In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2020 No: 118

IN THE MATTER OF FDG ELECTRIC VEHICLES LIMITED

IN THE MATTER OF THE COMPANIES ACT 1981

RULING

(Reasons)

Dates of Hearing:	18 July 2024
Date of Decision:	18 July 2024
Date of Reasons:	20 December 2024

Advanced Lithium Electrochemistry (Cayman) Co. Limited ("Aleees"): (Creditor and Member of Committee of Inspection)	Mr. Kim White (Cox Hallet Wilkson Limited)
Joint Liquidators:	Mr. Matthew Mason and Ms. Kehinde George (ASW Law Limited)

Joint Liquidators application for sanction of a settlement agreement- Creditor's objections

RULING of Shade Subair Williams J

Introduction

1. On 20 March 2024 this Court sanctioned a confidential global settlement agreement (the "Settlement Agreement") between the FDG Electric Vehicles Limited (the "Company"), SHK Finance, the FDGK Receivers and Managers, Mr. Jamie Che, Sinopoly Strategic Investment Limited ("Sinopoly") and Union Grace Holdings Limited ("Union Grace").

2. Mr. Che was the Company's Chief Executive Officer ("CEO") immediately prior to its winding up. He was also the CEO of FDG Kinetic Limited ("FDG Kinetic") and a director of various other subsidiaries of the Company. Sinopoly and Union Grace, both being companies incorporated in the British Virgin Islands, were subsidiaries of the Company and the subjects of a security charge held by the Petitioner, Sino Power Resources Inc. ("Sino Power"). (See In the Matter of FDG Electric Vehicles Limited [2020] SC (Bda) 32 Com (20 July 2020), per Subair Williams J).

3. This Ruling concerns the Court's sanction of proposed amendments to the Settlement Agreement (the "Amended Settlement Agreement") on the 25 April 2024 summons application of the Joint Liquidators, Ms. Wing Sze Tiffany Wong and Ms. Yeung Mei Lee of Alvarez & Marsal Asia Limited ("Alvarez") and Mr. Clive Fortis of Begbies Traynor Group[1] (the "JLs"). That summons application was supported by the Third Affirmation of Ms. Yeung Mei Lee.

4. The hearing of the JLs' summons was originally listed for 29 May 2024. This was to be heard at the same time as an application by Advanced Lithium Electrochemistry (Cayman) Co. Limited ("Aleees") on a summons dated 26 April 2024 for the discharge of the Sanction Order. Aleees also objected to the JLs' 25 April 2024 summons application for this Court's sanction of the proposed amendments. Aleees is a minority creditor of the Company and one of four members of its Committee of Inspection. The evidence in support of its application was in the form of an affidavit sworn by Ms. Yu Mei Lee. In answer to that evidence, Ms. Yeung Mei Lee swore a Fourth Affirmation.

5. At the request of Aleees' Counsel, the 29 May 2024 hearing was subsequently relisted and proceeded on 18 July 2018. At the close of the hearing on 18 July 2018, I granted the JLs' application, thereby refusing the discharge application brought by Aleees.

6. These are the reasons for my decision.

[1] Mr. Fortis was later replaced by Mr. Kenneth Krys of Krys Global

Background

The Company

7. The Company was a Bermuda exempt company which operated from Hong Kong as an investment holding company. It had numerous subsidiaries (the Company and its subsidiaries being the "Company Group"), and its shares were publicly traded on the Hong Kong Stock Exchange. The principal business of the Company Group was the manufacturing and sale of pure electric vehicles and lithium-ion battery and related cathode products.

8. By way of procedural background, the Petition for the winding up of the Company was filed on 5 March 2020 under section 161(e) of the Companies Act 1981. On 12 March 2020 this Court appointed provisional liquidators on a 'light touch' or 'soft touch' basis. However, on 1 February 2022, despite efforts to rescue the Company via a restructuring, this Court made a winding up order.

The Hong Kong Proceedings 785/2022

9. In June 2022, legal proceedings commenced in Hong Kong (the "Hong Kong proceedings") in the High Court of the Hong Kong Special Administrative Region (the "Hong Kong Court"). In the Hong Kong proceedings the JLs competed against others in their claim to recover HK$28,748,084.71 and CNY139.73 (hereinafter referred to in the sum of HK$28,000,000.00) on behalf of the Company's estate. The claim sum, which was held as a payment into the Hong Kong Court, was said to represent the available portion of the Company's advancement of a HK$30,000,000.00 interest free loan to FDG Kinetic Limited ("FDG Kinetic"), a non-wholly and indirectly owned Hong-Kong incorporated subsidiary of the Company. Controversially, that loan was made after the Petition against the Company was filed. Section 166(1) Companies Act 1981 prohibits post-petition asset disposals. It provides:

"*In a winding-up by the Court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the Court otherwise orders, be void*."

10. FDG Kinetic was indebted to SHK Finance Limited ("SHK Finance") which enjoyed security in the form of a charge over the assets of FDG Kinetic. FDG Kinetic, as the charger entered into a Hong Kong law Debenture dated 5 September 2019 with SHK Finance as the Lender. Exercising its lender entitlements, on 29 April 2020 SHK Finance appointed Hong Kong based Receivers and Managers (the "FDGK Receivers and Managers") over FDG Kinetic's

undertaking, property and assets. On 14 May 2020 a winding-up petition was presented against FDG Kinetic and on 6 September 2021, FDG Kinetic was wound up by the Hong Kong Court.

11. DBS Bank (Hong Kong) Limited was the Applicant in the Hong Kong proceedings. In addition to the JLs on behalf of the Company, the claimants were SHK Finance (1st Claimant) and the FDGK Receivers and Managers in their own right. (The FDGK Receivers and Managers had no authority under Hong Kong law to act on behalf of FDG Kinetic once liquidators were appointed.)

The Hong Kong Recognition Proceedings 2184/2022

12. On 22 December 2022 the JLs commenced proceedings in the Hong Kong Court for an order confirming their recognition by the Hong Kong Court (the "Recognition proceedings").

The Bermuda COA Proceedings 6/2021

13. On 12 March 2021 Sinopoly commenced proceedings in the Hong Kong Court against FDG Kinetic in respect of its rights as a shareholder of FDG Kinetic to nominate candidates for appointment as directors at FDG Kinetic's Annual General Meeting ("AGM")

14. On 1 April 2021, a Court of this same jurisdiction ordered that Sinopoly's nominations for directors were to be included in the AGM agenda. This culminated in the FDGK Receivers and Managers' filing of appeal proceedings on 12 May 2021 in the Bermuda Court of Appeal (the "COA proceedings").

The British Virgin Islands Proceedings 2021/0074

15. Mr. Jamie Che commenced proceedings in the British Virgin Islands ("BVI") against Union Grace and Sinopoly (the "BVI proceedings") in respect of the composition and powers of the board of directors of Union Grace and Sinopoly and the rectification of their corporate records. On 16 February 2022, the BVI High Court made an order by consent dismissing claims with costs payable by Mr. Che. Those costs are said to have been settled in full.

The Settlement Agreement

16. There are 4 Schedules to the Settlement Agreement which respectively provide for the settlement of the Hong Kong proceedings, the COA proceedings, the Recognition proceedings and the BVI proceedings.

17. In its most material part, the Settlement Agreement disposed of the Hong Kong proceedings. This was to be executed by a Consent Summons under Schedule 1 by which the JLs agreed to withdraw the Company's claims in consideration of payment out of Court to the Company in the sum of HK$12,000,000.00. The residual sum of HK$16,000,000.00 with interest accrued was to be paid to the Solicitors of SHK Finance Limited.

18. The other aspect of the Settlement Agreement, which was of significance to Aleees in these proceedings, was a Mutual Release clause whereby the Company waived all of its current and future litigation rights against the parties to the Settlement Agreement.

The 20 March 2024 Sanction Order

19. On 20 March 2024 this Court sanctioned the Settlement Agreement (the "Sanction Order").

20. The Sanction Order was granted in the terms prayed on the JLs' summons of even date. That summons was determined on the papers, meaning it was determined administratively without the convening a formal Court hearing.

21. The Sanction Order was the subject of bitter complaint by Aleees.

The JLs' Application for Sanction of the Amended Settlement Agreement

22. The JLs filed a further summons dated 25 April 2024 for this Court's sanction of the Amended Settlement Order. Ms. Yeung Mei Lee's Third Affirmation was filed in support of the JLs' application.

23. The proposed amendments did not alter the ultimate controversial effect of the Settlement Agreement which brought an end to the Hong Kong and other proceedings. In the objections made by Aleees, no issue was taken with any specific amendment proposed by the JLs.

24. Aleees overriding position is that neither the Settlement Agreement nor the Amended Settlement Agreement should have been made in the substantive terms which appear in both versions.

Aleees' Objections

25. By summons dated 26 April 2024 and by a letter to this Court dated 28 May 2024, Aleees, sought to challenge the Sanction Order in hopes of persuading this Court to set it aside. The following relief was sought on Aleees' summons:

"*An Order pursuant to Order 32/6 of the Rules of the Supreme Court that the Order made ex-parte by the learned Chief Justice on March 20 2024 be set aside*.

Directions as to the further conduct of the application of the Joint Provisional Liquidators."

26. Aleees' 26 April summons was supported by the evidence of Ms. Yu Mei Lee. The 28 May 2024 letter of "Disagreement" which followed Aleees' summons application argued the following grounds of objection (i) it was not given the opportunity to be heard by this Court prior to the making of the Sanction Order and (ii) the scope of the settlement order sanctioned was "excessively broad" and "disproportionately disfavoring the creditor".

27. The first ground of objection is developed more fully in Aleees' 24 March 2024 letter to this Court.

REASONS FOR DECISION

Aleees' Complaint that it had no opportunity to be heard by this Court

28. Affidavit evidence from Ms. Yu Mei Lee was filed on behalf of Aleees. In her affidavit, she exhibited a 22 March letter to this Court which contained a 2-page summary of objections made by the President of Aleees in respect of the Sanction Order. In that letter the following statement was made:

"*…We hereby formally register our disagreement with the Settlement Agreement…which was approved by the order of the Supreme Court of Bermuda on March 20, 2024, for the following reasons:*

1. *The lack of notification or communication regarding the hearing and approval of the Settlement Agreement on March 20, 2024, constitutes a serious breach of procedural justice on our part.*

   (1) Pursuant to the order and summons issued by the Supreme Court of Bermuda on March 20 2024, we noted that an order to approve the Settlement Agreement was granted on the same day.

   (2) However, we did not receive any summons or notification regarding this hearing with a specific date, nor were we informed by the Joint Liquidators through any other means. The only information we received was an email from Maggie Tang, the designated contact person for the Joint Liquidators, on March 14, stating that the Joint

Liquidators had submitted an application regarding the Settlement Agreement to the Court and that we were required to provide any comments before March 22…

(3) *Consequently, we were denied the opportunity to express our views on this matter, which constitutes an abnormal violation of our procedural rights*."

29. The JLs' plans to enter the Settlement Agreement was disclosed to Aleees in a 5 March 2024 email from Ms. Maggie Tang of Alvarez. In that email, Ms. Tang sought approval of the Settlement Agreement from the members of the Committee of Inspection (the "COI"). She disclosed that it was not until the previous month in February that the JLs were invited to enter into the Settlement Agreement. Ms. Tang also outlined the terms of the Settlement Agreement and shared the JLs' considered views and reasoning, breakdown of the trial costs and the Company's financial position.

30. Ms. Tang's 5 March email flagged the JLs' urgent need for a response by pointing out that the 3-day trial in the Hong Kong proceedings was due to commence on 26 March 2024. Aleees would have been aware of the trial fixture, as evidenced by a previous 16 January 2024 email to the COI. Against that background, Ms. Tang's 5 March email requested responses to be provided within 3 business days (using bold-type font).

31. Ms. Tang's 5 March email concluded:

"… …

- *The Liquidators and their legal teams are reviewing the draft settlement agreement with a view to enter into the settlement agreement in advance of the Trial.*

In view of the Trial is [sic] approaching (being just 3 weeks away), it would be ideal to agree the terms and sign on the settlement agreement, and to vacate the Trial before it is too late to do so, we would be grateful if you could provide your response within 3 business days from the date of this email by responding to this email. In the event that we do not receive any objections to the proposed settlement by the deadline, the Liquidator shall proceed to enter into the settlement agreement.
…"

32. On 14 March 2024, Ms. Tang followed up with another email to the COI. She wrote:

"…*We refer to our email dated 5 March 2024 regarding the proposed settlement…*

Please take notice that the Joint Liquidators have submitted an application ("Application") to the Bermuda Court for sanction to enter into the proposed settlement and sought an urgent

determination of this application within 7 days i.e. no later than 22 March 2024. Application papers filed with the Bermuda Court are enclosed for your attention.

If any of the Members of the COI has any response to the Application, it should be made known to the Bermuda Court and the Joint Liquidators as soon as possible and in advance of 22 March 2024. …"

33. Although the JLs' summons was dated 20 March 2024 (a date administratively assigned by the Registrar of the Supreme Court) it is important to keep in mind that it was filed on 13 March 2024, i.e. the eve of the 14 March email to the COI.

34. Also, Aleees' characterization of the JLs' summons application as "*ex parte*" is misguided. The Court, in granting the JLs second summons for substituted service, directed for the members of the COI to be served by email. Hence, service of the application by email to the COI on 14 March. Effectively, the Sanction Order was made one week after the filing of the JLs' application. This may not be immediately obvious if distracted by the 20 March 2024 date affixed to the summons by the Registrar. All of that said, by 14 March 2024 Aleees had been served with the Sanction Order which was made on 20 March 2024.

35. Regrettably, Ms. Yu Mei Lee, having received Ms. Tang's 14 March email, mistook Ms. Tang's reference to the 22 March date as a deadline for a reply by Aleees. This was an unfortunate error which might be easily forgiven as the 14 March email read: "…*it should be made known to the Bermuda Court and the Joint Liquidators as soon as possible and in advance of 22 March 2024*. [my emphasis] …"

36. In specifying the 22 March date, Ms. Tang was merely expressing the JLs' hope on the latest possible timeframe within which the JLs would be given a decision by the Court. The JLs never stated that the Court hearing would be held on 22 March. However, one can readily see how the drafted wording of the email could have left Aleees with a firm understanding that it had until 22 March to reply or to be heard before the Court. This confusion might have been avoided if the email had instead advised the COI that if anyone wanted to be heard, they should make it known to the Bermuda Court and the JLs "*as soon as possible as the Court has been asked to urgently determine the application on the papers.*"

37. Nonetheless, at the 18 July hearing, this Court allowed Aleees' Counsel to be heard on the objections to the Sanction Order and the Settlement Agreement. The effect of the Amended Settlement Agreement was given very little airtime.

38. As this Court confirmed its approval of the Amended Settlement Agreement, having heard Aleees' Counsel on arguments unrelated to the scope of the amendments, I will be brief in

considering the procedural dispute as to whether the 20 March 2024 Sanction Order took on the form an *ex parte* Order. That is because this Court would have, in all likelihood, granted the Sanction Order even if the arguments developed by Mr. White on 18 July 2024 had been filed and fully argued prior to 20 March 2024.

39. Notwithstanding, I pause only to hypothesize a scenario in which the JLs' application in respect of an Amended Settlement Agreement had never been filed. The JLs' summons for the original sanction of the Court was filed on Thursday13 March 2024 and granted on Thursday 20 March 2024. Had Aleees filed their objections on 19 March and requested a contested hearing, there would have been no realistic prospect of the application being heard and decided prior to the 26 March trial date. Under those circumstances, it would be reasonable to suppose that the Hong Kong trial date might have been delisted on the basis that a Settlement Agreement was being seriously pursued.

40. It is also noteworthy that the JLs' application for a sanction of the Settlement Agreement was treated as an urgent application. The JLs were in need of determination prior to the commencement of the 3-day trial listed to be heard in the Hong Kong Court on 26 March 2024. In Ms. Yeung Mei Lee's Second Affirmation she accepted that such an urgent pace afforded no real opportunity for the COI to consider its position. In her own words, she deposed [paras 29-31]:

"*…the Joint Liquidators are unlikely to obtain sanction from the COI in time for the settlement agreement to be completed prior to the trial…*

…I humbly request that the Court urgently sanction the Joint Liquidators to enter into the Settlement Agreement on the papers. I would propose that the COI, with each of the members to be served with the application once it has been filed, be given 7 days' notice to provide any response, subject to which Court sanction should be provided. If the Court considers that a hearing is required to dispose of this application, we will make arrangements to attend as required (subject to availability of counsel) and would be grateful for an urgent listing after the period of 7 days from the date of filing has lapsed.

Owing to the urgency of the application and short timeframe in which the Joint Liquidators are requesting the application be determined, we would also ask the Court's permission for alternative service of this application on the COI by email…such that the application comes to the attention of the COI in a short as time as possible…"

41. Against that background of urgency, this Court had to balance its duty to ensure that any creditor wanting to be heard had sufficient opportunity to consider the application before the Court. That balance might have been better struck had this Court expressly made the Sanction

Order subject to discharge or variation within an extended period following the 7-day post-filing period which was proposed on Ms. Yeung Mei Lee's Second Affirmation.

42. In any event, notwithstanding the averments made by Aleees in its 22 March letter to this Court, I was satisfied that the JLs' 20 March *ex parte* summons was made with 6 days' notice to Aleees and the other members of the COI. The defect in the scenario was that the 14 March email would have and did cause Aleees to reasonably think that they had a 22 March deadline to respond directly to this Court.

43. This did not, however, deprive Aleees for having the opportunity to be heard on its objections and it cannot fairly be said, in light of the 18 July hearing, that the Court procedure which governed this process was an "abnormal violation of [its] procedural rights".

Complaint that the Settlement Agreement was "excessively broad" and "disproportionately disfavoring the creditor"

The Relevant Law

44. Liquidators derive their statutory power from section 175 of the Companies Act 1981 (the "CA"). Subsection (1) restricts a liquidator's powers to the performance of acts which require the approval of either the Court or a Committee of Inspection. Subsection (2) empowers a liquidator to carry out another category of acts without the need for the approval of the Court or a Committee of Inspection.

45. Section 175(1)(e) and (f) apply in this case. Those provisions state:

"*(e) to make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;*

(f) to compromise all calls and liabilities to calls, debts and liabilities capable of resulting in debts, and all claims, present or future, certain or contingent, ascertained or sounding only in damages, subsisting or supposed to subsist between the company and a contributory or alleged contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as may be agreed, and take any security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect thereof."

46. In any event, a liquidator's exercise of any or all of these powers, whether pursuant to subsection (1) or (2), is subject to the ultimate control of the Court. This is consistent with section 176(5) which entitles any person who is dissatisfied by an act, omission or decision of a liquidator to apply to the Court which may confirm, reverse or modify the act.

47. In *Re Edenote Ltd (No. 2)* [1997] 2 BCLC 89 at 92 Lightman J said: "*Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interests of the creditors, in any ordinary case, where there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's views unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed*."

48. *Re Edenote Ltd* was previously cited by this Court in *In the Matter of US Holdings Limited* [2024] SC (Bda) 11 Civ. (2 April 2024) which called into question the correct legal principles and approach to be used by the Court when asked to sanction a momentous and controversial decision to be taken by joint provisional liquidators. The impugned decision in that case related to a disposal of a significant portion of the insolvent company's assets via a commercial contract for sale prior to a winding up order. The petitioning creditor objected to the sale. However, this Court accepted the evidence of the joint provisional liquidators that there would be no opportunity for returns to any class of unsecured creditor with or without the impugned sale. At para [44] I said:

"*While the Court ought never to be lured by the fast and easy rubber stamp, it must also avoid any inclination to micro-manage the decision-making powers of a liquidator. Liquidators are professional practitioners and officers of the Court who are equipped with an expertise in assessing the viability of commercial measures aimed to rescue a corporate entity from its final breath while meeting the authorized claims of creditors. It is not for the Court to impose itself on a liquidator by acting as a party of equal voting power to that analysis*."

49. That passage, as I find the legal position to be, is applicable to both joint provisional liquidators and permanent liquidators. In this case, the "commercial measure" is a settlement of Court actions founded on a factual background with which this Court has some real familiarity. One might consider this Court able to examine the finer details giving rise to the JPLs' decision to settle. However, even in these circumstances, the Court must be careful not to superimpose itself on the JL's decision-making powers. Even in a case such as the present one, the Court should restrict its supervisory powers to the question of whether the liquidator has behaved irrationally, not whether the judge might have acted differently in the shoes of the JLs.

50. On the evidence of Ms Yu Mei Lee, Aleees' grievances with the Settlement Agreement are set out, although poignantly so, in real brevity. She alleged that the Settlement Agreement (with

or without the proposed amendments) was not only excessively broad but also that it was weighted disproportionately against the Company's creditors.[2]

51. Aleees says that the Mutual Release Clause unreasonably released each of the parties to the Settlement Agreement from being prosecuted for all present and future claims. Aleees pointed to paragraph 3.1a of the Settlement Agreement which provided:

"*Save for the purposes of enforcing this Agreement, in consideration of the Parties' due performance of the obligations set out under this Agreement, upon execution of this Agreement and the Orders being made by the Hong Kong Court in terms of the 785 Consent Summons and 2184 Consent Summons, and the Bermuda Court in terms of the Bermuda 75 Consent Summons and Bermuda Appeal Consent Summons each Party shall be deemed to have unconditionally and irrevocably agreed and undertaken that:*

a. *it shall fully and finally waive, release and absolutely discharge each other and/or their Related Parties from all claims, rights, remedies, debts, demands, obligations, promises, causes of action, damages, losses, costs and expenses of any nature whatsoever whether known or unknown to either Party as at the date of this Agreement, directly or indirectly, arising out of or in connection with the management and affairs of the companies in the FDG Group, save and except for any rights and remedies in connection with…* [Aleees] *(the "Settled Claims")…*"

52. Under the Amended Settlement Agreement, the following text is added to the end of the above paragraph 3.1a: "… [Aleees] *(including not but not limited to litigation between* [Aleees], [FDG Kinetic] *and* [the Company] *in Taiwan…(the "Settled Claims")*".

53. The unchallenged evidence before this Court is that the JLs' claim in the Hong Kong proceedings was the Company's only remaining and potential asset to be realized. I accepted that the thrust of the JLs' evidence was that the Company's prospect of discovering future entitlements was far-fetched. That being the case, I found no irrationality behind the inclusion of the Mutual Release Clause. One might go so far as to say that the alternative would sooner broach a mark of unreasonableness. Arguably, it would have been illogical for the JPLs to refuse the certainty of the HK$12,000,000.00 sum only to preserve the Company's remote chances of identifying other money claims to be pursued through expensive litigation. Instead, and reasonably so in my judgment, it decided to accept the HK$12,000,000.00 as its last supper. On that basis, this Court found no cause to criticise the JLs' analysis which led to its agreement with the inclusion of the Mutual Release Clause in the Settlement Agreement.

[2] Ms. Yu Mei Lee at para 6b of her 24 April 2024 affidavit stated that the Settlement Agreement "disproportionately favours FDG EV creditor". That statement was taken by this Court as an intention to state that the Settlement Agreement disproportionately *disfavors* FDG EV creditor.

54. Aleees targeted its concern to the JLs' decision to allow the Company to waive its present and future litigation rights against Mr. Che. Aleees also accused the JLs of releasing Mr. Che from liability without adequate investigation for breach of duty in his former role as the Chief Executive Director of the Company. In the Fourth Affirmation from Ms. Yeung Mei Lee, she blanketly rejected this allegation as false. Again, I accepted the JLs' overall position that it had to make its decisions based on the funds available to the Company's estate.

55. Pointing out the Company's financial frailty, Ms. Yeung Mei Lee explained that the Company had no assets to be realized other than the potential for recovery of a portion of the $30,000,000.00 it lent out interest free. Tallying the total cost of the liquidation at over HK$40,000,000.000, she reported that the funds which were currently available in the liquidation estate peaked at HK$5,100,000.00, give or take, leaving creditors with only the certainty of disappointment. On her evidence, such an amount would not even prove sufficient to cover the fees and expenses for the Joint Provisional Liquidators, the JLs, and their advisors. Providing a clear example of the serious shortfalls brewing, Ms. Yeung Mei Lee deposed that the Company had also evinced its delinquency on the Court-approved fees and expenses for the period from 20 July 2020 to 30 September 2021.

56. I had no reason to suspicion the JLs' evidence that the Company was unable to meet its liabilities. The Company's acute financial crisis made the prospect of the Company prosecuting further civil claims entirely ill-advised and even unrealistic. The Court's sanction of the Settlement Agreement recognized the Company's need to escape the risk of cost liability and the certainty of exorbitant legal fees. This is consistent with the position explained to the Informal Creditors Committee (ICC) on 28 October 2021 and again on 12 January 2022. In those emails Mr. Gilbert Ho reported:

"*The JPLs have also conducted preliminary investigations regarding the events precipitating FDGEV's insolvency (including the circumstances relating to certain secured lending activities) and considered whether such events may give rise to potential litigation claims. The JPLs are also reviewing the events related to the failure of the Chanje transaction. The JPLs' investigations have identified a number of potential irregularities which warrant further investigation and legal advice. In this regard, the JPLs consider there is a need for additional funding to advance the investigations further, seek additional advice, and/or prosecute viable claims as appropriate. If creditors are interested to provide or facilitate such funding they should inform the JPLs*."

57. As Mr. White pointed out in his submissions, the then JPLs' investigations were underway by the time the produced their 13 April 2022 report in which it was said:

"*The JPLs have been investigating and reviewing the Post-Petition Transfers… Subject to advice from the JPLs' legal counsel, they intend to take steps to recover this sum. The JPLs intend to examine other potential post-petition transfers and whether they can be recovered.*

The JPLs have been investigating the events leading to the Company's insolvency and the failure of the restructuring efforts including the actions of certain lenders and the role of the Company's directors, management, and other third parties. The JPLs consider that additional investigations and legal advice are required and are seeking funding to address the same."

58. Aleees complained that it was never provided with any information arising from the preliminary investigations of the JLs, notwithstanding its 27 June 2024 unanswered letter to the JPLs seeking this information. This gave way to base-line query from Mr. White as to why the costs of a full investigation was not prioritized, costs-wise. That complaint is part of broader queries raised on Mr. White's written submissions about the JLs' accounting of the Company's financial position. (See Cox Hallet Wilkinson written submissions [paras 7-8].) However, Counsel's attempt to puff doubt on the JLs' evidence of the Company's financial position did very little to assist Aleees' case because the points raised were not (i) supported by any affidavit evidence setting out a counter-narrative on the Company's finances or (ii) formed after the testing of the JLs' evidence by cross-examination.

59. It could not fairly be said that the JLs were negligent or bullish in their endorsement of the HK$12,000,000.00 settlement. To the contrary, I found that the JLs were sensible in carrying out their efforts to secure a reasonably tenable settlement to litigation which may have very well left the Company in further debt if a litigation victory proved to be out of their reach. The deliberation of the Settlement Agreement entailed a sound appreciation for the uncertainty of litigation. The JLs recognised the risk of bypassing a settlement offer only to later lose on its claim in the Hong Kong Court. In such an event, not only would the value of the Company's estate remain capped, but the Company would have likely incurred further costs liability. With the Settlement Agreement came certainty which, as I see it, assuaged the effect of the oncoming depletion of the Company's assets. The JLs reasonably treated the Settlement Agreement as being tantamount to a mitigation of the Company's loss.

60. In the end, the role of this Court is to intervene where it is glaringly obvious that Court-appointed liquidators have acted irrationally against the best interests of the Company. As it is put by Tamberlin J in *State Bank of New South Wales v Turner Corp Ltd* (1994) 14 A.C.S.R. 480 at 483, the role of the Court in deciding whether or not to sanction a liquidator's power to effect compromises is:

"*not of course a rubber stamp for whatever is put forward by the liquidator but it is not the role of the court to independently appraise the commercial soundness of the proposal. The*

court will not generally interfere unless there can be seen to be some lack of good faith, error in law or principle, or some real and substantive ground for doubting the prudence of the liquidator's proposal."

61. In *Geelong Building Society, Re* (1996) 14 A.C.L.C. 334 at 338, the Court reportedly said:

"*The burden of establishing a lack of good faith, error in law or principle or some ground for doubting the liquidator's prudence is not light*…"

62. These judicial statements were quoted by the globally respected Australian author, Mr. Andrew Keay, in the Second Edition of McPherson's Law of Company Liquidation [9.007].

63. So, the Court's sanction of the liquidator's decision is merely a certification that the liquidators have not been deemed by the Court to have acted:

(i) fraudulently;
(ii) irrationally or imprudently;
(iii) in a manner which lacks good faith; or
(iv) unlawfully

64. There was no evidence of any of this on the part of the JPLs in this case. For all of these reasons, I sanctioned the Settlement Agreement and the Amended Settlement Agreement.

CONCLUSION

65. Aleees' summons dated 26 April 2024 was dismissed.

66. The JLs' summons for a sanction of the Amended Settlement Agreement was granted.

Dated this 20th day of December 2024

THE SEAL OF THE SUPREME COURT OF BERMUDA
SIGNED

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT