EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2017/0019

BETWEEN:

KEVIN GERALD STANFORD

Appellant

and

[1] STEPHEN JOHN AKERS
[2] MARK MCDONALD
(as Joint Liquidators of Chesterfield United Inc.)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mr. Rolston Nelson	Justice of Appeal [Ag.]

Appearances:

Mr. John McDonnell, QC with him Mr. Renell Benjamin for the Appellant
Mr. David Allison, QC and Mr. Sharif Shivji, QC for the Respondents
Mr. Ben Strong, QC on behalf of Kaupthing, the Interested Party

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2018: March 1;
July 12.

Interlocutory appeal – Disclosure order – Section 273 of the Insolvency Act, 2003 – Locus standi – Aggrieved person – Legitimate interest – Perversity test – Whether joint liquidators acted perversely in deciding to enter settlement agreement – Whether joint liquidators' decision was a commercial one

Liquidation proceedings were brought by Kaupthing Bank Iceland ("Kaupthing") against Chesterfield United Inc ("Chesterfield"), a company owned by three BVI companies, namely, Charbon Capital, Holly Beach and Trenvis. The appellant, Mr. Kevin Gerald Stanford ("Mr. Stanford"), is allegedly a shareholder of Trenvis.

Mr. Stephen Akers and Mr. Mark McDonald, the joint liquidators, entered into a global settlement proposal with Kaupthing, Chesterfield and its bankers (the "Settlement Agreement"). They applied to the court and was granted a sanction to admit Kaupthing's claim in Chesterfield's liquidation. Kaupthing later announced the settlement. Thereafter,

Mr. Stanford filed an application under section 273 of the Insolvency Act, 2003 to reverse or vary the joint liquidators' decision arguing that he is a person with a legitimate interest and one who is aggrieved by the decision. He applied for and was refused disclosure of the sanction documents.

The learned judge dismissed his application holding that there was no proper basis for alleging that the joint liquidators had acted perversely in deciding to enter the Settlement Agreement and thereby agreeing to admit and pay Kaupthing's claim and that Mr. Stanford had no locus standi since he was not an aggrieved person under section 273. In so doing, the learned judge made several findings of fact.

Mr. Stanford has appealed against the decision of the judge that he had no standing to bring the claim and that he had no interest in the liquidation. He also challenges the learned judge's decision that the joint liquidators' decision is a commercial one that was within their discretion. He has not appealed against the learned judge's refusal to order disclosure of the sanction documents neither has he appealed against the findings of fact made by the learned judge.

In this court, he has also filed an application for disclosure of various documents and an Icelandic judgment and, if leave is granted for disclosure, to adduce those documents as fresh evidence in the appeal.

Held: dismissing the application for disclosure; and dismissing the appeal and ordering that costs be paid on the application and appeal to be assessed, if not agreed, within 21 days of this order, that:

1. It would be an exceptional exercise of discretion for an appellate court to order disclosure of documents that were not sought at first instance. Additionally, where a request for disclosure in the lower court was refused and that order was never appealed, an appellate court has no jurisdiction to interfere with the exercise of the discretion of the judge.

   Michel Dufour and others v Helenair Corporation and others (1996) 52 WIR 188 followed.

2. As a general rule, in order to justify the reception of fresh evidence it must be shown that the evidence: (i) could not have been obtained with reasonable diligence for use at the trial, (ii) must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive, (iii) must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible. The documents which Mr. Stanford seeks to have admitted as fresh evidence in this appeal are documents which are either privileged and or irrelevant. In addition, he knew that they existed at the time of the trial and did not seek to utilise them. Accordingly, Mr. Stanford's application to adduce fresh evidence fails as it does not satisfy the conditions for reception of fresh evidence.

Ladd v Marshall [1954] 3 All ER 745 applied; Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary Representative for Castries South East) v The Constituency Boundaries Commission SLUHCVAP2015/0013 (delivered 1st October 2015, unreported) followed.

3. A person aggrieved by an act, omission or decision of an office holder may apply to the court and the court may confirm, reverse or modify the act, omission or decision of the office holder. It is a requirement that the person aggrieved be a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. A court that is asked to exercise a statutory power, or its inherent jurisdiction, will act only on the application of a party with a sufficient interest to make it. Mr. Stanford must therefore show that he is a proper person to make the application and that he has a legitimate interest in the relief sought since an outsider to a liquidation cannot attack decisions of a liquidator. Mr. Stanford is not a member or creditor of Chesterfield; neither is he within the class of third persons who can rely on the statute for protection from decisions of the joint liquidators. In the circumstances, he is not an aggrieved person for the purposes of section 273 of the Insolvency Act, 2003. At the highest, Mr. Stanford is the shareholder of a shareholder of Chesterfield. As such, he has not shown that he has a legitimate interest which will enable a court to exercise its statutory power or its inherent jurisdiction in his favour.

   Section 273 of the Insolvency Act, 2003 applied; Deloitte & Touche AG v Christopher D. Johnson et al [1999] UKPC 25 applied; ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al BVIHCMAP2016/0011 – BVIHCMAP2016/0015, BVIHCMAP2016/0023 – BVIHCMAP2016/0028 (delivered 20th November 2017, unreported) followed.

4. The learned judge made critical findings of fact in arriving at the decision to dismiss Mr. Stanford's challenge to the joint liquidators' decision. Insofar as the judge had the benefit of seeing the witnesses and hearing their evidence under cross examination, the findings of fact to which he arrived are not easily assailable. As Mr. Stanford has not appealed against those findings of fact, it is not open to him to seek to challenge the learned judge's decision which is premised on those findings of fact.

   Watts (Or Thomas) v Thomas [1947] 1 All ER 582 applied; Beacon Insurance Company Limited v Maharaj Bookstore Limited [2014] UKPC 21 applied; Yates Associates Construction Company Ltd v Blue Sand Investments Limited BVIHCVAP2012/0028 (delivered 20th April 2016, unreported) followed.

5. The test for setting aside an act, omission or decision of an office holder under section 273 is that of perversity. In essence, bad faith and fraud apart, a court will only interfere with the act of a liquidator if he has done something so perverse and manifestly absurd that no reasonable person would have done it. It is not open to

a court to seek to substitute its opinion for that of the liquidator or to question whether a liquidator has chosen the best approach. On the facts as found by the trial judge and which findings have not been appealed, the global Settlement Agreement was the only option available to the joint liquidators. In that regard, there is no basis for impugning the judge's conclusion that the decision which the joint liquidators took was a commercial one within their discretion.

Mahomed and another v Morris and others [2000] 2 BCLC 536 applied; Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another [1996] 2 BCLC 389 applied; ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al BVIHCMAP2016/0011 – BVIHCMAP2016/0015, BVIHCMAP2016/0023 – BVIHCMAP2016/0028 (delivered 20th November 2017, unreported) followed.

JUDGMENT

Introduction

[1] BLENMAN JA: This is an appeal by Mr. Kevin Gerald Stanford ("Mr. Stanford") against the decision of Wallbank J in which the judge refused Mr. Stanford's application to vary or reverse the joint liquidators' decision to admit or pay Kaupthing Bank Iceland's ("Kaupthing") claim in the Chesterfield United Inc. ("Chesterfield") liquidation.

[2] There is also before this Court an application by Mr. Stanford for an order that the joint liquidators disclose to him copies of redacted and other various documents that were alleged to have been utilised by the joint liquidators in obtaining from the court below, permission to settle the claim and in particular, to admit Kaupthing's claim in the liquidation. If successful on his application, Mr. Stanford seeks to have those documents adduced in the substantive appeal before us, on the basis that they amount to fresh evidence. He also seeks the leave of this Court to admit and rely on a decision of the Icelandic Supreme Court[1] on the basis of fresh evidence.

[1] The decision of the Supreme Court of Iceland where the court set aside the acquittal of Messrs. Hreidar Mar Sigurdsson and Sigurdur Einarsson, two of the defendants to the joint liquidators' English proceedings, and ordered a new trial.

[3] Mr. Stephen John Akers ("Mr. Akers") and Mr. Mark McDonald ("Mr. McDonald"), who are the joint liquidators of Chesterfield, oppose both the substantive appeal and the application. Kaupthing, who is an interested party, and was added as a party in the court below, also opposes both the appeal and the application.[2]

[4] We now address the factual background to provide some context to this appeal.

Background

[5] The factual background to the case is helpfully set out in Wallbank J's judgment and the task is made immeasurably easier by being able to rely heavily on those findings of fact. It is necessary to set them out in some detail.

[6] Chesterfield was a special purpose vehicle that was incorporated in the British Virgin Islands ("BVI"). It was owned by three BVI companies, namely, Charbon Capital, Holly Beach and Trenvis. The companies were in turn owned by several high net worth individuals. Mr. Stanford is alleged to own shares in Trenvis, together with his ex-wife, Ms. Karen Millen ("Ms. Millen").

[7] The Chief Executive Officer and the Chairman of Kaupthing, along with numerous subordinate staff and employees of Deutsche Bank AG, Kaupthing's bankers, in an effort to improve the perception of Kaupthing's credit worthiness, conceived a plan that Chesterfield and others would buy a number of Credit Linked Notes ("CLN") issued by Deutsche Bank AG. The funding for Chesterfield's initial purchase for €130 million of the CLN was provided to Chesterfield in equity contributions from Chesterfield's shareholders (Trenvis, Charbon and Holly Beach). Chesterfield's shareholders borrowed the money from Kaupthing to fund those equity contributions. It seems as though on any view, no funding was provided by Mr. Stanford or Ms. Millen.

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[2] Kaupthing is not named as a party in this appeal but was permitted by this Court to make submissions which turn out to be supportive of the position taken by the joint liquidators. With no disrespect intended, they will not be specifically referred to expect where new points are raised.

[8] Nevertheless, Kaupthing's credit spread had deteriorated further. To prevent the CLN terminating upon their own terms, Chesterfield had to pay further capital sums to Deutsche Bank AG in the nature of margin calls ("Margin Call Loans"). Chesterfield made the further payments to Deutsche Bank AG. The latter sums paid were allegedly lent directly to Chesterfield. There was evidence that Kaupthing provided the monies for the loans to Chesterfield. The injection of monies did not reverse Kaupthing's financial difficulties and as a consequence it entered into a formal insolvency process in Iceland. This was an event of default under the terms of the CLN with the result that the Chesterfield's CLN terminated with no returns to Chesterfield. Kaupthing made a statutory demand on Chesterfield which requested immediate payment on the default notice. Chesterfield was unable to repay the monies lent to it by Kaupthing and was placed into liquidation by the court below on Kaupthing's petition. Mr. Akers and Mr. McDonald were appointed as joint liquidators. The court below ordered that any claim that was to be settled or accepted by the joint liquidators should receive that court's approval.

[9] Chesterfield had no assets and the joint liquidators seemed not to have monies at their disposal so Kaupthing agreed to provide funding for the conduct of the Chesterfield liquidation. The joint liquidators subsequently sued Deutsche Bank AG (the "Deutsche litigation"), and the Chief Executive Officer and Chairman of Kaupthing in London, alleging various types of unlawful conduct aimed at manipulating the market. The joint liquidators did not sue Kaupthing since it was of the view that it and its creditors were victims of the alleged wrongful conduct. Kaupthing had in fact brought its own claims against Deutsche Bank AG in Iceland and in England, which the latter strenuously resisted. Deutsche Bank AG also strenuously resisted the joint liquidator's claim in London. Eventually, there were settlement discussions between Kaupthing and Deutsche Bank AG.

[10] The joint liquidators were able to get involved in settlement discussions between

Deutsche Bank AG and Kaupthing, which resulted in a settlement proposal under which Deutsche Bank AG would pay Kaupthing the sum of €425 million. The joint liquidators were able to negotiate an amendment to that agreement such that half of the total figure would go directly from Deutsche Bank AG to Kaupthing and the other half would go to Chesterfield and another company, Patridge, who had also bought CLN from Deutsche Bank AG (the "Compromise or Settlement Agreement"). As a result of the Compromise or Settlement Agreement which was entered into in December 2016, Chesterfield was to receive €106.25 million and, since Kaupthing's claim had also been compromised, the settlement made provision for the amount of money to be paid over by Chesterfield to Kaupthing. The settlement was a global one between Kaupthing, Deutsche Bank AG and Chesterfield. The joint liquidators, having entered into the Settlement Agreement, in December 2016, admitted Kaupthing's claim in the liquidation of Chesterfield and obtained the court's sanction for so doing on 5th January 2017. Subsequently, the settlement was announced by Kaupthing. Shortly thereafter, Mr. Stanford filed an application in the court below.

[11] We will now refer to the application in the court below.

The Application in the Court Below

[12] Mr. Stanford brought a challenge under section 273 of the Insolvency Act, 2003,[3] and/or the inherent jurisdiction of the court in relation to liquidation of Chesterfield. By his application, he sought to have the court reverse or vary the joint liquidators' decision to admit and pay Kaupthing's claim in the Chesterfield liquidation.

[13] Mr. Stanford asserted that the lender of the Margin Call Loans of €125 million to Chesterfield was not Kaupthing but rather its subsidiary, Kaupthing Luxembourg or some other entity. He also asserted that in any event, irrespective of the

[3] No. 5 of 2003, Laws of the British Virgin Islands.

identity of the lender, Chesterfield had a complete defence to any claim for the Margin Calls Loans of €125 million which were lent directly to it, on the basis that the transactions were illegal under Icelandic and Luxembourgish law and the monies were used for an illegal purpose. He further alleged that Kaupthing is liable to contribute to the assets of the company at not less than €255 million under section 255 of the Insolvency Act, 2003 because Kaupthing was knowingly a party to be carrying on the company's business with intent to defraud the creditors. The consequence of the illegality defence, as advocated by Mr. Stanford, was that insofar as Chesterfield made any recovery from Deutsche Bank AG, it was entitled to keep those monies and not return them to the entity that originally provided them. As a result, he posited that Chesterfield was solvent and should have made a distribution to its shareholders including Trenvis.

[14] Mr. Stanford stated in the alternative that Chesterfield had a cross-claim against the lender of the Margin Call Loans on the basis of illegality. He posited that this would in turn entitle Chesterfield to assert a set off against the lender's claims for repayment, such that Chesterfield was entitled to keep any recoveries made from Deutsche Bank AG and make a distribution to its shareholders, including Trenvis.

[15] In summary, Mr. Stanford's main contention was that, if the joint liquidators had disputed Kaupthing's claim for the Margin Call Loans on the basis of the arguments identified above, the joint liquidators would still have been able to settle with Deutsche Bank AG for €106.25 million but could have avoided paying any of that money to Kaupthing, or any other creditors. The result would have been that the settlement monies would then have been available for distribution to the Chesterfield shareholders, free of any creditor claims in the Chesterfield liquidation.

[16] The joint liquidators opposed Mr. Stanford's application and in so doing

produced some of the documents, in redacted form, that were placed before the court in obtaining the sanction. They did not produce all of the documents. Mr. McDonald, one of the joint liquidators, was cross-examined at the trial. So too was Mr. Stanford. In addition, Mr. Paul David Copley provided evidence on behalf of Kaupthing. In answer to Mr. Stanford, the joint liquidators contended that Mr. Stanford's application was mistaken both on the facts surrounding the settlement discussions and on his analysis that Chesterfield had a complete defence to Kaupthing's claims. Their case in summary was that:[4]

(a) Having conducted a critical analysis of the underlying evidence, Kaupthing was the lender of the Margin Call Loans of €125 million. They noted that it was significant that considering the length of the liquidation and the amount of money at stake, and the fact that the joint liquidators had advertised for claims, no other entity had come forward claiming to be the lender of the Margin Call Loans aside from Kaupthing.

(b) The argument that Chesterfield would have a complete defence to Kaupthing's claims for the return of the Margin Call Loans on the basis of illegality such that Chesterfield could recover damages from Deutsche Bank AG but avoid making any payment to Kaupthing lacked reality. The pleaded case against Deutsche Bank AG was that the entry to the CLN was a fraud on Kaupthing and its creditors and that Chesterfield's losses were comprised of its liabilities to Kaupthing. If Chesterfield had no liability to Kaupthing due to illegality, then Deutsche Bank AG's position was that Chesterfield suffered no loss (as pleaded by Deutsche Bank AG in its defence). In short, Chesterfield had to demonstrate that it had suffered a loss (by being indebted to Kaupthing) in order for Deutsche Bank AG to be willing to pay any settlement monies at all.

(c) Further, the joint liquidators were alive to the arguments about illegality because the point was already in issue in the Deutsche litigation. The

[4] For convenience, these are taken from the joint liquidators' skeleton arguments.

position was uncertain and there was no reason to think that Kaupthing would simply accept it.

(d) On the facts, there was no realistic possibility that Deutsche Bank AG would have permitted the joint liquidators to settle with Deutsche Bank AG and to keep a dispute with Kaupthing alive. The deal on offer was a global deal for settlement of both the Deutsche litigation and the claims of Kaupthing.

(e) Further or alternatively, Mr. Stanford did not have standing to apply under section 273 of the Insolvency Act, 2003 as that remedy was only available to a person aggrieved by the officeholder's decision and with a legitimate interest. Mr. Stanford did not fall into that class of persons since he was merely the shareholder of a shareholder of Chesterfield; further, he was only the legal and not beneficial owner of the shares in Trenvis.

The Judgment in the Court Below

[17] As alluded to earlier, over several days, the learned judge heard evidence from one of the liquidators, Mr. McDonald, and received oral submissions from learned Queen's Counsel. Indeed, there was a trial on the merits of the case. The learned judge dismissed Mr. Stanford's application on two independent grounds, namely, that there was no proper basis for alleging that the joint liquidators had acted perversely in deciding to enter the Settlement Agreement and thereby agreeing to admit and pay Kaupthing's claim and that Mr. Stanford did not have standing to apply under section 273 of the Insolvency Act, 2003.

[18] On the joint liquidators' decision to admit Kaupthing's claim, the learned judge, in his careful and coherent judgment, held as a fact that the settlement with Kaupthing formed a global settlement package which included the claims against Deutsche Bank AG. Also, the judge found as a fact that if the joint liquidators had tried to isolate Kaupthing's claims from the claims against Deutsche Bank AG, they would not have been able to settle against Deutsche

Bank AG. In the circumstances, Mr. Stanford's suggested course which the joint liquidators ought to have taken (i.e. settling against Deutsche Bank AG but not against Kaupthing) was not available on the facts.

[19] It is useful to set out the essential parts of the learned judge's findings on the joint liquidators' decision:

> "…what is in my view determinative of this aspect of the matter is that what Mr. Stanford effectively wants is for the Joint Liquidators to ignore the fact that the settlement was a global settlement between Kaupthing Iceland, Deutsche Bank and Chesterfield and that settlement was in essence an opportunity to settle both Chesterfield's claims against Deutsche Bank and Kaupthing Iceland's claims against Chesterfield and any counterclaims.
>
> In effect what Mr. Stanford wants the Joint Liquidators to do is to isolate Kaupthing Iceland's claims against Chesterfield from Chesterfield's claims against Deutsche Bank. In other words, to accept part of the settlement deal but reject another part."[5]
>
> ….
>
> "If the Joint Liquidators were to treat Kaupthing Iceland's claim against Chesterfield in isolation from Chesterfield's claims against Deutsche Bank, this would mean Chesterfield was dropping out of the global settlement and puts Chesterfield back into a position where it would have to subject itself to further lengthy and expensive litigation against Deutsche Bank with the inherent litigation risk of an uncertain outcome including possible defeat.
>
> Deutsche Bank for its part vigorously defended the claims against it taking, so I apprehend, every point. The settlement on the other hand meant at least some recovery for Chesterfield which on Mr. [McDonald's] evidence could have produced a small surplus for distribution to Chesterfield's shareholders in its liquidation."[6]
>
> …
>
> "Mr. Stanford has not been able to show that a settlement more beneficial to Chesterfield than the one reached was even potentially available."[7]

[20] On the standing point, the learned judge found that Mr. Stanford was at most

[5] At p. 20 of the Transcript of Trial Proceedings, lines 2 – 16.
[6] At p. 21 of the Transcript of Trial Proceedings, lines 3 – 18.
[7] At p. 21 of the Transcript of Trial Proceedings, lines 24 – 25 and p. 22, line 1.

merely the shareholder of a shareholder of Chesterfield and this was insufficient to satisfy section 273 of the Insolvency Act, 2003.

[21] In addition, the learned judge rejected Mr. Stanford's contention that Kaupthing was not the lender of the Margin Call Loans of €125 million to Chesterfield. The judge found that there "is considerable evidence on the documents that it was, in fact, Kaupthing which was the lender"[8] and "it is clear from the documents evidenced in the provision of funds that the lending institution was probably Kaupthing Iceland"[9].

[22] Mr. Stanford's substantive appeal is against the judge's decision. This will be addressed in more detail shortly.

[23] We turn now to his application before this Court.

The Application in this Court

[24] Mr. Stanford has filed the application which has been referred to earlier. In his application, Mr. Stanford seeks to have the joint liquidators disclose a number of documents and, if leave is granted for disclosure, to be able to adduce those documents as fresh evidence in the appeal. He also seeks to adduce into evidence an Icelandic decision and thereafter rely on it. In his application to this Court, Mr. Stanford sought disclosure of:

> "a complete and unredacted copy of the Agreement dated 12 December 2016 of which a redacted copy is at pages 2-23 of Exhibit MM1 to the First Affidavit of the Respondent Mark McDonald dated 15 May 2017, including the copies at Schedules 3 and 4 of the "Settlement Agreements" as defined in that Agreement (2) copies of their Application to the Court to sanction the compromise or arrangement comprised in the said Agreements and of any evidence or other documents placed before the Court on that Application and of any Orders or Directions by the Court in relation thereto and of any Transcript of the hearing of that Application (3) copies of any correspondence regarding that Application between them or their Legal Practitioners or Solicitors and any of the parties to that Application or other persons notified of it or any of the parties to any of the

[8] At p. 10 of the Transcript of Trial Proceedings, lines 19 – 20.
[9] At p. 13 of the Transcript of Trial Proceedings, lines 18 – 19.

> said Agreements and (4) copies of any legal advice relied upon by the Respondents to justify the said compromise or arrangement whether in their capacities as Joint Liquidators of Chesterfield United Inc ("Chesterfield") or as Joint Liquidators of any of the other parties of the said Agreements."[10]

[25] Mr. Stanford's application before this Court is vigorously opposed by the joint liquidators with the support of Kaupthing.

[26] On behalf of Mr. Stanford, learned Queen's Counsel Mr. McDonnell submitted that Mr. Stanford is an aggrieved person in accordance with section 273 of the Insolvency Act, 2003 and is therefore entitled to have access to the documents which form the basis of his application. Mr. McDonnell, QC submitted further that it is clear that Mr. Stanford is aggrieved by the decision of the joint liquidators to admit Kaupthing's Iceland's claim in the Chesterfield liquidation. He said that Mr. Stanford is a member of Trenvis which is one of Chesterfield's shareholders, and as a shareholder of Trenvis, he was not afforded an opportunity to be heard before the court below approved the Settlement or Compromise Agreement.

[27] In further support of the application, Mr. McDonnell, QC advanced much of the same arguments that he has put forward in the substantive appeal. Mainly, he contended that the joint liquidators have refused to disclose the full terms of the Settlement Agreement for which they obtained the sanction of the court below, and also the advice on which they relied in order to enter into the Settlement Agreement, together with copies of the application and the full evidence which was adduced in support of the application for sanction. Mr. McDonnell, QC submitted that, in the absence of having sight of the relevant documents and advice received, this Court would be unable to determine whether the joint liquidators acted properly in all of the circumstances.

[28] In addition, Mr. McDonnell, QC advocated that the judgment from the Supreme

[10] At para. 1 of the notice of application filed on 21st December 2017 on behalf of Mr. Stanford.

Court of Iceland should also be allowed in as fresh evidence, on the basis of the well-known Ladd v Marshall[11] guidelines. It is noteworthy that Mr. McDonnell, QC did not condescend into too many details in seeking to persuade this Court to admit the Icelandic judgment into evidence, save for his contention that the Supreme Court has set aside the acquittal of Messrs. Hreidar Mar Sigurdsson and Sigurdur Einarsson, two of the defendants to the joint liquidators' English proceedings, and ordered a new trial. He asserted that in light of the reasons given by the District Court for the acquittal, they are likely to be central to the question of Kaupthing's potential liabilities to Chesterfield and the shareholders Trenvis, Carbon Capital and Holly Beach.

[29] Learned Queen's Counsel Mr. McDonnell said that the advice which the joint liquidators had received was presumably disclosed to the court below when the joint liquidators sought and obtained the court's sanction to enter into the Compromise or Settlement Agreement. Mr. McDonnell, QC submitted that it is relevant to the substantive appeal since it would assist this Court in its determination of whether the legal advice satisfies the well-known test of perversity. He said that should this Court be minded to grant the disclosure order, leave should also be granted to Mr. Stanford to rely on any of the documents that are ordered to be disclosed notwithstanding that they were not produced in the court below. Mr. McDonnell, QC posited that the well-known guidelines in Ladd v Marshall would enable all of the documents to be admitted into evidence, on the basis that they amount to fresh evidence.

[30] Mr. Allison, QC, on behalf of the joint liquidators, complained that Mr. Stanford, in his application, is seeking to now pursue before this Court matters that he either disavowed or did not pursue in the court below. In resisting Mr. Stanford's application, learned Queen's Counsel Mr. Allison advanced three main arguments in rebuttal of Mr. Stanford's application for disclosure. He submitted

[11] [1954] 3 All ER 745.

that, firstly, Mr. Stanford, having made no application for disclosure at first instance, should not be permitted to do so now. He said that Mr. Stanford has adduced no evidence before this Court so as to satisfy us that there is some exceptionality which necessitates an order for disclosure at the appellate stage. He highlighted that there was no order for disclosure and that except for the sanction documents, which the court held that Mr. Stanford had applied too late for them, there was no application to the court at first instance for disclosure.

[31] Secondly, Mr. Stanford was aware of the sanction document by May 2017 and did not attempt to gain access to them until the first morning of the trial in July 2017, when the judge said that it was too late. This was a case management decision exercised within the discretion of the judge and with which an appellate court should not interfere. In any event, Mr. Stanford has not appealed against the decision. Mr. Allison, QC reminded us that there was no obligation on the joint liquidators to provide those documents. He said that Mr. Stanford did not seek an adjournment and that instead, he pressed his application and the joint liquidator, Mr. McDonald, was cross examined. As a result, the judge made factual findings. Mr. Allison, QC said that this is not a retrial of Mr. Stanford's application. We agree with Mr. Allison, QC; it seems to us that Mr. Stanford is seeking to get "another bite at the cherry" in an impermissible way. He ought to have pressed his application for disclosure of the sanction documents and not have proceeded with the hearing at first instance. Having failed in his application to obtain the sanction documents, he now seeks disclosure on appeal without appealing against the judge's case management decision.[12]

[32] Finally, Mr. Allison, QC stressed some of the documents of which Mr. Stanford seeks disclosure are clearly privileged, for example, the legal advice which the joint liquidators received and which during the trial, Mr. McDonnell, QC accepted was clearly privileged. Learned Queen's Counsel Mr. Allison argued that Mr. Stanford cannot now seek disclosure when he did not do so at the trial.

[12] We will treat with these documents in more detail.

Discussion

[33] Let us say straight away that it is clear from a reading of the transcript that learned Queen's Counsel Mr. McDonnell during the trial had conceded that some of the correspondence were privileged. He therefore cannot be permitted to launch an application for disclosure before this Court in relation to the documents for which such a concession was made. Also of concern is the effect of a disclosure order at the appeal stage, that is, the disruption of the conduct of the trial. It is noteworthy that Mr. Stanford has provided this Court with no authority in support of his application for disclosure on appeal. Neither is this Court aware of any such authority. It would be an exceptional exercise of discretion for an appellate court to order disclosure of documents that were not sought at first instance. Mr. McDonnell, QC's submissions therefore cannot be accepted.

[34] This in itself would be a basis for the determination of his application for disclosure. By way of emphasis, in the absence of any authority for Mr. McDonnell, QC's proposition that this Court has jurisdiction to order disclosure, we decline to do so at the appellate stage. This effectively disposes of the application. Accordingly, the application for disclosure is dismissed.

[35] Out of deference to learned Queen's Counsel, the further arguments on disclosure advanced will be succinctly addressed.

[36] We agree with Mr. Allison, QC and are not persuaded that we should make an order for discovery, even if this Court has the jurisdiction to do so during the hearing of the appeal. We are fortified in this view, since among other things, there is a case management order in relation to the sanction documents by the learned judge which has not been appealed. It is trite the circumstances in which an appellate court would interfere with the exercise of the clear discretion

of a judge.[13] The principle needs no recitation. Suffice to say that the application does not satisfy the threshold requirement in proving that the learned judge, in the exercise of his discretion, was plainly wrong. This Court has no basis to interfere with the exercise of discretion.

[37] In the interest of completeness, we turn to the related matter of fresh evidence. The principles upon which fresh evidence may be admitted before the Court of Appeal were laid down by the Court of Appeal in Ladd v Marshall in the pronouncements by Denning LJ. His Lordship said that three conditions must be fulfilled:

> "first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence most (sic) be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".[14]

[38] The principles that have been adumbrated by Lord Denning have been treated as authoritative guidance and the courts have commonly regarded those principles as a valuable guide to the exercise of discretion to admit fresh evidence. Indeed, in the recent case of Honourable Guy Joseph (in his personal capacity and in his capacity as Parliamentary Representative for Castries South East) v The Constituency Boundaries Commission[15] this Court applied the principles that were enunciated in Ladd v Marshall and explained that:

> "The onus was on the appellant to place all the material which was available to him and on which he wished to rely for the purpose of establishing the allegations he made. If he chooses not to do so then that is the risk he took and must be taken to accept and abide the consequences of the choice made by him and not seek to rectify it in hindsight after the decision has gone against him. To do otherwise would give the concept of having regard to the overriding objective in dealing with cases justly a hollow ring."[16]

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[13] Michel Dufour and others v Helenair Corporation and Others (1996) 52 WIR 188.
[14] At p. 748.
[15] SLUHCVAP2015/0013 (delivered 1st October 2015, unreported).
[16] At para. 16.

[39] We are of the clear view that the principles that were enunciated in Ladd v Marshall are applicable in the present case. Accordingly, even if this Court has jurisdiction to make an order for disclosure at the appellate stage, we should not make an order for disclosure on appeal unless the well-known principles of Ladd v Marshall are satisfied. Mr. Allison, QC quite appropriately, in our view, complained that Mr. Stanford's application has not met the requirement of the principles in Ladd v Marshall since the highest Mr. McDonnell, QC was able to put his case is that "they are guessing what may be in the documents and the potential relevance of those documents". We are impressed with Mr. Allison, QC's well-grounded complaint. In our view, Mr. Stanford's application is novel if not unique, since what he is seeking to do is to obtain discovery of documents at the appellate stage and simultaneously to have them adduced under the principles of Ladd v Marshall. In our view, Mr. Stanford can never satisfy the well-known three conditions or principles of Ladd v Marshall in his application to adduce the various documents into evidence, documents which he knew existed at the time of the trial and did not seek to utilise. It seems to us that the documents fall outside of the first condition to be satisfied under Ladd v Marshall and therefore offend the Ladd v Marshall guidelines.

[40] We will now address each of the categories of document in turn and apply the Ladd v Marshall principles. We will deal with each category of documents briefly.

The Complete and Unredacted Settlement Agreement

[41] Mr. Allison, QC submitted that Mr. McDonald's unchallenged evidence is irrelevant. Secondly, since Mr. Stanford knew about those documents before the trial, in the usual way, he ought to have applied for discovery of them. We agree entirely with these submissions. Furthermore, Mr. Stanford knew of the unredacted Settlement Agreement before the trial, his application will fall foul of the Ladd v Marshall principles since the evidence could have been obtained

with reasonable diligence for use at the trial. In our view, Mr. Stanford's application for the unredacted version of the Settlement Agreement offends the first and second limbs of the Ladd v Marshall principle.

Sanction Documents

[42] Next, we turn our attention to the sanction documents. Mr. Allison, QC submitted that they too fail the test in Ladd v Marshall. The reason being that the sanction documents are irrelevant to the appeal since the applications by Mr. Stanford under section 273 of the Insolvency Act, 2003 related to the Settlement or Compromise Agreement. It is common ground that the Settlement Agreement was entered into in December 2016. The sanction was in January 2017, which was subsequent to the decision to settle the claim. We therefore have no hesitation in agreeing with Mr. Allison, QC that these documents cannot meet the threshold of the guidelines of Ladd v Marshall and cannot be regarded as fresh evidence. For the sake of clarity, the documents which will be relevant are documents that precede the December 2016 Settlement Agreement and are supported by evidence that they could not have been obtained with reasonable diligence. Evidently, the sanction documents can never fall within this category and therefore offend the Ladd v Marshall principles. We have given equal consideration to learned Queen's Counsel Mr. McDonnell's helpful arguments and we have no doubt that the sanction documents also fail the first and second limbs of the Ladd v Marshall test. On this basis also, we refuse to grant Mr. Stanford the leave that he seeks in relation to the sanction documents.

[43] Secondly, Mr. Allison, QC said that the sanction documents are in a sealed file in the court below. He reminded this Court that the learned Queen's Counsel, Mr. McDonnell had requested the specific documents on the first day of the trial. The judge refused that application. He reiterated that this was a case management decision. Mr. Allison, QC said that Mr. Stanford has not appealed against this decision. What is more egregious, he said, is that Mr. McDonnell, QC did not cross examine Mr. McDonald on the sanction documents. Mr. Allison, QC therefore urged this Court not to grant Mr. Stanford leave to adduce

the sanction documents which, in any event, are irrelevant to the present appeal.

[44] On the case management point, we find Mr. Allison, QC's submissions on the exercise of the judge's discretion very persuasive and attractive. At the very least, Mr. Stanford ought to have appealed against the judge's refusal to make the order even though he would have been faced with attendant difficulties of appealing against the exercise of the judge's discretion. It is clear to us that it is impermissible for this Court to make the order that Mr. Stanford seeks, specifically when he has not appealed against the judge's case management order in relation to the documents that he now seeks. There is a rich body of jurisprudence on the appellate court's interference with the judge's discretion in making a case management order. They are well known and need no recitation. Applying the relevant principles, we decline Mr. Stanford's request for disclosure of the sanction documents.

Correspondence

[45] This brings us now to the correspondence. In relation to the copies of the correspondence regarding the sanction applications, including correspondence with their legal advisor, Mr. Allison, QC advanced the following reasons in support of his contention that disclosure should not be ordered:

(a) They were not sought at first instance, even though with reasonable diligence they could have been sought; they therefore offend the Ladd v Marshall principles.

(b) They fall outside of the period in which the decision to settle was taken and are therefore irrelevant to the decision that is being challenged.

(c) It included matters that are privileged.

[46] We have given consideration to Mr. McDonnell, QC's arguments and we are unconvinced that the evidence, such as it was, could not have been obtained by Mr. Stanford prior to the trial. In our view, Mr. Allison, QC's arguments on the

correspondence are unassailable. Mr. Stanford has the uphill, if not impossible, task of convincing us that there should be an order for disclosure during this appeal, particularly in circumstances where some of the documents are not relevant to the matter under review by this Court. It is plain that the principles of Ladd v Marshall would be offended. Here again, we decline Mr. Stanford's application for the reasons we have stated herein.

Legal Advice

[47] We now examine the legal advice. Mr. Allison, QC pointed out that those documents are privileged so that in any event this Court cannot make a disclosure order. The short response is, we agree. Accordingly, we would refuse to accede to Mr. Stanford's request.

Decision of the Icelandic Supreme Court

[48] Finally, we come to the Icelandic Supreme Court decision. Mr. Allison, QC said that that decision came long after the decision to settle and, in any event, there was no attempt by Mr. Stanford to suggest how it would have any influence on the case at bar. Mr. Allison, QC said that it clearly offends the Ladd v Marshall guidelines. This is a very strong and compelling complaint which finds favour with us. There is absolutely no indication as to how that judgment can be of any significance in considering the present case. Leaving aside the Ladd v Marshall guidelines, we fail to conceive any relevance that decision could possibly have to the appeal under consideration since it is a decision between different parties. Mr. Stanford's application for an order permitting him to rely on the Icelandic judgment is totally misconceived. In addition, it is obvious that the decision would offend the Ladd v Marshall guidelines, since it postdated the Settlement Agreement. We therefore decline to give the direction that he requests.

[49] It is readily apparent that Mr. Stanford's application for the discovery of certain documents and to adduce them into evidence comes too late in the day and it is quite impossible to see any compliance with the principles of Ladd v Marshall.

This conclusion also effectively puts an end to Mr. Stanford's application, which we dismiss in its entirety and order that he pays the joint liquidators costs of the application to be assessed if not agreed, within 21 days of this judgment.

[50] We now propose to address the substantive appeal and in so doing, we will highlight the two essential aspects of the learned judge's decision.

Essential Parts of the Judgment Below

[51] We remind ourselves that the learned judge held that (a) Mr. Stanford was not entitled to be heard as a "person aggrieved" by the decision of which he complained within the meaning of the Insolvency Act, 2003; and (b) even if Mr. Stanford was entitled to be heard as a "person aggrieved," the decision in question was a commercial decision at the discretion of the joint liquidators with whose judgment the court should not interfere.

Issues

[52] Against those important rulings, Mr. Stanford has appealed and there are two principal issues that arise for this Court's resolution:

(a) Whether the learned trial judge erred in concluding that Mr. Stanford does not fall within the category of "person aggrieved"; and

(b) Whether the learned judge erred in concluding that even if Mr. Stanford was a "person aggrieved", the decision in question was a commercial decision at the discretion of the joint liquidators with whose judgment the court should not interfere.

Submissions

[53] Learned Queen's Counsel Mr. McDonnell advocated a number of reasons why, in his view, the judge erred in concluding that Mr. Stanford had no standing. Mr. McDonnell, QC accepted that the learned judge addressed who is a "person aggrieved" as contemplated by the section 273 of the Insolvency Act, 2003. He said that the learned judge quite correctly identified the test that should be

applied in the determination of standing. The judge was also correct in his approach to standing in recognising that "standing" under section 273 of the Insolvency Act, 2003 is not based upon proximity but rather whether that person can show that he has a "legitimate interest" in the relief sought and that this was in conformity with the well known principles enunciated in Deloitte & Touche AG v Christopher D. Johnson et al.[17] He argued however, that had the judge properly applied the above test it would have led to the conclusion that Mr. Stanford had standing. His unequivocal and clear assertion is that the learned judge incorrectly applied the test in concluding that Mr. Stanford did not have standing.

[54] Mr. McDonnell, QC stated that the second basis upon which the judge dismissed Mr. Stanford's application was that "he was not directly affected" by the joint liquidators' decision to admit Kaupthing's claim. Mr. McDonnell, QC argued that the learned judge incorrectly concluded that Mr. Stanford was not directly affected by the exercise of the joint liquidators' powers and his interest was "at best indirect". He reminded us that the judge said that "An outsider to a liquidation cannot attack decisions of a liquidator".[18] Mr. McDonnell, QC said that the judge purported to apply the principles that were enunciated in Mahomed and another v Morris and others[19] in concluding that Mr. Stanford was an outsider to the liquidation. However, Mr. McDonnell, QC asserted that the judge should not have concluded that Mr. Stanford was a shareholder of a shareholder and that he was not directly affected by the liquidation of Chesterfield. He stressed his view that Mr. Stanford was not an outsider to the liquidation of Chesterfield and suggested that the fact that Mr. Stanford was a shareholder of Trenvis was of no moment since that ignores the reality and purpose of the corporate structures that had been set up. Learned Queen's Counsel Mr. McDonnell accepted that Trenvis was one of Chesterfield's shareholders.

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[17] [1999] UKPC 25.
[18] At p. 16 of the Transcript of Trial Proceedings, lines 13 – 14.
[19] [2000] 2 BCLC 536.

[55] Mr. McDonnell, QC maintained that Mr. Stanford is a person aggrieved. He reasoned that had the joint liquidators not paid Kaupthing, Chesterfield would have had monies and would have been solvent. He further posited that had Chesterfield been solvent, Trenvis would have come into funds and through this method, Mr. Stanford would also have been put into funds as a shareholder of Trenvis. Mr. McDonnell, QC acknowledged that there is no decided authority which supports his proposition, but, he argued, if one were to apply base principles, the position that he articulated would be borne out. Accordingly, Mr. McDonnell, QC submitted that the judge erred in concluding that Mr. Stanford was not aggrieved.

[56] Learned Queen's Counsel Mr. McDonnell further stated that had the learned judge properly applied the correct test he would have arrived at the conclusion that Mr. Stanford has a legitimate interest in the joint liquidators' application of the money that was received from Deutsche Bank AG. Mr. McDonnell, QC said that Mr. Stanford was directly affected by the joint liquidators' decision to pay Kaupthing. In support of his argument, he purported to rely on Deloitte & Touche AG v Christopher D. Johnson and the decision of this Court in ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al.[20]

[57] Mr. McDonnell, QC referred to the principle in Deloitte & Touche AG v Christopher D. Johnson that, "The only persons who could have any legitimate interest of their own in having the respondents removed from office as liquidators are the persons entitled to participate in the ultimate distribution of the Company's asset, that is to say the creditors".[21] Underscoring the words "persons entitled to participate in the ultimate distribution of the company", Mr. McDonnell, QC sought to persuade this Court that Mr. Stanford fell within that

[20] BVIHCMAP2016/0011 – BVIHCMAP2016/0015, BVIHCMAP2016/0023 – BVIHCMAP2016/0028 (delivered 20th November 2017, unreported).
[21] At para. 21.

category of persons. He therefore urged this Court to allow Mr. Stanford's appeal and remit the matter to the High Court for trial.

[58] Turning to the second issue, learned Queen's Counsel Mr. McDonnell stated that the learned trial judge erred in concluding that even if Mr. Stanford fell into the category of "aggrieved person", the decision that was made by the joint liquidators to admit Kaupthing's claim was a commercial decision, which properly falls within the discretion of the joint liquidators, with which the court will not ordinarily interfere. He said, however, that the judge in so concluding, overlooked Mr. Stanford's main complaint, namely, that the decision to pay Kaupthing could not have been taken without the court's sanction. He went on further to complain that the court below would not have sanctioned the Settlement Agreement if it were seized of all of the relevant facts. Mr. McDonnell, QC stated that the judge appeared to accept that the test to be applied is whether a liquidator "properly advised" could have taken the decision in question, which is the test that was laid down in Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another.[22] He argued that there was no evidence provided to the learned judge upon which he could have properly concluded that the joint liquidators were properly advised. Mr. McDonnell, QC said that the distinction should be drawn between the case at bar and Mahomed and another v Morris and others. He said that, in any event, the Court of Appeal in Mahomed and another v Morris and others correctly held that the applicants were not persons aggrieved and the court there also correctly held that since no sanction was required for the compromise agreement, the applicant was not entitled to challenge the liquidator's decision.

[59] In opposition to Mr. McDonnell, QC's submission, learned Queen's Counsel Mr. Allison's fundamental argument is that Mr. Stanford's appeal is unmeritorious and should be dismissed with costs. He reiterated that the learned judge's judgment was rendered after the court had heard oral evidence and reviewed

[22] [1996] 2 BCLC 389.

the extensive documentary evidence. Elaborating further, Mr. Allison, QC reminded this Court that the learned trial judge made critical findings of fact and that Mr. Stanford has not appealed against those findings. He said that those findings were the main bases for the learned judge's decision to dismiss Mr. Stanford's challenge to the joint liquidators' decision to enter into the Settlement Agreements. Mr. Allison, QC acknowledged that it is settled law that the appellate court is not a court of retrial but rather a court that is required to review the decision to which the learned trial judge has arrived. He also acknowledged that there are well-known boundaries within which an appellate court will not interfere with findings of fact.

[60] Mr. Allison, QC submitted that the judge was correct to hold that Mr. Stanford lacked standing. In his skeleton submissions, Mr. Allison, QC represented diagrammatically, and quite poignantly, the corporate structure of Chesterfield vis a vis Trenvis in underscoring his point that Mr. Stanford is very remote from Chesterfield. In doing so, he reinforced the point that, at best, he is a shareholder of the shareholder, Trenvis. He also highlighted the point that is still in dispute, namely, whether Mr. Stanford has a beneficial interest in Trenvis. Mr. Allison, QC reinforced his view that Mr. Stanford has no direct interest in Chesterfield and therefore had no standing to challenge the joint liquidators' decision in relation to Chesterfield. In further support of his argument, Mr. Allison, QC said that it is common ground that Mr. Stanford did not invest any monies in the corporate structure. He was adamant that since Mr. Stanford was not even a shareholder of Chesterfield he could never have standing in the Chesterfield liquidation.

[61] Mr. Allison, QC further reinforced the point that, since at the highest Mr. Stanford is a shareholder of the shareholder Trenvis, he has no standing to challenge the decision of the joint liquidators of Chesterfield. Mr. Stanford is not a member of Chesterfield, neither is he within the narrow class of third persons who can rely on the statute for protection from decisions of the joint liquidators. Mr. Allison,

QC acknowledged that it is settled law that a shareholder of a company cannot even challenge a decision of a liquidation within a company that is insolvent because only creditors have interest in insolvent liquidations. In a word, Mr. Allison, QC said that Mr. Stanford is neither a member nor a creditor of Chesterfield and so still would not have standing to apply under section 273 of the Insolvency Act, 2003.

[62] On the related matter of the decision of the joint liquidators, Mr. Allison, QC reminded us that the judge found, as a fact, that Kaupthing had lent monies to Chesterfield and that this finding of fact has not been challenged. Mr. Allison, QC highlighted the fact that the joint liquidators' decision must be examined against the findings of fact that were made by the judge in relation to the commercial decision to admit Kaupthing's claim. He stated that it is therefore not open to this Court to seek to evaluate or examine this specific finding of fact in the absence of any appeal in relation to them. Mr. Allison, QC argued that it is clear that having reviewed the document and the evidence that was adduced in cross-examination, including the evidence of Mr. McDonald, the judge correctly found, as a fact, that the deal that the joint liquidators accepted was a global one and the only one available to them and there was no other option. In fact, he said that the learned judge was correct to conclude that the deal from which Chesterfield benefited was a global one and that there was no possibility of accepting the monies from Deutsche Bank AG and rejecting Kaupthing's claim in the liquidation. He said that the learned judge also correctly concluded that had the joint liquidators rejected Kaupthing's claim they would have received nothing and would have had to proceed with the lengthy uncertain and complex litigation in London.

[63] Mr. Allison, QC advocated that as against the background of those specific findings of the learned judge it is impossible for Mr. Stanford to establish that the joint liquidators' decision was perverse.

Discussion

[64] We fail to see how Mr. Stanford could properly criticise the learned judge's approach when he has chosen not to appeal against the critical findings of fact that the judge made. In our view, it is worthy of emphasis that the learned judge examined the extensive documents that were filed and heard oral evidence from one of the joint liquidators, Mr. McDonald, on the events surrounding and leading up to the Settlement Agreement. He also received evidence on behalf of Mr. Stanford and Kaupthing. The learned judge heard and reviewed submissions on all of the important documents that were before him in making his findings of fact and law and ultimately arriving at his decision. Insofar as the judge had the benefit of seeing and hearing the witnesses under cross-examination, the findings of fact to which he arrived are not easily assailable. That much is settled law. Authority for the proposition that findings of fact are only challengeable in circumscribed circumstances can be found in the well-known decision of Watt (Or Thomas) v Thomas[23] in which it was held that:

> "Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion."

[65] Watt (Or Thomas) v Thomas is regarded as the locus classicus on appellate review of findings of fact. It is pertinent at this point to set out the relevant principles as stated by Lord Thankerton at page 587:

> "The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court."

[23] [1947] 1 All ER 582.

[66] This principle has been applied in several cases. In Beacon Insurance Company Limited v Maharaj Bookstore Limited,[24] the Board stated:

> "It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong"… This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: … Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation** of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence."[25]
>
> "Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses, who have given oral evidence, and of the weight to be attached to their evidence, an appellate court may have to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole."[26] (Emphasis mine).

[67] There is a very strong stream of jurisprudence that is entirely in accord with the above principles. In Yates Associates Construction Company Ltd v Blue Sand Investments Limited[27] this Court reviewed some of the leading authorities on the appellate court's ability to review findings of fact and held:

> "(1) An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may

[24] [2014] UKPC 21.
[25] At para. 12.
[26] At para. 17.
[27] BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.

(2) Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourable to the demeanour of the witness concerned."[28]

[68] Emanating from the above cases is the general principle that appeal courts do not overturn first instance decisions on the facts where the first instance judge has, in the exercise of his discretion and function as first instance judge, weighed up the evidence and reached a conclusion based on that evidence. This is because the first instance judge, having seen and heard from all of the witnesses, is best placed to reach his or her own conclusion. In considering the merits of an appeal in such circumstances, the Court adopts the same approach as it would in an exercise of discretion case.[29] Thus, as Lord Fraser stated in G v G (Minors: Custody Appeal):[30]

> "the appellate court should only interfere when they consider that the judge of first instance has not merely preferred an imperfect solution which is different from an alternative imperfect solution which the Court of Appeal might or would have adopted, but has exceeded the generous ambit within which a reasonable disagreement is possible."[31]

[71] It is worth repeating that it is settled law that the appellate court is even more reluctant to overturn findings of fact in circumstances where, as in the present case, the judge has had the benefit of hearing oral evidence from witnesses of

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[28] As taken from the headnote.
[29] See Assicurazioni Generali SpA v Arab Insurance Group (BSC) [2002] EWCA Civ 1642 per Clarke LJ at paras. 6 – 23 and per Ward LJ) at paras. 194 – 197.
[30] [1985] 2 All ER 225.
[31] At p. 229.

fact. As Lloyd LJ stated in Cook v Thomas[32] 'an appellate court can hardly ever overturn primary findings of fact by a trial judge who has seen the witnesses give evidence in a case in which credibility was in issue'.[33] Moreover, it is not just that the trial judge is in a unique position to assess the oral testimony, the point goes much wider than that and it applies to the evaluation of the evidence generally by the judge. This Court has stated this much in Yates Associates Construction Company Ltd v Blue Sand Investments Limited. Also, and as stated by Lord Reed in McGraddie v McGraddie and another,[34] the facts are to be found by the first instance judge.

[72] In our judgment, based on the critical findings of fact made by the judge, it is not open to Mr. Stanford to seek to challenge the facts in a "side wind" in circumstances where he has not appealed against those findings of facts. We accordingly accept Mr. Allison, QC's argument that there is no basis for Mr. Stanford to contend that the joint liquidators should have accepted the deal with Deutsche Bank AG and rejected Kaupthing's claim since that option was never available – it was "an all" or "nothing" situation. In a word, it was a global package settlement or nothing at all. We reiterate that as a consequence of the specific findings of the learned judge that there was no alternative or better deal, it simply is not open to Mr. Stanford, in the absence of any evidence to the contrary, to assert there was an alternative settlement deal that was open to the joint liquidators. There was not a scintilla of evidence to this effect before the learned judge and it is unfair to criticise of the judge for having reached the important conclusion based on uncontroverted evidence of Mr. McDonald, one of the joint liquidators.

[73] We turn now to specifically address the two principal issues that arise to be resolved. In our view, the issues that are raised on this appeal are dependent on setting aside the findings of fact that were made by the judge. To put it another

[32] [2010] EWCA Civ 227.
[33] At para. 48.
[34] [2013] UKSC 58.

way, it would be plainly futile to examine the issues that are raised in isolation of the findings of fact and law. Accordingly, we will now examine each of Mr. Stanford's complaints in turn and against the backdrop of the findings of fact and law that were made by the learned judge.

[74] We will now address issue 1: whether the judge erred in concluding that Mr. Stanford lacked standing. It is common ground that the learned judge correctly referred to the relevant authorities in determining whether Mr. Stanford is a person aggrieved in accordance with section 273 of the Insolvency Act, 2003 which provides as follows:

> "A person aggrieved by an act, omission or decision of an office holder may apply to the Court and the Court may confirm, reverse or modify the act, omission or decision of the office holder."

[75] The starting point must be the judge's conclusion in his full and careful judgment that Chesterfield was insolvent, that is, it had no assets or monies. The fundamental issue which therefore falls to be determined is, whether, in circumstances where Chesterfield was insolvent, the judge erred in concluding that Mr. Stanford had no standing.

[76] In examining the learned judge's treatment of the matter of standing, it is clear that the question falls to be determined within the particular context of the statute. Mr. Stanford had to bring himself within the statutory provision in order to be able to establish that he has locus standi to bring the application pursuant to section 273 of the Insolvency Act, 2003.

[77] We are of the view that section 273 of the Insolvency Act, 2003 requires the "person aggrieved" to be a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to liquidators, who would not otherwise have any right to challenge the exercise of that power. In this regard we are guided by the well-known principles in Deloitte & Touche AG v Christopher D. Johnson et al. We are in total agreement with

the learned judge that all other persons are considered outsiders to the liquidation, who are not capable of being "aggrieved persons" and thus cannot apply under section 273 of the Insolvency Act, 2003. This Court has definitively decided in ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al that the court will not look at the nature of a complaint in determining whether, notwithstanding the fact that a person may formally be a creditor or member, their complaint is in reality made as an outsider. It is evident that the learned judge applied the correct test in arriving at his conclusion that Mr. Stanford was an outsider to the liquidation.

[78] In view of the learned judge's finding that Mr. Stanford was, at most merely the shareholder of a shareholder of Chesterfield, and applying the above principles to the present case, there can be no doubt that the judge was therefore correct in holding that this was insufficient to satisfy the requisite interest under section 273.

[79] For completeness, we now look at the other related basis upon which the judge declined Mr. Stanford's application, that being his lack of legitimate interest. In answering the question whether the learned judge erred in so concluding, helpful guidance is provided in this Court's decision in ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al. This Court applied the reasoning of Lord Millet in Deloitte & Touche AG v Christopher D. Johnson et al, that when a court is asked to exercise a statutory power or its inherent jurisdiction 'it will act only on the application of a party with a sufficient interest to make it. This is not a matter of jurisdiction. It is a matter of judicial restraint.'[35] In analysing how the question of standing should be approached, the applicant must show he is a proper person to make the application. "This does not mean …that he 'has an interest in making the application or may be affected by its outcome.' It means that he has a

[35] Per Lord Millet at para. 18.

legitimate interest *in the relief sought*."[36]

[80] Despite Mr. McDonnell, QC's very courteous and forceful submissions, it is clear to us that the learned judge was fully entitled to come to the conclusions of fact and law to which he arrived, that is, that Mr. Stanford did not have standing. The learned judge's decision cannot be impugned.

[81] In light of our conclusion on issue 1, it is unnecessary to consider issue 2 since the resolution of the first issue effectively disposes of the appeal. Nevertheless, we will address the second issue raised out of sheer deference to the arguments of Queen's Counsel.

[82] Mr. McDonnell, QC complained that the learned trial judge erred in his conclusion that the joint liquidators' decision was a commercial one within the exercise of their discretion, and therefore the court should not interfere. This is commonly referred to as perversity test as stated in Mahomed and another v Morris and others. It is common ground that the legal test for setting aside 'an act, omission or decision of an office holder' under section 273 was that of perversity. In essence, bad faith and fraud apart, 'the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it'.[37] Authority for this proposition is the well-known case of Re Edennote Ltd; Tottenham Hotspur plc and others v Ryman and another. It is also common ground that the learned judge accepted that this was the applicable test.

[83] It is an important feature of the test that the threshold applied is a high one. It is not open to a court to seek to substitute its opinion for that of the joint liquidators; the court is required to ascertain whether the decision is so absurd that no reasonable liquidator could have arrived at it. This point is helpfully explained in

[36] Per Lord Millet at para. 19.
[37] As taken from the headnote of Mahomed and another v Morris and others.

ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited) and Others v Kenneth Krys et al where this Court held in relation to section 273, that it is not for a court to question whether a liquidator has chosen the best approach but rather it is to prevent a liquidator from taking steps that are so manifestly absurd or perverse that they fall completely outside the permissible range of options.

[84] Here again, in order to address the position contended for by Mr. Stanford the factual findings of the judge would, out of necessity, have to be considered. The gravamen of Mr. Stanford's complaint in this appeal appears to be that the joint liquidators should have accepted the part of the settlement to Deutsche Bank AG and rejected the part that related to Kaupthing. We remind ourselves that he contends that this course would have enabled the joint liquidators to have taken advantage of defences that he says Chesterfield had to Kaupthing's claim, and completely avoid repaying the Margin Call Loans. The result, he contends, is that a distribution would have been made to the Chesterfield shareholders and as contended for in the Trenvis Application, the Trenvis liquidators would have distributed some of that money to himself and the other shareholders of Trenvis. Mr. Stanford contends that the fact that Kaupthing and its creditors would receive nothing for the €135 million lent to Chesterfield under the Margin Call Loans, and that Mr. Stanford and the other shareholders would instead receive a windfall, is simply a matter of good fortune for him.

[85] In our judgment, Mr. Stanford has an insurmountable hurdle to overcome, namely, the specific findings of fact by the judge that the settlement was a global one between Kaupthing, Deutsche Bank AG and Chesterfield and was the only one that was available to the joint liquidators. The reason why the settlement was global in nature was because Chesterfield's losses were an important component of Chesterfield's claims against Deutsche Bank AG. In the circumstances, the recovery from Deutsche Bank AG by Chesterfield was contingent on Chesterfield having a liability to Kaupthing. In his judgment, the learned judge expressly

recognised that link finding that if the joint liquidators had taken the position that Kaupthing was not a creditor of Chesterfield then their claim against Deutsche Bank AG would also have been negatively affected since there would be no reason for Deutsche Bank AG to pay Chesterfield anything.

[86] The judge in his careful and thorough judgment recognised the fact that the other parties to the transaction were Deutsche Bank AG and Chesterfield. The joint liquidators plainly saw Kaupthing as the victim and the party who had suffered the loss because the initial settlement discussions were solely between Deutsche Bank AG and Kaupthing. As the judge found, the initial in-principle settlement deal involved all of the settlement monies going from Deutsche Bank AG to Kaupthing. It was only after the joint liquidators' involvement that they were able to negotiate an outcome whereby €106.25 million was to go to Chesterfield in place of Kaupthing. In our view, to approach this appeal from any other basis would amount to doing so from a wrong factual perspective.

[87] The above critical findings of fact are inextricably linked to the debate in relation to whether the liquidation decision was perverse in the Re Eddenote Ltd sense. In order to succeed on his appeal, Mr. Stanford would need to show that the learned judge was wrong in his findings that on the facts the settlement was global and that if the joint liquidators had wanted to leave Kaupthing's claims out of the settlement that would have involved Chesterfield dropping out of the settlement with Deutsche Bank AG. We can see no prospect of Mr. Stanford persuading us that the judge's findings should be impugned. We emphasise the fact that the judge was very careful and thorough in his evaluation of the evidence and his well-reasoned findings of fact and law. This much has been conceded by learned Queen's Counsel Mr. McDonnell.

[88] We are guided by the principles in Watts (Or Thomas) v Thomas, Beacon Insurance Company Limited v Maharaj Bookstore Limited and Yates Associates Construction Company Ltd v Blue Sand Investments Limited that

were distilled above in how we should treat an appeal against findings of fact. By way of emphasis, Mr. Stanford has not appealed against those specific findings of fact by the judge who saw and heard the witnesses and carefully analysed and assessed the documentary evidence. This is an unsurmountable difficulty which is presented to him in the prosecution of his appeal and therefore effectively undermines his appeal.

[89] The question is whether the judge's decision was outside the wide ambit given to a judge hearing oral evidence. On any view, the judge's decision could not be so described. We remain of the view that it seems unfair for Mr. Stanford to criticise the judge for his findings given the totality of the circumstances of the case.

[90] In our view, there is no basis for overturning the learned judge's factual findings that the settlement with Deutsche Bank AG and Kaupthing was a global deal and that there was no prospect of settling with Deutsche Bank AG without also settling with Kaupthing. We reiterate the fact that the learned judge found that had the joint liquidators not entered the settlement with Kaupthing, they would have found themselves pursuing the Deutsche litigation which would be "lengthy and expensive" and involved "the inherent litigation risk of an uncertain outcome including possible defeat".[38] In our view, what is particularly striking about this appeal is, as pointed out by Mr. Strong, QC on behalf of Kaupthing, that the global settlement has been partially performed. Deutsche Bank AG has transferred the settlement monies due from it to Kaupthing and the settlement sum due to the joint liquidators.

[91] Mr. McDonnell, QC accepts that it was the appropriate decision for the joint liquidators to have entered a settlement with Deutsche Bank AG. There is no suggestion from him that the joint liquidators should have refused the settlement with Deutsche Bank AG and continue to pursue the litigation. Despite learned Queen's Counsel Mr. McDonnell's attractive submissions, it is pellucid that based

[38] At p. 21 of the Transcript of Trial Proceedings, lines 9 – 12.

on the critical findings of the judge, the route that Mr. Stanford contends that the joint liquidators should have followed (and allegedly acted perversely in failing to do so) was never available to them. This, to our mind, effectively brings to an end the second issue raised by Mr. Stanford. In our view, this is fatal to Mr. Stanford's appeal.

[92] The judge was right to reject his application. As such, Mr. Stanford's appeal (and the Chesterfield Application) must fail. We reiterate that it is evident that there is no basis for criticising the joint liquidators' decision and by extension, there is no basis for impugning the judge's decision that the decision which the joint liquidators took was a commercial one within their discretion; a decision and discretion with which the court should not interfere. In so doing, we apply the well-known principles which were enunciated in Mahomed and another v Morris and others that the decision to enter the settlement agreement was one for the liquidators to decide and also Re Eddenote Ltd. Like the judge in the court below, we conclude that the need for rejecting Mr. Stanford's application is overwhelming.

[93] Accordingly, for the reasons which we have provided above, we would dismiss the appeal and order that Mr. Stanford pays the liquidators costs of this appeal which if not agreed within 21 days of this order, are to be assessed.

Conclusion

[94] In view of the totality of the circumstances, we make the following orders:

(1) Mr. Stanford's application for disclosure is dismissed with costs to be assessed, if not agreed within 21 days of this order.

(2) Mr. Stanford's appeal against the judgment of Wallbank J is dismissed and the judgment is affirmed.

(3) Mr. Stanford shall pay costs of this appeal to the joint liquidators, such costs are to be assessed, if not agreed within 21 days of this order.

[95] We gratefully acknowledge the assistance of all learned counsel.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Rolston Nelson
Justice of Appeal [Ag.]

By the Court

Chief Registrar