of its policy holders who have collectively lost a total of £2.735m. According to him at the time of the investments, the custodian (being XCAP, a part of Hume) would have been aware of the asset review criteria stipulated by Quilter and that the cells were clearly entirely unacceptable investments for Quilter and hence any of its policyholders.

17 For his part SK, in a witness statement dated January 7th, 2022, produced for the purposes of an application in the administration, and adopted for the present applications, explains that the directors of Inspirato invested in the “5 year Loan Notes” (described thus at para. 41) because they had been assured by Hume that further moneys were going to be received from it via its client services company XCAP, to complete the purchase of the Kingdom Bank/Hume and the repayment of the loan notes. That in SK’s view, all the relevant senior personnel at Hume, including those in control of XCAP were aware that the £2.735m. would be used to pay costs that had in some cases already been incurred in the proposed acquisition of the Kingdom Bank and Hume, via the loan notes issued to the KB Foundation. That the acquisition would have enabled the early repayment of the loan notes as per the original plans. That when further investments into the cells from XCAP did not materialize the loan notes repayments became dependent upon realisations arising from what is referred to as the Peterborough and Allerdale Investment Partnership.

18 The loan notes which date back to December 2014 and April 2015 by their terms were repayable three months after the date of issue unless otherwise agreed between the KB Foundation and the noteholder. I have not been referred to any evidence to indicate that the repayment dates were extended. What is certainly not in dispute is that they have not been repaid.

19 As I understand it, SK’s primary proposal on his and the Castle Group purported creditors’ behalf, is that negotiations should be commenced

between the cells; CTMS *qua* trustee of the KB Foundation and Keith Bayliss. This proposal is in large measure underpinned by a deed of settlement dated September 29th, 2021 (“the deed”) and which I understand is linked to what SK in his January 7th, 2022 witness statement refers to as “realisations arising from the Peterborough and Allerdale Investment Partnership.” The deed is one made between Keith Bayliss, with an address in Dubai, and the KB Foundation, by which Keith Bayliss agrees to pay CTML, *qua* trustee of the KB Foundation, certain sums set out in a schedule to the deed within 30 days of Keith Bayliss receiving those sums. The sums which have anticipated payment dates from late December 2021 to September 2024 total £4,645,000 and make reference to various projects, *inter alia* in Allerdale, Peterborough and Northminster. As at the hearing of the application, a payment in the sum of £200,000 which was expected in December 2021 had not materialized. A further two payments totalling £940,000 which were expected in March 2022 similarly had not been received. During the course of the hearing it was said by Mr. Feetham that there was some prospect that those payments would be effected by Keith Bayliss, and that there was a greater likelihood of that happening if the cells remained in administration, as opposed to a liquidation. Some reliance was placed upon an article in the *Peterborough Telegraph* of March 21st, 2022 reporting that construction had got started on a 10 storey block at Peterborough’s Northminster. The article was not exhibited to a witness statement, and there is no reference in it to any of the *dramatis personae* in these proceedings. In any event, I indicated that it was unlikely that I would be in a position to hand down my reserved judgment before June, and that in the event that payments were effected to the KB Foundation, and in turn to the cells, before my handing down of the judgment, that this should be brought to my attention as it could impact upon my decision. As it happens, I have not been so notified.

20 In respect of the deed, JW’s position can be summarized as follows:

(i) The deed is evidentially unsupported, in that Keith Bayliss has not made available documentary evidence which demonstrates his entitlement to any of the commissions referred to, that the projects are afoot or their timeline;

(ii) The counterparty to the deed is the KB Foundation and therefore the deed can only be enforced by positive action by CTMS *qua* trustee and is not enforceable by the cell administrator;

(iii) The recital to the deed, whilst stating that the intended purpose of the payments is to repay the loan notes to the cells, also states that CTMS will exercise its right of set off to pay the Castle Group in respect of its claims against the KB Foundation and the cells before the cells see any return whatsoever; and

(iv) The payments scheduled for December 2021 and March 2022 do not appear to have been received by the KB Foundation.

In my judgment JW's analysis of the deed is cogent, and in particular, in the absence of the cells (or in the first instance the KB Foundation) having received any payments, it does not remotely provide a basis upon which to justify the continuation of the administration.

Administration or liquidation?

21 The purpose of an administration order in relation to a protected cell company is to be found at s.24(4) of the Act; it provides:

“The purposes for which an administration order may be made are—

- (a) the survival as a going concern of the cell or (as the case may be) of the company;
- (b) the more advantageous realisation of the business and assets of or attributable to the cell or (as the case may be) the business and assets of the company than would be achieved by a cell liquidation or (as the case may be) by the liquidation of the company.”

Whilst the power of the court to bring an administration to an end is set out at s.27(1):

“The Court shall not discharge an administration order unless it appears to the Court that—

- (a) the purpose for which the order was made has been achieved or is incapable of achievement; or
- (b) it would otherwise be desirable or expedient to discharge the order.”

The statutory test that is to be applied when determining whether to make a cell liquidation order is to be found at s.19(1):

“Subject to the provisions of this section, if in relation to a protected cell company the Court is satisfied—

- (a) that the cellular assets attributable to a particular cell of the company (when account is taken of the company's non-cellular assets, unless there are no creditors in respect of that cell entitled to have recourse to the company's non-cellular assets) are or are likely to be insufficient to discharge the claims of creditors in respect of that cell;
- (b) that the making of an administration order under section 24 in respect of that cell would not be appropriate; and

- (c) that the making of an order under this section would achieve the purposes set out in subsection (3);

the Court may make an order under this section (a cell liquidation order) in respect of that cell.”

The purposes in s.19(3) are:

“A cell liquidation order is an order directing that the business and cellular assets of or attributable to a cell shall be managed by a person specified in the order (the cell liquidator) for the purposes of—

- (a) the orderly winding up of the business of or attributable to the cell; and
- (b) the distribution of the cellular assets attributable to the cell to those entitled to have recourse thereto.”

Section 19(4) allows for a liquidation order to be made in respect of a cell subject to an administration order, whilst s.20(1)(d) allows for an administrator of a cell to make an application for a cell liquidation order.

22 For JW it is said that since the making of the administration order she has sought to perform her obligations pursuant to the Act by seeking to obtain information as to the affairs of the cells from *inter alia* SK so as to ascertain whether they can be saved as a going concern. It is her evidence that, based on her professional experience and judgment, she has formed the opinion that there is no reasonable basis upon which the statutory purposes of the administration can be achieved. In particular she relies upon the failure by Keith Bayliss to make any payments under the deed; that the cells have no other assets or source of income; that according to the Kroll report the KB Foundation only has a cash balance of £4,000; that creditors are owed money, including the Financial Services Commission; that Inspirato and the cells are in breach of regulatory requirements in that there are not in place the two required EIF directors as stipulated by the Financial Services (Experienced Investor Funds) Regulations 2020; and, that there is no prospect of an annual audit as also required by those regulations.

23 For the purported creditors it is said that in effect it was and has only ever been a question of seeking to recover the proceeds of the loan notes, or the cells suing for losses incurred as a consequence of the investments. That the strategy of the purported creditors has revolved around attempting to bind Keith Bayliss into repayment of the loan notes and properly investigating those who may have caused losses to the cells including XCAP and Hume and all their directors. The purported creditors do not agree that the second limb of the statutory objective of an administration (s.24(4)(b) of the Act) namely “the more advantageous realisation of assets of or attributable to the cell” is not capable of being achieved and made an

open offer to JW to forbear on the repayment of their (alleged) debts for a period of six months and to pay the amounts due to the GFSC and three other minor creditors provided JW agreed to the following:

- (i) the adjournment of the present applications for a period of six months;
- (ii) the appointment of Mr. Stoneman as joint administrator with JW;
- (iii) that Mr. Stoneman and JW seek independent legal advice on the potential liabilities of third parties to the cells, to be funded jointly by the purported creditors and Quilter on a 50/50 basis, including any liability by SK and XCAP;
- (iv) that Mr. Stoneman and JW attempt to negotiate a settlement between the cells and Keith Bayliss;
- (v) that in the event that no settlement agreement is agreed within six months or the joint administrators are of the opinion that the cells should be liquidated, that the application be relisted; and
- (vi) that the appeal that I referred to earlier, and which in the event has now been determined, be adjourned.

24 It is beyond dispute that the statutory test at s.19(1)(a) of the Act, namely “that the cellular assets attributable to a particular cell . . . are likely to be insufficient to discharge the claims of creditors in respect of that cell” is made out. As regards the administration there is no prospect of the cells being saved as a going concern. Moreover, payments by Keith Bayliss to the KB Foundation not having materialized it is very unlikely that the continued administration of the cells will result in “the more advantageous realisation of the business and assets of or attributable to the cell . . . than would be achieved by a cell liquidation.” The views of creditors are important but, as Mr. Feetham properly accepts, not decisive.

25 The cells were not engaged in ordinary trading activities but rather were investment vehicles and in my judgment regard is also to be had to the protection of investors. The primary purpose of a liquidation is to pay the claims of creditors, although evidently, in the event that after paying for the costs of the winding up and the claims of creditors the fund collected by a liquidator is in surplus, contributories are then entitled to a distribution of that surplus. In circumstances in which the purported creditors were officers of or concerned in the management of the cells and their conduct likely falls to be inquired into, I afford their views less weight than would otherwise be the case. In my judgment it is appropriate to make an order for the appointment of a liquidator.

Who should be the liquidator?

26 The purported creditors propose that Mr. Stoneman, who has over 30 years’ experience in the industry, should be appointed. Either by himself

or jointly with JW. Mr. Stoneman undoubtedly has the credentials for such an appointment. The purported creditors take the stance they do against JW's appointment as the sole liquidator because they say that:

(a) she has already concluded there is no prospect of recovery, reaching that conclusion without proper investigation and without any regard for the purported creditors;

(b) she has little real interest in the position of the purported creditors; and

(c) the relationship between SK and JW has been difficult and has resulted in litigation including an appeal to the Court of Appeal with JW alleging that SK has not cooperated.

27 That reference to recovery is one which I understand to be recovery through negotiations with Keith Bayliss with the benefit of the deed or otherwise. For the reasons set out before, there is in my judgment little prospect of recovery in the manner proposed by the purported creditors. To the extent that there is recovery, the creditors who are able to prove and have their claims admitted will no doubt recover in priority to contributories, whilst the fact that SK and JW have already found themselves embroiled in litigation (in which incidentally JW has been successful) cannot be a principled basis upon which to refuse her appointment as liquidator or have her appointed jointly with Mr. Stoneman.

28 In *Power v. Petrus Estates Ltd.* (3), Lewison, J. (as he then was) adopted certain principles set out in *Fielding v. Seery* (2) governing the choice of liquidator ([2008] EWHC 2607 (Ch), at para. 29):

“29. In *Fielding v Seery* [2004] BCC 315 HH Judge Maddocks, sitting as a judge of the High Court, set out a number of principles that governed the choice of liquidator. Among those principles were the following at 322:

‘(4) A liquidator should not be a person nor be the choice of a person who has a duty or purpose which conflicts with the duties of the liquidator. There are many illustrations of this principle. I was referred in particular to *Re City & County Investment Co* (1877) 25 WR 342, *Re Charterland Goldfields* (1909) 26 TLR 132, and *Re Corbenstoke (No. 2)* (1989) 5 BCC 767.

(5) More specifically the liquidator should not be the nominee of a person: (a) against whom the company has hostile or conflicting claims as in *Re City & County Investment Co*, (and see also *Deloitte & Touche AG v Johnson* [1999] BCC 992; [1999] 1 WLR 1605); or (b) whose conduct in relation to the affairs of the company is under investigation as in *Re Charterland Goldfields* (and *Re Mansel, ex parte Sayer*).

(6) By contrast it is not an objection to a liquidator that he is allied to or the choice of a person who is concerned to pursue the claims of the company through the liquidator.”

29 Possibly in more terse terms, in the Federal Court of Australia in *Avant Garde Invs. Pty. Ltd. v. Cheema* (1), Jagot, J. said ([2020] FCA 98, at para. 12):

“the liquidator should not be chosen by the directors or other principals of the company because of the inevitable perception of bias to which such an appointment might give rise. In this regard, while the plaintiff has been appointed as the receiver for some time, this is not comparable to the position of the director of the company whose conduct is the subject of proposed investigation.”

It is evident that as a matter of principle a liquidator should not be nominated by a party against whom the company (or the cell) may have an adverse claim. Not only is the control and management of Inspirato and the cells inextricably linked with SK and Castle Group companies but so is that of the KB Foundation. Irrespective of whether they are able to prove their claims in due course, it is clear that a liquidator of the cells will inevitably have to inquire into the conduct of SK and Castle Group entities and therefore the purported creditors should play no part in the nomination of the liquidator.

30 JW’s suitability as liquidator is also questioned (or at least parallels are sought to be drawn between XCAP/Quilter’s and the purported creditors’ ability to influence the choice of liquidator) on the basis that the directors of XCAP and Hume may also have to be the subject of investigation by the liquidator. It is submitted that although Quilter has no locus and it was XCAP which made the application to appoint her as administrator, that Quilter who is funding the administration and would be funding the liquidation would wish to focus attention away from XCAP and onto someone else. The answer to that submission is to be found in JW’s third affidavit at para. 22:

“Quilter International lost £2,735,000, and it is Quilter that are underwriting this cost. It is not XCAP underwriting the cost, therefore any claims that ought to be brought against former Hume/XCAP executives are not dependent upon XCAP funding. The funding is impartial.”

There is no basis upon which it can properly be said that JW will not discharge her duties as liquidator properly and professionally or that she will hesitate to bring proceedings against such entities or individuals who may be liable to the cells in respect of the losses they have suffered.

31 Moreover, it is instructive to note that according to SK’s affidavit at para. 29 the purported creditors’ commitment to fund Mr. Stoneman is

limited to meeting “the initial funds required to move this process forward.” That poses the very practical question as to what happens if Mr. Stoneman is appointed and the purported creditors decide not to fund the liquidation beyond the initial stage.

32 In my judgment it is wholly appropriate that JW be appointed as liquidator. This will allow for there to be continuity in respect of the work already undertaken to investigate the affairs of the cells; there is no legitimate basis upon which her professionalism or impartiality can be challenged and she has funding available to discharge her duties, which funding does not affect her impartiality.

33 Orders accordingly and I shall hear the parties as to costs.

Orders accordingly.
