EASTERN CARIBBEAN SUPREME COURT

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

COMMERCIAL DIVISION

CLAIM NO. BVIHC(COM)2026/0136

BETWEEN:

GUANGZHOU LEYI INVESTMENT DEVELOPMENT CO., LTD.

Applicant

and

SZE MING LIMITED

Respondent

Appearances:

Mr. Jomokie Phillips, with him Ms. Emily Clegg for the Applicant

No appearance for the Respondent

2026: May 26,
June 22.

JUDGMENT

[1] **Wallbank J. (Ag.):** On 26th May 2026, I heard an application to appoint liquidators over a company incorporated in the Territory of the Virgin Islands ('BVI'), on account of the company's insolvency. The company did not oppose the application. I granted the application.

[2] I write this Judgment because in this matter I considered it necessary to depart from an approach, or rather, a change in this Court's approach, advocated for in a recent written judgment of this Court. As I will explain, the propounded change in this Court's approach seeks to follow the line taken by a statutory amendment made to the United Kingdom ('UK') Insolvency Act 1986 eleven years ago in 2015. However, in doing so, it would appear not to have been appreciated that the

material scheme of the UK Insolvency Act 1986, both pre- and post-amendment in 2015, is conceptually different from the scheme of the BVI Insolvency Act, 2003[1] ('BVI Insolvency Act').

[3] As only the Applicant, who was a petitioning creditor, appeared at this hearing, I did not have the benefit of argument from both sides. Consequently, my reasons for declining to take the approach urged upon me by the Applicant risk being the fruit of insufficiently complete consideration.

A. Factual summary

[4] The present matter represents a typical BVI offshore company liquidation, although the amount of the debt which triggered these proceedings, US$15.8 million, is on the relatively low side, and the relevant matrix of facts, so far as is presently known to the Court (this is an important qualifier, as will become apparent), is relatively simple and straight-forward.

[5] Very briefly stated, the present Applicant is the assignee of the rights and obligations of a company which, for convenience, can be referred to as 'Runbai', under a sales agreement between Runbai and another company which, for convenience, can be referred to as 'Jingyue'. It is not entirely clear when the sales agreement was signed, but it appears to have been in or around 2020. Jingyue is or was, for present purposes, the property developer of a commercial housing project in the People's Republic of China, involving the construction and sale of 39 four-bedroom villas. The aggregate sale price for all the villas together was approximately US$17.5 million. The agreed performance under the sales agreement was somewhat complicated. The detail is not immediately relevant. On 30th December 2023, Sze Ming Limited ('Sze Ming'), the present Respondent, entered into a guarantee agreement ('the Guarantee') with Runbai that Sze Ming would guarantee performance of Jingyue's obligations pursuant to the sales agreement. Jingyue defaulted upon its obligations under the sales agreement. Runbai and Jingyue negotiated a settlement, whereby they agreed that Jingyue would pay Runbai the sum of approximately US$15.8 million. Following assignment from Runbai to the Applicant of Runbai's rights and obligations under the sales agreement on 31st March 2025, a deed of confirmation was executed between the Applicant and Sze Ming, under which Sze Ming agreed *inter alia* that it would continue to guarantee Jingyue's performance of its obligations under the sales agreement to the Applicant as if the Applicant were an original party to the Guarantee. On 11th October 2025, the Applicant issued a demand to Sze Ming for payment of the outstanding sum

[1] Act 5 of 2003.

of US$15.8 million. After Sze Ming's initial silence, the Applicant sent a further demand, to which Sze Ming replied. Sze Ming acknowledged its liability and asked for understanding and indulgence, citing liquidity constraints. That was on 24th February 2026. The Applicant heard nothing further from Sze Ming. On 8th April 2026 the Applicant filed its present application for the appointment of liquidators over Sze Ming. Sze Ming remained silent, did not oppose the application and did not appear. No other interested parties appeared at the trial of this application.

[6] Sze Ming is a company incorporated in this jurisdiction pursuant to the BVI Business Companies Act, 2004[2] ('BCA'). It therefore falls to be wound up, for insolvency, under the BVI Insolvency Act.

[7] At this point, there remains much that is unknown to the Court. This is normal in BVI offshore company liquidations, because the insolvent company's business and legal relations take place overseas where the Court has no visibility.

[8] It is not apparent from the application evidence, nor documents:

(1) what type of relationship Sze Ming has or had with Jingyue; nor
(2) what, if any, corporate structure surrounds Sze Ming; nor
(3) who controls Sze Ming; nor
(4) what assets, if any, Sze Ming has, or (a) where, or (b) of what nature, or (c) of what value; nor
(5) whether there are other parties interested in Sze Ming or Jingyue, and if so, whether on a direct or indirect equity basis, or as lender(s), and if as lender, whether the lending is secured by charges; nor
(6) whether, at this point or imminently, insolvency proceedings are on foot in respect of Jingyue, or somewhere else in the Jingyue and/or Sze Ming corporate structure(s); nor
(7) whether there are likely to be any time or liquidity pressures which could militate against imposing a requirement for sanction.

[9] So far, the present application presents itself no differently from the majority of liquidation applications that come before this Court, both with respect to the type of factual situation and lack of information concerning the insolvent company.

[2] Act 16 of 2004.

B. The 'no sanction' submission

[10] But there was something new with this application. The Applicant submitted that no sanction from the Court should be required as a condition for the exercise of any of the liquidators' powers, in order to follow an *ex tempore* written decision of this Court, in the matter of **Jin Yao Holdings Ltd v Forever Winner International Ltd et al.**[3] dated 8th December 2025, by Justice Mithani. It did not treat, in detail, with what the BVI Insolvency Act provisions provide, nor with case law from this jurisdiction concerning sanction (nor applications to the Court for directions/approval). I will endeavour to supply the necessary elaboration in this judgment.

[11] In the past, applicants have also requested that no sanction should be required, based upon the facts of the matter in question, and the Court has granted some such requests. But this appears to be the first time, so far as I am aware, that an applicant has invoked purely legal authority as the basis for not imposing sanction requirements.

[12] In **Jin Yao**, Justice Mithani declined to make the exercise of certain of the liquidators' proposed powers conditional upon obtaining the Court's sanction. One of the parties there had urged the Court:

> "that the liquidators should require sanction to exercise their power to vote, sell or otherwise dispose of or deal with or otherwise exercise any rights in respect of the shares of [a corporate asset] held by the Company, in the absence of agreement between the shareholders of the Company".[4]

[13] These were the powers that Justice Mithani refused to make subject to Court sanction.

[14] Justice Mithani's reasoning is contained in paragraphs [58] to [67] of the written judgment. The present significance is that he went beyond dealing with the specific point in issue there (on which I offer no observations), going on to propound a view of principles of more general application.

[15] The nub of this more generally applicable view was that professional insolvency practitioners should be left to make what are essentially commercial or administrative decisions without recourse to the Court, because '**these are not decisions for the Court**'[5] (my emphasis added) to take, and the Court should decline to decide on matters in which there is no issue in dispute.

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[3] BVIHC (COM) 2023/0064, unreported, delivered 8th December 2025.
[4] Cf paragraph [11].
[5] At paragraph [65].

He considered that liquidators are already constrained to act in accordance with their legal duties and priorities, in a neutral and even-handed way.

[16] The following represents the most material propositions propounded by Mithani J. (Ag.):

> "[60] … liquidators should make decisions of this type ["essentially commercial decisions" see para [61]] without recourse to the Court …"
>
> "[63] **Even in the case of a liquidator seeking the Court's directions, the Court will not be willing to give them unless there is a genuine dilemma about how a liquidator should proceed**. …"
>
> **"[65] The point is that these are not decisions for the Court. …"**
>
> "[66] However, the type of scrutiny that Mr. Wang suggests, absent compelling reasons, would take us back to the old days of winding up under **court supervision in England and Wales, which was abolished when (so far as I am aware) the Insolvency Act 1986 came into force.**
>
> "[67] In this jurisdiction, the restrictions proposed by Mr. Wang would be entirely inconsistent with the role of liquidators in modern insolvency practice.…Whilst sanction applications do come before this Court, a significant number are unnecessary and are brought only because the liquidation order requires it. **Such applications consume the Court's time and resources unnecessarily, and the matters in question should, in most cases, be left to the professional judgment of the liquidators."** (Emphasis added.)

[17] Justice Mithani cited an English High Court decision, from 2016, **Re Longmeade Limited**[6] in support of his reasoning.

[18] With all due deference and respect, I apprehend that as a matter of BVI law, I am unable to follow **Jin Yao** in relation to the general principles there propounded.

[19] There are also additional reasons why I respectfully consider that no departure from the Court's developed practice is appropriate.

[20] **Jin Yao** appears to be the only published written decision of this Court on the approach to be adopted towards imposing Court sanction conditions on the exercise of liquidators' powers.

[21] A number of factors appear not to have featured in the analysis in **Jin Yao**, including the following:

[6] [2016] EWHC 356 (Ch).

(1) As recapitulated in our Court of Appeal decisions in **Phoenix Group Foundation et al. v Jackson et al.**[7] and **Showa Holdings Co., Ltd v Gronow and Ayres,**[8] there is a distinction in the functions of the Court when considering whether to grant sanction:

a. **where sanction is required** (in that case it is the Court, not the officeholder, that makes the decision which requires sanction; these types of decision ***are*** for the Court to take),

b. **where no sanction is required** and the officeholder seeks the Court's approval, it is the officeholder who takes the decision and the Court merely exercises a supervisory role to exclude 'perverse' decisions;

(2) The UK Insolvency Act 1986 did not 'abolish' the UK courts' supervision over company winding up, either in its original, 1986 version, or in its 2015 revision (as section 167(3) thereof expressly preserves and puts beyond doubt) – although the degree of the UK courts' involvement was ***reduced*** through the 2015 amendment;

(3) The statutory treatment of sanction requirements is fundamentally different between the UK and the BVI Insolvency Acts: the BVI Insolvency Act scheme confers a discretion upon the BVI Court by section 186(3) to impose, or not as the case may be, sanction requirements, whereas the UK Insolvency Act 1986 does not confer such a discretion (or, at least, not directly);

(4) The BVI did not undergo the legislative policy changes effected by the amendment to the UK Insolvency Act 1986 in 2015.

[22] I would respectfully add that the notion, postulated by Justice Mithani, that decisions in liquidations are not for the court to take but should be left to liquidators' professional judgment, may be correct as far as the United Kingdom is concerned, but **only because the United Kingdom legislature has decided that should be the case**, and **only since 2015** when the UK Insolvency Act 1986 was amended, by the legislature, to reflect this new position. That notion has **never been correct for the BVI**, because the BVI legislature has expressly abstained from decreeing such a position and has delegated it to the Court to decide, in each liquidation, which decisions should be left to liquidators, and which should be reserved to the Court. What may hold true, since 2015, in the UK cannot be applied here in the BVI without more when we have our own statutory scheme which adopts a different path. **In the BVI, the legislature has conferred a discretion on the Court to decide, in each case, whether the decision on the**

[7] BVIHCMAP2020/0019, unreported, delivered 17th November 2020.
[8] BVIHCMAP2020/0031, unreported, delivered 31st May 2021.

exercise of a liquidator's power should, or should not, be for the Court to take. In my respectful judgment (and this is where I start to differ fundamentally from the thoughts expressed in **Jin Yao**) it is not open to a Judge of this Court to pronounce a general proposition that such decisions are not for the Court to take, as the legislature has legislated the exact opposite.

[23] This analysis does not change through appeal to 'modern insolvency practice'. The BVI Insolvency Act was enacted in **2003**; it is a 'modern' piece of legislation which has progressively been amended, some six times since then. The BVI legislature has seen fit to revise certain provisions, but not the discretionary sanction regime.

C. Whether or not the Court should require sanction

[24] This present case is not the first time that the Court has turned its mind to the question whether or not the Court should impose sanction requirements upon the appointment of a liquidator, as the Court is empowered to do by section 186(3) of the BVI Insolvency Act. The BVI Insolvency Act was enacted to make provision for the liquidation of both on- and offshore companies. The BVI Commercial Court was established in 2009. A practice grew up for liquidation orders over BVI offshore companies to stipulate that (a) liquidators would be permitted to exercise most of their powers without the Court's sanction; but (b) the exercise of **four** of the liquidators' powers would require the Court's sanction.

[25] It is the liquidation of offshore companies that we are presently concerned with. The BVI Commercial Court's insolvency work consists almost entirely of offshore company liquidations.

[26] The precise origin of the BVI Commercial Court's approach to offshore company liquidation orders seems to have been lost. It appears to be commonly understood amongst BVI legal practitioners that it had been the first BVI Commercial Court Judge, Justice Edward Bannister QC (as he then was), who first adopted this approach.

[27] This practice has since generally been followed and applied by his successors on the BVI Commercial Court Bench, of which there have been around fifteen.

[28] Speaking for myself, I too applied the same approach during the periods, spanning 14 years from 2012 to present, that I have acted as BVI Commercial Court Judge.

[29] I can think of a number of cases where the Court decided to impose no sanction conditions. If there exists an impression that sanction conditions have been imposed as an unthinking routine, I disagree that this is so.

[30] The general practice, extending over hundreds, and possibly thousands, of cases, has been for certain powers of liquidators to be granted conditional upon Court sanction and others not, but with each case considered on a case-by-case basis.

[31] A standard draft order came into being, through judicial practice, not through formal codification. This, in itself, is not unusual. The same happened in relation to freezing orders. Cases of a certain type tend to give rise to similar issues and risks, such that there is no need to presume each order needs to be crafted from zero. The wheel, as it were, might need some adjustment from one case to another, but it does not need to be reinvented each time.

[32] The relevant part of the standard liquidation appointment order would typically provide as follows, or at least, closely along these lines (as I ordered in the present case):

> "3. The Liquidators shall have all the powers necessary to carry out the functions and duties of a liquidator under the Act in the British Virgin Islands or elsewhere, and to exercise the powers conferred on them under Schedule 2 to the Act, including the following:
>
> (a) Power to pay any class of creditors in full.
>
> (b) Power to make a compromise or arrangement with creditors or persons claiming to be creditors, or having or alleging that they have any claim against the Company, whether present or future, certain or contingent, ascertained or not.
>
> (c) Power to compromise, on such terms as may be agreed:
>
> (i) calls and liabilities to calls, debts and liabilities capable of resulting in debts, and claims, whether present or future, certain or contingent, ascertained or not, subsisting or supposed to subsist between the Company and any person; and
>
> (ii) questions in any way relating to or affecting the assets or the liquidation of the Company;
>
> and take security for the discharge of any such call, debt, liability or claim and give a complete discharge in respect of it.
>
> (d) Power to commence, continue, discontinue or defend any action or other legal proceedings in the name and on behalf of the Company.
>
> (e) Power to carry on the business of the Company so far as may be necessary for its beneficial liquidation.
>
> (f) Power to sell or otherwise dispose of property of the Company.
>
> (g) Power to do all acts and execute, in the same and on behalf of the Company, any deeds, receipts or other document.
>
> (h) Power to use the Company's seal.

(i) Power to prove, rank and claim in the bankruptcy, liquidation, insolvency or sequestration of any member or past member for any balance against their estate, and to receive dividends, in the bankruptcy, liquidation, insolvency, sequestration or in respect of that balance, as a separate debt due from the bankrupt or insolvent, and rateably with the other separate creditors.

(j) Power to draw, accept, make and endorse any bill of exchange or promissory note in the name and on behalf of the Company with the same effect with respect to the Company's liability as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the Company in the course of its business.

(k) Power to borrow money, whether on the security of the assets of the Company or otherwise.

(l) Power to take out in their official names letters of administration to any deceased member or past member or debtor, and to do any other act necessary for obtaining payment of any money due from a member of past member or debtor or their estate, that cannot conveniently be done in the name of the Company. For the purpose of enabling the Liquidators to take out letters of administration or do any other act under this paragraph, to be due to the Liquidators themselves.

(m) Power to call meetings of creditors or members for:

(i) the purpose of informing creditors or members concerning the progress of or matters arising in the liquidation;

(ii) the purpose of ascertaining the views of creditors or members on any matter arising in the liquidation; or

(iii) such other purpose connected with the liquidation as the Liquidators consider fit.

(n) Power to appoint a solicitor, accountant or other professionally qualified person in the British Virgin Islands or elsewhere to assist the Liquidators in the performance of their duties at such hourly rates as agreed between the Liquidators and those persons from time to time.

(o) Power to appoint an agent in the British Virgin Islands or elsewhere to do any business that the Liquidators are unable to do themselves, or which can be more conveniently done by an agent at such hourly rates as agreed between the Liquidators and those persons from time to time.

4. **The powers of the Liquidators listed at paragraphs 3(a) to 3(d) shall only be exercisable with the sanction of the Court and the powers of the Liquidators listed at paragraphs 3(e) to 3(o) shall be exercisable without the sanction of the Court**." (Emphasis added.)

[33] We can see here that the four powers requiring sanction are to all intents and purposes the same as the three powers contained in Part I of Schedule 4 to the UK Insolvency Act, together with the first of the two powers contained in Part 2 of that Schedule 4.

[34] The second of those Part 2, Schedule 4 powers (power to carry on the business of the company) is not made conditional upon sanction. This differs from the UK Insolvency Act 1986 position, prior to its revision, where the exercise of all five powers set out in Parts I and II of Schedule 4 were statutorily conditional upon sanction. This difference makes sense in the BVI offshore context, where BVI companies are generally holding companies for shares in other companies – liquidators would generally not immediately shut down all the activities of the BVI company, including the exercise of its shareholding rights, as to do so could unwittingly destroy or damage value at a different level in the group structure, and thereby, indirectly, the value of the company in liquidation itself. A reasonably thorough reconnaissance of the group's structure, its assets, possible means of realizing them, commercial activities and sources and repositories of crucial information is normally carried out before the business of the company is halted. This is different from onshore liquidations of operating companies, where it is quite normal for liquidators to lay off a company's employees and cease commercial operations immediately the liquidators take office.

[35] The rest of the powers, which do not require sanction, are to all intents and purposes the same in the BVI as in the UK under the Insolvency Act 1986. Under the UK Insolvency Act these are set out in Part III of Schedule 4.

[36] The powers for which liquidators would require sanction can be classed as decisions of a particularly significant or momentous nature for the conduct of the liquidation and/or of a legal nature. Certainly, exercise of the other powers ***could*** also have very significant or 'momentous' consequences, but these four identified in the BVI standard order are inherently momentous.

[37] In the case at bar, I declined to follow the general approach propounded in **Jin Yao** and I made the appointment order in the standard terms, out of prudence.

[38] As we have seen, the standard terms empower the liquidators to operate in this liquidation mostly without requiring Court sanction. But Court sanction is required for the four particularly significant or momentous acts that the liquidators will or might take to administer justice to and between interested parties as Officers of this Court. The requirement for sanction is for the protection of the liquidators and for the creditors/contributories. By analogy, before setting off on a car journey in the dark across into unknown territory, putting on seatbelts is generally considered advisable, however good, experienced and confident the driver.

[39] The requirement for sanction has nothing to do with the Court, or Judges of the Court, knowing how to conduct liquidations better than liquidators; of course, that is not so. All liquidations in the BVI Commercial Court are conducted by insolvency professionals, who are specialized and almost invariably extremely experienced in this role.

[40] The main purpose of the requirement for sanction is to provide the Court's officers with a very strong protection mechanism, and, as we will also see, other interested parties such as creditors and contributories with a broad-ranging right to be heard on an application for required sanction. This protection for Court appointed officeholders is unique to them; it does not extend (in general) to other, often-called 'officeholders', such as trustees or contractually appointed receivers.

[41] The protection for Court appointed officeholders is, on the terms of the standard order, made to balance protection with fluidity. It would (of course) be undesirable for officeholders to wish to conduct all, or most of their work, cowering under the protective shield of the Court. Equally, a requirement to apply for sanction represents a certain burden, in terms of time and cost, and care should be taken by the Court to prevent this becoming an impediment.

D. Reasons for declining to follow the Jin Yao approach

[42] I made the standard order for the following reasons.

[43] These can be broken down into general reasons and reasons specific to this case.

1. BVI Insolvency Act regime is different from English Insolvency Act

[44] As a starting point, I respectfully disagree with Justice Mithani on the assistance to be derived from **Re Longmeade Limited**.[9] Its context was markedly different.

[45] **Longmeade** was an English High Court, Chancery Division, case. Normally, of course, such decisions are treated by our courts as useful guidance, although not binding upon this Court. The judgment is a clearly and well-reasoned decision of Snowden J. as he then was (in 2015, before his elevation to the English Court of Appeal). But, as is apparent from the law report, Snowden J. did not hear argument from both sides, because only the applicants (the liquidators in question) appeared in court to make submissions.

[46] **Longmeade** concerned an application for the court's directions, not for required sanction, by English court appointed liquidators over a company in the Lehman Brothers group, following the

[9] [2016] EWHC 356 (Ch).

well-documented collapse of that United States ('US') investment banking firm. They did so pursuant to section 168(3) of the English Insolvency Act 1986. Court sanction was not required. The liquidators had identified a potentially lucrative, US$26 million claim against the British Government's Secretary of State for Business, Innovation and Skills, arising out of a failure to file US tax and Office of Foreign Assets Control (OFAC) forms. They had obtained legal advice, and a litigation funder (Manolete Partners plc) willing to finance the claim with zero risk to the liquidation estate, in return for a share of the proceeds. Over 99%, by value, of the creditors opposed the bringing of this claim. Some of them, alternatively opposed using that particular litigation funder, or a litigation funder at all. The liquidation was a high value one, concerning upwards of US$ 130 million, it so appears from the judgment. So the liquidators found themselves in a dilemma – should they follow the wishes of the majority of creditors (conscious that they had a legal duty to take the creditors' views into account, and, ordinarily, being guided by their wishes) and not pursue the claim, or should they proceed with it, on the basis that there was no financial downside to doing so, only a potentially large upside for the creditors. Having heard Counsel for the liquidators, Snowden J. gave them directions, stating as follows:[10]

> "As regards the decision to commence litigation, although it is not for the court to take that decision for the Liquidators, the circumstances of this case are highly unusual and I think that some reassurance for the Liquidators is appropriate. In my view, if there remain one or more creditors, even for comparatively small amounts, who would lose the opportunity for a materially increased distribution if the Claim were not to be pursued, then on the basis of counsel's advice and the other material placed before me which demonstrates that the majority of creditors are pursuing their own agendas, I think that a decision by the Liquidators that Longmeade should pursue the Claim at no financial risk with the assistance of funding from Manolete would be within the range of decisions that a reasonable liquidator could properly take."

[47] What Snowden J. was doing here was to:

(1) Acknowledge that the circumstances were 'highly unusual';

(2) Recognise that 'some reassurance' for the liquidators was appropriate;

(3) Limit himself to opining, judicially, that a decision to pursue the claim would be within the range of decisions a reasonable liquidator could properly take – i.e. leaving the liquidators free to decide the matter and not taking it instead of the liquidators.

[48] In legal terms, what Snowden J. was doing was to adopt his thinking in **Nortel Networks UK Limited**,[11] (a judgment he rendered shortly after **Longmeade**) since this was a **Nortel** type

[10] At paragraph 71.

[11] [2016] EWHC 2769 (Ch), at paragraph 50 (Snowden J.)

situation, as opposed to following **Re Greenhaven Motors Ltd**,[12] because this was not a **Greenhaven** type situation. We will come back to these two seminal cases below.

[49] It warrants repeating, at this point, that the *ratio* of **Longmeade** did not concern an application for sanction, but for directions. This distinction is important, as we will also see. Snowden J. did allude to the development of English insolvency law on sanction to lay out the background concerning greater English liquidators' autonomy from the court. That background fed through into his decision to leave the actual decision in question to the discretion of the liquidators, with the reassurance that if they decided in a particular way, in his (i.e. the court's) opinion, that would be a reasonable one. So, in that sense, Snowden J.'s observations on the English development of law on sanction were not *obiter*.

[50] Snowden J. pointed out[13] in **Longmeade** that in the UK Insolvency Act 1986, section 167(1) had originally provided that a liquidator would need the court's sanction, or that of the 'liquidation committee' (i.e. the creditor's committee), if there was one, to exercise certain prescribed powers, which, materially there, included the '[p]ower to bring or defend any action or other legal proceeding in the name and on behalf of the company'. He observed[14] that as from **26th May 2015**, that position had been altered, by the Small Business, Enterprise and Employment Act 2015 ('SBEE 2015'). The effect of this was to remove the need for sanction. Snowden J. explained[15] further:

> "58 The Explanatory Notes to the relevant provisions of the SBEE 2015 explained the thinking behind the amendment as follows:
>
> > 716. The amendment gives liquidators the ability to exercise any of the powers contained in Schedule 4 without the need to obtain sanction (approval) of either the court or a creditors committee (or where there is none, the Secretary of State or a meeting of creditors).
> >
> > 717.Removing the requirement to obtain sanction brings the provisions for liquidations into line with administration, in that administrators do not need sanction for any of the acts, which if undertaken by a liquidator would require sanction.
>
> 59 The Explanatory Notes to the Bill had included a further paragraph that was omitted from the Explanatory Notes to the 2015 Act itself: As regulated professionals, insolvency practitioners acting as liquidators are expected to act in the interests of creditors and should not undertake actions that are likely to have a negative financial impact on the estate. Such conduct may give rise to disciplinary concerns which may be addressed

[12] [1999] EWCA Civ 3046, [1999] 1 BCLC 635.
[13] At paragraph 43 and 44.
[14] At paragraph 42.
[15] At paragraphs 58 and 59.

> through the regulatory system. The requirement therefore imposes a burden which the Government considers adds no practical value to the conduct of a liquidation."

[51] The UK Insolvency Act, with its **statutory requirement** for sanction for the exercise of certain liquidators' powers was dated **1986**. The BVI Insolvency Act, with **no statutory requirement** for sanction, **but leaving this up to the Court's discretion**, was dated **2003**. The UK amendment, by virtue of SBEE 2015, introducing **no requirement for sanction at all in the UK**, was in **2015**. We see through this timeline that the BVI, in recent material times, has always had a different sanction regime from that applicable in England. The BVI has not followed England's scheme. The English position was more extreme than the BVI in 1986, and just as extreme, but at the opposite end of the spectrum, after the 2015 amendment. The BVI position has stayed constant, in the middle. The UK machine had and has a statutorily pre-set sanction position. The BVI machine is not pre-set; it has an adjustable sanction mechanism. It cannot be said in the abstract that one is 'better' than the other: they are adapted to different circumstantial contexts.

[52] The BVI Government did not adopt the UK Government 2015 policy change. As we will come to in a moment, there has been no reason to do so. We see in paragraph 58 of **Longmeade** that the explanation for the change is given, that it was to bring the position concerning liquidators' powers into line with those of administrators. It is to be recalled that the BVI Insolvency Act makes provision for company administration in Part III. At section 90(2) administrators would also have very similar powers to those of liquidators, and, pointedly, Part III contains no provision similar to that found at section 186(3) that 'The Court may provide that certain powers may only be exercised with the sanction of the Court', i.e. administrators' powers in the BVI would be pre-set to require no sanction. But, and it is a big 'but', **<u>Part III of IA 2003 is not yet in force</u>**. Consequently, in the BVI there is presently no discrepancy between the position of liquidators' powers and those of administrators – because we do not at present have an administration regime.

2. Protection for liquidators and creditors/contributories

[53] It would be remiss of me not to mention that, as Snowden J. points out at paragraph 62 in **Longmeade:**

> "So, for example, in *In re T & D Industries plc* [2000] 1 WLR 646, 657, Neuberger J commented that a person appointed to act as an administrator may be called upon to make important and urgent decisions. He has a responsible and potentially demanding role. Commercial and administrative decisions are for him, and the court is not there to act as a sort of bomb shelter for him."

[54] In the UK, the bringing of liquidators' powers into line with the no-sanction powers of administrators implies that the same logic applies to liquidators; that is to say, commercial and administrative decisions are for a liquidator, not the court, to take and a court should not be regarded as 'a sort of bomb shelter' for liquidators. We have of course seen that the BVI legislature does not oppose the use by liquidators of the Court as a 'bomb shelter' in the way the UK legislature has done since 2015.

[55] Using verbal imagery can be useful to get a point across, but doing so carries a risk of blurring important nuances.

[56] 'Bomb shelter' obviously implies some kind of protective shield. But we need to ask ourselves how this protection works. In other words, how protection is afforded by law to BVI liquidators?

[57] An officeholder (such as a liquidator, Court appointed receiver, or (elsewhere, not yet in the BVI) an administrator) clearly makes 'commercial and administrative decisions'. Such an officeholder is accorded, by law, great latitude. It is well established that, following the English Court of Appeal decision in **Re Edennote Ltd***:*[16]

(1) The court's powers to set aside an act of an office holder is to be exercised sparingly;[17]

(2) "…(fraud and bad faith apart) …the court will not interfere unless the trustee is doing that which is so utterly unreasonably and absurd that no reasonable man would so act";[18] and

(3) "it is only in very exceptional circumstances that the court will interfere with the exercise by a liquidator of his discretion to do an act within his power as a liquidator of an insolvent company"[19]

[58] This has been called 'a formidable test'.[20] It has also become known as the 'perversity test'.

[59] It is well settled that the perversity test, as propounded in **Re Edennote Ltd**,[21] has been approved and applied in this jurisdiction: see e.g. **Showa Holdings Co., Ltd v Gronow and Ayres.**[22]

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[16] [1995] 2 BCLC 248.
[17] [1995] 2 BCLC 248 at *256 e-f (*Sir John Vinelott).
[18] Ditto and following Jessel MR in *Re Peters ex p Lloyd (1882) 47 LT 64.*
[19] [1995] 2 BCLC 248 at *264g* Sir John Vinelott.
[20] In re Edengate Homes (Butley Hall) Limited in liquidation [2021] EWHC 2970 (Ch) paragraph 44 (HHJ Halliwell).
[21] [1995] 2 BCLC 248.
[22] BVIHCMAP2020/0031, unreported, delivered 31st May 2021.

[60] The English position, after the amendment to the English Insolvency Act by SBEE 2015, is that the protection afforded by the perversity test suffices.

[61] But that does not mean that the English court has no further involvement. Section 167 of the UK Insolvency Act 1986 provides:

> "The exercise by the liquidator in a winding up by the court of the powers conferred by this section is subject to the control of the court, and any creditor or contributory may apply to the court with respect to any exercise or proposed exercise of any of those powers."

[62] As is clear from the English High Court, Chancery Division, decision in **Nortel**, it remains open to an officeholder to apply to the English court for directions or approval for a decision to be taken by the officeholder, where there is 'particular reason' for doing so[23] such as (i.e. by way of example only), where the decision is 'particularly momentous'[24] in the factual context of the matter.[25] This approach has been adopted in this jurisdiction by our Court of Appeal's decision in **Phoenix**[26] where it acknowledged that an office holder can apply, out of prudence, where there is a particular reason such as a momentous decision in a complex situation.[27] In passing, I note that **Phoenix** did not impose a more exacting access requirement that 'the Court will not be willing to give [directions] unless there is a genuine dilemma about how a liquidator should proceed' as postulated by Justice Mithani at paragraph [63] in **Jin Yao**. **Phoenix** is binding upon this Court. This Court's decision in **Jin Yao** appears to have been *per incuriam* of **Phoenix**. On this point, **Jin Yao** appears to propound an over-exacting hurdle, with the correct access qualification being some kind of 'particular reason', such as the momentousness or particular significance of the decision in question, and prudence to obtain the Court's directions or approval, viewed in the overall context of the matter. There is, furthermore, nothing in **Phoenix** which denies access to the Court where an officeholder's decision can be described as 'commercial' or 'administrative', as long as the 'some reason' test is satisfied and prudence reasonably justifies it.

[23] [2016] EWHC 2769 (Ch) at paragraphs 45 and 46 (Snowden J.).
[24] [2016] EWHC 2769 (Ch) at paragraph 46 (Snowden J.).
[25] See [2016] EWHC 2769 (Ch) at paragraph 47 (Snowden J.).
[26] Phoenix Group Foundation et al. v Jackson et al. BVIHCMAP2020/0019, unreported, delivered 17th November 2020.
[27] See, e.g. paragraphs [45] to [48] of Phoenix.

[63] Moreover, in section 168 of the UK Insolvency Act:

> "(3) The liquidator may apply to the court (in the prescribed manner) for directions in relation to any particular matter arising in the winding up.".

[64] The BVI Insolvency Act contains a similar provision at section 186(5):

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

[65] We can see here that under BVI law, liquidators have the protection of the perversity test and, further, the protection of having express power to apply to the Court for directions (and thereby to be 'clothed with the blanket of immunity' – on which more shortly), and yet further that BVI law provides an extra, third, layer of protection, in that section 186(3) additionally provides that 'The Court may provide that certain powers may only be exercised with the sanction of the Court.'

[66] But we need to look even more closely at how the protection system works.

[67] Upon an application for directions, the court's 'approval [for the step, or proposed step] will prevent subsequent challenge': **Nortel Networks UK Limited.**[28] **Nortel** is an English High Court case which has been adopted and followed in this jurisdiction in, e.g**. Phoenix Group Foundation et al. v Jackson et al.**[29] In **Phoenix**, our Court of Appeal explained[30] that '[t]he effect of such an order is to clothe the office holder with the blanket of immunity from being sued by dissatisfied creditors or contributories'.

[68] The Court of Appeal likewise endorsed **Nortel** in **Showa Holdings Co., Ltd v Gronow and Ayres**[31] (not a liquidation but a receivership case). In **Showa**,[32] our Court of Appeal stated:

> "…it is clear that based on **Re Nortel**, as applied in **Phoenix**, the court's role is therefore a very limited one of supervisory oversight, based on the perversity test".

[69] What we have here (as explained at paragraph [42] in **Phoenix**) is that ***where liquidators have a power that they can exercise without sanction***, and faced with 'very significant or

[28] [2016] EWHC 2769 (Ch), at paragraph 50 (Snowden J.)
[29] BVIHCMAP2020/0019, unreported, delivered 17th November 2020.
[30] At paragraph [42].
[31] BVIHCMAP2020/0031, unreported, delivered 31st May 2021 at paragraph [67].
[32] At paragraph [69].

momentous' decisions during the course of a liquidation, 'in relation to which the office holders consider it prudent to obtain the approval or sanction of the court of their decision, before proceeding with its implementation', **<u>then the Court does not assume any part in taking the decision, but applies its supervisory oversight</u>** to determine whether or not the liquidators' proposed course of action is, or is not, 'perverse' (i.e. the Court carries out what has come to be referred to as the '**Nortel** test' – which we do not need to describe in detail here). If determined not to be perverse, the liquidators become 'clothed with the blanket of immunity' from subsequent challenge.

[70] The corollary is that if the liquidators do not seek approval or sanction but merely proceed on the basis that they have the power to take the step in question, they will not be 'clothed with the blanket of immunity' and their decision remains open to be challenged, albeit, under English and BVI law, for 'perversity'.

[71] As explained in **Phoenix**[33] the position is different where officeholders, including liquidators, require sanction (be it of the court or of a creditors' committee). In such a case the **Nortel** test does not apply. Instead, the Court is to adopt the approach taken in the English Court of Appeal case of **Re Greenhaven Motors Ltd.**[34]

[72] As the Court of Appeal explained in **Phoenix,**[35] '…in **Re Greenhaven Motors**, the approach of the court is more far-ranging, and the wishes and interest of creditors and contributories of even more significance'. The task and role of the court was described as follows in **Re Greenhaven Motors:**

> "**In deciding whether or not to sanction the exercise of a power under 167(1)(a) of the Insolvency Act 1986, the court may have regard to the wishes of the creditors and contributories**, as proved to it by evidence – see section 175 of the Insolvency Act. The court may, **if it thinks fit**, direct that a meeting be called for that purpose. In my view **it is plain that a creditor or contributory of a company is entitled to be heard on an application by the liquidator under section 167(1)(a)**. I do not understand that to be in dispute. … **At the end of the day it is a matter for the discretion of the court whether or not to authorise or sanction** the compromise – see <u>Bank of Credit and Commerce International SA (No 2)</u> [1992] BCC 715 at page 735H. **The court** may, and usually will, take into account the views of someone claiming to be a creditor or contributory, but it **is not bound by those views**. If the claim appears thin, or the claimant can be seen to have no real interest in the assets having regard to prior claims,

[33] At paragraphs [42], [56] to [60].
[34] [1999] EWCA Civ 3046, [1999] 1 BCLC 635.
[35] At paragraph [57].

> his views may carry little weight. I would think it inappropriate for the court to embark, in the context of application under section 167(1)(a) of the Act, on a detailed examination of the question whether a person wishing to be heard is indeed a creditor or a contributory. The circumstances in the present case demonstrate that such examination is likely to prove inconclusive. I think it is sufficient that the court should be satisfied that the claim is made bona fide and it is not plainly misconceived. If the claimant satisfies that test, then it seems to me that he should be heard. **It remains a matter for the court what weight should be given to his wishes**.
>
> **The decision whether or not to sanction the exercise of a power which falls within Part I or Part II of schedule 4 of the Act is a decision for the court** or for the liquidation committee. **It is not a decision which the liquidator can take**. If the exercise of the power is sanctioned, the liquidator, in the absence of a direction from the court, can decide whether or not actually to exercise it. The court may think it sensible in an appropriate case to leave that decision to him. That is a different matter. It is because the decision whether or not to sanction the exercise of the power is a **decision which is not entrusted to the liquidator** that it is wrong in principle for the court to approach its task on the basis that the liquidator's wish to exercise the power should prevail unless it is satisfied that the liquidator is not acting bona fide or that he is acting in a way in which no reasonable liquidator should act."

[73] What we see here is that where a liquidator requires Court sanction in order to exercise any of his powers, the Court's task is not to decide upon the perversity of the proposed step. The Court's task is, itself, to take the decision whether or not to approve the step.

[74] This has a logical and necessary consequence. <u>**The liquidator has no liability whatsoever for taking the decision, because he did not take it and it was not his to take**</u>. The liquidator is not 'clothed by the blanket of immunity' here; his decision is not protected by any 'blanket', quite simply because there is no decision of his to protect. There is no decision of his that can be challenged. Moving the responsibility for a decision from the liquidator to the Court takes the liquidator out of the firing line altogether. Protection for a liquidator does not get stronger than that.

[75] An observer may grumble here: 'that's not fair on the creditors and contributories, as it leaves them with no possible recourse against the liquidator for that decision'. That superficial view is mistaken. As we have just seen, creditors and contributories ordinarily have a right to be heard by the court on an application for sanction, which is (ordinarily) to say, before the court takes the decision. That places them in a position to influence the decision. Otherwise, all they could do is challenge it after the event, when the 'perversity' test presents the creditors and contributories

with a high obstacle.[36] To be clear, creditors and contributories can challenge an officeholder's decision ***after*** the decision has been taken, pursuant to section 273 of the BVI Insolvency Act, if they can show that they are 'persons aggrieved' thereby. But, where sanction is required, creditors and contributories have a far greater opportunity to oppose a decision, and indeed before it is taken, to prevent any prejudice to them occurring. The strong protection for liquidators is balanced by the (ordinarily) far greater opportunity for creditors and contributories to be heard before the strong protection is afforded to the liquidator.

[76] So, not only does a requirement for sanction give complete protection for a decision to the liquidator, it also (ordinarily) provides creditors and contributories with an opportunity to be heard and to influence the decision before it is taken.

[77] A requirement for sanction thus provides superior protection for liquidators and greater procedural fairness for creditors and contributories than where sanction is not required.

[78] It can be seen from the overview given above that the BVI's statutory scheme has a different focus from that prevailing under the amended UK Insolvency Act 1986. Under the BVI regime, the BVI Court has discretion to impose sanction requirements. It can thereby adjust the degree of protection afforded to liquidators, and also, extremely importantly, the degree of protection afforded to creditors and contributories by affording them the right to be heard on a sanctions application. These benefits are not merely accidental. They are built into the very architecture of the BVI Insolvency Act, in the specific context of a jurisdiction which has a far greater offshore 'population' of legal persons than onshore.

[79] I therefore respectfully disagree with Justice Mithani that the BVI sanction regime is comparable to the scheme in the UK, and that the BVI can and should follow the UK approach, which is what his perspective distils down to. They are radically different regimes, and their country contexts are also radically different.

[80] We can also see that, in short, our BVI sanction regime provides:

(1) stronger protection for liquidators than under UK law; and

(2) legally entrenched rights for creditors and contributories (as a general rule) to make representations to the **Court** (i.e. not just to the liquidators) **before** sanction is granted,

[36] See Stanford v Akers et al. BVIHCMAP2017/0019, unreported, delivered 12th July 2018 at paragraph [82], [83].

without being at the formidable disadvantage of having to try to overturn a liquidator's decision **after the event** based upon the 'perversity' test.

3. The developed practice.

[81] As we have seen, the BVI Court has developed the approach of requiring sanction for four types of particularly significant or momentous decisions, whilst not requiring sanction for other commercial or administrative decisions.

[82] This approach has become a feature of the legal, corporate and insolvency landscape in the BVI.

[83] I am not aware of any industry professional view that the international legal and litigation environment in which BVI Commercial Court liquidators operate has become any safer, such that less protection might become in order. If anything, the reverse would seem to be the case. Office holders' interim reports to the Court are replete with accounts that their work is met with 'lack of cooperation' and 'obstruction'. These anodyne terms, reported in a matter-of-fact manner, might suggest that office holders are met with polite disagreement from gentlemanly industrialists who have simply met with commercial misfortune and who wish to have a further opportunity to improve their situation without the interference of officeholders. The frequent reality is completely different. Those who own or control businesses in liquidation or receivership stop at nothing to protect their empires. They sabotage and thwart the officeholders' work. They personalize the matter into a rabid campaign of revenge and come up with ever more unpleasant ways to intimidate them. They embroil officeholders, sometimes for years, in cleverly conceived 'lawfare'. There is a marked increase in 'deep pocket' litigation, including against officeholders, where disaffected stakeholders bring legal proceedings against the officeholders, including in foreign jurisdictions where the 'formidable obstacle' of the perversity test does not apply, with an obviously opportunistic goal of extracting a multi-million-dollar settlement out of the officeholder's professional indemnity insurers. For such opponents of officeholders, the sole principle is their own personal financial gain; for them absolutely anything and everything goes to achieve and protect it. That is the unforgiving and harsh environment in which BVI officeholders operate on a daily basis. This is far removed from the liquidation scene in onshore jurisdictions where the majority of liquidations are of businesses which simply failed to remain afloat in increasingly difficult economic and regulatory conditions.

[84] I am also not aware of any industry professional view that applying for sanction in the BVI is generally disproportionately burdensome in terms of cost or diversion of time from other

liquidation work. From my observation over the past 14 years, the cost of applying for sanctions mostly represents a small fraction of the liquidators' fees and professional expenses incurred in liquidating a company.

[85] Moreover, I am not aware of any industry professional view that reasons of speed, cost or Court decision reliability militate in favour of dropping sanction requirements.

[86] That said, circumstances may change. There are ways in which industry professional views can be made known to the Court. In addition to the normal evidence procedures, such updates and professional representations can be communicated through, for example, the Commercial Court Users' Committee.

[87] In my respectful opinion, where a problem requires a solution in the interests of justice to the parties and interested parties involved, alteration of the Court's practice may be desirable. Where there is no, or no significant problem, change for the sake of making a slight improvement can backfire badly by removing one of the elements of the package that has made the BVI offshore industry attractive and successful. We cannot know what, if any, adverse effects might follow for the cost of doing business in the BVI (including the level of office holder fees to cover eventual additional professional indemnity insurance overheads and increased reliance on protective KC opinions), stability of the BVI offshore industry and its reputation.

[88] The developed practice also confers a number of additional benefits, such as the following:

(1) Preventing problems and disputes before they occur, rather than having to rectify matters after the event, when interested parties may already have suffered significant, perhaps irreversible, prejudice.

(2) The requirement for sanction permits an officeholder to seek the Court's approval without needing to justify to stakeholders the cost of making an application. This is important, in a context where interested parties frequently oppose, for purely self-interested reasons, the incurring of costs which they deem unnecessary.

(3) The need for sanction acts as a check upon the potential conflict of interest that arises where a liquidator's initial costs are paid by a petitioning creditor. The requirement to return to Court for sanction injects accountability and helps a liquidator resist attempts to manipulate him.

(4) Not infrequently liquidators themselves become litigators, including against other officeholders, creditors and other interested parties. A need for sanction forces them to

step back and carry out a reality check before, like other litigators, they might get carried away in their perhaps too narrow or one-sided perspective.

[89] In my respectful opinion, it would be inappropriate to see in the almost invariable granting of sanction a reason to stop requiring it. The same logic would say that we should do away with seatbelts, because most car journeys are completed uneventfully, 'modern' cars have airbags, and the cost of a car can be reduced by leaving off that 'superfluous' part. The flaw in that thinking is, of course, that serious accidents happen and seatbelts, put on before the accident takes place, save lives.

[90] If there exists an impression that sanction is granted as a matter of routine, that is incorrect. I can think of a number of cases where the Court has refused to grant sanction sought. Where liquidators are professional insolvency practitioners with the benefit of legal advice, the vast majority of sanction applications will indeed be in respect of a reasonable, sound proposed course of action. That is properly to be expected. Refusal to grant sanction is a rare exception rather than the rule.

4. Case specific reasons

[91] In the present case, the amount of the debt relied upon to ground the application for appointment of liquidators over Sze Ming was US$15.8 million. This is relatively low, compared to many other liquidations in this Court. But there is a complete veil currently over the situation of Sze Ming. It might have far greater assets to be got in and distributed as part of its liquidation, and it might have complex relationships. The Court does not know, and the proposed liquidators do not know, what lies beyond the veil, or what can come round the corner.

[92] I take as my starting point section 186(3) of the Insolvency Act, which materially provides:

> "The Court may provide that certain powers may only be exercised with the sanction of the Court: (a) where the liquidator is appointed by the Court, on his or her appointment or subsequently …"

[93] This subsection enables the Court to impose Court sanction as a condition for the exercise by a liquidator of his or her powers. This subsection requires the Court to consider each matter separately on its merits. No statutory fetter is here imposed upon the Court's discretion. Nor does the BVI Insolvency Act exclude any of the liquidators' powers from sanction. The Court could, depending upon the circumstances, require sanction for one, more than one, all of the liquidators' powers, or none. The section also does not require actual situations already to have arisen or to be in immediate contemplation before a sanction requirement can be imposed. The

Court's discretion is thus created to be extremely wide, although it would probably be going too far to say that it is boundless.

[94] The nature of a requirement for sanction is that it looks forward. It is an important feature that the Court's discretion to impose sanction requirements is statutory. That is because the Court's inherent jurisdiction to control the conduct of its officers (which include liquidators) cannot be invoked to control the future, unknown conduct of the Liquidators: see e.g. **Chu Kong v David Yen Ching Wai.**[37] Statute has no such constraints.

[95] The context of the present matter is that it is a multimillion-dollar transnational liquidation, of potential complexity and a lack of visibility.

[96] In such a case, the various interests of different parties may compete and conflict.

[97] We have seen the degrees of protection afforded by sanction and no-sanction requirements, for both liquidators and stakeholders. We have also seen that the requirement for sanction is a prospective, preventative measure, to address situations which could possibly occur, rather than a retrospective, remedial measure (although applications for retroactive sanction can be entertained). The nature of prospective measures is that the future cannot be known clearly, but not everything will be a total unknown, nor a complete surprise if or when it takes place. There is no need to proceed from a position of artificial ignorance and myopically take a line that since there is no evidence of such-and such an impending problem, no reason for requiring sanction in a particular respect exists.

[98] The standard order represents a tried and tested balance for this jurisdiction. No factual reason has been advanced for departing from the standard order here, either by the Applicant or the proposed liquidators.

E. In conclusion

[99] The question which has been brought into focus in the present matter is whether the Court should move away from its traditional, tried and tested, cautious, prudence-based approach, to a new, 'modern' one, in which liquidators would normally be allowed to liquidate unchecked, fettered only by the bonds of their legal and professional obligations and the possibility of litigation against them.

[37] BVIHCMAP2018/0019, unreported, delivered 11th December 2018 at paragraph [33].

[100] In my respectful judgment, the answer is 'no', and I am not aware of any reason to abandon the traditional approach.

[101] Drawing the strands together, in my respectful judicial opinion, I decline to follow **Jin Yao** because it appears to me that the Court's approach there does not reflect the law:

(1) At paragraph [65] in **Jin Yao**, a principle of general application was postulated that '[t]he point is that these are [commercial and administrative decisions which are] not decisions for the Court' to take. But this, in my respectful view, contradicts section 186(3) of the BVI Insolvency Act, 2003, which confers a wide, statutory discretion on the Court to decide on a case-by-case basis which decisions are for the Court to take, i.e. which should be reserved to Court, or not.

(2) **Jin Yao** proposes that the BVI should follow the UK no-sanction regime – ignoring that as between the BVI and the UK:

a. The schemes are different;

b. The statutory development has been different;

c. The country context is different: BVI offshore, UK onshore;

(3) **Jin Yao** did not consider:

a. The nature and reasons behind the BVI standard order practice;
b. The protective purpose of sanction for officeholders and interested parties;
c. The unique nature of required sanction protection;
d. The degrees of lesser protection available, how they work and their vulnerabilities;
e. Industry views on appropriate protection for BVI offshore liquidation practice;
f. Whether the standard practice discloses a significant problem requiring to be fixed.

(4) **Jin Yao**, in my respectful view, states the test for access to Court approval/directions too high. **Jin Yao** appears to have been *per incuriam* of the binding Court of Appeal authority of **Phoenix Group Foundation et al. v Jackson et al.**[38] which permits officeholders to apply to the Court for directions or approval where a 'particular reason'

[38] BVIHCMAP2020/0019, unreported, delivered 17th November 2020.

such as a 'momentous' decision in the context of a particular situation would render such an application 'prudent'.

[102] I am, though, conscious that it is undesirable for the Court's voice to be divided particularly on what is an important issue. Whilst we have been concerned here with liquidators, the principles apply in a similar fashion to provisional liquidators and receivers.

[103] I am also conscious that my own views may not reflect the prevailing BVI legal and insolvency industry view. This BVI Commercial Court is there, as its very purpose, to serve the justice needs and expectations of the BVI's offshore clients; the BVI Commercial Court must therefore remain most sensitively attuned and responsive to them.

[104] In making the liquidation order in the standard terms in this case, I directed that there would be express liberty to apply to vary the terms of the order to remove the requirement for sanction (although this is not strictly necessary, as section 186(3) of the Insolvency Act enables the Court to set as well as remove sanction requirements after liquidators have been appointed).

[105] If it is that representative views of the relevant BVI insolvency, corporate and legal service providers are communicated to the Applicant or the Court which favour a change in the traditional approach, or indeed, if my reasoning has omitted or misunderstood some fundamental consideration, the Court will be pleased to consider an application by the Applicant, or by the Liquidators, or the other creditors/contributories, to vary the terms of the liquidation order.

Hon. Justice Gerhard Wallbank, KC
High Court Judge (Ag.)

By the Court

Registrar