IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO. FSD 139 of 2017 (RMJ)

IN THE MATTER OF THE COMPANIES LAW (2020 REVISION)

AND IN THE MATTER OF PACIFIC HARBOR ASIA FUND I, LTD (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:	Mr. Guy Manning and Mr. Shaun Tracey of Campbells for the Joint Official Liquidators of Pacific Harbor Asia Fund I, Ltd (In Official Liquidation)
	Mr. Hector Robinson QC and Mr. Laurence Aiolfi of Mourant for Pacific Harbor Capital, Ltd.
	Mr. Tom Lowe QC instructed by Ms. Janaki Tampi of Appleby (Cayman) Ltd., for Benchmark Alternative Investment Fund Plc
	Ms. Rebecca Hume of Kobre & Kim (Cayman) for Muldoon Associates Limited
	Ms. Gemma Lardner and Mr. Marc Kish of Ogier for Cheng & Cheng Ltd, Cheng & Cheng Services Limited and for fn Asia Advisory Co. Ltd.
Before:	**The Honourable Mr. Justice Robin McMillan**
Heard:	**9, 15, 16 and 17 April 2020**
Draft Judgment: **Circulated:**	**4 May 2020**
Judgment Delivered:	**6 May 2020**

HEADNOTE

Application for sanction of the Court under Section 110 (2) (a) of the Companies Law (2020 Revision) – The respective weight to be given to views of liquidators and creditors – The importance of clarity and transparency in a competitive bidding process

JUDGMENT

1. This hearing arises from a Summons Application ("Application") by the Joint Official Liquidators ("JOLs") of Pacific Harbor Asia Fund I, Ltd (In Official Liquidation) (the "Company") for Orders and Directions that:

> *"(1) the JOLs be authorized to cause the Company to enter into a purchase and sale deed (the "**Deed**") in respect of the sale of the Company's Assets to Muldoon Associates Ltd in the same or substantially the same form as that exhibited to the Sixth Affidavit of David Griffin filed in these proceedings and to do all such things and take such actions as may be necessary or required to implement the steps contemplated by, and give effect to the terms of, the Deed; and*
>
> *(2) the JOLs' costs of and occasioned by this application be paid out of the assets of the Company as an expense of the liquidation."*

2. The Application is opposed by a number of parties.

3. It is opposed by Pacific Harbor Capital, Ltd (the "Manager"), Benchmark Alternative Investment Fund PLC ("Benchmark"), Cheng & Cheng Services Limited ("C&C Services"), Cheng & Cheng Limited ("C&C Limited") and fn Asia Advisory Co. Ltd. ("fn Asia").

4. To the extent that it may be relevant, the Application is supported by Muldoon Associates Limited ("Muldoon"). Muldoon and its affiliates shall be referred to collectively as "Stonehill".

5. In effect, the JOLs seek the Court's sanction to cause the Company to enter into a Sale and Purchase Deed dated 16 March 2020 by which the Company's assets would be sold to Muldoon (the 99% shareholder in and a purported creditor of the Company) for the sum of US$4,500,000.

6. Muldoon is an affiliate of Stonehill Capital Management, LLC. Given the extensive and interchangeable references to Stonehill and Muldoon in the evidence, as indicated, reference will be made to both entities as Stonehill for simplicity. Stonehill's offer to purchase the Company's assets for US$4, 500,000 (the "Stonehill Bid") was the winning bid in a formal competitive bidding process arranged by the JOLs which is said to have concluded on 5 February 2020.

7. The Stonehill Bid was accepted by the JOLs, after some consultation with (but not active agreement by) the Liquidation Committee ("the LC") and subject to the sanction of this Court.

THE BACKGROUND

8. The Company was placed into voluntary liquidation on 8 June 2017. The voluntary liquidation was brought under the supervision of this Court by order dated 29 August 2017 (the "Supervision Order"). David Griffin of FTI Consulting (Cayman) Limited and Lai Kar Yan (Derek) of Deloitte China were appointed as the JOLs, with their responsibilities divided in accordance with paragraph 4 of the Supervision Order.

9. The Company had been a feeder fund to Pacific Harbor Asia Master Fund (Cayman) L.P. (the "Master Fund"), a closed-ended investment vehicle for its two limited partners, the Company and Pacific Harbor LP I (the "LP Feeder"), established in accordance with an Amended and Restated Limited Partnership Agreement dated 30 April 2007 between the Feeder Funds and the former general partner of the Master Fund, Pacific Harbor Master Fund (Asia), Ltd (the "Former GP"). The Manager is the investment manager of the Master Fund and it was also the investment manager of the Company.

10. The voluntary liquidators caused the Former GP to be replaced as general partner of the Master Fund by GP Limited (an entity now under the control of the JOLs). The winding

up of the Company itself terminated the Manager's role as investment manager of the Company. Terminating the Manager's additional role as investment manager of the Master Fund would, however, have required the winding up of the Master Fund.

11. Pursuant to the terms of a Protocol approved by Order of this Court on 21 June 2019, (a) Mr. Lai was directed to act in collaboration with the Manager as long as Mr. Lai considered it to be appropriate and beneficial to the realisation of the Master Fund's assets, (b) the JOLs could not dissolve the Master Fund (and thereby terminate the Manager's investment management agreement) without first consulting with the LC and obtaining Court sanction, and (c) any disposal of the Master Fund's assets was to be the subject of a specified consultation procedure between the JOLs, the LC and stakeholders of the LP Feeder. The Manager, under the control of its principal and founder, Mr. Warren Allderige, was therefore left in place to realise the Master Fund's assets subject to the supervision of Mr. Lai and his team and the consent of the JOLs and the LC.

12. At the commencement of the Company's liquidation its assets comprised a redemption claim against the Master Fund for a principal amount of US$11.23 million plus interest, its 77% limited partnership interest in the Master Fund, and US$374,000 in cash. However, the Manager and Benchmark both deny that the Company is a creditor of the Master Fund, contrary to the JOLs' indicative evidence of that claim and notwithstanding their own economic interests as purported creditors of the Company.

13. In October 2019, the JOLs learned that the Manager had completed a sale of the Master Fund's principal asset, the Shenyang Hotel, apparently in breach of the consultation procedure under the Protocol, and that it appeared to have paid approximately US$15 million of the Master Fund's share of the proceeds of sale primarily to entities affiliated with the Manager. Despite repeated requests by the JOLs, the JOLs contend that no credible or satisfactory explanation or accounting has been provided by the Manager.

14. The Company's assets (and the Master Fund's assets) therefore are said to include potential claims against the Manager and its affiliates and officers, including Mr. Allderige, arising from an apparent dissipation of the Master Fund's share of the Shenyang Hotel sale proceeds.

15. The liquidation has not been funded from the outset and has always proceeded on the basis that there would be recoveries distributed from the Master Fund to the Company following the realization of the Shenyang Hotel. The JOLs and their legal advisers have not received any payments in respect of their fees and expenses since their appointment in 2017. As at 31 March 2020, the unpaid liquidation expenses amounted to US$4,063,159. Those expenses were incurred in good faith in anticipation that they would in due course be paid.

16. The JOLs convened a meeting of all members of the LC (other than the Manager) on 19 November 2019 to discuss the Manager's apparent perceived dissipation of the Shenyang Hotel sale proceeds. The JOLs' proposal to wind up the Master Fund and examine Mr. Allderige was met with opposition by Benchmark, which expressed its ongoing support for Mr. Allderige and its confidence that an eventual accounting would reveal that the sale proceeds had been properly applied. Benchmark then initiated settlement discussions with the JOLs.

17. Benchmark, however, disputes any contention by the JOLs that it made a bid as such for the Company's assets before 5 February 2020. This goes to an issue as to whether a three business day window of notice before 5 February was ample time for Benchmark to make its competitive bid or was not ample time.

18. In any event, the JOLs submit at paragraph 5.10 of their Written Submissions that Benchmark made a without prejudice offer on 6 January 2020 (subsequently referred to in open correspondence) to purchase the Company's assets for US$2,598,917.

19. Meanwhile the JOLs state that they became aware of a competing third party claim to the Master Fund's interest in the proceeds of sale of the Shenyang Hotel and they reported that fact to the LC.

20. Then on 23 January 2020 the JOLs received *"an unsolicited higher bid from Stonehill to purchase the company's assets for US$4m. Stonehill made that bid without knowing the amount of Benchmark's bid or the identity of the Bidder."* (Paragraph 5.12.).

21. The JOLs' Written Submissions continue as follows:

"*5.13 Indeed, the JOLs did not disclose the amounts of either of those bids to any party. Instead, on 31 January 2020 they invited Benchmark, Stonehill and the other members of the LC (save for the Manager) to submit their best and final bids for the Company's assets on a "blind" basis by 5 February 2020.*

5.14 Two bids were received on 5 February. Benchmark made an increased bid of US$3,631,306. Stonehill made the Stonehill Bid in the increased amount of US$4,500,000.

5.15 No stakeholder expressed (or has since expressed) any opposition to the Company's assets being sold.

5.16 No other stakeholder expressed (or has since expressed) any interest in purchasing the Company's assets.

5.17 The JOLs therefore accepted the Stonehill Bid and proceeded to negotiate and agree the terms of the Deed, which are binding subject only to the sanction of the Court."

22. Clause 5 of the Deed provides that if the closing date (which for practical purposes only requires this Court granting sanction) has not occurred by 30 April 2020 then the Deed shall terminate unless the parties agree otherwise. Following the conclusion of the hearing this date has now been extended to 7 May 2020.

23. The JOLs consider that if the sale to Stonehill does not complete there is a real risk that no other sale will be concluded, leaving the estate back at square one with no returns for creditors and no funding to pay outstanding liquidation expenses or pursue claims to make recoveries from the Manager. They argue that this would put the estate in the worst possible position.

24. Finally, the JOLs state at paragraph 7 that on 12 March 2020 (i.e. some five weeks after the bidding process had concluded, and following extensive correspondence with the LC

regarding the JOLs' proposed acceptance of the Stonehill Bid), Benchmark submitted a further unsolicited bid to purchase the Company's assets for US$5 million (the "Benchmark Late Bid"). The terms of the Benchmark Late Bid included a release of claims against the Manager and clearly contemplate the Manager resuming full control of the Pacific Harbor Group.

25. The JOLs further point out, inter alia, at paragraph 8.2, that the terms of the Stonehill Bid are certain and documented in the Deed. Stonehill has provided satisfactory proof of funding and is required to pay the purchase price of US$4,500,000 within three business days of the Court granting sanction. In contrast, even if the terms of the Benchmark Late Bid were amended to become legally capable of acceptance, it is currently nothing more than a non-binding heads of terms. Detailed terms would need to be negotiated and agreed (in circumstances where there is no funding to do so) and the outcome of that process is highly uncertain, especially at a time of unprecedented global economic uncertainty. If it was not possible to negotiate acceptable and legally binding terms with Benchmark then the Stonehill Bid could lapse in the meantime, leaving the estate in a substantially worse position than it is now.

THE CREDITORS

26. The proofs of debt filed in the Liquidation to date are as follow:

The Manager (revised claim) – Management fees and expenses – US$21,603,063
Benchmark – Promissory Note debt – US$11,291,013
PAAMCO – Outstanding redemption debt – US$7,358,386
fn Asia – Promissory Note debt – US$3,513,584
Aggregator Funds (now Stonehill) – Loan – US$375,000
Six former service providers (including C&C Services and C&C Limited – unpaid service fees – US$46,323
Teneo – Public relations and reputational management – US$15,486
CIMA – late lodgment penalties – US$6,125

Total – US$44,210,980.

27. It is to be noted that both Benchmark and Stonehill as respective bidders are also claimant creditors. In addition, as earlier indicated, Stonehill is now the major contributory. Furthermore, the Manager is both a substantial claimant creditor and is also the potential target of an asset recovery initiative which may be open to the JOLs.

28. Finally, fn Asia, C&C Services and C&C Limited while also claimant creditors in addition have enjoyed a long professional relationship with Mr. Allderige and hold his expertise in favourable regard.

29. Bearing in mind all of these factors and the perceived or actual conflicts of interest to which they may entirely understandably give rise, it is extremely important to recognize that this sanction application presents some most unusual features and it is not a sanction application of what may be described as the ordinary kind.

THE EVIDENTIAL ISSUE

30. A very considerable volume of evidence has been produced for the assistance of the Court in weighing the respective issues which the Court as a matter of law is required to weigh before arriving at a final decision. However, for reasons which will become evident, the Court must also ascertain whether independently of the JOLs' views the evidence reveals any substantial reasons why the Court in the circumstances should decline sanction.

31. This qualification is well expressed in *Re Edennote Ltd (No 2) [1992] 2 BCLC 89* where Lightman J states at page 92 g-l:

> "*Where a liquidator seeks the sanction of the court and takes the view that a compromise is in the best interest of the creditors, in any ordinary case, where (as in this case) there is no suggestion of lack of good faith by the liquidator or that he is partisan the court will attach considerable weight to the liquidator's view unless the evidence reveals substantial reasons why it should not do so, or that for some reason or other his view is flawed.*"

32. Putting the present issue in concrete terms, do certain criticisms of the bidding process rise to the level where a sense not merely of disappointment but also of grievance can be engendered on the part of at least a segment of the creditors whether they be conflicted or not?

33. Ultimately the Court should decide the Application before it on a basis that is both in accordance with the applicable principles of law and following a bidding process which can fairly and objectively be said to be beyond the scope of controversy.

34. Unless the Court is satisfied of both these matters then it is open to the Court in the broad exercise of the discretion which the Court ultimately has to refrain from sanctioning the sale.

THE GOVERNING LAW

35. Pursuant to Section 110(2)(a) and Schedule 3, Part I of the Companies Law (2020 Revision) an official liquidator may only exercise the power to sell any of the company's property by public auction or private contract with the sanction of the Court.

36. The leading modern authority is *Re Greenhaven Motors Ltd [1999] 1 BCLC 635* which confirms that it is the Court which sanctions the exercise of the power and not the liquidator, and the Court which in addition gives weight to the interests of those who have a real interest in the assets of the company in liquidation and also gives weight to the views of the liquidators, who may, and normally will, be in the best position to take an informed and objective view.

37. The case, however, also draws attention to the fact that creditors if uninfluenced by extraneous considerations are likely to be good judges of where their best interests lie.

38. Similarly, in the *Edennote* case at page 94 c-d the learned Judge refers to the view expressed by disinterested creditors.

39. The general principles which govern the Court's decision whether or not to grant sanction were set out by the learned Chief Justice in *In the Matter of SAAD Investments Company*

Limited (In Official Liquidation) (Grand Court Unreported, 1 October 2019, Smellie CJ) at paragraph 37:

"37. *In deciding whether or not to grant sanction to the exercise of a liquidator's powers, similar principles apply and have been applied in different kinds of circumstances by this Court. They are set out In re DD Growth Premium 2X Fund 2013 (2) CILR 361 and although in that case the principles were considered in the context of official liquidators seeking sanction of the power to make a compromise or arrangement with creditors, the JOLs assert and I accept that they are applicable, mutatis mutandis, in the present situation. The principles were outlined in Re DD Growth at paragraph 30, as follows:*

(a) the decision whether to sanction the exercise of a power falling within Part I of the Third Schedule to the Companies Law is a decision for the Court (see Re Greenhaven Motors Ltd. [1999] 1 BCLC 635);

(b) in exercising its discretion to grant sanction, the Court must consider all the relevant evidence (see In re Universal and Surety Co. Ltd. [1992-93] CILR 149);

(c) the Court must consider whether the proposed transaction is in the commercial best interests of the company, reflected prima facie by the commercial judgment of the liquidator (see Re Edennote Ltd. (No.2) [1997]2 BCLC 89);

(d) the Court should give the liquidators' view considerable weight unless the evidence reveals substantial reasons for not doing so (Re Edennote Ltd No.2 (above));

(e) the liquidator is usually in the best position to take an informed and objective view (see Re Greenhaven Motors Ltd); and

(f) unless the Court is satisfied that, if the company is not permitted to enter the compromise in question, there will be better terms or some other deal on offer, the choice is between the proposed deal and no deal at all (see Re Greenhaven Motors Ltd).

38. *The principles on which the Court decides sanction applications were also considered by Cresswell J in re Trident Microsystems (Far East) Ltd [2012] (1) CILR 424. Citing re Universal Surety and Co Ltd (above) it was similarly held that whether to sanction the exercise of a power under Part 1 of Schedule 3 to the Companies Law was a decision for the Court, which must consider the correctness, or otherwise, of the liquidator's decision having regard to all the evidence, in particular:*

(a) the financial consequences of the decision for stakeholders;

(b) the wishes of the stakeholders; and

(c) whether the interests of stakeholders are best served by permitting the company to enter into the particular transaction (which reflected Chadwick LJ's approach in Re Greenhaven Motors Ltd (above)).

39. *The net effect of these decisions, taken together as I accept they should be taken, is that the Court should ordinarily respect the commercial judgment of the liquidator and grant sanction, unless the course of action proposed by the liquidator is regarded by the Court as so unreasonable or untenable that no reasonable liquidator would take it or, in the more strident words of the English Court of Appeal in Re Edennote Ltd [1996]2 BCLC 389 "so utterly unreasonable and absurd that no reasonable person would have done it.""*

40. As this Court has indicated earlier, this is not an ordinary application. The wishes of creditors, in particular of Benchmark and Stonehill, are inevitably influenced by their duality of roles.

41. Correspondingly the position of the JOLs is entirely properly also subject to the desirability and even the necessity of ensuring an adequate fee recovery in what may objectively be described as challenging and difficult circumstances.

42. Putting all of these considerations another way, the weighting to be accorded in all respects may well be less than otherwise there would be. In this context, the finer aspects of the bidding process and how they may be perceived become even more important.

43. In the matter of *Universal and Surety Company Limited* 1992-93 CILR 149, in relation to the relevance of unpaid liquidation fees and expenses Malone CJ held as follows at paragraph 150:

> "Despite *the fact that the settlement offer was less than 3% of the value of the judgment obtained in the lower court, the liquidator had good reason to accept the offer since that would at least assure him of covering his expenses and these were his first charge in order of priority. Should he reject the offer and lose the appeal, he would lose both his out-of-pocket expenses and his fees, and it was unacceptable that he should be faced with the prospect of having to work without remuneration, or use his own resources to finance the liquidation. The creditors, on the other hand, would have nothing to gain or lose by accepting the offer, or by rejecting it and losing the appeal, it was acknowledged that they had everything to gain if the appeal were successful, but since the court accepted the expert evidence that the appeal was likely to fail, it was reasonable for the liquidator to refuse to take the risk and to secure what he would at this stage. Despite the conflict of interest facing the liquidator, he would be acting bona fide and within his powers if he accepted the offer, and the court would accordingly authorise him to accept it (page 155, lines 20-37; page 155, line 41 – page 156, line 31).*"

44. Each authority is of course distinguished upon its facts. In the matter of *PAC Ltd (In Official Liquidation)* (Unreported, 11 December 2015) Foster J came to a contrary conclusion in circumstances where a settlement agreement giving rise to a payment of US$2.5 million would have been enough to settle the JOLs' expenses and remuneration but would provide nothing for the creditors, and where the company in question was said to have strong litigation claims in respect of a total recovery of just over US$44 million.

45. Foster J states at paragraph 39 of his Judgment:

> *"In my view the wishes of the creditors, particularly those of the former employees who together form the largest creditor group, were, in the circumstances of this case, of greater weight. As stated in the Greenhaven Motors judgment quoted above, the Court will give weight to the wishes of the creditors for the reason that they are likely to be good judges of where their own best interests lie. The creditors are strongly opposed to the Settlement Agreement. They see no benefit from it for themselves, as creditors, in waiving strong claims for some USD$44 million against the relevant Rotana Companies and substantial prejudice to their proceedings in Lebanon in doing so. They have now arranged litigation funding to enable those claims to be pursued by the JOLs in Lebanon. The JOLs were critical of the proposal that the litigation should take place in Lebanon. However, in my opinion it is not for this Court to comment on an unfamiliar system of substantive and procedural law or to second guess the views of the creditors, on legal advice from Maitre Kadige, as to the likelihood of success, including by obtaining a substantial settlement, in proceedings in Lebanon. To my mind, in the circumstances here, the prospect of success in Lebanon against the Rotana Companies outweighs no prospect at all in Cayman. The JOLs also argue that there is no proposed funding by the creditors of the claim for USD17.49m. against LBCI. However, there is no proposal that that claim should be waived and if the JOLs succeed in recovering substantial funds from the Rotana Companies in proceedings in Lebanon they would have the resources to*

be able to pursue that claim. The JOLs also have claims underway in Lebanon against LBCI for recovery of the Adma Property and for possession of PAC's plant and equipment held by LBCI, as mentioned above. In any event, in the final analysis, as was pointed out, a strong claim for USD 44m. is worth substantially more to the liquidation estate than a claim for USD17.49m."

46. The Court highlights these two cases specifically concerning the subject of JOLs' fees and expenses to illustrate the proposition that outstanding unpaid fees are not in themselves dispositive of the merits of a sanction application. Clearly fees do have a larger role where further prospective recoveries are unpromising as distinct from good, but ultimately if other concerns are present even of a procedural nature those concerns are not submerged or minimized by the fact that as in the present instance the sanction sought if approved would provide a clear gateway to full fees recovery.

47. Emphasis was made in the course of legal submissions by counsel opposing the Application that sanction would effectively extinguish the creditors' claims and that it was therefore a grave step to take in the face of creditor opposition.

48. Although counsel for the JOLs accurately pointed out that in fact there would be a balance payable to creditors in the region of US$800,000 nevertheless that limited sum does not entirely diminish the significance of what is contended by the opposing creditors.

49. All of these finely balanced factors underline once again the need for a bidding system which enjoys the confidence of all interested parties and about which the Court has no reservations or concerns.

THE BIDDING PROCESS

50. In a number of respects the competing views of the JOLs and of the opposing creditors as to how the bidding process unfolded constitute the most confusing and challenging aspect of this matter.

51. Accordingly at the outset the Court considers it sensible and indeed prudent to state that notwithstanding the lateness of the Benchmark bid of US$5 million alongside with the prospect of certain additional sub-participation rights in respect of possible Master Fund recoveries, the Court takes the view that this bid does raise serious questions as to whether the final Stonehill bid itself should be sanctioned and approved.

52. If the Stonehill bid is not sanctioned there is of course the risk of a worse outcome and even of no further recoveries at all. However, as in the *PAC* case there is also the possibility of an improved position and one that enjoys broader creditor support. In the circumstances and for this specific commercial reason the Court at this stage would be minded in any event to reject the JOLs' Application.

53. Moving on from that indicative outcome to considering the various perplexities of the bidding process itself, the Court notes that Mr. David Griffin of FTI Consulting (Cayman) Limited sets out a lengthy chronology at paragraph 10 of his Eighth Affidavit:

"*C.* ***CHRONOLOGY***

10. Beginning with the JOLs' discovery of the sale of the Shenyang Hotel, the chronology of key events leading up to the bidding process and the JOLs' ultimate acceptance of the Stonehill Bid was as follows:

11 October 2019	*Deloitte informed by Mr. Allderige / the Manager of the sale of the Shenyang Hotel and the payment away of the proceeds of sale.*
17-29 October 2019	*Correspondence between Campbells and the Manager's lawyers in which no credible or satisfactory explanation for the dissipation of the sale proceeds is provided.*
11 November 2019	*JOLs' notice to the LC (excluding the Manager) reporting these events, proposing to seek a winding*

	up of the Master Fund, and convening a LC meeting for 19 November 2019.
19 November 2019	*LC meeting at which Benchmark objects to a winding up of the Master Fund and initiates without prejudice discussions with the JOLs (which begin shortly afterwards and culminate in Benchmark submitting its first offer on 6 January 2020 to purchase the Company's assets (see below)).*
3 December 2019	*Call between FTI and Stonehill (instigated by Stonehill) concerning recent developments and the JOLs' proposal to seek a winding up of the Master Fund.*
31 December 2019	*JOLs' notice to the LC enclosing a draft winding up petition and convening a LC meeting for 9 January 2020.*
31 December 2019	*Public court hearing in Hong Kong regarding a competing claim by DAC to the Master Fund's interest in the proceeds of the sale of the Shenyang Hotel.*
6 January 2020	*Benchmark makes its first (without prejudice) offer to the JOLs to buy the Company's assets. The amount cannot be disclosed but it is the lowest of all bids received for the Company's assets.*
9 January 2020	*LC meeting at which the JOLs report the fact of a bid having been made. At Benchmark's insistence, neither its identity nor the amount of its bid is disclosed.*

10 January 2020	*Call between FTI and Stonehill (instigated by Stonehill) concerning the possibility of Stonehill funding winding up proceedings in respect of the Master Fund; Stonehill requested a costs estimate.*
16 January 2020	*Call between FTI and Stonehill during which FTI give a rough indication of the costs of winding up proceedings.*
23 January 2020	*First offer from Stonehill to purchase the Company's assets for US$4,000,000 (Stonehill having decided to submit a bid for the Company's assets rather than fund proceedings to wind up the Master Fund).*
24 January 2020	*Revised first offer from Stonehill (still for US$ 4,000,000 but revised to cater for the possibility of it only being able to acquire a participation interest in (rather than legal title to) the Company's limited partnership interest in the Master Fund).*
31 January 2020	*JOLs' notice to the LC reporting the receipt of two bids (but not their terms or the identity of the bidders) and inviting best and final bids by 5pm on 5 February. Full details of the assets for sale are given in the notice (but are already well known to both Benchmark and Stonehill).*
5 February 2020	*Best and final bids received from Stonehill and Benchmark. Both bids involve cash payments only: Stonehill bid US$ 4,500,000 and Benchmark bid US$ 3,631,306. No other expressions of interest are received by 5 February (or subsequently).*

10 February 2020	*JOLs' notice to the LC reporting on the bids received, explaining why the JOLs intend to accept the Stonehill Bid, and convening a LC meeting for 19 February 2020 to discuss the Stonehill Bid.*
14 February 2020	*JOLs' consultation notice to purported creditors who are not members of the LC (to which no responses have been received).*
19 February 2020	*LC meeting held but there is no substantive discussion of the Stonehill Bid at the insistence of the LC members, led by Benchmark. Substantial correspondence about the Stonehill Bid before and after this meeting, providing full disclosure (at Benchmark's request) of all communications between the JOLs and Stonehill.*
2 March 2020	*Campbells request final comments on the Stonehill Bid from the LC by 5 March.*
8 March 2020	*JOLs' notice to the LC, extending the deadline for final comments on the Stonehill Bid to 13 March.*
12 March 2020	*Benchmark Late Bid for US$5,000,000 submitted in correspondence from Mehigan LLP (on terms which are legally incapable of acceptance).*
13 March 2020	*Correspondence on behalf Fn Asia Advisory Co Ltd and Cheng & Cheng (the other reportedly non-conflicted LC members) objecting to the Stonehill Bid and urging acceptance of the Benchmark Late Bid.*

16 March 2020 *JOLs' acceptance of the Stonehill Bid, subject to Court sanction, for the reasons explained in the JOLs' evidence."*

54. Then in his Ninth Affidavit, Mr. Griffin further states at paragraphs 5-10:

"***B. CORRECTION OF FACTUAL MIS-STATEMENTS IN THE BENCHMARK SKELTON ARGUMENT***

The Submission that I should have informed Benchmark and Stonehill of who the other bidder was on 9 January 2020

5. Paragraph 9 of the Benchmark Skeleton had stated that if on 9 January 2020 I "knew that there were two bidders [I] could have told each one who that was". First, I was not aware of that there were two bidders on 9 January 2020. As stated in my previous evidence, Stonehill made an unsolicited bid for the first time on 23 January 2020. Secondly, when making its bid, Benchmark refused to permit the JOLs to disclose its identity as the bidder and so Benchmark prevented the JOLs from adopting the very course of action now proposed in the Benchmark Skeleton. Benchmark's position was stated in the attached email from Mr Mehigan to Mr Manning on 8 January 2020 (pages 3-4), which has been redacted to remove the rest of the without prejudice communications. This point has been retracted in Benchmark's revised Skeleton.

6. In this connection, the volume of communications passing between the JOLs and Benchmark (principally via their respective attorneys) has been far greater than that which passed between the JOLs and Stonehill. However, whereas the JOLs have, upon request, provided the LC with copies of all of their communications with Stonehill (and it has therefore been exhibited to Griffin 6 at DG6 pages 171-242 and 254) the bulk of the JOLs' communications with Benchmark have not been divulged to other

parties or in evidence since they were agreed to be made on a without prejudice basis.

The allegation that the JOLs did not inform Benchmark that Stonehill's first offer was higher than Benchmark's first offer

7. *The Benchmark Skeleton was replete with false allegations that the JOLs informed Stonehill that its first offer was the highest offer to date, but did not give the same information to Benchmark, and the submission that this fact made the bidding process unfair. This point was made in paragraphs 17, 24, and 57 and was adverted to by implication in the final sentence of paragraph 23.*

8. *However, the allegation is factually wrong, since Mr. Tracey wrote to Mr. Mehigan by email on 31 January 2020 (page 5), stating that "By way of update, the JOLs have now received a* ***higher*** *bid for PHAFI's assets. The other bidder made its bid without knowing the amount of Benchmark's bid, and without being told that Benchmark was the bidder" (emphasis added). Therefore, Mr. Tracey's email to Mr. Mehigan is in the same terms as his email sent to Mr. Stern of Stonehill on the same date (exhibit MS1, page 12). In other words, Benchmark and Stonehill were provided with precisely the same information, in the same manner and at the same time.*

9. *This point has been retracted and corrected in Benchmark's revised Skeleton, although Benchmark now complains (at [17], [22], [57]) that the JOLs did not inform it of the amount of Stonehill's first bid (US$4 million). However, that is the very nature of inviting 'blind' best and final bids. Consistent with that approach, the JOLs did not inform Stonehill of the amount of Benchmark's first bid; both parties were treated equally. This approach proved to be successful since Stonehill increased its bid by*

US$500,000, which it might not have done if it had known the amount of Benchmark's initial bid.

10. *If anything, the JOLs' approach favoured Benchmark. I say this because Benchmark knew that its initial bid of US$2,598,917 was the lower of the two bids in the first round of bidding, and therefore that its best and final bid would have to be higher in order to be winning bid. In contrast, Stonehill knew that its initial bid of US$4 million was the higher of the two bids in the first round of bidding, and was therefore in the more difficult position of not knowing whether it needed to make a higher best and final bid. In the end, Stonehill did increase its bid from US$4 million to US$4.5 million and arguably overpaid given that its initial bid of US$4 million would still have been the winning bid. In any event, Benchmark was certainly not at any informational disadvantage. It simply lost the bidding process by bidding too low."*

55. Following the completion of the hearing, the First Affidavit of Mr. Bertie Mehigan was received and admitted on behalf of Benchmark.

56. Mr. Mehigan takes strong issue with the allegation that Benchmark had made a bid for the Company's assets on 6 January 2020 or at any time before 5 February 2020. Mr. Mehigan states at paragraphs 11-13:

"11. *By 13 January 2020, whilst Benchmark had confirmed that they were in principle willing to proceed with an asset sale structure, there had been no discussion or agreement regarding which of the Company's assets which were to be acquired or the price which would be paid should the sale proceed on this basis.*

12. *On 23 January 2020 by email, I asked Mr. Manning how he was getting on with the draft documents. Mr. Manning responded on 24 January 2020 by email stating that the "Drafts of the SPA, resolution and section 10 notice are with the JOLs for review. We hope to be able to get those to*

you shortly after the Chinese New Year holiday". I had no further correspondence with Mr. Manning, any other person from Campbells or the JOLs until 31 January 2020 at 10:18p.m. (Hong Kong time), when Mr. Tracey sent an email notifying me that there was another bid for the assets of the Company stating "By way of update the JOLs have now received a higher bid for PHAFI's assets. The other bidder made its bid without knowing the amount of Benchmark's bid and without being told that Benchmark was the bidder."

13. *At 3:18am Hong Kong time on 1 February 2020, I received the Liquidation Committee Notice dated 31 January 2020 ("**31 January LC Notice**"). The language of the 31 January 2020 LC Notice tracked the language of Mr. Tracey's 31 January 2020 email. In the 31 January 2020 LC Notice, the JOLs had listed the assets which were the subject of the purported bidding process. The list was more extensive and detailed than the list of assets set out in the email from Campbells dated 10 January 2020 in which Mr. Manning set out a brief list of assets which Campbells "envisage", but at no point confirmed, would be for sale under an asset sale structure descried above at paragraph 8."*

57. Perhaps most significantly from his perspective Mr. Mehigan states at paragraph 15:

"The statements made by Mr. Manning and Mr. Tracey in the hearing when Mr. Lowe was interrupted were therefore incorrect. Benchmark had made no bid for the assets at any time in January 2020 and we had no knowledge that it was participating in a bidding process for the sale of the assets until I received the 31 January 2020 Liquidation Committee Notice by email on 1 February 2020 (Hong Kong time)."

58. Finally by way of general clarification Mr. Mehigan states at paragraph 17:

"*Benchmark is not seeking to obtain a direction that its offer is accepted but is seeking to support a new sales process."*

59. Mr. Andreas Jeschko, a director of Benchmark, in his Second Affidavit states at paragraphs 40-49:

"***The JOLs' Handling of First and Second Stonehill Bids***

40. At no time during the settlement discussions or the documentation process did the JOLs inform Benchmark that it was soliciting bids from other parties to purchase the Company's interest in the Master Fund.

*41. The JOLs received the first bid on 23 January 2020 from the Stonehill Group for the price of US$4 million (plus certain participation rights in future recoveries) (the "**First Stonehill Bid**"). A copy of the email from Michael Stern of the Stonehill Group submitting the Frist Stonehill Bid to FTI, including Mr. Griffin is exhibited at (**AJ-3 page 960**). A copy of the First Stonehill Bid dated 23 January 2020 is exhibited at (**AJ-2 pages 931-934**).*

42. In fact, the JOLs then positively and proactively assisted Stonehill Group in making the offer. On 24 January 2020, Mr. Tracey of Campbells responded to Mr. Stern noting three preliminary matters which he suggested Mr. Stonehill consider in the event that he "wish[ed] to submit a revised proposal document". Those preliminary matters included a recommendation to amend the terms of the bid because:

*"...unless Stonehill has also acquired a controlling interest in the Onshore Feeder, you may wish to amend Stonehill's proposal, such that either (1) PHAFI's LP interest would be assigned to Stonehill if GP Limited and the Onshore Feeder so consent or alternatively (2) Stonehill would acquire a 100% participation right in PHAFI's LP interest and the right to direct how PHAFI shall act in its capacity as a limited partner", (**AJ-3 page 959**)*

*43. Later that day, on 24 January 2020, Stonehill sent a revised bid for the attention of Mr. Griffin (the "**Second Stonehill Bid**") which addressed the*

*changes that Mr. Tracey suggested earlier that day (referred to above at paragraph 40) (**AJ-2 pages 935-938**). Mr. Tracey responded and confirmed that the JOLs would "shortly confirm the next steps in the bidding process"). (**AJ-3, page 962**) The JOLs appear to have given the Stonehill Group the clear impression that they supported the bid as early as 24 January 2020. Thus in his email Mr. Tracey had also referred to the acknowledgement / signature line of Mr. Griffin and the reference in Annex A to the "JOLs presenting Stonehill's bid to the court as the highest and best bid" and that the "JOLs would shortly confirm the next steps in the bidding process and then evaluate all bids once the bidding process was complete".*

44. *The JOLs must have commenced soliciting bids for the assets some time before receiving the First Stonehill Bid while settlement discussions were going on with Benchmark. The First Stonehill Bid makes reference to and confirms that its bid was being submitted pursuant to a "solicitation process conducted by the JOLs prior to the Purchaser's submittal of the Proposal" (see page 4). There is, however, no indication in any documents that a bid was sought from anyone else at the same time. At this point in time, and as a result of the JOLs' representations that their agreement with Benchmark was simply being documented, Benchmark had no inclination whatsoever that there was any bidding process even in existence.*

45. *Benchmark was not afforded similar opportunities for discussion of its settlement offer with the JOLs nor any information that other bids were under consideration in parallel until 31 January 2020.*

46. *I am concerned that the arrangements between the JOLs, the Aggregator Funds and Muldoon in the context of the earlier transfer of shares gave rise to inherent conflicts of interest when the assets came to be sold. I also*

consider that these dealings affected the sale process. In particular it is apparent that:

46.1 During the period 3 December 2019 to 13 January 2020 Campbells acted for three parties simultaneously: the JOLs, the Aggregator Funds and Muldoon in the context of the share transfer during which time FTI, Stonehill Group, Muldoon and the Aggregator Funds were in regular contact.

46.2 I do not dispute the fact, as stated in its letter dated 2 March 2020, Campbells could represent all parties for "efficiency and cost-effectiveness". The JOLs had not, however, disclosed this three-party representation by their counsel to the creditors. The very fact that Stonehill Group / Muldoon were negotiating a share transfer in an otherwise insolvent entity would suggest that they were targeting the Company's assets.

46.3 My concern reading this correspondence is that these dealings had put the JOLs, the Stonehill Group and the Aggregator Funds in close contact immediately before a bid was "solicited" from the Stonehill Group and that contact had continued thereafter. The association appears to have been more than brief or purely transactional as might have been expected if nothing more than a share transfer had to be executed. In particular, I note that the share transfer was only made on 13 January 2020, 2 months after Muldoon's representatives were first allowed to join meetings of the liquidation committee.

*47. Despite having requested further information from the JOLs and Campbells in relation to the role that they played in each of the events described above at 21 February 2020 and 12 March 2020, no response has been forthcoming (**AJ-3 pages 1007-1022**).*

48. *The discussions with Stonehill Group / Muldoon in relation to the First Stonehill Bid appear to have emerged from the contact they had with the JOLs and Campbells during the time the share transfer arrangement were made rather than from some arm's length solicitation process. For example, I know that Mr. Griffin spoke to Mr. Stern of the Stonehill Group on 22 January 2020, two days prior to the First Stonehill Bid being submitted (**AJ-3 pages 979-983**), although no details of that discussion have been disclosed. In fact, nothing disclosed explains how and when the JOLs first discovered that the Stonehill Group / Muldoon would be prepared to make a bid or what was disclosed to them beforehand. I therefore have difficulty in understanding what was meant by the recital in the First Stonehill Bid that there had been a "solicitation process" conducted by the JOLs or that, as suggested in Mr. Tracey's email of 24 January 2020 there was a "bidding process" on foot when the Liquidation Committee was not informed of this until 31 January 2020.*

49. *The close contact between the JOLs and Muldoon after the Second Stonehill Bid also does not appear to have been typical of arm's length bidding process. On 31 January 2020, there appears to have been a call between Mr. David Griffin of FTI and Mr. Michael Stern of Muldoon. Despite requests the JOLs have not provided information about what was discussed. A copy of the email correspondence referring to the call is exhibited at (**AJ-3 page 964**)."*

60. Mr. Jeschko continues at paragraphs 50-57:

"C. ***The JOLs' Invite Offers from Liquidation Committee***

50. *Benchmark was itself unaware of the JOLs having solicited any other bids until 31 January 2020 when Mr. Griffin wrote to the Liquidation Committee informing it that the JOLs had received "two separate bids for the Company's assets" and that "[n]either bidder is aware of the amount of the other bid" (the "**31 January 2020 Notification**"). While the JOLs*

*did not name the bidding parties, those bids had been received from Stonehill and Benchmark. All non-conflicted members of the Committee who wished to bid for the Company's assets were invited to do so by 5 February 2020 (3 business days) (**AJ-3 pages 965-966**) Whilst the Liquidation Committee knew that an offer had been made in the context of the Benchmark's settlement discussions, the JOLs did not inform the Liquidation Committee that the First Stonehill Bid had been received on 23 January 2020 and that there had been to a purported solicited bid process. Despite repeated requests from Benchmark (**AJ-3 pages 971-978 and 1007-1022**) the JOLs have not explained why they did not communicate that there was a parallel bidding process afoot from at least 23 January 2020. (**AJ-3 pages 1002-1022**).*

51. *The 31 January 2020 Notification noted that PHC and its nominated representative on the Committee, Mr. Allderige remained excluded from the bidding consultation notified on 31 January 2020 because he was deemed a conflicted member.*

52. *Based on the correspondence I have reviewed (referred to above at paragraphs 40-42), only Mr. Griffin was copied on the correspondence between FTI, Campbells and the Stonehill Group from 23 January 2020 which discusses the solicitation of the bid (**AJ-3 pages 959-962**).*

53. *I note that Mr. Lai and his colleagues at Deloitte China are not copied to the correspondence I have reviewed relating to the Stonehill bids in the period 24 January 2020-30 January 2020. The exclusion of Mr. Lai from the Stonehill bidding process appeared to Benchmark as unusual because as I explained earlier (see paragraph 20 (a)) the Liquidation Order provided that Mr. Lai was responsible for the realisation of the Master Fund's assets, subject only to Mr. Griffin's consent which was required in respect of any sale or disposal of any Master Fund's Assets. Benchmark argued for his appointment precisely because being an experienced*

practitioner based in the PRC and that being where the Master Fund's Assets are located, he was better placed to oversee the realization of those assets. It is unfortunate from Benchmark's point of view that Mr. Lai was not more involved. It is surprising to Benchmark that Mr. Lai is supportive of the Third Stonehill Bid when he was excluded from the bidding process.

54. *Over the course of 2-4 February 2020, Mr. Mehigan and Mr. Manning of Campbells discussed by email the origin of the Stonehill Bid and the transparency of the JOLs conduct in soliciting that bid without disclosing it to the Liquidation Committee (**AJ-3 pages 967-970**). I have read that email chain and note that:*

    54.1 *On 2 February 2020, Mr. Mehigan wrote to Mr. Manning of Campbells to articulate Benchmark's strong objection to the bidding process notified by Mr. Griffin on 31 January 2020. Mr. Mehigan asked for information on the other bid referred to in the 31 January Notification and whether it had been made on the same terms as the Benchmark settlement proposal. He also noted the Benchmark settlement proposal originated to achieved a different objective to the objective identified in the 31 January 2020 Notification and that the JOLs had an obligation to conduct their duties transparently to ensure that Benchmark was not misled.*

    54.2 *Mr. Manning responded on 3 February 2020 stating that: "the other bid is an (unsolicited) offer to purchase the assets referred to in the JOL's notice to the unconflicted members of the Liquidation Committee. Its terms have not been negotiated by the JOLs and, as with the Benchmark's offer, it therefore remains subject to contract." (**AJ-3 page 969**)*

    54.3 *Mr. Mehigan noted in his response on 4 February 2020, that Benchmark continued to be interested in concluding a deal with*

the JOLs and had funds available for that purpose, but that the JOLs needed to clarify the terms of the other bid, without which it was not possible for Benchmark to make any further proposal. What Benchmark needed to know was the basis on which the JOLs were selling the assets as indeed explained by Mr. Tracey to Mr. Stern on 24 January 2020."

D. The JOLs Obtain Further Bids from Benchmark and Stonehill

55. *Despite such clarification not being forthcoming, Benchmark submitted a revised bid to increase its offer to UD$3,631,306 on 5 February 2020. This was before Notification deadline expired as per the 31 January 2020 Notification.*

56. *On 10 February 2020, Mr. Griffin gave notice of a Liquidation Committee meeting to be held on 19 February 2020. Two of the agenda items for discussion were the (i) reconstitution of the Committee because of the JOL's new determination of the Company's state solvency and the (ii) sale of the Company's assets to Stonehill (**AJ-2 pages 939-942**).*

57. *In relation to agenda item (ii), the agenda stated that the JOLs recommended the acceptance of a bid from Stonehill Capital Management LLC (which in fact transpired to be a bid from Muldoon) (the "**Third Stonehill Bid**") on the basis that it was in an amount higher than that of Benchmark's bid."*

61. Mr. Jeschko concludes his account of the bidding in this way at paragraphs 63-67.4:

"63. *In a letter of 8 March 2020 (**AJ-3 pages 1002-1006**), Mr. Griffin stated that none of the non-conflicted members of the Liquidation Committee had expressed a view about the Stonehill Bid in response to the JOLs' notice to creditors on 14 February 2020. I believe this to be inaccurate, as I have explained above, Benchmark repeatedly expressed its concern with the bidding process and the JOLs selection of the Stonehill Bid as the*

preferred bid. It also fails to acknowledge that the 19 February 2020 Liquidation Committee meeting was terminated by Benchmark and the other creditors because JOLs had not kept the other creditors abreast of Benchmark's protests over the solicitation of the Stonehill bid.

64. *On 8 March 2020, Mr. Griffin sent a letter to members of the Liquidation Committee, that the JOLs would consider written objections in relation to the acceptance of the Third Stonehill Bid which were to be submitted in four days' time on 13 March 2020 and that there would be no reconvening of the 19 February 2020 meeting (**AJ-3 pages 1002-1006**). At the 19 February 2020 meeting, Mr. Griffin emphasized that the "very purpose of meetings of liquidation committees was to discuss the views and concerns in relation to matters such as this" and the "very purpose of these meetings is to have a proper forum for discussions with the Committee members" (extracts from FTI's draft minutes of the 19 February 2020 liquidation committee meeting).*

65. *On 8 March 2020, Mr. Griffin sent a notice and requested non-conflicted members of the liquidation committee provide responses with respect to the JOLs' intended acceptance of Stonehill's bid on 13 March 2020. This gave members of the liquidation committee 4 days to consider the matters at a time when the JOLs refused to respond to the specific information requests made by Mr. Mehigan on behalf of Benchmark. A copy of Mr. Griffin's notice dated 8 March 2020 is exhibited (**AJ-3 pages 1002-1006**).*

66. *On 12 March 2020, Mr. Mehigan sent a list of questions to Campbells regarding the JOLs' bidding process in order to enable the liquidation committee to assess the Third Stonehill Bid and make an informed decision in relation thereto. To date, Mehigan has not received any substantive response other than a generic response stating that the JOLs determined that the disclosure of such information is not necessary. (**AJ-3 pages 1007-1022**).*

67. *At the same time, Benchmark's concluded that the only way to give all other creditors (and not just Benchmark) a clear alternative was to submit a clearly superior bid. Benchmark therefore submitted a revised bid with a co-investor (the "**Benchmark Co-Investment Bid**") on 12 March 2020 together with a co-investor. The co-bidder, Mr. Ro Park, is experienced in the distressed debt market having previously been a distressed debt professional and an executive director at Goldman Sachs. The key commercial terms of Benchmark Co-Investment Bid are:*

67.1 *US$5 million would be paid for assets identical to those covered by the Stonehill Bid;*

67.2 *US$ 3.8 million would be paid to the JOLs in respect of their fees and expenses (which, as at 31 January 2020 stood at US$3.77 million), thereby accounting for fees and expenses incurred in executing the transaction;*

67.3 *US$1.2 million would be paid to the creditors (including Benchmark) which Benchmark now understands is an amount that is more than the US$725,231 provided for in the Stonehill Bid; and*

67.4 *The creditors would stand to benefit from a 25% participation in future recoveries of the Investments of the Master Fund following Benchmark's and Ro Park's threshold recovery of funds invested in this bid."*

62. In addition to Mr. Mehigan's Affidavit, an Affidavit in Reply was sworn by Mr. Shaun Tracey and likewise was received and admitted after the hearing itself.

63. Although Mr. Mehigan denied that Benchmark had made a bid for the Company's assets on 6 January or at a time before 5 February 2020, nonetheless Mr. Tracey strongly asserted that this was not correct.

64. Mr. Tracey affirmatively states at paragraph 8 that Benchmark decided to pursue its initial offer on an asset-sale basis from at least 10 January 2020 onwards (well before 5 February 2020). He refers specifically to an email from Mr. Mehigan to Mr. Manning on 10 January 2020.

65. Mr. Tracey sets out a chronology at paragraph 15 in these terms:

> "*C.* ***CHRONOLOGY OF THE FACTUAL POSITION***
>
> *The true factual position is simple and straightforward:*
>
> *a.* *Benchmark made its first offer by email on 6 January 2020 in the sum of US$2,598,917.*
>
> *b.* *That offer contemplated the possibility of it being structured as an asset sale (as an alternative to the originally-contemplated structure of a settlement payment and stay of the liquidation).*
>
> *c.* *The nature of the assets for sale was summarized briefly in Mr. Manning's email of 7 January 2020, without any queries being raised by Mr. Mehigan in that regard.*
>
> *d.* *During a telephone call on 9 January 2020, Mr. Mehigan indicated to Campbells that Benchmark favoured the asset-sale structure.*
>
> *e.* *In an email from Mr. Manning to Mr. Mehigan on 10 January 2020, Mr. Mehigan was asked (explicitly by reference back to the 6 January 2020 email, which contained Benchmark's first offer) to confirm whether it wished to pursue the asset sale structure instead of the stay of the liquidation, i.e. a purchase of the Company's assets for the same agreed price of US$2,598,917.*

f. *Mr. Mehigan answered affirmatively in his email dated 10 January 2020 (subject to contract and resolving any regulatory issues) and agreed that Campbells should proceed to draft the transaction documentation, which Mr. Manning's prior email said would include a sale and purchase agreement providing for "an assignment of all claims of PHAFI against the Master Fund, a transfer of PHAFI's limited partnership interest in the Master Fund, and releases of any claims against GP Limited and / or the JOLs".*

g. *Since Mr. Manning's 10 January 2020 email explicitly referred back to Mr. Mehigan's email of 6 January 2020 which stated a price of US$2,598,917, and there had been no subsequent mention of any price change, it was clearly understood and confirmed that any such sale would be for that price. Indeed, given the negotiations which had preceded that confirmation, it would have made no sense for the parties to have agreed to proceed with drafting all of the detailed transaction documentation if there was any uncertainty about the price which Benchmark would pay for the assets if this transaction were to be consummated.*

h. *The nature of the assets for sale was particularised in more detail in the JOLs' 31 January notice to the Liquidation Committee, which was received by Benchmark, Stonehill and all non-conflicted members of the Liquidation Committee at the same time.*

i. *By email dated 3 February 2020, Mr. Mehigan queried what assets were for sale (saying that "Benchmark does not even have a basic understanding of what you are proposing"), but this query made no sense to me or Mr. Manning, and so Mr. Manning responded on*

4 February 2020 by referring back to the 31 January notice, which gave full details.

j. Neither before, nor when, making its "best and final" bid on 5 February 2020, did Benchmark indicate that it required more time to make a bid. Likewise, Benchmark has never contended in its evidence that, if it had more time, it would have put in a higher bid. It only made such a higher bid on 12 March 2020, some five weeks after the bidding process concluded, and it did not claim (and could not have claimed) that it had increased its bid based on some change in its understanding of what assets were for sale."

66. Having reviewed all of this material at length, I am of the view that the differences between the parties are not as stark as they may initially appear on this narrow but contested issue.

67. Clearly Benchmark was initially in discussions concerning an offer to purchase assets and then confirmed that it was fine to proceed accordingly.

68. Benchmark did not state in formal terms that it was making a bid in the sense of a competitive bid because at that point Benchmark did not know that there was a bidding process or that there was going to be a bidding process.

69. Inevitably the stance or stances that a party may assume in the course of a competitive bidding process may be completely different from those it may assume when in the course of making a unilateral offer.

70. It is in that context that the difficulties arise.

71. First, as the Court has indicated there will inevitably be a tactical difference between engaging in a unilateral process and engaging in a bilateral one.

72. Secondly, if in these circumstances Benchmark was constrained to make a competitive bid on 5 February 2020 after only being told of the bidding process on 31 January 2020

one can readily see some force in Benchmark's submission that the bidding process operated in a way that could be perceived as unfair and even potentially disadvantageous.

73. Genuine misunderstandings often occur but it is important in this case that a misunderstanding does not produce an unintentionally negative outcome for either bidder, a factor which the Court in exercising its discretion will fully bear in mind.

74. All of this gives rise to issues of both fact and inference which are extremely difficult for the Court to resolve on Affidavit evidence alone. What the Court can state with certainty is that it provides the Court with concerns as to the clarity and transparency of the bidding process when viewed in hindsight.

75. The JOLs seek to allay those concerns by relying upon the bidding principles and practice approved in *Edennote Ltd (No.2)*. It is clear from the learned Judge's comments at paragraph 93 d-l that the liquidator can reserve the right to reject any offer even if the offer was the better offer and that in allowing offers it was a matter for the liquidator to decide how much time should be allowed.

76. The Court considers that the JOLs are of course correct as to those points, but it does seem that in the instant case the areas of dissatisfaction on the part of the opposing creditors go somewhat wider. They include alleged ambiguity as to when the process began, the apparent difficulty of the JOLs' attorneys acting for Stonehill in a technically unrelated share transfer, the advantage to Stonehill at one stage of knowing that there was a second bidder when Benchmark was not reciprocally aware and the discovery that FTI Cayman although not Deloitte might at some point become responsible for the prospective winding up of the Master Fund itself. Last but not least is the understandable conviction of Benchmark that its final bid offer was of greater commercial value to both the Company and the creditors.

CONCLUSION

77. In the opinion of the Court the JOLs were entirely right to bring forward their Application on the basis that in their professional judgment it was in substance the best outcome available and they did so properly and in good faith.

78. However, that does not mean that in the highly unusual circumstances of this case the procedural complaints of the opposing creditors including Benchmark itself can be lightly disregarded.

79. It is the considered view of the Court that those concerns do constitute a substantial reason why the Court at this stage should not proceed to approve the Application before it. The Court must give considerable weight to the JOLs' views and it does so, and it also gives due weight to the wishes of the creditors as those wishes have been expressed, bearing in mind the degree to which at least some of them may be influenced by extraneous considerations.

80. Ultimately in light of the reservations which this Court has identified and expressed the Court exercises its discretion to refuse the Application as not being in the best commercial interests of the Company at this time. The Court is not satisfied that the proposal is in the commercial best interests of the Company or that the clarity and transparency of the bidding process were broadly sufficient in what were unusually challenging circumstances.

Robin McMillan

THE HON. JUSTICE ROBIN MCMILLAN
JUDGE OF THE GRAND COURT

GRAND COURT
CIV-03
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