IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS CICA 15/2016

ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD 0090/2010

FSD 0091/2010

FSD 0092/2010

MANGATAL J.

B E T W E E N:

ROBERT SELKIRK WATLER Appellant

- and -

(1) GWYNN HOPKINS and ELEANOR FISHER in their capacity as the Joint Official Liquidators of each of Watler Holdings Limited (in Official Liquidation), Frank Sound Estate Limited (in Official Liquidation) and Red Bay Estates Limited (in Official Liquidation)

(2) SHANNON PANTON

(3) LYNETTE WATLER Respondents

BEFORE:

THE RIGHT HON SIR BERNARD RIX, JA

THE HON JOHN MARTIN QC, JA

THE RIGHT HON SIR ALAN MOSES, JA

Andrew De La Rosa, instructed by Mark A. Russell of HSM Chambers, for the Appellant
Fenner Moeran QC, instructed by Guy Cowan of Campbells, for the First Respondents
Anna Peccarino of Travers Thorp Alberga for the Second and Third Respondents

Hearing: 17 November 2016

Judgment: 10 March 2017

MARTIN JA:

Introduction

1. On 9 April 2016, Mangatal J made an order authorising the Official Liquidators of three associated companies to sell all or any of the land owned by the companies and distribute the proceeds among the shareholders, who are the appellant and the second and third respondents. The appellant appeals the order with the leave of the judge. His principal contention is that a sale of the land is precluded by the terms of a compromise agreement under which he and the second and third respondents are contractually bound to take the land in specie.

Background

2. The appellant Robert Selkirk Watler ("Selkirk"), the second respondent Shannon Panton ("Shannon") and the third respondent Lynette Watler ("Lynette") are the three children of the late Selkirk Watler ("Mr Watler"). I refer to them together as "the three children". Prior to his death in 1989, Mr Watler held all the issued shares of Frank Sound Estate Limited ("FSE") and Red Bay Estates Limited ("RBE"). These companies operated as land development vehicles, and owned several plots of land on Grand Cayman. Principal among them were four areas of land ("the principal land") known as Duck Pond 36A 4,5,13 and 14; High Rock 68A81; George Town 20D171 and 20E213; and Red Bay 22D141REM12. There were also lesser areas of land in the ownership of the companies. Following the death of Mr Watler, and subsequently that of his widow, the three children executed a deed of family arrangement dated 19 February 1993 that provided for the vesting of the shares in them equally. On the same date, Watler Holdings Limited ("the Company") was incorporated. Its shares were issued equally to the three children and it was intended

to operate as a joint venture vehicle. At some time prior to 2007, the three children transferred their shares in FSE and RBE to the Company. Thus the three children own the shares in the Company; the Company owns all the shares in FSE and RBE; and FSE and RBE own the land.

3. Between Mr Watler's death and 2007, the three children tried to work out a scheme of distribution of the land. When they failed to reach agreement, Shannon issued a petition to wind up the Company on the just and equitable ground. On 28 November 2008 Foster J made an order ("the 2008 Order') in the following terms:

> "UPON hearing leading counsel for the Petitioner and 1st Respondent and counsel for the 2nd Respondent
> AND UPON reading the Amended Petition and Amended Defence of the 2nd Respondent
> IT IS ORDERED BY CONSENT that:-
> 1. Watler Holdings Ltd. ("the Company") be wound up in accordance with the Companies Law.
> 2. Mr. G. James Cleaver of Kroll (Cayman) Limited, PO Box 1102, Bermuda House (4th Floor), George Town, Grand Cayman, KY1-1102 be appointed as official liquidator of the Company.
> AND IT IS DIRECTED BY CONSENT that:
> 3. The Official Liquidator is directed to appoint himself as the sole director of the Company's wholly-owned subsidiaries, namely Red Bay Estates Ltd and Frank Sound Estates Ltd ("the Subsidiaries").
> 4. The Official Liquidator is authorised to put the Subsidiaries into voluntary liquidation if he considers it necessary or appropriate to do so in order to distribute their land in specie to the Company.
> **5. The Official Liquidator is directed to prepare a scheme of liquidation whereby the assets of the Company and its subsidiaries be distributed amongst the shareholders in**

specie in equal shares by value, for which purpose he is directed to instruct a licensed land surveyor to prepare a plan for the distribution of the land. Such scheme of liquidation shall be submitted to the shareholders within 90 days and, in the event that such scheme of liquidation is not unanimously agreed upon within 30 days thereafter, the official liquidator shall apply to the Court for further directions.

6. The Official Liquidator may exercise any of the powers contained in Section 109 (b), (d), (e), (f), (g) and (h) of the Companies Law without the sanction of the Court.

7. The Official Liquidator shall prepare a report and accounts (including full details of the remuneration claimed) for the period ended 31st May 2009, which shall be delivered to the shareholders and the Court by 14th June 2009.

8. The reasonable fees and expenses of the Official Liquidator shall be approved by the shareholders and the Court prior to payment.

9. The parties and the Official Liquidator shall have liberty to apply, on not less that 21 days' notice, for further or other directions.

AND IT IS FURTHER ORDERED BY CONSENT that: –

10. There be no order for costs."

Paragraph 5 of the 2008 Order, which I have emphasised above, is the foundation of Selkirk's contention that the companies' land must be distributed in specie among the three children.

4. There are now joint official liquidators of the Company and of FSE and RBE. Nothing turns on the identity of the holders from time to time of the office of liquidator, and references in this judgment to the liquidators are references to the holders of the office at the relevant time.

5. Soon after the making of the 2008 Order, FSE and RBE were put into voluntary liquidation. At some time thereafter, and for reasons which are not apparent, an order was made directing that the liquidations of those companies were to continue subject to the supervision of the court.

6. On 14 July 2009 Foster J made an order, on the ex parte application of the official liquidator, directing that the assets of the Company, FSE and RBE be pooled for the purpose of the payment of costs, expenses, claims and distribution; that all funds, property and assets held by the companies be realised and pooled in one liquidation estate account; and that the official liquidator's remuneration and all costs and expenses in relation to the liquidation of the companies be paid from that account. This order, and perhaps also the order directing that the liquidations of FSE and RBE continue subject to the supervision of the court, seems likely to have been a consequence of the fact that the Company, FSE and RBE were, in the judge's repeated phrase, "asset rich, but cash-strapped". It appears from the judgment that one small property owned by FSE, not part of the principal land, was sold at an early stage, but otherwise no steps appear to have been taken to implement the order of 14 July 2009.

7. Funding of the liquidation costs and expenses was, however, to become a recurrent problem. The sale proceeds of the small property belonging to FSE were less than the amount of the admitted creditors' claims. Since the three children were at that stage in agreement that the principal land should not be sold, the liquidators sought funding from them; and in 2010 each of the three children contributed US$200,000.

8. Paragraph 5 of the 2008 Order directed the liquidators to prepare a scheme of distribution of the land in specie. This they did on 28 April

2011. Shannon and Lynette approved the scheme, but Selkirk did not. He took the view that the liquidators had obtained valuations only after deciding how the properties were to be distributed, and so had got the process back to front; that the valuer had in any event failed to take into account development potential; and that the properties to be distributed to him were significantly less valuable than those to be distributed to Shannon and Lynette.

9. There being no unanimous agreement, the liquidators applied to the court for directions as required by paragraph 5 of the 2008 Order. On 2 October 2012, Henderson J made an order primarily designed to clarify the basis on which the land was to be valued. That order directed trial of an issue in the following terms:

> "Is it the intention of the Honourable Justice Foster's order ("Order") dated 28 November 2008 that the valuer should value the land and property owned by the Company on an "as is" basis on the assumption that its use will be nothing other than residential, or is it the intention of the Order that the valuer will proceed to value this land and property on the basis of "highest and best use"?".

10. That issue was tried by Foster J. The relevant parts of the order made by him on 6 March 2013 are as follows:

> "1. The word "value" in paragraph 5 of the order made herein on 28th November 2008 means the market value of the land to be distributed in specie to the three shareholders. ... And that such market value shall be ascertained in accordance with internationally recognised valuation standards, in particular the Royal Institution of Chartered Surveyors' Professional Standards (Incorporating the International Valuation Standards) of March 2012 in the glossary at page 7 and at Valuation Standard 3.2 at pages 30 and 31.
>
> ...

3. The JOLs shall instruct Mr David Greener of JEC Property Consultants Ltd to carry out market valuations of all the real property concerned, and having regard to such valuations, the JOLs shall if necessary then prepare a revised plan for the distribution of the said real property among the shareholders in specie in equal shares by market value. In preparing the said plan the JOLs may consider, adopt or adapt by reference to their said market valuations the scheme ("the Original Scheme") previously produced by the JOLs as exhibited at exhibit GH4 to the Affidavit of Gwyn Hopkins dated 10th November 2011.

4. The completed valuations and, if produced, the revised plan of distribution referred to in paragraph 3 above shall be disclosed to each of the shareholders and unless within 21 days of such disclosure they unanimously agree to accept the plan (or, if no revised plan is deemed necessary by the JOLs, the Original Scheme) the JOLs shall apply to the court for directions as to whether or not the revised plan (or, if no revised plan is deemed necessary by the JOLs, the Original Scheme) shall be carried into effect. On the hearing of such application the valuer instructed by the JOLs shall attend for cross-examination on behalf of the respective shareholders."

11. In early 2014, the liquidators estimated that to bring the liquidation to a conclusion would require a further US$60,000. This was in the expectation that there would be no further substantial dispute about the distribution. They asked each of the three children to contribute an equal share. Selkirk and Shannon each agreed to pay US$20,000, but Lynette said that she was unable to pay her share. The liquidators then asked Selkirk and Shannon to pay US$30,000 each, but Selkirk was unwilling to do so. Ultimately, Shannon paid the entire US$60,000, after the liquidators had threatened to sell some of the land. She did so on the basis that she would receive additional land by way of compensation.

12. JEC Property Consultants Ltd ("JEC") provided valuations of the land in August and October 2014. According to the liquidators, the valuations revealed that the original scheme gave Selkirk more than an equal share. They therefore produced a revised scheme of distribution ("the 2014 Scheme"), reducing the amount of land to be distributed to Selkirk. At about the same time, they made a request for further funding of US $165,000. This was on the basis that bringing the liquidation to a conclusion was likely to be contentious. None of the three children made any further payment.

13. Shannon and Lynette accepted the 2014 Scheme; Selkirk did not, although the grounds of his objection were not then made clear.

14. There being again no unanimous agreement, the liquidators applied for directions by summons dated 11 February 2015. The summons sought a direction that the liquidators distribute the assets of the companies in accordance with the 2014 Scheme; but it also asked for an order, to take priority over the distribution, that the liquidators be authorised "should they feel it appropriate and necessary to do so" to sell all or any of the land owned by the companies and make cash or other adjustments to the 2014 Scheme to take account of the impact of any sale and to compensate for unequal funding provided by the three children. The rationale was explained in the ninth affidavit of Gwynn Hopkins as follows:

> "[57]. The liquidation estate currently has minimal cash on hand and none of the Shareholders have shown a willingness or ability to provide further funding. Further, upon resolution of the current dispute, it is currently intended that the estate's assets will be distributed in specie according to an agreed plan, meaning that it is likely that there will be no further substantive realisations into the Companies' estates. In such circumstances, it is essential for the liquidation estate to be properly funded to enable payment of

professional and government fees including potential stamp duty. In the absence of the willingness, or ability, of the Shareholders to guarantee that funding (both of the current amount sought, plus any further funds should they be required) will be available, such funds must necessarily come from the sale of the estate's assets.

[58]. There is also the problem that if the Shareholders are not able to contribute funding equally, this would necessitate further revisions to the 2014 Scheme to compensate the funding party.

[59]. The prospect for a funding related revision is anticipated in the 2014 Scheme and, given the difficulties documented above, the Liquidators wish to avail themselves of this option. Accordingly, in the event that this Honourable Court is minded to accede to the Liquidators' application to sanction the 2014 Scheme, the Liquidators seek an order allowing them to list for sale all of the plots that form the 2014 Scheme. Upon a successful sale of any one area resulting in sufficient funds for the liquidation estate, the remaining unsold plots will be delisted."

15. The liquidators' summons was dealt with by Mangatal J. The suggestion that the land might be put up for sale was strongly resisted by Shannon and Lynette. Initially, there was no material from Selkirk setting out his objections to the revised scheme of distribution; but following the making of an unless order he filed an affidavit on 25 June 2015 identifying his objections, which were primarily that JEC had ignored all or almost all of the development potential of the land. That caused the judge to direct that the liquidators' directions application be relisted as part heard.

16. On 28 July 2015, the liquidators made a further request for funding, this time in the sum of US$354,791.10. Selkirk's response was that he would contribute his share, and would consider providing additional funds if Shannon and Lynette could not or would not contribute. However, the position taken by Shannon and Lynette was that they no

longer wanted the land to be distributed in specie, and instead wanted it sold and the proceeds distributed. They explained their position in a letter dated 10 August 2015 from their attorneys to the liquidators, which contained the following statements:

> "Our clients have thus far supported a scheme that would enable the land to be distributed in specie, as they set out in their affidavits that were produced for the most recent hearing. However, having reflected upon the sums of money required to fund both the ongoing liquidation and litigation and the fact that [Selkirk] continues to dispute the liquidator's proposals with no end in sight to the current litigation, they have revised that position and are now of the view that the land in the estate should be sold and the net proceeds distributed equally between the three shareholders."

17. On 13 August 2015 the liquidators asked Selkirk for his response to the position adopted by Shannon and Lynette; but, despite some communications with Selkirk and his lawyers, no firm response was obtained by 22 December 2015. On that date the liquidators issued a summons seeking authority without further order and at any time to list for sale of all or any of the land owned by the companies, with power to sell to any party, and seeking consequential relief. This summons was to be heard on 28 January 2016.

18. On 18 January 2016 – ten days before the hearing date of the summons - Selkirk advanced a distribution plan (referred to in the judgment as “the Alternative Proposal”) of his own, supported by alternative valuations. The attitude of Shannon and Lynette to this proposal was expressed as follows in Lynette's fourth affidavit dated 21 January 2016:

> "3. I have considered the proposals put forward by Selkirk and I have also had the opportunity of discussing those proposals with Shannon. We are not in a position ourselves to determine whether

the expert valuations that Selkirk has obtained are accurate or whether the resulting scheme of land distribution he has created is equal and fair to all of us. To properly consider that expert evidence, we would need to instruct a further expert of our own. We would have to wait whilst that expert produced a further report, we would have to continue to retain our lawyers, and the Joint Official Liquidators would need to continue to be involved.

4. All of this would cause more delay and further deplete the estate and decrease the value of what will ultimately be left for us as beneficiaries. In the event that our expert does not agree with the valuations and distributions that Selkirk has put forward are fair, we would still be arguing over the split even after the additional delay and considerable expense of reviewing the latest proposals.

5. We have spent too many years and wasted too much of the estate already on instructing experts and paying professionals in the hope that we may be able to finally agree to how the land should be distributed. It was our father's intention that his children should benefit from his estate, not experts and insolvency professionals. We want this litigation to be brought to a close as soon as possible and we think that at this point the fairest and quickest way of doing that is for the land to be sold and for that money to be divided up fairly between us. This will also allow us to pay off the considerable fees that we already owe to the various professionals that have been working on this matter for us.

6. By allowing the Liquidators to put the land on the market for sale, we would not be depriving any of the shareholders of the right to buy any of the parcels from themselves. So, if Selkirk wants to purchase any of the land from the estate when it is placed for sale on the open market, he is free to do so at market value.

7. I therefore continue to support the sanction application that has been made by the Joint Official Liquidators."

The judge's order and reasons

19. On 9 April 2016 Mangatal J made the order now appealed against. The operative parts were, so far as relevant, in the following terms:

" IT IS ORDERED AND DIRECTED THAT:

1. The Liquidators be authorised without further order at any time to list for sale all (or any) of the parcels of the land owned by the Companies and thereafter:

   a. with the written consent and at a price to be agreed in writing by the majority of Lynette Watler, Shannon Panton and Robert Selkirk Watler III (the "Shareholders") of the Companies, to sell to any party (including, for the avoidance of doubt, to any of the Shareholders themselves) all (or any) of the parcels of the land owned by the Companies by private treaty without further order of the Court;

   b. in the event that the majority of the Shareholders do not provide their written consent as required above, within 30 days of a written request for that consent having been made by the Liquidators, the Liquidators shall be authorised to sell all (or any) of the parcels of the land owned by the Companies by public auction without further order of the Court;

   c. to pay, out of any proceeds of sale, the Court fees which were previously ordered to be deferred;

   d. to make such cash distributions to any of the Shareholders (as may be necessary) to repay any liquidation funding which may have been provided to date or which may be provided in due course (and which, for the avoidance of doubt, the Liquidators shall be authorised to accept); and

   e. subject to sub-paragraphs (c) and (d) above, to declare and pay to each of the Shareholders, on a pari passu basis, such interim and/or final dividends as the Liquidators, in their sole discretion, consider appropriate.

2. Paragraph 5 of the Order of 28 November 2008 shall be varied accordingly."

20. The judge's reasons for making this order were in summary as follows.

(1) The 2008 Order was not an ordinary consent order: it had been made in relation to winding-up proceedings. A winding-up order was a discretionary remedy, and was binding on all the world. Accordingly, notwithstanding that the shareholders had agreed to the making of the order, the court had had to be satisfied that it was a proper case for a winding-up order. Thus the order was "a manifestation of the Court's exercise of its adjudicatory powers".

(2) The 2008 Order had to be "viewed through the prism of liquidation." Although at some level it represented the agreement of the shareholders, it was nevertheless subject to the duties and powers of the liquidators. These powers, which included those then set out in section 109 of the Companies Law (2007 Revision), were designed to enable the liquidators to realise assets and distribute them among the creditors and shareholders in a speedy, inexpensive and effectual manner.

(3) Although the 2008 Order contemplated, as a consensual position between the shareholders of a solvent company, a distribution of the land in specie, it also expressly recognised that the liquidators might need to apply to the court for further or other directions if there was no unanimous agreement of the shareholders within defined time periods. In the absence of unanimous agreement to the scheme of distribution proposed by the liquidators, the liquidators were accordingly bound to come back to court. In that sense, there was no concluded agreement represented by the 2008 Order, and no room for estoppel.

(4) The order made by Foster J on 14 July 2009 had given the liquidators blanket authority to sell. Although that order was made ex parte, it was never set aside.

(5) The order made by Foster J on 6 March 2013 required a revised plan of distribution, if produced, or the original plan if no revised plan were produced, to be unanimously agreed, failing which the

liquidators were to apply for directions as to whether the revised scheme (or, if there was no revised scheme, the original scheme) should be carried into effect. However, nobody was now arguing that either of those schemes should be effected.

(6) The court was faced with a situation where, whatever the state of play in relation to valuations and schemes of distribution, it was plain that there would be no unanimity. Distribution in specie by unanimous agreement was now, as a result of the passage of time, a non-starter. It would be quite impractical for the court to insist on further valuations being carried out or acted on, and to do so would defeat the interests of efficiency, time and cost saving.

(7) The law concerning court sanction of a liquidator's powers, as set out in Smellie CJ's decision in *Re DD Growth Premium 2X Fund (In Official Liquidation)* [2015] 2 CILR 361 at [30], was that the decision was one for the court; and in making it the court must consider all the evidence, and consider whether the proposed course of action was in the best commercial interests of the company. That was prima facie reflected by the commercial judgment of the liquidator, who was usually in the best position to take an informed and objective view and whose views should be given considerable weight unless the evidence revealed substantial reasons for not doing so. In the case of a proposed compromise, the choice might be between the proposed deal and no deal at all. Applying that law to the facts, it was plain that the opinion of the liquidators should be given considerable weight. They had no other way of obtaining funding than by a sale of some of the land. Considering an alternative proposal would lead to further delay. There were no substantial reasons for not according significant weight to the liquidators' views. Although the shareholders had wanted to fulfil their father's desire that the land remain in the family, that had not been possible; and now even that point of unanimity no longer applied. The order proposed by the liquidators would allow Selkirk to bid for any land he wanted

to retain. It was plain that there was no realistic alternative to the course proposed by the liquidators. That course now seemed to be the most commercially prudent one to be adopted so as to cauterise any further loss, depletion, expense, cost and delay. It was time to mitigate and finally bring this long outstanding liquidation to completion upon a settled path.

(8) It did not matter significantly whether the relief sought by the liquidators was considered as a variation of the November 2008 Order, or as further directions under it, although the description "further directions" was perhaps most apt.

The appellant's contentions

21. Selkirk's grounds of appeal were in summary as follows:

(a) the judge failed to recognise that the 2008 Order was a final binding order incorporating a compromise which she had no power to vary, whether on the basis that some of the parties had changed their minds, or circumstances were different, or otherwise;

(b) the judge misconstrued the 2008 Order in concluding that it allowed her to substitute a cash distribution for the in specie distribution agreed by the parties and recorded in the 2008 Order;

(c) the judge was wrong to hold that the terms of the 2008 Order dealing with in specie distribution were subordinated to and liable to be altered in consequence of the fact that the 2008 Order was a winding up order and the liquidators had powers of sale; and

(d) the judge was wrong to hold that distribution in specie by unanimous agreement was no longer possible and that that was a sufficient change of circumstance to justify departure from the 2008 Order.

22. The central issue arising from these grounds of appeal, as summarised in Selkirk's skeleton argument, "is whether the judge below had any jurisdiction and grounds to make an order which overrides that

agreement between the three shareholders as to the basis on which the companies are to be liquidated and substitutes for it an altogether different basis for the liquidation".

23. In his effective and attractive submissions to us, Mr De La Rosa for Selkirk contended that the directions contemplated by paragraph 5 of the 2008 Order were, and were only, directions designed to resolve disputes about the implementation of the agreed in specie distribution. They were not intended to permit substitution of a different regime altogether. The order of Henderson J, the 2013 order of Foster J and the order of the judge made on 11 June 2015 all proceeded on that basis. The judge was wrong to treat the consent order as merely "some level of agreement" and, on the basis that the liquidators were directed to apply for further directions, to find that "in that sense there is no concluded agreement represented in the Consent Order". The further directions were to be sought for the purpose of implementing the agreed in specie distribution, and in particular for resolving any issue as to valuation of the companies' land. The liquidators did not contend below, and in fact disavowed, the liberty to apply as a means of enabling the court to vary or alter its original order. The liquidators' summons of 22 December 2015 was an illegitimate attempt to depart from the binding agreement embodied in the consent order.

24. Mr De La Rosa contended that the effect of a consent order was to bring to an end the underlying dispute and substitute new substantive rights and obligations between the parties. Both the consent order and the agreement on which it was founded were binding unless set aside, which could be done only in fresh proceedings and on grounds (such as incapacity, mistake, misrepresentation, duress and illegality) equivalent to those capable of vitiating an otherwise enforceable contract. Reference was made to *Foskett on Compromise*, and to *Pannone LLP v Aardvark Digital Ltd* [2011] 1 WLR 2275, a decision of

the English Court of Appeal. That case concerned the power to extend time for compliance with a consent order for the service of a pleading; but at paragraph [27] Tomlinson LJ contrasted a case management decision made at the instance of one party to which the other party made no objection with a genuine settlement of a substantive dispute as to the parties' rights, saying this:

> "The court was there [in *Weston v Dayman* [2008] 1 BCLC 250] being invited to interfere with a concluded settlement of substantive disputes. Assuming that there is a power so to do, where the settlement is embodied in an order of the court, it can rarely be appropriate for the court to intervene further than to the extent to which the contract can, by its own terms or pursuant to general contractual principles, be modified or discharged in the light of changed circumstances".

Objectively construed in accordance with ordinary principles, the 2008 Order did not contemplate any course other than an in specie distribution.

25. As to the liquidators' powers of sale, Mr De La Rosa submitted that the judge was wrong to hold that they could be exercised, not for purposes ancillary to the main original object of the winding up (equal in specie distribution by value), which prima facie in a solvent liquidation is the only proper purpose for which they could be exercised, but so as to supplant that object with a wholly different regime. It was true that the liquidators had powers capable of being used in a manner contrary to the shareholders' agreement; but they were not in fact intended to be so used. It was not possible to separate the nature of the liquidation from the basis on which the Company had been put into liquidation: this was a solvent liquidation designed to bring about an in specie distribution, and the liquidators were not entitled to ignore that fact and treat their undoubted powers otherwise than as ancillary to the achievement of such a distribution. There was no authority demonstrating that in a solvent liquidation a

liquidator has any authority to override the rights created by a valid agreement between shareholders for an in specie distribution. On the contrary, *In re Strathblaine Estates Ltd* [1948] Ch 228 was authority for the proposition that such an agreement constitutes the company trustee for the shareholders. The effect in a solvent liquidation was to constitute the company trustee of its assets for the shareholders and to subject the liquidator to fiduciary responsibilities in that regard. The relevant question was whether the liquidators were entitled to exercise powers of sale for the central purpose put forward, which was to depart from the original basis of distribution the shareholders had agreed and on the footing of which the liquidators were appointed. This was an issue of substantive legal rights, not a commercial judgment attracting the court's jurisdiction to sanction the exercise of liquidators' powers; and the principles on which sanction might ordinarily be given had no relevance to this case.

26. It was said that the judge was also wrong to hold that distribution in specie was "a non-starter" and that a subsequent change in circumstances was sufficient reason to depart from a consent order. The parties remained bound to complete the process envisaged by the consent order and the professed unwillingness of two parties to the agreement underlying the consent order to carry it out was not a ground for substituting a different process.

27. Finally, at a procedural level, Mr De La Rosa complained that the liquidators had made no attempt to grapple with Selkirk's objections to the JEC valuation or assess his alternative proposal; they had brought forward a new summons instead of complying with the judge's order to relist their direction summons, and had thereby deprived Selkirk of the opportunity to cross-examine that Foster J's 2013 order had intended him to have; they had made no adequate attempt to identify the methodology of the sale of the land, such as the reserve price at any auction; and they had spent more on the litigation

than it would have cost to investigate the alternative proposal or Selkirk's objections to the JEC valuation.

The respondents' contentions

28. Mr Moeran QC for the liquidators pointed out that paragraph 5 of the 2008 Order on its face permitted an application for directions other than such as were designed to bring about implementation of an in specie distribution. There was no express limit on the directions, and the 2008 Order did not in terms direct a distribution in specie. What the 2008 Order did make clear, however, was that, in the absence of unanimity, the liquidators were to seek directions. Whilst those might be directions designed to implement an in specie distribution, it must be possible for the liquidators to seek directions generally if the point came where it was impractical to complete the liquidation. That could be done either under paragraph 5 of the 2008 Order or under the general law applicable in a winding up. The liquidators had come up with a series of unsuccessful proposals, and it was now impractical to do anything other than sell the principal land. That was the liquidators' own view: they were not merely adopting the views of Shannon and Lynette. The conditions on which Selkirk's alternative proposal was put forward would require the liquidators to take sides with Selkirk instead of maintaining neutrality, and in any event failed to deal with the whole of the necessary funding. The liquidators were accordingly seeking the Court's sanction of their decision to sell, but it was the liquidators' view that was important. It was not possible to oust the jurisdiction of the court to supervise a liquidation, and the judge had correctly applied the correct principles as stated in *Re DD Growth Premium 2X Fund (In Official Liquidation)* [2015] 2 CILR 361.

29. Ms Peccarino for Shannon and Lynette adopted Mr Moeran QC's submissions. She did not pursue her respondents' notice, which had asserted a general jurisdiction to vary a consent order.

Discussion

30. There are in my judgment two main difficulties with Mr De La Rosa's arguments. First, as the judge emphasised, the 2008 Order was a winding up order as well as a consent order. That meant that it affected other people than just the persons whose consent led to its making. Those other people included the creditors of the Company (of which there were some, although the value of their debts is not disclosed by the material available to us), who had the right to have their debts paid from the assets of the Company; creditors of FSE and RBE if (as in fact happened) the liquidators chose to put those companies into voluntary liquidation; and the liquidators themselves, who had statutory duties in relation to the assets of the Company and the right to charge their proper costs and expenses against those assets. The rights and duties of all those persons took priority over the rights of the shareholders, who could at most direct what was to be done with the assets remaining after discharge of all liabilities. Mr De La Rosa accepted that, despite its literal meaning, paragraph 5 of the 2008 Order could not refer to all the assets of the Company and its subsidiaries, but merely to the net assets. By net assets in that context, however, must be meant the assets remaining after discharge of all proper liabilities of the liquidation; and there is nothing in the fact that the 2008 Order is a consent order that would prevent the liquidators from discharging those liabilities, or from seeking the court's assistance if there were difficulty in arriving at a position where all proper liabilities could be discharged. It was inherent in the mechanism adopted, namely a winding-up order, that (quite apart from existing liabilities) further liabilities would be incurred by the liquidators in dealing with existing liabilities, engaging a surveyor, considering and submitting the scheme of distribution, and if necessary applying for further directions. Any agreement for distribution was necessarily subject to discharge of those liabilities. It is true that, on the facts of this case, discharge of the liabilities could no doubt be achieved by a more limited exercise than a sale of all the

assets; but, given the existence of a right to realise assets for the purpose of discharging liabilities, it is a matter of judgment for the liquidators as to how best to achieve that end. It is also possible to be sceptical of the liquidators' position that their decision to sell everything was independent of the change of mind by Shannon and Lynette; but they had in fact first proposed marketing all the land in February 2015, before the change of mind, and the fact remains that there is no satisfactory proposal for funding their existing costs of the liquidation (the most that Selkirk has said being that he is prepared to consider providing the balance of funding not already agreed to by him). Although Mr De La Rosa asserted that a large part of the costs of the liquidation was the result of the liquidators' failure to prepare the two proposed schemes of distribution properly, he has not gone so far as to say that the liquidators are not entitled to their costs at all. In those circumstances, the situation is that there are outstanding liabilities of the liquidation which cannot be met otherwise than by a sale; and nothing in the consent order prevents exercise of the court's power to sanction the liquidators' proposal as to how those liabilities should be met.

31. The second main difficulty concerns the further directions contemplated by paragraph 5 of the 2008 Order. That paragraph identifies the circumstance in which the liquidators are to apply for further directions, but says nothing about what directions might then be given and provides no criteria for the resolution of any issues arising. Since the circumstance is the absence of unanimous agreement to a scheme the liquidators have themselves proposed, the contemplation of the parties must have been that the application for directions would take the form of a request by the liquidators for guidance as to how they should act. The intention was thus that the liquidators should be entitled to invoke the general supervisory jurisdiction of the court; and that in turn meant that the directions the court might give were at large. Mr De La Rosa argued that the purpose

of the directions was the resolution of obstacles to the scheme of in specie distribution put forward by the liquidators, but that states the position too narrowly: once that scheme had been rejected, it became an open question as to what should be done. Answering that question was a matter for the discretion of the court, guided but not bound by the views of the liquidators. Any exercise of that discretion could be challenged only on conventional grounds, namely that the judge had taken into account an immaterial consideration, had failed to take into account a material one, or had arrived at an irrational conclusion. There is no possibility of a challenge of that nature succeeding in this case. The judge was faced with a situation in which two schemes of distribution had been rejected by Selkirk; where his objections to the second of them could not be resolved without further time and expense; and where he had advanced a third proposed scheme, which itself could not be assessed without further expenditure of time and money by all parties. The judge had a choice to make between insisting on cross-examination of the JEC valuer and continuing with a view to trying to overcome Selkirk's objections, or calling a halt to the process; and for my part I do not see that she can be criticised for choosing the second of those courses.

32. The judge's order had the merit of providing an effective mechanism to ensure that Mr Watler's estate was at least distributed equally among the three children. It was also intended, as she remarked in her judgment, to preserve Selkirk's ability to acquire all or any of the principal land by purchasing it from the liquidators. In the sense that he has the possibility of obtaining as much of it as he wants, rather than being confined to what the scheme of distribution would give him, he may be said to be better off. However, as it is currently framed, it seems to me that the order does not achieve its intended objective. The reason is that paragraph 1.a of the judge's order of 9 April 2016 requires the written consent and agreement on price of a majority of the three children before there can be a sale to anybody, so it would in

principle be possible for Shannon and Lynette if they were so minded to prevent Selkirk (who appears now to be the only one of the three children interested in taking the land in specie) acquiring any of the land by private treaty and leave him to take his chance at auction. In my view, the order should be amended to allow Selkirk to apply to court if he wants to buy any of the principal land but cannot obtain the necessary consent or agreement to the price.

Disposition

33. For the reasons I have given, I would dismiss this appeal, subject only to amendment of the judge's order in the manner mentioned in the preceding paragraph.

RIX JA:

34. I agree.

MOSES JA:

35. I agree for the reasons given by Martin JA.