EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2013/0043

BETWEEN:

STEVEN GORAN STEVANOVICH

Applicant

-and-

MARCUS WIDE AND MARK MCDONALD

(AS JOINT LIQUIDATORS OF BARRINGTON CAPITAL GROUP LIMITED
(IN LIQUIDATION))

Respondents

**Appearances:**

Mr. Stephen Moverley Smith, QC, with him Mr. Justin Davis for the Applicant
Mr. Robin Dicker, QC, with him Mr. Shane Donovan for the Respondents

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2018: November 20, 21
December 5

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**JUDGMENT**

[1] **WALLBANK, J. (Ag.)**: This judgment concerns an application by the former sole director of a company in insolvent liquidation to set aside the decision of the company's liquidators to admit the proof of debt of a purported creditor of the company. The reason the former director wishes to do so is because the liquidators have commenced legal proceedings against him on behalf of the company to seek a contribution on various grounds of alleged improper conduct. The proof of debt that the liquidators admitted is the only creditor's claim against the company. If the decision to admit the proof of debt is set aside, there would be no reason for the liquidation to continue. The applicant brings this application pursuant to section 273 of the Insolvency Act,

2003 ('Insolvency Act') and/or the inherent jurisdiction of the Court. Where I refer in this judgment to section 273, it is to this section in the Insolvency Act. Alternatively, the applicant seeks an order that the liquidators be directed to apply to the Court under s 210(2) of the Insolvency Act to expunge the claim. The applicant also seeks his costs of this application. On 5th December 2018 I delivered judgment, dismissing the application with costs to the respondents, with written reasons to follow. These are the reasons.

**Background**

[2] The applicant, Mr. Stevanovich, is the former sole director of Barrington Capital Group Limited ('the Company'). The Company was incorporated in the Territory of the Virgin Islands ('TVI') on 12th September 2000, under the name Capital Strategies Fund Limited. The sole voting shareholder of the Company was and is a company called Bermuda Administrative Service Limited ('BASL'). It is said by the applicant to be a nominee for his extended family and associates, who are the ultimate beneficial owners of the Company.

[3] The Company carried on business as an investment fund. Its Articles of Association provided that it would have an investment manager. This was initially a company called Bridgewater Capital Management LLC, which later changed its name to Westford Asset Management, LLC. The investment manager subsequently changed to Westford Asset Management Limited. The applicant represents that as part of this business the Company made various types of investment and lent money to various companies, charging interest on the principal lent. The applicant says that between 2001 and 2006, in the ordinary course of business, the Company loaned monies to companies controlled by a certain Mr. Petters, following extensive professional due diligence. The loans were fully documented by a Master Loan Agreement that controlled the issuance of multiple loan notes. Between September 2008 and October 2009 the Company made a number of distributions to BASL. Then, 'during the second half of 2009' (as the applicant puts it), the applicant decided to put the Company into solvent voluntary liquidation.

[4] As part of this plan, the applicant resigned as the Company's sole director as of 18th or 19th August 2010. It is not clear when he really resigned, as he uses both dates, and there is a plethora of documents in this case which were executed in advance, with the dates intentionally left blank to be filled in later. The applicant however stresses that he resigned as director. It

was clearly a very important part of his plan to distance himself from the continuing direction of the Company from that point onwards.

[5] For present purposes the exact date of his resignation does not matter. He was immediately replaced as director by a company also registered in this Territory, called Universal Directors Inc. ('Universal Directors'). The applicant states that Universal Directors was appointed as an independent director to deal with the formalities of dissolution, 'in which it specialized'. Ostensibly, the applicant no longer had a directorship function from at least 19th August 2010 onwards. From the same date the Company's name was changed to Barrington Capital Group Limited and its Memorandum and Articles of Association were restated.

[6] On 23rd August 2010 the Company applied to the Financial Services Commission for cancellation of its certificate of recognition. This certificate was cancelled with effect from 15th September 2010.

[7] On 14th October 2010 Universal Directors approved a liquidation plan. They resolved to declare a dividend and distribute to BASL what they assumed was the Company's sole remaining asset, limited partner units in a Cayman limited partnership, Capital Strategies Cayman LP, then said to be worth about US$10million. The applicant avers that at all times when distributions were made to BASL from the Company, including in October 2010, the Company was solvent and under no liability to anyone.

[8] On 29th November 2010, one Mr. Edwin Geerman was appointed as the sole voluntary liquidator of the Company and a certificate of solvency, signed by Universal Directors, was dated the same day.

[9] On 14th January 2011, a certificate of completion was filed by the voluntary liquidator and the Company was dissolved the same day.

[10] But that was not the end of the story. I have observed that the applicant says it was 'during the second half of 2009' that he decided to wind up and dissolve the company. As the applicant himself says in his evidence for this application, on 3rd June 2009 Mr. Petters and his company, Petters Company Inc., were charged with mail and wire fraud, money laundering and conspiracy in the United States of America. Mr. Petters had been caught carrying out a

massive Ponzi scheme. That date, 3rd June 2009, was at the start of the second half of 2009. The applicant states further that on 2nd December 2009 Mr. Petters was convicted of those crimes. That date was almost at the end of the second half of 2009. The applicant's decision to put the Company into liquidation and distribute its assets to its shareholder was, on the applicant's own case, taken in this period.

[11] Mr. Petters was sentenced to 50 years imprisonment on 8th April 2010. A Trustee in Bankruptcy ('the Trustee') had been appointed over Mr. Petters' company in the United States of America under Chapter 11 of the United States Bankruptcy Code, on 24th December 2008, after Mr. Petters had been indicted by a Federal Grand Jury on 1st December 2008.

[12] The respondents say (but the applicant denies) that Mr. Petters and his companies had been the Company's main investment object. The applicant creates the impression that his plan to dissolve the Company had nothing to do with the Petters implosion, and everything and only to do with a routine corporate restructuring for tax optimization purposes. There is a separate legal dispute about whether this is so.

[13] In any event, on 8th October 2010, the Trustee filed a complaint against the Company and others, seeking to reverse certain transfers that Mr. Petters and his companies had made to the Company and others, claiming about US$3.2 billion in all. The applicant himself is a defendant in those proceedings, which were filed in the United States Bankruptcy Court for the District of Minnesota. The complaint was served on the Company here in the TVI on 16th November 2010.

[14] The 8th of October 2010 fell after the applicant had ostensibly resigned as a director of the Company and after its certificate of recognition had been cancelled by the Financial Services Commission, but before Universal Directors approved the Company's liquidation plan, on 14th October 2010. So, as at 8th October 2010 the Company was not yet in liquidation.

[15] The applicant is defending the proceedings in Minnesota, but the Company did not. The applicant insists that the Company never submitted to the jurisdiction of the Minnesota court. On 7th April 2015 the Trustee obtained judgment in default of appearance against the Company in the total sum of US$578,366,966.24.

[16] The applicant's plan to dissociate himself from the Company's direction and dissolve it was about to be put to the test. On 16th April 2013 the Trustee applied to this Court to restore the Company into liquidation under the terms of the BVI Business Companies Act. 2004. On 30th April 2013, upon the Trustee's application, the respondents were appointed Joint Liquidators over the Company. On 19th August 2013 the Trustee submitted a claim in the liquidation of the Company seeking payment of the sum claimed in the Trustee's US proceedings. Such claims are submitted pursuant to section 209 of the Insolvency Act. The Joint Liquidators gave notice to the Official Receiver that the Company was, in their view, insolvent, on 23rd August 2013 and they then conducted the liquidation as an insolvent liquidation.

[17] The Joint Liquidators admitted the Trustee's claim on 15th May 2015, in the sum of US$398,503,855.66 (being the default judgment sum less costs and pre-judgment interest).

[18] Some seventeen months after the Joint Liquidators admitted the Trustee's claim, on 7th October 2016, the Joint Liquidators issued proceedings against the applicant in this jurisdiction.[1] The Joint Liquidators claim a contribution from the applicant personally, alleging that he engaged in fraudulent trading and misfeasance as a director and/or *de facto* director of the Company in respect of the distributions made by the Company, including upon its winding up. The alleged basis for these claims is that the applicant should have known that once Mr. Petters' fraudulent scheme was discovered, the Trustee would seek to recover the monies paid to the Company by Mr. Petters' company. The applicant is defending those proceedings vehemently.

[19] The applicant explains that it is common ground that the 'bedrock' of any claim against him is the admission of the Trustee's claim in the liquidation of the Company. In the absence of such a claim, there is no creditor for whose benefit the proceedings against the applicant are being pursued. The Trustee is the only purported creditor. The applicant points out that the liquidation is being funded by the Trustee.

[20] So, the applicant has applied pursuant to section 273, and/or the inherent jurisdiction of the Court, to set aside the Joint Liquidators' decision to admit the claim, alternatively that the Joint

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[11] BVIHCM2016/0142.

Liquidators be directed to apply to the Court under s 210(2) of the Insolvency Act to expunge the claim, plus costs.

**Legal principles and the applicant's arguments**

[21] Section 273 provides:

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

[22] Section 210(2) provides:

> "The Court, on the application of the liquidator or, where the liquidator declines to make application under this subsection, a creditor, may expunge or amend an admitted claim if it is satisfied that the claim should not have been admitted or should be reduced."

[23] The applicant claims to be a 'person aggrieved', for the purposes of section 273, by the Joint Liquidators' decision to admit the Trustee's claim in the liquidation of the Company. The applicant does not apply to set aside the Joint Liquidators' decision to commence legal proceedings against him.

[24] The applicant's main argument is that a foreign judgment obtained in a jurisdiction which the defendant has not submitted to, and in which he was not present at the time the proceedings were issued (being 8th October 2010), is unenforceable, following the decision of the English Supreme Court in **Rubin v Eurofinance SA**.[2] An unenforceable liability is not provable in the liquidation of a TVI company, pursuant to section 10(3) and 11(2) of the Insolvency Act.

[25] The Joint Liquidators agree with these propositions of law. But they reply that the Company was indeed present in the United States as at 8th October 2010. I will return to this.

[26] The Joint Liquidators however take a threshold point. They argue that the applicant is not a 'person aggrieved' pursuant to section 273.

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[2] [2012] UKSC 46.

[27] The applicant relies upon *dicta* of the Court of Appeal in **ABN Amro Fund Services (Isle of Man) 24 Nominees Limited & Ors v Kenneth Krys & Ors**[3] to the effect that a person cannot be considered as 'aggrieved' unless he has a sufficient interest in the outcome of an act, omission or decision taken by a liquidator in a liquidation. The applicant further relies upon *dicta* of the Court of Appeal in **Stanford v Akers & Anor**[4] that:

> "...section 273 of the Insolvency Act 2003 requires the "person aggrieved" to be a contributory, a creditor, or a third narrow class of persons directly affected by the exercise of a power specifically given to the liquidators, who would not otherwise have any right to challenge the exercise of that power. In this regard we are guided by the well-known principles in Deloitte & Touche AG v Christopher D. Johnson et al. We are in total agreement with the learned judge that all other persons are considered outsiders to the liquidation, who are not capable of being "aggrieved persons" and thus cannot apply under section 273 Insolvency Act, 2003."

[28] The applicant recognizes that he needs to show that he falls within the third category of persons able to apply under section 273, namely that he is '...directly affected by the exercise of a power specifically given to the liquidators, who would not otherwise have any right to challenge the exercise of that power'. The applicant says he 'clears this hurdle with ease'. He tries to do so by arguing that, whilst he can defend the claim brought against him by the Joint Liquidators in this jurisdiction, he has no ability to challenge the premise of the claim, which he says is that the Company has an unpaid enforceable liability to the Trustee of about US$398million. That is potentially crucial to his defence because he should be entitled to say that the Trustee in fact has no claim, there having been no submission to, or presence in, the United States bankruptcy jurisdiction. At the hearing, the applicant's learned Queen's Counsel, Mr. Moverley Smith, QC, submitted that 'but for' the admission of the Trustee's claim in the liquidation, the Joint Liquidators would have no claim against the applicant. So, the applicant says, he is 'directly affected' by the exercise of the Joint Liquidators' power to admit a claim in the liquidation.

[29] There are flaws in this argument. First, the applicant brings this application in his capacity as a defendant to a claim by the Joint Liquidators, not as a someone with a legitimate interest in the relief sought in this application, thus as an outsider to the liquidation. Moreover, his interests are adverse to the liquidation and the interests of creditors. He is not directly affected by the Joint Liquidators' decision to admit the Trustee's claim. At best he is only indirectly affected. It

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[3] ABN Amro Fund Services (Isle of Man) 24 Nominees Limited & Ors v Kenneth Krys & Ors BVIHCMAP2016 11-16, 23-28 (hereinafter 'ABN Amro') at paragraphs [30] – [34] (Pereira CJ) (Unreported, 20th November 2017).
[4] BVIHCMAP2017/0019 at paragraph [77] (Blenman JA) (Unreported, 12th July 2018).

follows that, at least for the purposes of an application pursuant to section 273, the applicant should not be entitled to say that the Trustee has no provable claim. A close look at the governing authorities leads me to conclude, in my respectful judgment, that the applicant has no standing to bring this application.

[30] The position as developed by the Court of Appeal in **ABN Amro Fund Services (Isle of Man) 24 Nominees Limited & Ors v Kenneth Krys & Ors** is as follows. There, the applicants were former (i.e. not current) shareholders of a company, Fairfield Sentry Limited, which was in liquidation. The court appointed liquidators decided to bring legal proceedings against those former shareholders in the United States seeking orders that they should restore to the liquidation estate redemption payments made to them out of the Madoff Ponzi scheme. Thus, at the time when the liquidators took that decision, the former shareholders were no more than alleged debtors with respect to the company in liquidation. The former shareholders sought to invoke section 273 in an attempt to have the liquidators' decision set aside. They did so on the basis that they were 'persons aggrieved' by that exercise of the liquidator's powers.

[31] The Honourable Chief Justice, delivering the judgment of the court, commenced her analysis by first remarking that a party's standing to seek relief is a threshold requirement.[5] Then, that the present judicial approach under our law is to give a generous, as opposed to rigid or inflexible, interpretation to the phrase 'person aggrieved', such that '[t]he test of 'sufficient interest' has become an extremely flexible rule and pragmatic requirement in ascertaining locus standi...'.[6]

[32] The Court of Appeal then recognized that there is a limit to such flexibility. The meaning of this phrase is to be ascertained in this particular part of this particular statute.[7] The court formulated the question then as whether, having regard to the context of section 273, and the remedy which is thereby given, namely, 'confirming, reversing or modifying the act, omission or decision of the officeholder', a person who has no proper or legitimate interest in a liquidator's

[5] ABN Amro at paragraph [28], quoting from Intertrade Corporation v Windjammer Landing Co. Ltd SLUHCVAP1996/0001 (delivered 24th November 1997, unreported).
[6] ABN Amro at paragraph [28], quoting from Intertrade Corporation v Windjammer Landing Co. Ltd SLUHCVAP1996/0001 (delivered 24th November 1997, unreported).
[7] ABN Amro at paragraph [29], quoting from Sevenoaks Urban District Council v Twynam [1929] 2KB 440.

decision, act or omission in respect of an insolvent company's estate may be said to be a 'person aggrieved'.[8]

[33] The Court of Appeal then considered that persons who would be concerned with, or have a proper interest in, the administration of a liquidation estate would be a creditor in the case of an insolvent company, a contributory in the case of a solvent company, a debtor and, importantly for present purposes, 'a person who is directly affected by the exercise of a power given specifically to that officeholder, and who would not otherwise have any right to challenge the exercise of that power'.[9]

[34] Then, the Court of Appeal stated that it is important to identify for the purpose of section 273 the capacity in which a person is praying in aid the relief sought.[10] In that case, the applicants were seeking to invoke section 273 as 'alleged debtors', as opposed to as debtors. The Honourable Chief Justice observed that 'alleged debtors', in contradistinction to 'debtors', are complete outsiders to the liquidation.[11] She considered that a person cannot be considered to be 'aggrieved' unless that person has a sufficient interest in the outcome of an act, omission or decision taken by a liquidator in the liquidation.[12]

[35] The Court of Appeal then adopted the approach taken by Lord Millett in the Privy Council decision in **Deloitte & Touche AG v Johnson.**[13] The applicant should first show that he is qualified to make the application. This 'goes to the jurisdiction of the court, for the court has no jurisdiction to exercise a statutory power except on the application of a person qualified by the statute to make it.'[14] Secondly, the applicant must show he is a proper person to make it, in the sense that he has a legitimate interest in the relief sought.[15] Lord Millett described this as a matter not of jurisdiction, but of judicial restraint.[16] It does not suffice that the applicant has an interest in making the application or may be affected by its outcome. Lord Millett also noted

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[8] ABN Amro at paragraph [30].
[9] ABN Amro at paragraph [31].
[10] ABN Amro at paragraph [32].
[11] ABN Amro at paragraph [33].
[12] ABN Amro at paragraph [34].
[13] [2000] 1 BCLC 485, [1999] 1 WLR 1605.
[14] Deloitte & Touche A.G. v Johnson [1999] 1 WLR 1605 at 1611 B (Lord Millett).
[15] Deloitte & Touche A.G. v Johnson [1999] 1 WLR 1605 at 1611 at E.
[16] Deloitte & Touche A.G. v Johnson [1999] 1 WLR 1605 at 1611 at C.

that the appellants in that case were strangers to the liquidations, with their interests being adverse to the liquidation and the interests of the creditors.[17]

[36] Then, in a key paragraph, the Court of Appeal noted that the applicants there did not suggest they had any interest in the assets of the company or the manner in which they were distributed. Their sole complaint was that they were being sued by the liquidators. They were trying to invoke section 273 in their capacity as a defendant in the United States proceedings, as strangers to the liquidation, and with their interests being adverse to the liquidation and the interests of the creditors.[18] As mere defendants in the United States proceedings they did not qualify as 'persons aggrieved' for the purposes of the relief sought under section 273.

[37] The Court of Appeal in **Stanford v Akers & Anor**[19] adopted the same analysis. It concluded that a shareholder of a member of a company in liquidation was an outsider to the liquidation and had no legitimate interest *in the relief sought* (emphasis added by Blenman JA).[20] A slight difference between the Court of Appeal's reasoning in this case was that the court omitted reference to a debtor from the class of persons within a liquidation estate. That omission was of no moment there (although counsel addressed me upon it), because the applicant was not claiming in that capacity. I equally do not have to consider whether there is any material divergence between these two Court of Appeal decisions on this point for present purposes.

[38] The exercise of power the applicant here complains of is the Joint Liquidators' admission of the Trustee's claim. The applicant does not seek to set aside the Joint Liquidators' decision to sue him. Indeed, had he done so he would have got no further than the applicants in **ABN Amro Fund Services (Isle of Man) 24 Nominees Limited & Ors v Kenneth Krys & Ors.** He too is only an alleged debtor. He too seeks to invoke section 273 only in his capacity as a defendant to proceedings brought against him by the Joint Liquidators. He too has no interest in the assets of the company or the manner in which they are to be distributed. His interests are also adverse to the liquidation and the interests of the company's creditor(s), because he wants to

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[17] [2000] 1 BCLC 485 at pages 491 – 492, quoted in ABN Amro at paragraph [35]. Also at Deloitte & Touche A.G. v Johnson [1999] 1 WLR 1605 at 1611 H (Lord Millett).
[18] ABN Amro at paragraph [36].
[19] BVIHCMAP2017/0019 (Blenman JA) (delivered 12th July 2018, unreported).
[20] BVIHCMAP2017/0019 at paragraphs [76] to [79], in particular [79] (Blenman JA) (delivered 12th July 2018, unreported).

stop the liquidators recovering money from him that would increase the estate's assets for distribution to the creditor(s). He is a complete outsider to the liquidation.

[39] I do not think it makes any difference that the applicant is not seeking to set aside the Joint Liquidators' decision to bring proceedings against him, but their decision to admit the Trustee's claim. It is correct that the applicant has **an** interest in making the application or may be affected by its outcome, because 'but for' admission of that claim the Joint Liquidators would have no claim to bring against him. Beguiling though the applicant's 'but for' argument is, we have seen that merely having an interest in or being affected by the outcome of the decision complained of is not enough. The applicant must have a 'legitimate interest' in the relief he seeks under section 273. The applicant has none here – as an outsider to the liquidation it cannot matter to him whether, as a matter of administration of the liquidation, the Trustee's claim is admitted in the liquidation or not.

[40] Both these Court of Appeal authorities offer a further consideration, namely whether the applicant is 'directly affected' by, in this case, admission of the Trustee's claim. The answer is 'no'. The key word here is 'directly'. He is only indirectly affected by the decision to admit the claim. It is the later (and, it would appear, considerably later) act of bringing proceedings against him that directly affects him.

[41] Apart from the fact that the Court of Appeal's decision that a person must be 'directly' affected is binding upon this Court, this requirement is in my view right. The need for a person to be 'directly' affected, in the context of section 273, is also a question of judicial restraint. It sets the boundaries to the class of persons that the Court will treat as 'affected'. There may be others who will doubtlessly be 'affected' in some way, but a line must be drawn somewhere in the public interests of finality and certainty. The requirement for a person to be affected 'directly' is co-extensive with, and parallel to, the need for an applicant under the section to have a 'legitimate' interest in the relief sought. Furthermore, if the notion of 'directly' is rendered elastic – which the 'but for' argument does – the meaning of 'affected' becomes ambiguous. It becomes a relative concept that is open to the subjective interpretation of individual judges. That would undermine certainty in the interpretation of laws and in their application. I therefore have no hesitation in applying a literal meaning to the word 'directly' here.

[42] I must also consider whether the applicant is a person who would not otherwise have any right to challenge the exercise of the liquidators' power. In one sense he has no right to do so, being an outsider to the liquidation. But that of itself does not confer upon him a right to invoke the jurisdiction of the court pursuant to section 273 – he must still be 'directly affected' in the way explained above in order to have such a right.

[43] Moreover, the applicant claims, on his own case, to have an alternative way of challenging the liquidators' decision. In his defence of the Joint Liquidators' proceedings against him, the applicant challenges the legal and factual basis of the Joint Liquidator's decision to admit the Trustee's claim. The applicant expressly puts the Joint Liquidators to proof that the Company was present in Minnesota on 8th October 2010 and advances a positive case that the Joint Liquidators wrongly admitted the Trustee's claim.[21]

[44] For all these reasons, in my respectful judgment, the applicant is not a 'person aggrieved' for the purposes of section 273. The application therefore ought to be dismissed.

**Admission of claims in liquidation – whether the Edennote perversity test applies**

[45] However, should that not be the end of the matter, there are other aspects on which I should reach a decision.

[46] There is a dispute between the parties as to whether the applicant (assuming he had standing) would have to show that the Joint Liquidators' decision to admit the Trustee's claim was 'so manifestly absurd or perverse' that it fell completely outside the permissible range of options open to the Joint Liquidators. The Joint Liquidators say this is the test, relying upon *dicta* of our Court of Appeal in **Stanford v Akers & Anor**,[22] quoting **Re Edennote.**[23] The applicant disagrees. The applicant draws a distinction between commercial decisions and decisions involving purely legal issues, relying upon the English Court of Appeal decision in **Mahomed v Morris**.[24] There, the court distinguished between compromises made pursuant to commercial decisions, to which the **Edennote** perversity test applies, and liquidators' decisions which

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[21] See paragraphs 36 and 37 of the Defence filed in BVIHCM2016/0142 dated 13 December 2017.
[22] BVIHCMAP2017/0019 at paragraph [83] (Blenman JA) (delivered 12th July 2018, unreported).
[23] [1996] BCC 718.
[24] Mahomed v Morris [2001] BCC 223 at 241, paragraph 32 (Peter Gibson LJ).

involve purely legal issues.[25] **Stanford v Akers & Anor** did not concern a liquidator's decision to admit a proof of debt.

[47] The applicant refers to the decision of this Court in **Rainer Busch and Mercury Partners Gmbh v Crumpler & Anor**[26] as a case where this Court considered **Mahomed v Morris**. In **Rainer Busch** the applicants, who were unsecured creditors, challenged a liquidator's decision not to admit two claims. Both sides' counsel approached the matter on the basis that the **Edennote** perversity test applied generally to applications pursuant to section 273, but one side submitted that a claim involving purely legal issues is an exception to application of the perversity test. This Court held that the rejection of the first claim could not be defended on any reasonable or rational basis. It was therefore not required to decide whether the **Edennote** test was the appropriate test nor whether perversity was the appropriate threshold. In respect of the second claim, this Court held that it involved a dispute which required the construction of a contract as a whole. The learned judge found that this was not the type of claim which ought to be determined on a section 273 application, which entails a summary procedure. **Rainer Busch** is thus of limited assistance for our present purposes.

[48] The reason this dispute arose in the present case is because the Joint Liquidators had admitted the Trustee's claim on the basis that the default judgment entered against the Company is enforceable in this jurisdiction. It is common ground that in order to be enforceable here, the Company had to have been present in the United States when the claim against it was issued by the Trustee, on 8th October 2010. It is also common ground that it could have been present either by itself, or through an agent. As the applicant has been keen to point out, he had resigned as director on 18th (or 19th) August 2010, in favour of Universal Directors. The Joint Liquidators say there is good reason to infer that the applicant was nonetheless present in the United States. The Joint Liquidators rely upon the fact that the applicant was also a director of the Company's investment manager. He had admitted on oath, during a deposition, that he made all the investment decisions for the investment manager. There is other evidence that it was the Company's investment manager who managed the assets held by it. As at 8th October 2010 the Company still had two assets: the share in the Cayman limited partnership that was eventually distributed in the Company's voluntary liquidation, and a small quantity of shares, worth about CHF1,800, that both Universal Directors and the voluntary liquidator had

[25] Mahomed v Morris [2001] BCC 223 at 241, paragraph 32 H (Peter Gibson LJ).
[26] BVIHCM2014/0030 (Farara J (Ag.) (delivered 26th January 2016, unreported).

overlooked. The role and function of the investment manager was embedded in the constitution of the Company. Indeed, when its Memorandum and Articles of Association were restated shortly before the company was put into voluntary liquidation, the role and function of the investment manager was expressly preserved and continued. It was never cancelled or terminated. In an Offering Memorandum dated 2003 the address given for the investment manager was care of the applicant, at an address in the United States of America. Although there is evidence that addresses overseas were also used by the investment manager, the provisions of that Offering Memorandum, and representations therein, appear never to have been superseded formally. The Joint Liquidators have taken these factors as supporting a conclusion that the Company was still present in the United States as at 8th October 2010: it was still managing two assets, through the agency of the investment manager, which in turn was acting through the agency of the applicant. The Joint Liquidators say they took independent legal advice on this issue. The way the Joint Liquidators present their analysis, their conclusion is not utterly absurd nor utterly unreasonable. However, the applicant raises arguments that the investment manager, though still technically available, was not managing any assets, because the Company was simply holding them, could no longer conduct investment business, and all persons concerned had overlooked one of them. The applicant raises other arguments and points to other facts which calls the Joint Liquidators' analysis further into question. Put another way, the issue of the Company's presence, or not, as the case may be on the facts as we currently have them, is debatable.

[49] The Joint Liquidators take an alternative line of reasoning, to the effect that Universal Directors was not independent and impartial as the applicant has represented. Nor was it any kind of dissolution specialist. Instead, this company was a classic man of straw, or a hollow automaton energized by the applicant. All Universal Directors did was sign undated documents to set up the voluntary liquidation, signing off on documents prepared by the Company's United States corporate lawyers, who themselves were acting ultimately upon the instructions of the applicant. Hence, say the Joint Liquidators, the applicant continued to be the Company's *de facto* (or at least shadow) director, and thereby the Joint Liquidators can establish the Company's continuing presence in the United States on 8th October 2010. The applicant disagrees and argues that by the time Universal Directors took over as director, the company had already been set on the path towards liquidation and all Universal Directors had to do was complete the formalities. Thus, there was no direction as such of the Company that remained

to be carried out, so there was no reason for the applicant to be treated as a *de facto* or shadow director.

[50] If the **Edennote** perversity test applies, then the applicant has a much higher hurdle to overcome for the Joint Liquidators' decision to be set aside. The applicant would have to show that their analysis was utterly absurd or unreasonable. This would be a tall order here. If a lower test applies, the Joint Liquidators' decision is more vulnerable.

[51] Learned Queen's Counsel for the Joint Liquidators argued that the question of whether the Company had a United States presence does not involve purely legal issues. That is because it involves a fact specific inquiry. On his reasoning, if it does not involve purely legal issues then the **Edennote** perversity test applies.

[52] With respect, I disagree, because the question whether a debt is provable in a liquidation is a question of law. The starting point, it seems to me, is what **Palmer's Corporate Insolvency** describes as 'the long-established judicial rule to the effect that legal enforceability is a logical prerequisite to a debt being provable in insolvency proceedings...'.[27] The same principle applies in this jurisdiction. Although the question of presence is fact specific, it is a component of the greater legal issue whether the alleged debt is 'provable'. That inquiry leads to a legal conclusion: either the debt is provable or it is not. This exercise involves no compromise, nor discretion.

[53] As a matter of principle the determination of such a legal issue falls outside the scope of the **Edennote** perversity test. That is because the **Edennote** test entails that, when it comes to exercise of liquidators' discretion, the courts defer to liquidators in all but extreme cases.

[54] The Court must also look at how, in practice, a liquidator is to react when faced with a claim where it is debatable that it is provable. **Palmer's Corporate Insolvency** explains: 'When a liquidator is faced with a proof of debt which he suspects may be unenforceable, the proper course is to reject the proof and put the onus on the creditor to justify his claim.'[28] Thus, liquidators should, as a rule of practice, err on the side of rejecting a proof of debt. That does

[27] Palmer's Corporate Insolvency Release 26: March 2009 at 1.402.
[28] Palmer's Corporate Insolvency Release 26: March 2009 at 1.414.

not appear to have happened here. Such a practice is incompatible with reliance by liquidators on the relatively high burden of the **Edennote** test to protect their decision to admit a claim.

[55] In practical terms, the upshot is that the Joint Liquidators' decision to admit the Trustee's claim is considerably more vulnerable than the Joint Liquidators submit.

[56] I have considered whether the Court has inherent jurisdiction to set aside admission of a proof of debt, and if so, whether the Court should do so here. The parties did not address me in detail on this point. Where liquidators are appointed by the Court, and act as its officers, it is logically correct that the Court has power to overrule their decisions. To do so, the Court would need to conduct an investigation into the manner in which the liquidators' decision was taken. It would need to assess the gravity of the liquidator's errors and the ensuing prejudice caused to persons having a legitimate interest. The Trustee would, as the Joint Liquidators submit, need to be joined to these proceedings so that he could be heard because he has a legitimate interest that might be prejudiced. But such an investigation would then occur in a vacuum. The Trustee would want the Joint Liquidators' decision upheld. That is clear from the facts here. The Joint Liquidators would, at best, take a position of neutrality. There is no other person here with a legitimate interest to argue against them.

[57] But there is no real need for such an investigation here, because, in his defence to the legal proceedings brought against him in the TVI, the applicant challenges the admission of the Trustee's proof of debt. He also he puts the Joint Liquidators to proof that the Company was present in the United States. This question can be resolved on an adversarial basis in that forum.

[58] It would therefore be appropriate in my view to leave open for now the question whether the Company had a presence in the United States as at 8th October 2010. Having concluded that the applicant has no standing to apply under section 273, I do not need to determine this issue.

[59] The parties did not address me in any detail in respect of section 210(2) of the Insolvency Act. This provides that the Court may make certain orders upon the application of the liquidator or a creditor. No such application has been made. This section does not apply.

**Order**

[60] The order is thus that the applicant's application stands dismissed. Costs should, in my view, follow the event here. The respondents will therefore have their costs, to be assessed if not agreed within 21 days.

[61] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

**Gerhard Wallbank**
High Court Judge

**By the Court**

Deputy Registrar