IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NUMBER: FSD 273 OF 2020 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF ENERGICON HOLDINGS (CAYMANS) (IN OFFICIAL LIQUIDATION)

IN CHAMBERS

Appearances:

Mr John Harris Nelsons, on behalf of the Joint Official Liquidators ("JOLs")

Before: The Hon. Justice Kawaley

Heard: 21 November 2022

Date of decision: 21 November 2022

Draft Reasons circulated: 1 December 2022

Reasons delivered: 2 December 2022

HEADNOTE

Application by official liquidators for sanction of proposed sale of shares in two subsidiaries and for approval of remuneration-notice of application given to creditors-written opposition without appearance from minority creditor-refusal of application for adjournment by company unable to instruct counsel because of international sanctions-need to consider merits of minority creditor's objections-right of access to the court- Companies Act (2022 Revision) section 109(1)-Cayman Islands Constitution, section 7-Companies Winding Up and Restructuring Rules Order 11 rule 3

REASONS FOR DECISION

Introduction and summary

1. By a Summons dated 10 November 2022, the JOLs sought prospective sanction to enter into an agreement for the sale of the Company's shareholding in Neos Exploration Inc. ("NEOS") and retrospective sanction of a sale and purchase agreement in relation to the Company's shareholding in Petrolera del Comahue S.A. ("PDC"), companies incorporated in Delaware and Argentina respectively. Approval for fees and expenses for the period 14 October 2021 and 30 September 2022 was also sought. The application was supported by the First Affirmation of Neil Stuart Demspsey dated 11 November 2022 (Dempsey 1"), the affiant being one of the JOLs and a Cayman Islands based partner of Krys Global.

2. The JOLs' counsel on 17 November 2022 filed his clients' Hearing Bundle and Skeleton Argument. The latter document informed the Court that Tempest Capital BVI Limited, "a minority creditor" ("Tempest BVI"), had objected in correspondence to the share sales and fee approval applications but had not signified its intention to appear and advance formal opposition. The following day, the last working day before the hearing, Nelsons on behalf of the JOLs forwarded a copy of Tempest BVI's written 'Objection' at the creditor's request. Tempest BVI, acting by Mr Ivan Mutovin, its

Moscow-based attorney, also emailed the Court directly forwarding the same document (which attached exhibits running to more than 250 pages) and requested an adjournment of the application in order to instruct local counsel.

3. At the hearing, Mr Harris emphasised how time sensitive the sanction applications were and submitted that the Objection lacked merit. The commercial urgency was supported by the Second Affirmation of Neil Dempsey affirmed on the morning of the hearing ("Dempsey 2"). At the beginning of the hearing, the JOLs' counsel nonetheless assisted the Court by handing in a binder containing a hard copy of the Objection and its various Exhibits. I decided to proceed with the application on its merits without adjourning on the basis that it was tacitly supported by the majority of creditors and was not undermined by any of the matters advanced in the Objection. I granted an Order in the following substantive terms:

> "*1. The JOLs have sanction to cause the Company, as advised, to enter into an agreement for the sale of the Company's shareholding in Neos Exploration Inc., a company incorporated under the laws of Delaware, on terms substantially the same as those set out in the draft agreement provided to the Court.*
>
> *2. The JOLs have retroactive sanction to enter into a sale and purchase agreement dated 19 May 2022 between the Company, Mr Carlos Alberto Fernandez, and Ms Vanina Judit Acosta in respect of the Company's shareholding in Petrolera del Comahue S.A., a company incorporated under the laws of Argentina.*
>
> *3. The JOLs' remuneration and expenses for the period 14 October 2021 to 30 September 2022 be approved in the amounts of US$143,336.50 and US$2,565.93 respectively and paid from the assets of the Company.*
>
> *4. The JOLs' costs of and occasioned by the Application be paid as an expense of the Liquidation.*"

4. Despite finding it straightforward to conclude that the Objection could properly be rejected, both on procedural and substantive grounds, the circumstances which purportedly explained Tempest BVI's failure to appear through counsel at the hearing were somewhat unusual. Fairness to Tempest BVI appeared to me to call for an explanation to be given as to why its request for an adjournment to obtain legal representation had been rejected and, secondarily, why the JOLs' application had been acceded to. As Lord Neuberger observed nearly 10 years to the day before the present hearing: "*without Judgments there would be no justice, because decisions without reasons are certainly not justice: indeed, they are scarcely decisions at all.*"[1]

The Objection

The grounds for the adjournment

5. The Objection on its face did not invite the Court to refuse the JOLs' application on the merits, but rather sought an adjournment in order to instruct counsel to appear and oppose on another day. Nonetheless, in a document which runs to 33 paragraphs, almost half the document (paragraphs 19-31 and approximately 1.5 of 3 pages) addresses the merits and the basis for the adjournment is dealt with in a comparatively brief and cursory manner. The Court was well-placed to assess the merits of the substantive objections it was being asked to afford Tempest BVI an opportunity to further develop.

6. The Objection concludes as follows:

> "*32. Tempest capital humbly requests that the Court take Tempest Capital's objection into consideration and adjourn the hearing to a date not earlier than 21 December 2022 so that Tempest Capital again try its best to engage Cayman Islands solicitor or, should fail to succeed in it, to prepare extended argument properly formalized in respect of the matter. The impositions of sanctions has made it difficult for Tempest BVI to secure representation*

[1] '*No Judgment-No Justice*', First BAILII Lecture, 10 November 2012.

and we humbly request the Court to be slow to authorize these assets sales to the only other creditor without hearing from Tempest BVI.

33. Tempest Capital humbly request that the Court to sanction the next hearing to be held remotely via zoom or via other appropriate for the Court facility."

7. The adjournment application was grounded on difficulties in retaining local counsel which were not asserted to be capable of being resolved within any estimated period of time or at all. A plea was made, implicitly, for Tempest BVI to be permitted to appear remotely by its Russian attorney if local counsel could not be retained. This was on any view a very unusual adjournment application.

8. Tempest BVI effectively admitted it was unlikely to be able to retain local counsel. This was because it was ultimately owned, through a Bermudian company referred to in shorthand as "Valla", by a Mrs. Aleksandra Melnichenko who is on the EU Consolidated Financial Sanctions List. It is notoriously difficult for sanctioned individuals to fund litigation. There is an inevitable potential tension between the duty of the judges and the lawyers to uphold the specific terms of applicable sanction rules, on the one hand, and the Court's overarching duty to uphold the rule of law, on the other hand. As Lord Atkin famously observed, "*amid the clash of arms the laws are not silent*"[2]. That observation applies not only when fundamental individual rights such as liberty are concerned, but equally when other fundamental rights enjoyed by artificial and natural persons alike are engaged. One such fundamental right is the right of access to the Court, an incident of the right to a fair hearing (Bill of Rights, section 7, European Convention of Human Rights, article 6). Valuable support for the general proposition that the right of access to the Court can empower the Court to grant procedural relief to litigants which would not ordinarily be legally available is provided by the Cayman Islands Court of Appeal decision of *H.E.B Enterprises Limited-v-Richards* [2020 (2 CILR 855] where Birt JA opined as follows:

[2] *Liversidge-v-Anderson* [1942] AC 206 at 244.

"*18 Mr. Russell was correct to concede that this court does not have power to extend the twenty-one day period. It is well established that, where a time limit for doing some act in relation to proceedings is contained in a statute, a court has no power to extend that period unless the statute itself so provides: see, for example, Mucelli v. Government of Albania (2).*

19 Although it was not raised in argument, I add for the sake of completeness that the only possible exception is where an extremely short time limit may in some circumstances "impair the very essence" of the right of access to a court in the determination of civil rights, in which event the court may exercise a discretion to extend a statutory time limit in exceptional circumstances if this is necessary to prevent a breach of the right of access to a court pursuant to art. 6 ECHR; see Pomiechowski v. Legnica District Ct. (Poland) (3). The same argument may well apply in respect of s.7 of the Constitution. However, this exception could have no application in the present case as the twenty-one day time limit is not unusually short and, in any event, there would be no impairment of the right of access to a court because a prospective appellant can always apply for leave directly from the Privy Council itself."

9. Although ordinarily a company can only appear through counsel admitted to appear before the Court, I have occasionally in the past permitted a company's agent to address the Court on the part of an unrepresented body corporate in tacit reliance on such fair hearing rights in circumstances where the reasons for a lack of representation were far less compelling than the circumstances of the present case. In that case, before ultimately refusing an adjournment request, I allowed the principal of the Fund's former Manager to apply orally for an adjournment on behalf of an unrepresented company for the following reasons [3]:

[3] *In the Matter of Oakrun Precious Metals Fund, Ltd*, FSD 9/2019 (IKJ), Judgment dated 30 April 2019 (unreported).

"*6… I heard him to ensure that there were no unusual extenuating circumstances which might justify the Court granting the adjournment he sought to enable the Fund to obtain legal representation*…"

10. Accordingly, I did not simply dismiss Tempest BVI's application out of hand on the grounds that they had not formally appeared to request an adjournment. Because I accepted that good grounds existed for failing to instruct local counsel, I was astute to consider whether the merits of the opposition to the JOLs' application were sufficiently cogent to justify acceding to the adjournment request. I would if justice required have permitted Tempest BVI's Russian attorney to address the Court remotely from Moscow to avoid any material impairment of the company's right of access to the Court.

Merits of the adjournment application: preliminary

11. The Objection betrayed a sense of unreality as regards the nature of Tempest BVI's standing in relation to the application before the Court. After mentioning its status as 65% shareholder, paragraphs 8-13 are devoted to addressing "*Commencement of winding-up proceedings in respect of the Company*". It is argued that the Petitioner had contractually agreed not to present a winding-up petition. The complaint that a winding-up order ought not to have been made could only validly be advanced by way of appeal against the winding-up order. Mr Harris made the additional point that Tempest BVI had been represented by local counsel in connection with the winding-up petition. The Objection appeared to reflect the underlying disappointment of a majority shareholder that its investment had been lost rather than arguments genuinely designed to advance the interests of creditors in an insolvent and illiquid liquidation. This impression would be borne out by closer scrutiny of the evidence before the Court.

12. Maples on behalf of the Petitioner, majority creditor and minority shareholder Tempest PE Fund 6 ("Tempest PE") and Harneys on behalf of Tempest BVI seemingly explored settlement options for

some months after the Petition was presented on 5 November 2020. The Petition was not heard until 14 October 2021. Prior to the hearing, Harneys advised Maples that their client would be adopting a "*neutral position*" to the Petition, and the Winding-Up Order was granted without any opposition by me at the 14 October 2021 hearing in open Court. Tempest BVI has no standing to challenge the validity of that Order before this Court.

13. Complaints are next made about inadequate financial records being made available in relation to the Company; yet clearly the JOLs cannot be held accountable for pre-liquidation record keeping deficiencies and Tempest BVI accepts that the JOLs asserted in a 20 July 2022 email that that they were "*not in possession of any financial statements…for*" the Company. These complaints lacked any substance as well.

14. Paragraphs 19-29 of the Objection addressed the two sales which the JOLs sought the Court's sanction for and required closer scrutiny. Those transactions were criticised on the following main grounds:

(a) the sale price was far below the only valuations available, although those valuations were admittedly heavily qualified because of deficiencies in data;

(b) the only beneficiaries of the sale were the JOLs and Tempest PE;

(c) Tempest Capital was given insufficient financial information to make an offer of its own and/or to be able market the assets to third parties in a liquidation subject to a "shareholders' conflict";

(d) the sales should not have taken place without "*a complex and complete due diligence*".

15. Additional points made included the following:

(a)Tempest Capital offered to provide funding for the liquidation but the offer was rejected by the JOLs by email dated 11 August 2022 (this point was patently invalid to the extent it implied the JOLs had no reasonable grounds for rejecting the offer); and

(b) Tempest Capital objected to the JOLs' fees because they "*failed to perform even basic and general actions*" to gather information and conduct a transparent sale. Krys Global had been criticised "*in other cases*" for, *inter alia*, its billing practices e.g. *In the Matter of Performance Insurance Company SPC (in Official Liquidation)*, FSD 70/2021 (RPJ), Judgment dated 10 November 2022 (Parker J, unreported).

16. Whether the criticisms made of the sales for which sanctions were sought and the remuneration for which approval was sought merited an adjournment to enable the points to be further developed by Tempest Capital obviously entailed measuring the objections against the merits of the JOLs' fully developed case.

Adequacy of the sale price

17. According to Dempsey 1, the company's main asset was NEOS which in turn owned Energicon SA ("ESA"), an Argentinian company which after June 2022 held one valid exploration license granted by the Argentinian Government. It also owned shares in PDC. PDC was balance sheet insolvent and the exploration licenses it held were at risk of being cancelled because of a lack of working capital. A letter dated 22 April 2022 from the Manager of ESA and PDF warned that the state of affairs "*could cause a complete loss of value and the bankruptcy of both entities*", ending with a resignation threat. Untranslated letters dated 10-11 March 2022 to ESA and PDC from the Rio Negro "*Secretario de Hydrocarburos, Secretaria de Estado de Energia*" appeared to support the financial distress case. Tempest BVI proposed a public sale but there were no funds available for such a marketing effort. The JOLs accepted the only offer which came from Tempest PE and included a

commitment that the JOLs would negotiate a sale of NEOS as well. As regards NEOS, the JOLs had "*no funds available to undertake any wider marketing effort, and no reason to suppose that further marketing would lead to any higher offers, having regard to the precarious financial situation of NEOS and ESA*" (Dempsey 1, paragraph 15).

18. In complaining to the JOLs about the US$50,000 sale offer accepted for the PDC shares in his email dated 8 August 2022, the central proposal advanced on behalf of Tempest BVI was effectively to take more time to find other buyers to acquire a better price. No reference was made to any valuations. Mr Mutovin's position seemingly ignored the compelling evidence that PDC was a distressed asset and for its shares to have any value they had to be sold quickly. In a more detailed 24 August 2022 email objecting to the PDC sale, Tempest BVI seeks to cast doubt on the urgency the JOLs relied upon but primarily criticises the general course of the liquidation. In a 17 October 2022 "*Letter Before Action*", the passing reference to the valuation reports is not developed as a serious complaint. Rather complaint is made about a lack of an adequate explanation for:

> "*(ii) the approach of determination of price for the aforesaid transaction due to its symbolic value- Tempest Capital (BVI) introduced to official liquidators valuation report that defined the value of PDC as of June 2021 at the amount up to US$4,400,000 which does not correspond to the price of US$50,000 agreed and determined by official liquidators for the purpose of aforesaid transaction*".

19. The proposed NEOS sale, its terms and the reasoning for accepting the $135,000 offer from Tempest PE were set out in the JOLs' Second Report dated 28 October 2022. From Tempest BVI's perspective, in light of its disapproval of the PDC sale, the second transaction may well have felt as if the JOLs were rubbing salt in the largest shareholder's wounds. However the urgency case relied upon by the JOLs in my judgment was (on the available evidence) compelling. ESA Manager Carlos A. Fernandez emailed the JOLs at 11.29pm on Sunday 20 November 2022 with an update from the trenches on the Argentinian front. He attached a 17 November 2022 letter from the Province of Rio

Negro requesting ESA to attend a meeting on 29 November 2022 in relation to problems with its concession. The email concluded with the following plea:

> "*…Since Valla became a shareholder over 2 years ago, not 1 cent has been put into the company by them, you should not delay a solution to this situation one more day. We need someone committed to fund Energicon SA starting tomorrow not in a week from today.*"

The asset sales benefitted the JOLs and Tempest PE

20. It was common ground that the Court was being asked to sanction two transactions in which the Company was selling its principal assets to its largest creditor, which was also a minority shareholder, at a distressed sale price which would only yield sufficient funds to cover liquidation expenses. Those factors were not, by themselves, grounds for refusing to sanction the transactions. It is a fundamental winding-up principle that liquidation expenses should be paid on a priority basis. Section 109 of the Companies Act (2022 Revision) provides:

> "*(1) The expenses properly incurred in the winding up, including the remuneration of the liquidator, are payable out of the company's assets in priority to all other claims*." [Emphasis added]

21. There is nothing eyebrow-raising about a major creditor buying key assets from a company in liquidation, particularly if other creditors have been given a fair opportunity to make competing bids and particularly if the purchasing creditor has been primarily funding the liquidation. Creditors of companies in liquidation which have no liquid assets are routinely looked to by liquidators as sources of funding. In the present case there was nothing untoward about the JOLs declining to directly or indirectly sell assets to a company (Tempest BVI) which was beneficially owned by a sanctioned individual and which was as a result unable to assist with funding the winding-up and/or making a competing bid. A feature of the NEOS sale agreement explicitly designed to mitigate any prejudice to Tempest BVI was the following subordination clause:

"*4.1 From Completion, the Buyer and Tempest agree to subordinate any creditor claims they each have against the Seller until such time as all other creditors of the Seller have been paid in full during the course of the Seller's liquidation.*"

22. Fundamentally, the majority shareholder appears to have felt aggrieved by finding itself in a winding-up proceeding cast in the role of minority creditor and effectively denied by the local regulatory consequences flowing from the EU sanctions regime from playing an active commercial role at all. The circumstances of the liquidation clearly prejudiced Tempest BVI in a general sense, but the transactions could not be viewed as prejudicial in any legally cognizable sense. It seemed obvious that the real culprits for Tempest BVI's entirely understandable discontent were (to borrow Shakespeare's *Hamlet*'s words) the "*slings and arrows of outrageous fortune*", not the JOLs or Tempest PE.

Tempest Capital was given insufficient financial information to make an offer of its own and/or to be able market the assets to third parties

23. The proposition that Tempest BVI was deprived by the JOLs of sufficient information to make a bid of its own or to effectively market the Company's assets to third parties was an obviously unsustainable complaint because:

(a) Tempest BVI was in no position to make a bid of its own because of sanctions concerns;

(b) there was no basis for doubting the JOLs' assertion that no funding existed to market the assets to third parties and Tempest BVI was unable to provide such funding;

(c) there was no basis for believing that the JOLs could be shown to have withheld relevant financial information in any event.

The sales should not have taken place without further due diligence by the JOLs

24. The complaint that the sales should not have taken place without further due diligence by the JOLs, as does the Objection as a whole, fundamentally challenges their business judgment in concluding that the asset values could be lost altogether. This same commercial judgment underpinned the JOLs' decision to proceed with the PDC transaction and seek retrospective approval later.

Legal principles governing liquidators' sanction applications

25. Mr Harris righty submitted in oral argument that the Court should be slow to second-guess the business judgment of liquidators when asked to sanction a transaction they have consummated or propose to enter into. In the JOLs' Skeleton Argument, the Court was encouraged to adopt the following approach which I did not regard as in any sense controversial:

> "*4. In Trident Microsystems (Far East) Limited*[4] *the Court held that when a liquidator seeks the court's sanction to sell company assets, the court will apply the following principles:*
>
> *(i) the liquidator's primary duty was to take reasonable care to obtain the best price available in the circumstances—taking account of the nature of the asset, the relevant market, the steps taken to market and sell the asset and the urgency of the sale;*
> *(ii) the court should give the liquidator's views considerable weight unless there were substantial reasons for not doing so; but*
> *(iii) the decision was ultimately one for the court, which must consider the correctness of the liquidator's decision, having regard to all the evidence—in particular the financial consequences for stakeholders; the creditors' wishes; and whether the stakeholders' interests were best served by sanctioning the sale.*

[4] 2012 (1) CILR 424.

5. More recently, in SAAD Investments Company Limited[5] *Smellie CJ held that in deciding whether to sanction the exercise of a liquidator's powers, the court should ordinarily respect the commercial judgment of the liquidator and grant sanction unless the proposed course of action was regarded by the court as so unreasonable or untenable that no reasonable liquidator would take it.*" [Emphasis added]

26. The test this Court applies to sanction applications is a rationality test similar to the test applied when asked to approve trustees' decisions to enter into momentous transactions in *Public Trustee-v-Cooper* Category 2 cases. The hurdle a party has to reach to persuade the Court to withhold its sanction is rarely possible to reach when professional liquidators are involved.

The remuneration application

27. It is important for the efficacy of the Court's winding-up jurisdiction as a whole that skilled professionals are encouraged to take liquidation appointments in the confidence that their reasonable fees and expenses will be recoverable in accordance with the policy imperatives underpinning section 109(1) of the Companies Act. Safeguards to protect the interests of creditors from abuse of the process take the following main forms:

(a) fee scales are fixed under the Insolvency Practitioners' Regulations;

(b) creditors are given an opportunity to vet remuneration applications; and

(c) the Court grants final approval.

28. As regards the correct approach to fee approval applications, Mr Harris reminded me of my recent decision in *Re World Properties Ltd (In Official Liquidation)*, FSD 49/2018 (IKJ), Judgment dated

[5] 2020 (1) CILR Note 1.

3 October 2022 (unreported). In that case I was guided by *dicta* of Segal J in *Re Direct Lending Income Feeder Fund Inc*., FSD 108/2019 (NSJ) (at paragraphs 58, 65), Judgment dated 3 February 2022 (unreported) and Ramsey-Hale J (as she then was) in *Re OneTradex Ltd.*, FSD 166/2020, Judgment dated 17 June 2022 (unreported) (at paragraph 46). I concluded:

(a) (citing Segal J in the former case):

"*18. In short, the JOLs have to demonstrate that the fees in relation to which approval is sought were reasonable in the sense that they were 'commensurate with the nature and extent of the tasks which they have properly undertaken, and that the work for which they have charged has resulted in significant and proportionate benefits to the estate'. Where the Liquidation Committee wishes to object, the opposition must be based on (a) grounds which have been 'identified with reasonable precision' and (b) if the professional judgment of the official liquidators is impugned, the objector must be 'supported in its view by another professional'*";

(b) (citing Ramsey-Hale J in the latter case):

"*19. In other words, an important aspect of the rationale for requiring specific objections to be raised when the officeholder has prepared a comprehensive explanation of the fees and expenses incurred is ensuring that the Court resolves serious challenges in an efficient manner. A fee approval hearing in which the Court is not able to proceed 'on a structured and informed basis' is likely to be itself wasteful of costs. If an objector is unable to formulate 'specific objections to the work claimed by reference to the underlying supporting evidence and to specifically quantify the quantum of fees to which there is objection', there is an obvious risk that:*

(a) the objections raised are unmeritorious;

(b) *the liquidators will incur unnecessary costs dealing with unmeritorious objections to their remuneration claim; and/or*

(c) *Court time and resources will be wasted on an unnecessarily prolix contested application which the Court is unable to adjudicate in a straightforward and timely manner*."

29. In the present case, Tempest BVI has advanced a broad-brush disgruntled minority creditor's attack on the fees that essentially contends that the JOLs have failed to perform any tasks properly in relation to the liquidation estate. The Court in such matters always starts with the assumption that the majority of stakeholders are the best judges as to where their commercial interests lie. The standing of a party objecting to a remuneration application is therefore relevant in terms of how much weight can be attached to the objections. In *Re World Properties Ltd.*, I conducted my own independent review of the fee approval application because, atypically, the majority stakeholder had objected, albeit not through an appearance before the Court. In the present case, 78% of all known creditors have approved the relevant fees and expenses which were clearly explained in the JOLs' First and Second Reports. The Objection does not disclose any arguable case for this Court to withhold its approval. The Second Report setting out fees and rates and work done for the period 14 October 20221 to 30 September 2022 was dated 28 October 2022, and was available to Tempest BVI for roughly 3 weeks before the hearing of the JOLs' 10 November 2022 Summons on 21 November 2022.

30. The purely rhetorical objection to the JOLs' remuneration application found no material support from *Re Performance Insurance Company SPC (in Official Liquidation)*, FSD 70/2021 (RPJ), Judgment dated 10 November 2022 (Parker J, unreported) upon which Tempest BVI relied. The implication that the JOLs' firm's billing approaches were entirely discredited by this decision was unfounded. Two important distinctions can be made from the factual matrix of the present case. Firstly, *Re Performance Insurance Company SPC* concerned multiple segregated portfolios, some of whose owners approved the professional fees. Secondly, the objector who succeeded in persuading the Court to reduce a far larger tranche of fees than arose in the present case was the sole

economic owner of the relevant accounts. Here the fees were modest on their face and Tempest Capital was a minority creditor whose unfounded complaints only served to increase the liquidation costs and eliminate the prospect of a small distribution to creditors (JOLs' Second Report, paragraphs 11.1-11.4).

Findings: disposition of adjournment application

31. The Court's inherent jurisdiction to adjourn an interlocutory summons within a liquidation is entirely flexible depending on the nature of the matters at hand. The JOLs' Summons did not in any meaningful or direct sense involve the substantive rights of any creditor, including the rights of Tempest BVI. It was an 'internal' application for directions in which the overriding consideration was the interests of the liquidation estate as a whole. This was not a case to which CWR Order 11 rule 3 applied:

> "*(1) The Court may direct that, when a sanction application gives rise to an issue in respect of the substantive rights as between the company and any creditor or contributory or any class thereof, it shall be adjudicated as an inter partes proceeding as between shareholders, creditors or any class of shareholders or creditors (as the case may be), for which purpose the Court may –*
>
> *(a) make a representation order; and/or*
>
> *(b) direct that the official liquidator's role shall be limited in such way as the Court thinks fit; or*
>
> *(c) direct that the official liquidator shall take no further part in the proceeding.*"

32. In my judgment the Objector's section 7 fair trial rights were not, in the final analysis, actually engaged by the present application. Had Tempest BVI's substantive rights been engaged, for example, as a plaintiff, a defendant or a proprietary claimant, its inability to obtain legal representation due to the EU sanctions issue might fall to be determined in a similar way to the rights of a natural person unable to attend trial on health grounds: see e.g. *Solanki-v-Intercity Technology Limited* [2018] EWCA Civ 101 [2018] EWCA Civ 101. In deciding whether to either proceed with the JOLs' Summons or to adjourn to enable a minority creditor to seek counsel or elaborate upon written submissions already filed in Court, however, the primary consideration was how likely was it that the benefits of an adjournment would outweigh the disadvantages to the interests of the liquidation estate as whole. As the main objective of a winding-up is to maximize the return to stakeholders, the Court is usually astute to avoid legal 'wild goose chases' instigated by disgruntled minority stakeholders which serve no apparent practical end other than wasting costs at the expense of other more financially vested stakeholders.

33. Tempest BVI had been afforded an opportunity over several weeks before the hearing of challenging the PDC sale. This transaction was consummated by the JOLs on essentially the same commercial grounds as the proposed NEOS sale with which it was closely connected. Yet Tempest BVI was unable to formulate anything close to a credible case that the JOLs had acted irrationally. There were accordingly no tangible grounds for believing that if the hearing of the JOLs' Summons was adjourned, Tempest BVI would realistically have been able to formulate grounds for withholding the sanctions sought.

34. As regards the remuneration application, no serious objection was advanced at all and the criticisms made appeared to fall into the category described in *Re World Properties Ltd (In Official Liquidation)*, FSD 49/2018 (IKJ), Judgment dated 3 October 2022 (unreported, at paragraph 22), and warrant a similar judicial response:

> "*(b)where some stakeholders have, in effect, grumbled and griped without having the gumption to positively oppose the application, the Court in my judgment must further satisfy*

itself that there is, taking a high-level view, nothing 'eyebrow-raising' about the level of fees and expenses. If there is readily discernible cause for concern, the Court of its own motion should consider making appropriate disallowances after carrying out a more rigorous review."

35. In summary, I refused Temple BVI's application for an adjournment notwithstanding the fact that it was genuinely unable to instruct counsel to appear for it because of international sanctions-related regulatory challenges which had no clear end in sight. I considered whether or not the Objector was likely to be able to improve upon the grounds of opposition set out in the Objection, and concluded that it was not. There was no realistic prospect that if afforded further time, Tempest BVI could persuade the Court that the JOLs had acted irrationally in deciding to enter into the two share sales for which sanction was sought. The real grievance underlying the attacks on the liquidation process, reflected in the hollow complaint about the Company being wound-up in the first place, appeared to be the understandable disappointment of a majority shareholder that its investment had gone 'belly-up'.

Findings: merits of JOLs' Summons

The sanction applications

36. The following clear and concise submissions were advanced by Mr Harris in the JOLs' Skeleton Argument in support of the sanction applications:

"*7. The merits of the PDC and NEOS sales are essentially the same, in that:*

7.1. The assets are of only limited value given the need for substantial further capital investment in exploration and are or were at risk of having any residual value extinguished by the cancellation of the licences, due to the Company's inability to honour outstanding liabilities;

7.2. the JOLs have been able to identify only one potential purchaser and lack the funds or time to engage in any more extensive marketing effort; and

7.3. the only party objecting to the sale has failed to make any offer of its own or advance the necessary funding to seek alternatives.

8. In the circumstances the JOLs consider that the agreed sales represent the only viable option for realising any value from the assets.

9. In respect of the PDC application, it was impractical for the JOLs to seek prior sanction for the sale due to the urgency of PDC's need for working capital to avoid cancellation of the licences. A prior application being impossible, and given the overlap between the two sales, making a subsequent joint application in respect of both sales represented the most efficient and cost-effective option."

37. This argument was compelling even if it was overstated in one minor respect which was immaterial to the merits. The submission in the second sentence of paragraph 9 that a prior application for sanction in relation to PDC was "*impossible*" overstated the position. The true evidential position was more accurately described in the first sentence of paragraph 9 of the Skeleton as "*impracticable*", which was consistent with the averment in Dempsey 1 (paragraph 12) that the "*JOLs did not consider it to be practicable to obtain such sanction prior to the sale*". The JOLs' approach was entirely rational and consistent with a common sense commercial approach. There was no rational basis for declining to grant the retrospective and prospective sanctions sought.

Fees and expenses

38. The JOLs sought approval for fees totalling US$143,336.50 and expenses totalling $2,565.93 incurred over a period of roughly one calendar year. Those amounts equate to approximately CI$ 115,000 and CI$2000 over one year or monthly fees of roughly CI$9600 and monthly expenses of

roughly CI$160. Despite the modesty of these sums, the JOLs' Second Report (paragraphs 11.1-11.4) explained that it had initially been hoped to make a small distribution to creditors. However, unexpected time costs had been incurred from July through November dealing with 7 itemized matters, 5 of which fell under the broad umbrella of dealing with allegations raised by Mr Mutovin on behalf of Tempest BVI.

39. It was easy to see why the majority creditors had approved the JOLs' fees and easy to infer that the entire Objection filed by Tempest BVI bordered on an abuse of process, because the disappointed majority shareholder had apparently been acting inconsistently with its commercial interests as minority creditor by conduct which only served to increase liquidation costs and diminish the assets available for distribution to creditors overall.

Conclusion

40. For the above reasons on 21 November 2021 I granted the sanctions and fee approval sought by the JOLs through their 10 November 2022 Summons.

THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT