EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2018/0019

BETWEEN:

CHU KONG

Appellant

and

[1] DAVID YEN CHING WAI
[2] CHAN PUI SZE
[3] ROY BAILEY
[4] JOHN GREENWOOD as Joint Liquidators of OCEAN SINO LIMITED (in Liquidation)
[5] LAU WING YAN

Respondents

Before:

The Hon. Dame Janice Pereira	Chief Justice
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]
The Hon. Mr. Godfrey Smith, SC	Justice of Appeal [Ag.]

Appearances:

Mr. John Carrington, QC, with him, Ms. Pauline Mullings for the Appellant
Ms. Rosalind Nicholson for the Fifth Respondent

2018: October 29;
December 11.

Commercial appeal – Insolvency proceedings – Application by stakeholder for directions to be given to liquidators regarding future conduct – Inherent jurisdiction of the court— Whether the court can direct liquidators to implement proposed splitting arrangement under its inherent jurisdiction – Whether judge erred in refusing to give directions – Substantive relief sought by appellant not sought in the court below.

The appellant, Mr. Chu Kong ("Mr. Chu") and the fifth respondent, Mr. Lau Wing Yan ("Mr. Lau"), are each 50% shareholders in Ocean Sino Limited ("OSL"), a business company in the British Virgin Islands ("BVI"). OSL's only asset is its one share in PBM Asset Management Limited ("PBM"), a Hong Kong company. Mr. Lau and Mr. Chu are at deadlock at both board and shareholder levels of OSL and PBM.

Mr. Lau applied to the court for the appointment of liquidators on just and equitable grounds under the BVI Insolvency Act, 2003 (the "Act"). Kaye J [Ag.] ordered the liquidation of OSL and by an order of Wallbank J, the first through fourth respondents were appointed as liquidators of OSL.

Subsequently, Mr. Chu applied, under the inherent jurisdiction of the court and under sections 185 and 186 of the Act, for directions to be given with respect to the conduct of the liquidation. It is noteworthy that Mr. Chu's application was not made pursuant to section 273 of the Act. Adderley J declined to give the directions sought holding that the application was not made under section 273 of the Act and that the application was not one on which the court should give directions under section 186(5) of the Act.

Mr. Chu, dissatisfied with Adderley J's decision, has appealed on several grounds. Mr. Chu has asked this Court to exercise its discretion to direct the liquidators to implement what is described as the Proposed Splitting Arrangement (the "Splitting Arrangement"). Mr. Lau has taken a preliminary objection that this relief was not open to Mr. Chu because it was not sought in the court below.

The substantive issue to be determined is whether the court can direct the liquidators to implement the Splitting Arrangement under its inherent jurisdiction and if so, whether this is an appropriate case for the court's exercise of its inherent jurisdiction.

Held: dismissing the appeal and awarding costs to the respondent to be assessed if not agreed within 21 days of the date of this order, that:

1. Though the Splitting Arrangement was not a specific order mentioned on paper, from the evidence and the judge's decision, it appears to have formed a central part of the application orally presented to the court. No party can claim to be now prejudiced.

2. The Legislature has provided for a stakeholder to access the court for directions to be given to a liquidator through the mechanism of section 273 of the Act. Section 273 entitles any person, including a stakeholder, who is aggrieved by an act, omission or decision of a liquidator to apply to the court to correct it. In reversing or modifying an act or omission of the liquidators, the court would, effectively, be directing them. To say that section 273 cannot avail the stakeholder because the liquidators have not yet made a decision as to the whether the Splitting Arrangement should be implemented, suggests that the application was premature.

3. A stakeholder who believes that liquidators are deliberately stalling or refusing to decide on a proposal put to them for the efficient liquidation of a company might write to them seeking a reasonable timeframe by which to expect a response and warning that a failure to respond would be met by recourse to the court. If the liquidators reject the proposal, the stakeholder may move the court under section 273 to reverse that decision. If, after the expiration of a reasonable period, the liquidators have signally failed to respond, this could be considered an omission for the purposes of section 273.

4. Any residuary or complementary jurisdiction the court has to control the conduct of the liquidators, outside the scope of the Act, cannot be invoked to control the future, unknown conduct of the liquidators. It is not in dispute that the liquidators have not yet made a decision on the Splitting Arrangement. It is therefore entirely premature for the court to anticipate what they may or may not do. Rather, it appears to be an unwarranted interference with the powers granted to the liquidators for this Court to direct future action in circumstances where there has been no complaint about any act, omission or decision of the liquidators.

JUDGMENT

[1] SMITH JA [AG.]: This is an appeal by Mr. Chu Kong ("Mr. Chu") against the decision of the learned trial judge of the Commercial Division, refusing to give directions to the first through fourth respondents ("the Liquidators") to implement what is described as the Proposed Splitting Arrangement ("the Splitting Arrangement").

[2] The appeal concerns the ambit of the inherent jurisdiction of the court in insolvency proceedings in the British Virgin Islands ("the BVI") where the Insolvency Act, 2003 [1] ("the Act") expressly provides for who may make applications to the court in relation to a liquidation. It raises the perhaps novel issue of whether a stakeholder in a liquidation in the BVI may invoke the court's inherent jurisdiction to give directions to the Liquidators regarding their future conduct if there is no scope for doing so under the Act. The Liquidators were not represented at this appeal, choosing instead to rely on their written submissions made at the hearing of the application in the court below.

Background

[3] Mr. Chu and the fifth respondent, Mr. Lau Wing Yan ("Mr. Lau"), are each 50% shareholders in Ocean Sino Limited ("OSL"), a company incorporated as a BVI Business Company. OSL's only asset is its one share in PBM Asset Management Limited ("PBM"), a Hong Kong company. PBM, in turn, holds 49% of the shares of BGA Holding Limited ("BGAHL"), also a Hong Kong company. Mr. Lau and Mr.

[1] Act No. 5 of 2003, Laws of the Virgin Islands.

Chu fell out, resulting in deadlock between them at both board and shareholder levels of OSL and, consequently, PBM.

[4] Mr. Lau applied to the court for the appointment of liquidators on just and equitable grounds under the Act. Following a contested trial, Kaye J [Ag.], at page 27 of a detailed judgment, summarised his findings as follows:

> "In summary, by the time of the hearing in May 2017,
>
> A. Mr. Lau had fully justified his case as to deadlock on the facts;
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> B. Their attempts to come to some reasonable parting of the ways under the two Restructuring Agreements had come to naught;
>
> C. Mr. Chu had managed to engineer, in my judgment, a situation whereby he, or associates of his, seized effective overall control of Beibu Gulf by BGAL and Polyrise in order to exclude Mr. Lau from any participation in management (via OSL and PBM) of PBM's 49% interest in Beibu Gulf and, thereby its subsidiaries. All this was done or engineered by Mr. Chu … without properly or fully informing Mr. Lau despite his personal interest via PBM's 49% share and his own 50% share in OSL. He removed, or secured the removal of Mr. Lau as director of Beibu Gulf and its subsidiaries, and diverted the two operating subsidiaries ... to a company, Ausca, which he now accepts is owned by his son and of which he is a director and moreover without any cogent due diligence or any approach or explanation to Mr. Lau. Mr. Chu failed to explain or justify the commercial reasons for this … but I infer and find it was done directly or indirectly to exclude Mr. Lau from any benefit;
>
> D. Moreover, he caused PBM, without PBM's and Mr. Lau's true knowledge or consent, to participate in a re-financing transaction (the Lohas transaction), to its detriment;
>
> E. Mr. Chu has consistently and repeatedly obstructed, frustrated and blocked Mr. Lau's repeated requests for full and proper financial information as to the financial affairs of Beibu Gulf via a series of excuses … and cynically blamed Mr. Lau for failing to implement the Restructuring Agreements. Indeed, although Mr. Chu was plainly aware the details of many transactions about which Mr. Lau had expressed concern, he consistently failed to produce the relevant supporting documentation in evidence and failed to give a full and proper explanation to many of the commercial and corporate machinations in Beibu Gulf."

[5] Kaye J [Ag.] therefore ordered the liquidation of OSL. After a further contested hearing as to who should be appointed as liquidators, on 28th July 2017, Wallbank J made an order ("the Order") appointing the first through fourth respondents as Liquidators of OSL.

[6] The Order provided:

> "4. That the Liquidators shall have the powers necessary to carry out the functions and duties of a liquidator under the Act, in the British Virgin Islands or elsewhere, including the powers specified in Schedule 2 of the Act, namely to:
>
> (a) …
>
> (d) Commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the Company.
>
> 5. The powers of the Liquidators set out in paragraph 4(a) to 4(d) shall only be exercisable with the sanction of the Court. The powers of the Liquidators set out in paragraph 4(e) to 4(o) shall be exercisable without requiring the sanction of the Court."

[7] In an application dated 5th December 2017, Mr. Chu applied "under the inherent jurisdiction of the Court and Sections 185 and 186 of the Insolvency Act 2003" for directions to be given with respect to the conduct of the liquidation of OSL. He made it plain that he was not applying under section 273 of the Act. The specific orders sought were:

> "(1) a declaration that the liquidators of Ocean Sino Limited (in Liquidation) have no power under the Order appointing them and/or under the Insolvency Act 2003 section 185 to intervene in the affairs of PBM Asset Management Limited, the wholly owned subsidiary of Ocean Sino Limited (in Liquidation) and in particular to seek to commence litigation in the name of that company.
>
> (2) an Order restraining the liquidators of Ocean Sino Limited (in Liquidation) from exceeding the scope of their statutory duties under the Insolvency Act 2003 section 185 and the powers granted under the Act and the Order of the Court in relation to the liquidation of Ocean Sino Limited (in liquidation)
>
> (3) Costs of the Application be paid by the liquidators …personally."

[8] The relevant grounds of the application were:

> "5. After their appointment, the liquidators have wrongfully failed to distribute the shareholding in PBM Asset Management Limited to the shareholders or realise those shares and distribute the proceeds thereof to the shareholders of Ocean Sino Limited (in Liquidation).
>
> 6. The liquidators have wrongfully and without justification caused themselves to be appointed as directors of PBM Asset Management Limited and are attempting to run the affairs of that company to the exclusion of the incumbent directors including the retainer of solicitors without sanction of the board of that company and proposing the commencement of liquidation in Hong Kong in the name of that company without sanction of this court.
>
> 7. The aforementioned actions of the liquidators amount to an abuse of their powers under the Insolvency Act to create work and profits for themselves to the detriment of the shareholders and creditors of Ocean Sino Limited (in Liquidation) in that such actions do not involve the collection, preservation, realization or distribution of assets of Ocean Sino Limited (in Liquidation).
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> 8. It is appropriate therefore for the court to give directions to the liquidators, as officers of this court, in relation to their conduct of the liquidation of Ocean Sino Limited (in Liquidation) and to restrain them from acting contrary to their statutory duties and powers in relation to this liquidation." (underlining supplied)

[9] In an oral judgment delivered on 14th February 2018, Adderley J declined to give directions. He held, firstly, that the application was not made under section 273 of the Act and, secondly, the application was not one on which the court should give directions under section 186(5) of the Act.

Grounds of Appeal

[10] Mr. Chu has appealed on the following grounds:

(1) The learned judge erred in law in dealing with the application only as an application under the Act;

(2) The learned judge erred in law in failing to deal with the application on the grounds on which it was made, i.e., under the inherent jurisdiction of the court; and

(3) The learned judge erred in failing to give adequate reasons for his refusal to give directions especially in light of his finding that "the Proposed Agreement is worthy of serious consideration".

Mr. Chu is asking this Court to reconsider the application and exercise its own discretion to direct the Liquidators to implement the Splitting Arrangement.

[11] Ms. Nicholson, counsel for Mr. Lau, took a preliminary objection that the substantive relief sought by Mr. Chu in his notice of appeal, namely, that the liquidators be directed to implement the Splitting Arrangement, was not included in his application in the court below and so it was not now open to him to seek that relief on appeal.

Issues

[12] The issues that arise for the determination of this Court are therefore:

(1) Whether the substantive relief sought by the appellant in this appeal is open to him (the preliminary point);

(2) Whether the Court can direct the Liquidators to implement the Proposed Splitting Arrangement under its inherent jurisdiction;

(3) If the Court is able to so do, whether this is an appropriate case for the Court's exercise of its inherent jurisdiction;

(4) Whether the learned trial judge provided adequate reasons for his refusal to make an Order for the directions sought by the appellant.

The Preliminary Point

[13] It is clear from a perusal of Mr. Chu's original application that the order he is asking this Court to make, namely, to direct the Liquidators to implement the Splitting Arrangement, was not one sought in the court below. As set out at paragraph 7 of this judgment, the orders he sought were limited to a declaration

that the Liquidators had no power to intervene in the affairs of PBM and an order restraining them from exceeding their powers under the Act and Wallbank J's Order.

[14] Mr. Carrington, QC, conceded that the application might not have been elegantly drafted but insisted that all the parties had addressed the issue of whether it was appropriate to implement the Splitting Arrangement. He directed the Court's attention to a number of documents in the record of appeal. Firstly, he referred the Court to the seventh affidavit of Mr. Chu. The Court notes that indeed the Splitting Arrangement is described at paragraphs 13 and 20 of that affidavit. Secondly, the Splitting Arrangement was analysed and rejected as a solution in paragraphs 34 through 37 of the affidavit of John Greenwood, the fourth respondent. Thirdly, Mr. Lau himself, at paragraph 19 of his Fifth Affirmation, deposed to the impracticality of the Proposed Arrangement. Fourthly, Mr. Carrington referenced ground 8 of the original application (set out at paragraph 5 of this judgment) which, he submitted, "signaled" the Splitting Arrangement. Finally, he pointed the Court to the transcript of the oral judgment of Adderley J in which the learned judge, after declining to give the direction sought, stated:

> "… however, after reviewing the proposed Splitting Arrangements which the liquidators say they have not yet considered, and having looked at all the sides of the arguments, it seems to me worthy of the liquidators' serious consideration".[2]

[15] Mr. Carrington, QC, submitted that, from the evidence, it is clear that no party was taken by surprise; everyone knew that what was being dealt with was the Splitting Arrangement. He asked the Court to accept that, by the time the matter came before the judge in the original application, everyone knew the judge was being asked to give directions, under its inherent jurisdiction, to the Liquidators on the implementation of the Splitting Arrangement.

[2] At p. 6 of the transcript of proceedings dated 14th February 2018.

[16] The record of appeal included the transcript of Adderley J's oral judgment but no transcript of the hearing. This Court, therefore, did not have the benefit of seeing how the application had in fact been presented and whether the Splitting Arrangement was among the relief sought in the course of submissions made before the judge. Be that as it may, this Court is satisfied that, though the Splitting Arrangement was not a specific order mentioned on paper, from the evidence as well as the learned judge's decision, it appears to have formed a central part of the actual application orally presented to the Court. It is noteworthy that Ms. Nicholson did not dispute that it was in fact dealt with at the hearing before the judge. That being the case, no party can claim to be now prejudiced. In the circumstances, we would overrule the preliminary objection and consider the appellant's arguments on the Splitting Arrangement.

Inherent Jurisdiction

[17] This ground of appeal raises the question of the interplay between the court's inherent jurisdiction, on the one hand, and, on the other hand, legislation dealing with the subject matter on which the court is asked to exercise its inherent jurisdiction. It is therefore necessary to set out the relevant provisions of the Act dealing with the court's power to control and direct liquidators:

> "184. (1) In performing his functions and undertaking his duties under this Act, a liquidator, whether appointed by resolution of the members or by the Court, acts as an officer of the Court.
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> (2) A liquidator is the agent of the company in liquidation.
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> 185. (1) The principal duties of a liquidator of a company are:
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> (a) to take possession of, protect and realise the assets of the company;
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> (b) to distribute the assets or the proceeds of realisation of the assets in accordance with this Act; and
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> (c) if there are surplus assets remaining, to distribute them, or the proceeds of realisation of the surplus assets, in accordance with this Act.

(2) The liquidator shall, subject to this Act and the Rules, use his own discretion in undertaking his duties.

(2A) If it appears to the liquidator that the company has carried on unlicensed financial services business, he shall as soon as reasonably practicable report the matter to the Commission.

(2B) Where the liquidator makes a report to the Commission under subsection (2A) he shall

(a) send to the Commission a copy of every notice or other document that he is required under this Part to send to a creditor or the Court; and

(b) notify the Commission of any application made to the Court in or in connection with the liquidation.

(3) A liquidator also has the other duties imposed by this Act and the Rules and such duties as may be imposed by the Court.

186. (1) A liquidator of a company has the powers necessary to carry out the functions and duties of a liquidator under this Act and the powers conferred on him by this Act.

(2) Without limiting subsection (1), a liquidator has the powers specified in Schedule 2.

(3) The Court may provide that certain powers may only be exercised with the sanction of the Court:

(a) where the liquidator is appointed by the Court, on his appointment or subsequently; or

(b) where the liquidator is appointed by the members, at any time.

(4) Where a liquidator disposes of any assets of the company to a person connected with the company, he shall notify the creditors' committee, if any, of such disposition.

(5) The liquidator of a company, whether or not appointed by the Court, may at any time apply to the Court for directions in relation to a particular matter arising in the liquidation.

(6) The acts of a liquidator of a company are valid notwithstanding any defect in his nomination, appointment or qualifications.

187. (1) The Court may, on application by a person specified in subsection (2) or on its own motion, remove the liquidator of a company from office if:

(a) the liquidator

(i) is not eligible to act as an insolvency practitioner in relation to the company,
(ii) is not eligible to act as an insolvency practitioner in relation to the company,
(iii) breaches any duty or obligation imposed on him by or owed by him under this Act, the Rules or the Regulations made under section 486 or, in his capacity as liquidator, under any other enactment or law in the Virgin Islands, or
(iv) fails to comply with any direction or order of the made in relation to the liquidation of the company; or

(b) the Court is satisfied that:

(i) the liquidator's conduct of the liquidation is below the standard that may be expected of a reasonably competent liquidator,
(ii) the liquidator has an interest that conflicts with his role as liquidator, or
(iii) that for some other reason he should be removed as liquidator.

(2) An application to the Court to remove the liquidator of a company may be made by

(a) the creditors' committee;

(b) a creditor or member of the company; or

(c) the Official Receiver.

…..

273. 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".

[18] From the above statutory provisions, the following clear and unequivocal statements of law emerge regarding the powers of the court in relation to a liquidator:

(i) A liquidator appointed under the Act acts as an officer of the court (section 184);

(ii) The liquidator uses his own discretion in undertaking his duties (section 185(2));

(iii) The liquidator may at any time apply to the court for directions in relation to a particular matter arising in the liquidation (section 186(5));

(iv) The court has the power to remove a liquidator if he breaches any duty or obligation imposed on him by law, fails to comply with an order or direction of the court, falls below the standard of a reasonably competent liquidator or for some other reason (section 187(1)); and

(v) Any person aggrieved by an act, omission or decision of an office holder may apply to the court and the court may reverse or modify the act, omission or decision of the liquidator (section 273).

[19] The application in the court below, having been brought by a stakeholder and not a liquidator, was not one made under the provisions of section 186(5) of the Act. In the court below, as well as before this Court, Mr. Chu maintained that this was not a section 273 application. He maintained this position even though it is clear from the grounds of the application (set out at paragraph 8 of this judgment) that the acts complained about are challengeable under section 273 of the Act. In response to the Court's question as to why an application was not made under section 273, Mr. Carrington told the Court that the Splitting Arrangement had been put to the Liquidators but they have not yet made a decision on it. His argument was that if the Liquidators had not made a decision, there was not, as yet, any act, omission or decision to seek the court's assistance in confirming, reversing or modifying under section 273 of the Act. Since the Act did not provide for a stakeholder to apply to the court to direct future conduct of the Liquidators, the inherent jurisdiction of the court was being invoked to do so.

[20] Mr. Carrington acknowledged that there was little direct authority on the point. Indeed, the judgments he referred to, while being authorities for the proposition

that the court does have an inherent jurisdiction to control or supervise its officers, were all based on an invocation of the court's statutory jurisdiction. We will therefore only refer to a few of them.

[21] In Re J W Murphy & P C Allen; Re BPTC Ltd (in liq),[3] the applications to the Supreme Court of New South Wales were made by the liquidators for directions under the Companies Code and by the trustees under section 63 of the Trustee Act. That court held that where a liquidator or trustee seeks to enter into a transaction in respect of which the court's sanction is desired, it is preferable that the contract be made conditional upon the approval of the court. The application to be made to the court for an order approving the contract could be made under its inherent jurisdiction to supervise and guide the activities of its own officers in the case of a liquidator; and in the case of a trustee, under the Supreme Court Rules of New South Wales. The court exercised its inherent jurisdiction because, as it found, an application under the Companies Code or the Corporations Law of New South Wales had no effect on the substantive rights of persons external to the winding up. In the case at bar, the court, unlike in Murphy, is moved not under any statutory provisions but strictly under its inherent jurisdiction. Secondly, in Murphy, the liquidators and trustees themselves applied to the court for directions, while in the case at bar it is a stakeholder who applied to the court.

[22] Similarly, Re Addstone Pty Ltd (in liq) and Others[4] involved the liquidator of two companies applying for directions from the court in relation to the issue whether the companies should discontinue court proceedings in which the companies were plaintiffs. That court held that this was the kind of case where the court should give its direction. Re Addstone can be distinguished on the basis that it involved an application brought by the liquidators whereas the case at bar involves an application by a stakeholder.

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[3] (1996) 19 ACSR 569.
[4] (1997) 25 ACSR 357.

[23] Reliance was also placed on Deloitte & Touche AG v Johnson[5] in which Lord Millett stated that:

> "As liquidators of the company the respondents are officers of the court. The court's inherent jurisdiction to control the conduct of its own officers is beyond dispute".

[24] Neither party disputed that the court has an inherent jurisdiction to control the conduct of liquidators. The question is whether the court's power to control the conduct of a liquidator includes the power to control future conduct. Mr. Carrington urged the Court to conclude that it does.

[25] Ms. Nicholson, while accepting that the court has an inherent jurisdiction to supervise its officers, submitted that it was limited in circumstances where an express statutory regime exists to deal with a particular matter. She relied on Raja v Van Hoogstraten (No. 9),[6] which was adopted and applied by the Privy Council on appeal from this Court in Texan Management Limited et al v Pacific Electric Wire & Cable Company Limited.[7]

[26] In Texan Management, the Privy Council stated:

> "[56] The answer, therefore, on the first issue is that there is no doubt that there is an inherent jurisdiction to stay proceedings. But that does not in itself answer the question whether the inherent jurisdiction may be exercised to the extent that the CPR themselves contain provisions for applications for stays which are subject to procedural conditions and time limits. The authorities strongly suggest that the inherent jurisdiction to stay proceedings is such a fundamental one that it will not normally be displaced by express powers to grant a stay. It was so held by the BVI Court of Appeal in *Addari v Addari* (2005), a decision on a leave application.
>
> [57] But the modern tendency is to treat the inherent jurisdiction as inapplicable where it is inconsistent with the CPR, on the basis that it would be wrong to exercise the inherent jurisdiction to adopt a different approach and arrive at a different outcome from

[5] [2000] 1 BCLC 485 at p.492.
[6] [2009] 1 WLR 1143.
[7] [2009] UKPC 46.

> that which would result from an application of the rules: *Raja v Van Hoogstraten* (No 9) [2008] EWCA Civ 1444 … That decision concerned the court's power under the inherent jurisdiction to set aside an order made without notice ex debito justitiae. It was held that although the inherent jurisdiction may supplement rules of court, it cannot be used to lay down procedure which is contrary to or inconsistent with them, and therefore where the subject matter of an application is governed by the CPR it should be dealt with in accordance with them and not by exercising the court's inherent jurisdiction".

[27] Mr. Carrington's response to this was that since the Act was silent on the matter of a stakeholder applying to the court for directions, invoking its jurisdiction to do so could not be viewed as laying down a procedure contrary to or inconsistent with the Act. The two, he said, go hand in hand.

[28] Both Van Hoogstraten and Texan Management concerned the relationship between the inherent powers of the court to control proceedings and the Rules of the Supreme Court. The instant case concerns the relationship between the inherent powers of the court to control liquidators and the provisions of the Act. In our opinion, the principle enunciated in Van Hoogstraten and Texan Management should apply with equal force where the interplay is between the inherent jurisdiction and an Act, which is an expression of the will of the sovereign legislature, as opposed to the rules of court. The question that remains to be answered, however, is whether there is a conflict between the two.

[29] Sir Jack Jacob in his Hamlyn lecture, "The Inherent Jurisdiction of the Court",[8] referenced in Van Hoogstraten, said that the powers of the court under its inherent jurisdiction:

> "are complementary to its powers under rules of court; one set of powers supplements and reinforces the other… [W]here the usefulness of the powers under the rules ends, the usefulness of the powers under the inherent jurisdiction begins".

[8] [1970] Current Legal Problems 23, 50-51.

[30] This is the approach Mr. Carrington is inviting us to take, that is, to view the inherent power of the court to direct the Liquidators at the instance of a stakeholder as being complementary to, and not inconsistent with, the Act since the Act is silent on the question.

[31] Ms. Nicholson's counter to this was that it was not within the statutory scheme of the Act for a stakeholder to approach the court. The legislature had applied its mind as to who was empowered to apply to the court for directions and stakeholders were not among those who could. There was no room left for invoking the court's inherent jurisdiction.

[32] In our view, this is not a proper case for the exercise of the court's inherent powers to control the conduct of the Liquidators. We say so for two reasons. Firstly, the legislature has in fact provided for a stakeholder to access the court for directions to be given to a liquidator. It has done so through the mechanism of section 273. Section 273 entitles any person, including a stakeholder, who is aggrieved by an act, omission or decision of a liquidator to apply to the court to correct it. In reversing or modifying an act or omission of the Liquidators, the court would, effectively, be directing them. To say that section 273 cannot avail the stakeholder because the Liquidators have not yet made a decision whether to implement the Splitting Arrangement suggests that the application was premature.

[33] Secondly, any residuary or complementary jurisdiction that the court has to control the conduct of the liquidators, outside the scope of the Act, cannot be invoked to control the future, unknown conduct of the Liquidators. It is not in dispute that the Liquidators have not yet made a decision on the Splitting Arrangement. It is therefore entirely premature for Mr. Chu – or for this Court – to anticipate what they may or may not do. It would appear to us to be an unwarranted interference with the powers granted to the Liquidators under the Order and the Act for this Court to direct future action in circumstances where there has been no complaint about any act, omission or decision of the Liquidators.

[34] A stakeholder who believes that liquidators are deliberately stalling or refusing to decide on a proposal put to them for the efficient liquidation of a company might write to them seeking a reasonable timeframe by which to expect a response and warning that a failure to respond would be met by recourse to the court. If the liquidators reject the proposal, the stakeholder may move the court under section 273 to reverse that decision. If, after the expiration of a reasonable period, the liquidators have signally failed to respond, this could be considered an omission for the purposes of section 273. This ground of appeal therefore fails.

[35] Although much time was spent (and a number of authorities cited) on the question of whether this Court should direct the Liquidators to implement the Splitting Arrangement as a just, reasonable and cost-effective means of bringing the liquidation to an expedient end, in light of our conclusion above, it is not necessary to consider this issue.

Adequacy of reasons

[36] The learned judge, in declining to give the directions sought on the application, stated:

> "The question is, can the Court give directions to a liquidator at the instance of the stakeholder on a matter which he has omitted to consider and direct him to make a decision.
> That is a question which may possibly be answered by an application under section 273, but the Applicants made it clear that this is not a section 273 application.
> Accordingly, I do not have to consider it under section 273, and in my judgment this is not the type of application on which the Court should give directions under section 186 subsection (5).
> ……
> I therefore decline to give directions".[9]

[37] One of the grounds of appeal, in the appellant's notice of appeal, was that the learned judge had failed to give adequate reasons for declining to give directions to the Liquidators. In SFC Swiss Forfaiting Company Ltd and Swiss Forfaiting

[9] At pp. 5-6 of the transcript of proceedings dated 14th February 2018.

Ltd,[10] this Court endorsed the principles stated in English v Emery Reimbold[11] wherein Lord Phillips MR stated:

> "A judge should give reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties, and if need be, the Court of Appeal the basis on which he acted".

[38] We note that in the appellant's written submissions, there are no arguments or submissions in relation to this ground. In his oral presentation, Mr. Carrington seemed content to state that the learned judge did not address the issue of the court's inherent jurisdiction anywhere in his oral judgment, but beyond this, he did not appear to be pressing the point and cited no authorities.

[39] While there is no reference to the inherent jurisdiction of the court in the oral judgment of the learned judge, in the absence of a transcript of the actual hearing that took place before him, it is unclear how the matter of the exercise of the court's inherent jurisdiction was put to the judge. In any event, this ground ultimately is of no moment since we have already concluded that this was not a case for the exercise of the court's inherent jurisdiction. The learned judge clearly and correctly explained that the application must be dismissed because the court had no power to grant the relief sought by Mr. Chu since he had declined to pursue the appropriate procedural course under section 273 of the Act.

[10] BVIHCMAP2015/0012 (delivered 4th July 2016, unreported).

[11] [2002] 1 WLR 2409.

Conclusion

[40] The appellant has not prevailed in his challenge to the judge's decision refusing to give directions to the Liquidators. The appeal is therefore dismissed and the fifth respondent is entitled to his costs to be assessed, if not agreed within 21 days of this order.

I concur.
Dame Janice M. Pereira
Chief Justice

I concur.
Paul Webster
Justice of Appeal

By the Court

Chief Registrar