THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0031

BETWEEN:

JTRUST ASIA PTE LTD.

Claimant/Counter-Appellant

and

[1] MITSUJI KONOSHITA
[2] A.P.F. GROUP CO. LTD. (IN RECEIVERSHIP)

Defendants

and

SHOWA HOLDINGS CO., LTD.

Appellant/Respondent

and

NICHOLAS JAMES GRONOW AND JOHN DAVID AYRES
(AS RECEIVERS OF THE SECOND DEFENDANT)

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Gerard St. C Farara	Justice of Appeal [Ag.]
The Hon. Mde. Vicki-Ann Ellis	Justice of Appeal [Ag.]

Appearances:

Mr. Adrian Francis and Ms. Olga Osadchaya for the Appellant
Mr. Hefin Rees, QC, with him, Mr. Iain Tucker and Ms. Yegâne Güley for the Respondents
Mr. Vernon Flynn, QC, with him, Mr. Peter Ferrer for the Counter-Appellant

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2021: February 23;
May 31.

Commercial appeal — Insolvency law — Receivership — Appellate interference with trial judge's exercise of discretion — Appellate interference with trial judge's findings of fact — Application for adjournment — Appellate interference with judge's exercise of case management powers — Whether the learned judge erred in refusing to grant adjournment — Removal of directors by receivers — Application of correct legal test — Whether the learned judge failed to apply the correct legal test for the determination of the removal application and reached a decision no judge properly directed could have reached — Fair hearing — Whether the learned judge was predisposed against the appellant — Whether Showa Holdings Co. Ltd was deprived of a fair hearing by the learned judge during the removal application

On the application of JTrust Asia PTE Ltd ("JTrust"), the Commercial Court made a receivership order on 5th July 2018 ("the Receivership Order") over A.P.F. Group Co. Ltd. ("A.P.F.") under which Mr. Nicholas James Gronow and Mr. John David Ayres ("the Receivers") were appointed as joint and several receivers to protect and preserve the assets of A.P.F. Pursuant to the Receivership Order, the Receivers were granted, among other powers, the power to appoint and remove directors of A.P.F and/or its subsidiaries. A.P.F.'s most significant asset is its majority shareholding in its subsidiary, Showa Holdings Co. Ltd. ("Showa"). In the exercise of their powers under the Receivership Order, the Receivers appointed Mr. Gronow and Mr. Atsushi Hosono to the board of directors of Showa ("the Board). In addition to these two new members, the Board is comprised of seven further directors ("the Majority Board"). Against the backdrop of numerous allegations against the Board, the Receivers have sought to remove the Majority Board for the purported purpose of enabling an independent investigation to take place into certain transactions involving Showa that took place in 2015/2016.

On application by the Receivers, the Commercial Court ordered that unless the Board agreed to appoint an independent review committee ("IRC"), the Receivers were permitted to cause A.P.F. and Asukano Holdings Co Ltd ("Asukano"), both shareholders of Showa controlled by the Receivers, to exercise their voting rights to replace the Majority Board ("the December Order"). Despite the December Order and Showa resolving to appoint an IRC, the IRC was still not constituted. It was upon this basis that the Receivers, in September 2020, made an application to sanction the reconstitution of the Board ("the Removal Application"). The Removal Application was filed on an *ex parte* basis and was accompanied by a certificate of urgency. A short *ex parte* hearing took place on 15th October 2020 at which the court gave directions for the Removal Application ("the Directions Order") to proceed on an *inter partes* basis on 30th November 2020.

On 6th November 2020, Showa made an application to adjourn the Removal Application ("the Adjournment Application") and for extended time to file and serve any evidence in response to the Removal Application. This was done on the basis that Showa was not given ample or reasonable time to adduce the evidence required to resist the Removal Application and were prejudiced by not being present at the *ex parte* hearing. On 12th November 2020, the learned judge delivered an oral decision, accompanied by an order of even date ("the Adjournment Order"), dismissing the Adjournment Application. The learned judge held that it would not be unjust to deny Showa additional time to respond to the Removal Application. On 30th November 2020, upon hearing the Removal Application, the learned judge delivered

an *ex tempore* decision, similarly accompanied by an order of even date ("Removal Order), granting the Removal Application. He determined that the Receivers were successful on the sole issue before the court, that is, whether their decision to apply to remove the Board was a rational one.

Showa, being dissatisfied with the learned judge's orders has appealed on six (6) grounds of appeal, challenging the Adjournment Order and the Removal Order. The appeal is strenuously resisted by the Receivers and JTrust. JTrust has also filed a counter-appeal seeking to uphold the Adjournment Order and Removal Order on the basis that the learned judge did not commit any error of principle and neither was the decision in excess of the generous ambit within which reasonable disagreement is possible. The following issues arise to be resolved in these appeals: (i) whether the learned judge erred in refusing to grant the adjournment; (ii) whether the learned judge failed to apply the correct legal test for the determination of the Removal Application and reached a decision no judge properly directed could have reached; and (iii) whether Showa was deprived of a fair hearing by the learned judge during the Removal Application.

Held: dismissing the appeal and affirming the orders of the learned judge in their entirety, allowing the counter-appeal, and ordering Showa to pay to the Receivers and JTrust no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court unless agreed to within 21 days of this judgment, that:

1. An appellate court should not interfere with the judge's exercise of discretion except, in limited circumstances. The appellate court could only interfere if it is satisfied that in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors, or by taking into account irrelevant factors; and that, as a result of the error, in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Therefore, the appellate court should not easily substitute its own exercise of discretion for the discretion already exercised by the judge unless the decision of the judge was plainly wrong.

   Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188 followed; **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited** BVIHCVAP2020/0006 (delivered 16th April 2021, unreported) followed; **Ian Hope-Ross v Martin Dinning et al** AXAHCVAP2020/0005 (delivered 30th April 2021, unreported) followed; **Throne Capable Investment Limited v Agile Star Group Limited** [2021] ECSCJ No. 433, (delivered 14th January 2021) followed; **Byers and Others v Chen Ningning** [2021] UKPC 4 followed; **Edy Gay Addari v Enzo Addari** [2005] ECSCJ No. 125, (delivered 27th June 2005) followed; **Charles Osenton & Co v Johnston** [1941] 2 ALL ER 245 followed; **Piglowska v Piglowski** [1999] 1 WLR 1360 followed.

2. There is no principle that requires a judge to discuss every point or all of the evidence in depth, failing which the decision would be impugned. This does not provide any basis for an appellate court to interfere with the judge's findings of fact

nor the evaluation of these facts and inferences drawn from them. Neither is there any duty on a judge to address every argument presented by counsel. However, it is important that the judge should have considered all of the evidence.

English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis [2002] EWCA Civ 605 followed; **Eagil Trust Co Ltd v Pigott-Brown and another** [1985] 3 All ER 119 followed; **Sohal v Suri and another** [2012] EWCA Civ 1064 followed.

3. It is not open to the appellate court to overturn a trial judge's exercise of discretion on the basis of the judge's findings and evaluations of facts, simply because it would have found them differently. Unless the judge's findings of facts, evaluation and inferences drawn were perverse, the appellate court is prevented from interfering with the evaluation. Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all aspects of the case and therefore he would be able to better assess the evidence and has advantages which the appellate court does not have. It is not open to the appellate court to go trawling through the evidence in the manner that a first instance judge is required to do in order to make findings of facts.

   Yates Associates Construction Company Ltd v Blue Sand Investments Limited [2016] ECSCJ No. 63 (delivered 20th April 2016) followed; **Flat Point Development Limited v Mary Dooley** [2019] ECSCJ No. 116 (delivered 13th March 2019) followed; **Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd** ANUHCVAP2018/0021 (delivered 26th April 2021, unreported) followed.

4. In this case, applying the principles of appellate restraint in relation to the judge's findings of fact and exercise of discretion, the learned judge has been hearing related matters between the parties including this one before the Court, for many months and there is no basis upon which it could be said that he plainly failed to take into account evidence or arrived at a conclusion which the evidence could not on any view support. It was clearly open to the judge, in the circumstances, to conclude that there was urgency in hearing the Adjournment Application. Further, in all of the circumstances the learned judge was justified, in exercising his case management powers, in refusing Showa's Adjournment Application. As for Showa's challenge to the time given by the learned judge to file and serve any evidence in response to the Removal Application, on the basis that it was not given ample or reasonable time to adduce the evidence required, this too is without merit and wholly unreasonable. Accordingly, there is no discernible error committed by the judge which could justify appellate interference with his findings and evaluation of facts or the exercise of his discretion in making the Adjournment Order.

5. In relation to the Removal Order, there was evidence adduced by the Receivers and which it was clearly open to the judge to accept in preference to the evidence Showa deployed. The judge's reasoning and approach in his *ex tempore* judgment

withstand scrutiny and do not indicate any errors of fact which could be subjected to the appellate court's interference. Additionally, the criticism that the learned judge failed to correctly apply the correct legal test in his decision to grant the Removal Application and thereby sanction the reconstitution of the Board cannot be sustained. The judge was clearly alive to, and correctly applied, the relevant principles from **Re Nortel Networks UK Ltd and Other Companies** in granting the Removal Order. It is clear that there was no bad faith on the part of Receivers in seeking the approval of the removal. The judge's jurisdiction was therefore supervisory in relation to the Receivers. In all of the circumstances, it was evidently within the judge's discretion to give sanction to the Receivers' application in relation to the Removal Order and his decision therefore cannot be impugned on this basis.

Re Nortel Networks UK Ltd and Other Companies [2016] EWHC 2769 (Ch) followed; **Phoenix Group Foundation and another v Carl Stuart Jackson and another** [2020] ECSCJ No. 373 (delivered 17th November 2020) followed; **Re MF Global UK Ltd (in special administration) and another** [2014] EWHC 2222 (Ch) considered; **Re Greenhaven Motors Limited (in liquidation)** [1999] BCC 463 followed; **Re Edennote Limited; Tottenham Hotspur plc and others v Ryman and another** [1996] 2 BCLC 389 followed; **Re Hans Place Ltd (in liquidation)** [1993] BCLC 768 considered; **Kevin Gerald Stanford v Stephen John Akers an another** [2018] ECSCJ No. 200 (delivered 12th July 2018) followed; Sections 128(1) and 132 of the **Insolvency Act, 2003**, Act No. 5 of 2003, Revised Laws of the Virgin Islands applied.

6. The totality of circumstances of this case do not suggest that the judge was predisposed against Showa or unfair to it. To the contrary, the judge displayed balance and good case management skills. Accordingly, there is no basis upon which it could be said that the judge was unfair or partisan to Showa, neither is there any evidence to substantiate Showa's complaint of predisposition against the judge.

Byers and Others v Chen Ningning [2021] UKPC 4 followed.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by Showa Holdings Co. Ltd. ("Showa") against parts of the order of the learned Wallbank J [Ag.] of the Commercial Court of the Territory of the Virgin Islands, dated 30th November 2020, which granted an application sanctioning the reconstitution of the board of directors of Showa ("the Removal Application"). The Removal Application was made by the receivers of Showa, Mr. Nicholas James Gronow and Mr. John David Ayres ("the Receivers").

There is also an appeal by Showa against an interlocutory order made by the learned judge refusing an application by Showa to adjourn the Removal Application ("the Adjournment Application"). Showa's appeal against the learned judge's orders is strenuously resisted by the Receivers, and JTrust Asia PTE Ltd. ("JTrust"). JTrust counter-appeals and invites this Court to uphold the orders of the learned judge. Both the Receivers and JTrust urge this Court to dismiss Showa's appeal.

[2] I shall set out the relevant background to the appeals in order to provide the requisite context.

Background/Chronology

[3] JTrust is a company incorporated in the Territory of the Virgin Islands (the "BVI"). Showa is a company incorporated in Japan and listed on the Tokyo Stock Exchange. Its majority shareholder is A.P.F. Group Co. Ltd. ("A.P.F."). On the application of JTrust, the court made a receivership order on 5th July 2018 ("the Receivership Order") over A.P.F. under which the Receivers were appointed as joint and several receivers to protect and preserve the assets of A.P.F. Pursuant to the Receivership Order, the Receivers were granted the power (i) to appoint and remove directors of A.P.F and/or its subsidiaries; (ii) to take possession of, get in and collect all assets of A.P.F; and (iii) to carry on and manage the business of A.P.F (including its subsidiaries). This application was made after A.P.F. had been implicated in the alleged misappropriation of JTrust's funds, amounting to approximately USD$95 million. A.P.F. is a company that is incorporated under the laws of the BVI. A.P.F.'s most significant asset is its majority shareholding in Showa – Showa is A.P.F.'s subsidiary.

[4] In the exercise of their powers under the Receivership Order, the Receivers appointed Mr. Gronow and Mr. Atsushi Hosono to the board of directors of Showa ("the Board). In addition to these two new members, the Board is comprised of Showa's President and Chief Executive Officer, Mr. Tatsuya Konoshita, the Chief

Financial Officer and Chief Operating Officer, Mr. Tomohiko Shoji, and five further directors, two of whom are designated 'independent' directors ("the Majority Board").

[5] There is much controversy in relation to the circumstances in which the Board was to have been reconstituted. However, there is no need to burden this judgment by regurgitating the rival positions on the matter. It is sufficient to say that against the backdrop of numerous allegations against the Board, the Receivers have sought to remove the Majority Board for the purported purpose of enabling an independent investigation to take place into certain questionable transactions involving Showa that took place in 2015/2016.

[6] Based on an application by the Receivers, the Commercial Court in December 2019, ordered that unless the Board agreed on or before 25th December 2019 to appoint an independent review committee ("IRC"), the Receivers were permitted to cause A.P.F. and Asukano Holdings Co Ltd ("Asukano"), both shareholders of Showa controlled by the Receivers, to exercise their voting rights to replace the Majority Board ("the December Order"). Meanwhile, in Singapore, JTrust sued Group Lease Holdings PTE Ltd., an indirect subsidiary of Showa, on the basis of questionable or fraudulent transactions involving the latter.

[7] Despite the December Order and Showa resolving to appoint an IRC on 24th December 2019, the IRC was still not constituted. It was upon this basis that the Receivers, in September 2020, made the Removal Application. The Removal Application was filed on an *ex parte* basis and was accompanied by a certificate of urgency. It sought an order that the Receivers be permitted to cause Asukano to requisition an extraordinary shareholders' meeting of Showa in order to vote the shares that A.P.F. and Asukano hold in Showa, and to remove and/or appoint members of the Board. The Receivers contended that this was necessary in order to give them effective control of the board of directors of Showa in furtherance of the objectives of the Receivership Order and, in particular, to assist with the appointment of an IRC to investigate certain questionable transactions involving

Showa. A short *ex parte* hearing took place on 15th October 2020 at which the court gave directions for the Removal Application ("the Directions Order") to proceed on an *inter partes* basis on 30th November 2020. The *inter partes* hearing was assigned a time estimate of 2.5 hours and directions were given for the filing and service of evidence in response.

[8] On 6th November 2020, Showa filed its Adjournment Application under a certificate of urgency, seeking, among other things, orders that: (i) the hearing of the Removal Application be adjourned until the first available date in January 2021, with a revised time estimate of one day; (ii) Showa and JTrust shall each file and serve any evidence in response to the Removal Application by 4:00 pm on 4th December 2020; and (iii) the parties shall file and serve any evidence in reply by 11th January 2021. This was done on the basis that Showa was not given ample or reasonable time to adduce the evidence required to resist the Removal Application and were prejudiced by not being present at the *ex parte* hearing. It is also noteworthy that the learned judge was fully seised of the facts of the matter and had previously dealt with several applications that were related over many months.

Issues in the court below on the Adjournment and Removal Applications

[9] On the Adjournment Application, the learned judge had to determine whether to grant the orders sought. In so doing the judge had to consider whether Showa had a reasonable opportunity to adduce the evidence it sought to rely upon before the court. The Removal Application raised the issue of whether Showa satisfied the court, on a balance of probabilities, that the proposed decision to remove and/or replace directors at Showa was a rational one, or that it was a not a decision that no reasonable receiver could take in all the circumstances of this case.

Judgment in the Court Below
The Adjournment Appeal

[10] On 12th November 2020, the learned judge, having considered the strenuous arguments from counsel for Showa, the Receivers and JTrust, delivered an oral decision dismissing the Adjournment Application. The learned judge held that it

would not be unjust to deny Showa additional time to respond to the Removal Application. Instead, the learned judge determined that the time estimate given at the *ex parte* hearing, on 15th October 2020, was appropriate and correct given that the court had already heard the parties on the similar issue in July 2020 and the same judge had delivered a detailed judgment on 30th September 2020. The learned judge reasoned as follows:

> "It is incumbent for the Court to act with a degree of care both to allow Showa a reasonable opportunity to adduce evidence of why it is not so that it has been trying to obstruct and delay the constitution of the Independent Review Committee, but also to ensure that the interest of others such as the Receivers and the Claimants are not prejudiced.
>
> In sum, the Court considers it must proceed with reasonable expedition and with the necessary degree of impulsion before stalled eventual harm. Those considerations, in my respectful judgment militates against an adjournment beyond the 30th of November. The 30th of November is already a month and a half since the application for sanction first came on for hearing. I do not see that Showa needs to be provided with a copy of the transcript of the hearing on the 15th of October 2020 or at all in order to prepare its evidence. Nor would there be any procedural unfairness flow from the fact that Showa cannot see what precisely was said at the hearing."[1]

[11] This oral decision is accompanied by an order, of even date, made by the learned judge ("the Adjournment Order"). It states as follows:

> "
>
> 1. The Adjournment Application is dismissed.
> 2. Showa shall file and serve any evidence in response to the [Removal] Application by 4pm on 17th November 2020.
> 3. The Receivers and JTrust shall file and serve any evidence in reply by 4pm on 24 November 2020.
> 4. Any evidence filed subsequent to these respective dates and times shall be ignored by the court.
> 5. The Receivers shall prepare and furnish upon Showa and JTrust a hearing bundle by 4pm on 25th November 2020.
> 6. Skeleton arguments with authorities shall be filed and exchanged by 4pm on 27 November 2020.
> 7. Showa shall pay the Receivers' and JTrust's costs of the Adjournment Application to be assessed if not agreed within 21 days.

[1] Page 69, lines 6-25 of the Transcript of Proceedings dated 12th November 2020.

8. The time to appeal this order shall run from the date judgment is handed down in the [Removal] Application."

[12] I turn now to the Removal Application.

Removal Application

[13] On 30th November 2020, the hearing for the Removal Application took place in the Commercial Court below. After hearing and considering the submissions of counsel, the learned judge delivered an *ex tempore* decision on the same day. In his decision, the learned judge granted the Removal Application. He determined that the Receivers were successful on the sole issue before the court, that is, whether their decision to apply to the court to sanction the removal of the Board was a rational one. The learned judge stated:

> "And in my respectful judgment in light of the fact that I think it is entirely rational for the Receivers to want a truly independent and competent review committee established and established promptly, their decision to apply now to remove the Board of Showa is a rational one.
> I would go further and remind the parties that as far back as December 2019 the Court didn't just put on record that time was of the essence for the establishment of the review committee and for it to conduct its review. It enshrined it, if I remember correctly, in the December 2019 Order itself. I'm just turning to that now if I may. And I think we'll find that the time being of the essence, unless I'm mistaken -- help me out possibly, Mr. Rees, but I think that -- yes, paragraph 2(g) said:
>
> > 'The Independent Review Committee shall be instructed that time is of the essence for their investigation.'
>
> Now those are not otiose words. No, they mean something. And that time has already been lost over the many months since that order."[2]

[14] This oral decision is similarly accompanied by an order, of even date, made by the learned judge ("Removal Order). It states as follows:

"

> "1 The Receivers have the sanction of this Court and are permitted to cause [Asukano] to requisition an extraordinary shareholders' meeting of [Showa] in order to vote the shares that [A.P.F.] and Asukano hold in Showa to remove and/or appoint members of the board of directors of Showa.

[2] Pages 99-100 of the Transcript of Proceedings dated 30th November 2020.

2. The application by Showa for leave to appeal is granted.
3. The application by Showa for a stay of execution of this Order pending appeal is refused.
4. For the purposes of bringing or maintaining any appeal from this Order, and/or the Order on the Adjournment Application dated 12 November 2020, Maples shall be allowed to receive instructions from the majority of the directors or former directors comprising the board of directors of Showa immediately prior to the appointment of the Receivers (the "Majority Board of Showa"), and that any communications passing between Maples and the Majority Board of Showa pertaining to the appeal shall be confidential and not shared with the whole Board of Showa.
5. Showa shall pay the costs of both the Receivers and the Claimant incurred in the Application, to be assessed if not agreed within 21 days.
6. Liberty to apply."

The Appeal and Counter-Appeal

[15] Showa, being dissatisfied with the learned judge's orders has appealed. Showa has filed six (6) grounds of appeal, challenging paragraphs 1-7 of the Adjournment Order and paragraphs 1 and 5 of the Removal Order. With no disrespect intended, I will not recite the grounds of appeal in their entirety. I note however that there are 5 schedules, annexed to Showa's notice of appeal. In Schedule 1, which spans some 12 pages, Showa alleges that several errors of law and fact were made by the learned judge in his conduct of the Adjournment and Removal Applications. JTrust has also filed a counter-appeal seeking to uphold the Adjournment Order and Removal Order on the basis that the learned judge did not commit any error of principle and neither was the decision in excess of the generous ambit within which reasonable disagreement is possible.

[16] From the notice and counter notice of appeal, and the helpful oral and written submissions of all counsel, the following three condensed issues arise to be resolved in these appeals:

(i) whether the learned judge erred in refusing to grant the adjournment;

(ii) whether the learned judge failed to apply the correct legal test for the determination of Removal Application and reached a decision no judge properly directed could have reached ("Correct Legal Test Issue"); and

(iii) whether Showa was deprived of a fair hearing by the learned judge during the Removal Application ("the Fair Hearing Issue").

Submissions on behalf of Showa
(i) Adjournment Application

[17] Learned counsel, Mr. Adrian Francis complained that the judge erred in not granting the adjournment that was sought. He argued that the learned judge took into account irrelevant factors while failing to take into account relevant factors. Mr. Francis stated that the judge refused to read, and failed to take into account, the vast majority of the evidence before him, which was directly relevant to the matters heavily relied on by Showa and which had dealt with factual matters widely. This, he submitted included, evidence central to the issues of: (i) whether Showa had obstructed or delayed formation of the IRC; (ii) the adverse consequences for Showa of removal of the Majority Board; and (iii) the nature of the questionable transactions, the subject of the IRC investigation and the steps taken by Showa to make provision for them, all of which informed the central issue of whether the IRC investigation served an important purpose and/or was urgent.

[18] Mr. Francis emphasised that the learned judge in refusing to adjourn the Removal Application, wrongly determined, without any evidence or factual basis, and wrongly relied upon the allegation, that Showa was asking for additional time to prepare evidence and submissions unnecessarily and solely for the purpose of delaying and obstructing the hearing of the application. He reiterated that additionally, in refusing to adjourn the Removal Application the learned judge also unreasonably determined, that Showa had already been afforded sufficient time to submit its evidence on the application. He complained that this was wrong and that it warrants the intervention by the appellate court in order to correct the learned judge's errors.

(ii) The Correct Legal Test Issue

[19] Learned counsel Mr. Adrian Francis submitted that the judge erred in sanctioning the removal of the directors. He argued that the learned judge failed, adequately or at all, to apply the correct legal test, or to conduct the required type or depth of investigation into the material facts, or to exercise the requisite degree of care, for determination of sanction applications, as set out by the English Court of Appeal in **Re Nortel Networks UK Ltd and Other Companies**[3] later adopted by this Court in **Phoenix Group Foundation and another v Carl Stuart Jackson and another**.[4] He reminded this Court that **Phoenix**, set out the principles applicable to category two sanction applications made by officeholders, which concern situations where the administrator or liquidator has, in exercise of their undoubted statutory power, decided to take or to embark upon a very significant or momentous step in the administration or insolvency of a company or companies under their control, and have approached the court subsequently to seek its approval or sanction of the intended course of action. Mr. Francis stated that it followed that the relief being sought by the Receivers on the Removal Application represented a 'very significant or momentous step' in respect of which the Receivers sought protection by way of blanket immunity conferred by the court's sanction, as such it was imperative that the **Re Nortel** and **Phoenix** principles be applied properly.

[20] Mr. Francis referred to the fact that the Receivers were obliged to comply with their duty to act reasonably and prudently in seeking relief under the Removal Application; they were obliged to put before the court all relevant considerations supported by evidence; the court was bound to consider the factors taken into account by the Receivers and to assess whether they were complying with their duties as officeholders; the court was bound to act with caution; and if the court was left in any doubt, the court should have withheld its sanction. Mr. Francis contended that the learned judge's misunderstanding of, and/or or failure to apply, the correct legal test affected, and led him to err fundamentally, in his approach to the entire

[3] [2016] EWHC 2769 (Ch).
[4] [2020] ECSCJ No. 373 (delivered 17th November 2020).

process below, causing him to proceed recklessly, treating the Removal Application as an interlocutory matter of little importance, that could appropriately be disposed of summarily. Further, he maintained that the applicable legal test required the learned judge to take account of the Receivers' conduct and to consider whether they were acting reasonably and in good faith in compliance with their duties as officeholders and officers of the court.

[21] Mr. Francis reminded this Court that in the BVI, the appointment, duties, and conduct of receiverships is governed by the section 128(1) of the **Insolvency Act, 2003**[5] ("the Insolvency Act or the Act"). This section, he emphasised, showed clearly that the Receivers owe a duty of care and skill to A.P.F, a duty to act in good faith and that they were not entitled to conduct the receivership in a way which unfairly prejudices A.P.F. or recklessly sacrifices their interests. He accepted that the Receivers, as officers of the court, have a duty to act not merely lawfully but, in accordance with enhanced notions of fairness and honest dealings. Mr. Francis insisted that in the case at bar, the learned judge, if he had properly applied the **Phoenix** case and considered section 128(1), should not have permitted the Receivers to conduct themselves as they have, acting in bad faith. Further, Mr. Francis reasoned that should the Receivers be permitted to carry out the terms of the Removal Order, Showa would be deprived of any recourse to recover the probable irreparable loss that it predicts will be suffered as a result of the actions that have now been sanctioned by the court below.

(iii) The Fair Hearing Issue

[22] Mr. Francis also complained that there were procedural irregularities throughout the learned judge's conduct of the Removal Application, beginning with the directions given by him at the *ex parte* hearing in October 2020. He stated that service of these directions were not effected on Showa until 19th October 2020, which in turn unfairly imposed an unnecessarily short period of time within which Showa was required to respond to the application and file evidence. This, Mr. Francis stressed,

[5] Act No. 5 of 2003 Revised Laws of the Virgin Islands.

occurred because at the *ex parte* hearing the Receivers led the court to believe it was appropriate for the court to proceed in this summary, expedited fashion: that all relevant issues had been covered by existing evidence and rehearsed at the 8th July 2020 hearing of JTrust's application for similar relief and that there was only one short witness statement that Showa would need to respond to, covering the period since July. This, he argued, was wrong in law.

[23] Mr. Francis said that Showa protested at the Adjournment Application where the relief sought was potentially devastating and of huge importance to it, that there were numerous issues that it wished to canvass in evidence, and that the time allocated to the hearing (2.5 hours), was wholly inadequate. He said that nevertheless the learned judge refused to accept its submissions, as the judge was convinced that extensive new evidence was not required as the existing evidence in the proceedings could be relied upon and that there was adequate time provided to Showa to produce evidence.

[24] Mr. Francis also complained that prior to the hearing of the Removal Application, Showa experienced the following instances of procedural irregularity during the learned judge's conduct of the matter:

(i) The judge, though, prepared to read and take into account new evidence from the Receivers and JTrust, which introduced numerous new matters and sought to justify removal of the Majority Board on grounds extending way beyond those relied upon in the Removal Application was not prepared to do the same in relation to Showa.

(ii) Showa was permitted no more than 45 minutes to address the court at the hearing, which was a wholly inadequate time to develop its case on the numerous issues of fact and law that needed to be covered.

(iii) The learned judge below took no more than a few minutes to consider his decision and returned to deliver an almost immediate *ex tempore* judgment which was brief and failed to address most of the submissions made by Showa.

[25] Mr. Francis adverted this Court's attention to several exchanges between the judge and the Receivers in different hearings in an effort to support Showa's complaints against the judge. Mr. Francis argued that prior to the hearing of the Removal Application, and over the course of several hearings, the learned judge expressed strong views adverse to Showa. These views, he emphasised, indicate that the learned judge considered members of the Majority Board to be obstructing and delaying the IRC investigation and the hearing of JTrust's application and the Removal Application. Mr. Francis also indicated that the learned judge considered that members of the Majority Board may have been using the delay to, variously, dissipate assets, destroy documents, "muddy the waters" or otherwise evade justice. This he stated, among other matters, causes Showa to infer that the learned judge was grossly unfair and one-sided in the manner in which he conducted the Removal Application and had rushed to judgment, was unable to maintain an open mind, or to remain uninfluenced by his previously expressed views. Further, Mr. Francis posited that it is to be inferred that the judge was predisposed to grant the Removal Application and to do so as quickly as possible, without any or due regard to the fairness of the process to Showa or the merits of its case. Mr. Francis concluded that in the totality of the circumstances, Showa has been denied a fair hearing by an objective, nonpartisan tribunal.

[26] In conclusion, Mr. Francis argued, Showa was subjected, by the judge, to an unfair and one-sided summary process for determination of a matter of extreme importance to it. He said that this was sufficient reason for this Court to interfere.

Submissions on behalf of the Receivers
(i) Adjournment Application

[27] Mr. Hefin Rees, QC, counsel for the Receivers took issue with all of the allegations that were made against the learned judge. He did not accept that, when exercising his discretion to make the Adjournment Order, the learned judge wrongly failed to take into account the relevant factors as argued by Showa. Mr. Rees was adamant that Showa's assertion that the learned judge 'refused to read, and failed to take into account, the vast majority of the evidence before him, which was directly relevant to the issues', was incorrect. He said that if in fact this assertion was a reference to the thousands of pages of evidence filed by Showa seeking to delay and obfuscate the Removal Application, the Receivers agree that the learned judge was entirely justified in not reading that evidence, because there was no need for him to do that. In any event, the evidence had already been before the court and had been referred to in numerous applications that the learned judge had determined.

[28] In relation to Showa's complaint surrounding the learned judge's refusal to accede to Showa's request for a full day's hearing, Mr. Rees stated that the learned judge dismissed the Adjournment Application because he did not believe that a full day's hearing was necessary and that 2.5 hours was sufficient on the basis that the parties would be filing very full written submissions, with authorities. Those written submissions together with oral submissions, Mr. Rees argued, was more than sufficient to draw the parties' main legal and factual arguments to the court's attention. He said that the learned judge was therefore justified in his decision. Further, in all of the circumstances, the learned judge was entirely justified, in exercising his case management powers, in refusing to give Showa a further 2-week adjournment where Showa had the benefit of an extension ordered by the learned judge of an additional 2 weeks to file and serve its evidence, in response. He therefore urged this Court to reject Showa's appeal on this issue.

(ii) The Correct Legal Test Issue

[29] In response to the complaints about the judge's alleged failure to apply the correct legal test, Mr. Rees took issue with Showa's contention that the learned judge erred in exercising his discretion to sanction the removal of the directors. Mr. Rees submitted that based on **Re Nortel**, the court's role is a very limited one of supervisory oversight only, by application of what is often referred to as the perversity test. He posited that this legal test can helpfully be summarised and formulated into a singular question, that being 'is the Receivers' decision to remove and/or replace the Majority Board of Showa one that is so utterly irrational and absurd that no reasonable Receiver could take in all the circumstances of this case?'. He reasoned that the answer to that question, in all the circumstances of this case, is 'no'. He asserted that unless Showa could get over this legal hurdle, there was no realistic prospects of success on the appeal in this case. In his view, Showa was singularly unable to meet this threshold before the learned judge during the Removal Application and now on this appeal.

[30] Mr. Rees said that there was no basis for Showa's assertion that the judge had failed to apply the test in **Re Nortel**. Mr. Rees, therefore, concluded his arguments by emphasising that this Court should approach the appeal at bar on the basis that it is concerned only with the limits of rationality and honesty, and in such circumstances, he said that this Court should find that the learned judge applied the correct test, cannot be fairly criticised for the approach that he took to the application, and cannot be fairly criticised for his ultimate decision to grant the Removal Application, on the evidence in this case. He maintained that the judge correctly applied the relevant legal principles and reached the proper decision. He urged this Court to dismiss Showa's appeal on this issue.

(iii) The Fair Hearing Issue

[31] For his part, Mr. Rees strongly disagreed that the proceedings below were procedurally irregular and/or unfair to Showa and deprived it of a fair hearing and/or a reasonable opportunity to defend itself. He explained that the Receivers were

perfectly entitled to move the Removal Application *ex parte* in the first instance in their capacity as receivers of A.P.F. He also said that the judge acted quite properly in entertaining the application.

[32] Further, Mr. Rees insisted that Showa had adequate time to prepare for the Removal Application, as it was served on Showa on 19th October 2020 and Showa had until 2nd November 2020 to file evidence in response. He pointed out that the 2nd November 2020 date was then extended by the Adjournment Order to 17th November 2020, with a hearing date of 30th November 2020. This meant that Showa had, in total, 29 days to respond to the Receivers' evidence, which consisted of an affidavit and a witness. In all the circumstances, he was adamant that there was no procedural irregularity and that the Removal Order would be potentially devastating to Showa. The Receivers made the Removal Application as officers of the court after careful consideration and mindful of the need to protect the value of A.P.F's assets by protecting the value of Showa.

[33] Mr. Rees maintained that the judge acted fairly and that the criticisms were unwarranted. He rejected Showa's submissions that the learned judge was predisposed to the Receivers' view or arguments. He countered that the hearing of the Removal Application and the Adjournment Application was fair and objective. In his view, there was no merit to this ground of appeal. He reiterated that the decision of the learned judge was clearly open for him to make on the evidence, and Showa cannot in anyway establish that it was plainly wrong. Accordingly, he asked this Court to uphold the judge's orders so that the Receivers could further the receivership as they are bound to do by the Receivership Order.

Submissions in opposition on behalf of JTrust (The Counter-Appeal)

[34] JTrust has, in these proceedings, filed a counter-appeal, urging this Court to uphold the subject orders of the learned judge. Mr. Vernon Flynn, QC advanced oral submissions on behalf of JTrust.[6]

[6] Written submissions were filed by Peter Ferrer, Lucy Hannett and Marcia McFarlane.

(i) The Adjournment Application

[35] Mr. Flynn reminded this Court that the question of whether an adjournment should be granted involves the exercise of the judge's discretion. He said that there is no guarantee that a party's request for an adjournment would be granted. Mr. Flynn maintained that, in all the circumstances, the judge exercised his discretion properly in not granting Showa the adjournment. He highlighted the fact that the Receivers Application was supported by the certificate of urgency; and the December Order that the IRC be put in place had been made approximately one year earlier with the express provision that time was to be of essence. He said that Showa failed to comply with the December Order. Of further importance, Mr. Flynn pointed out that JTrust's application had sought almost the same relief as the Receivers Application and that the Receivers Application was heard and a full judgment rendered by the same learned judge. He underscored the fact that the learned judge was therefore well versed with the issues and the extensive evidence that had already been filed. He reiterated the fact that the parties had been directed to file full submissions in advance of the hearing so as to maximise the use of the court's time. He said that Showa's complaints against the judge are baseless.

[36] Mr. Flynn pointed out deficiencies in Showa's Adjournment Application. Mr. Flynn illustrated that Showa's evidence in support of the Adjournment Application failed, in the main, to specify the time and relevance of the evidence. He maintained that the judge properly exercised his discretion in not granting the adjournment. Mr. Flynn said that the issue before the judge was a narrow one and did not warrant a 1-day hearing or an adjournment.

(ii) The Fair Hearing Issue

[37] Mr. Flynn said that Showa's allegation against the judge about procedural unfairness, predisposition against it and breach of their right to a fair hearing, are ill founded and should be dismissed. He reiterated that there simply were no procedural irregularities or unfairness in the court below and urged this Court to so rule.

(iii) The Removal Order

[38] Lastly, in relation to the Removal Order, Mr. Flynn urged this Court to refrain from interfering with the learned judge's exercise of discretion in making the Removal Order. He relied on the well-known principles of **Dufour and Others v Helenair Corporation Ltd and Others**[7] to undergird his submissions that the learned judge did not commit any error of principle and neither was the decision in excess of the generous ambit within which reasonable disagreement is possible. He maintained that a review of the circumstances in which the Removal Order was made and the Removal Order itself does not support Showa's contention that the judge's decision was blatantly or plainly wrong. He therefore urged this Court to affirm the decision of the judge, in its entirety. Mr. Flynn reiterated that the learned judge considered and correctly applied the relevant legal principles in **Re Nortel** as followed in **Phoenix** in making the Removal Order. He therefore urged this Court to affirm the decision of the judge and dismiss Showa's appeal.

[39] It is of sufficient importance, and necessary, to briefly refer to the relevant statutory provisions, to which I now turn.

The Insolvency Act and Rules of the BVI

[40] Section 128(1) of the Insolvency Act sets out the primary duties on of a receiver in the exercise of its powers under the Act. The section reads: '(1) The primary duty of a receiver is to exercise his powers (a) in good faith and for a proper purpose; and (b) in a manner he believes, on reasonable grounds, to be in the best interests of the person in whose interests he was appointed.'

[41] Section 132 of the Insolvency Act states respectively:

> "132. (1) On the application of a person referred to in subsection (2), the Court may, in relation to any matter arising in connection with the performance of the functions of a receiver, make one or more of the following orders:
>
> (a) an order giving such directions as it considers appropriate;
> (b) an order declaring the rights of persons before it; and

[7] (1996) 52 WIR 188.

(c) such other order as it considers just.

(2) Application to the Court for an order under subsection (1) may be made by any of the following persons:

(a) the receiver;

(b) the person by whom or on whose behalf the receiver was appointed;

(c) a person in whose interest the receiver is acting; and

(d) where the company in receivership is or has been a regulated person, the Commission."

[42] Provision is made in rule 21 of the **Insolvency Rules, 2005**,[8] for an application under section 132 to be made and heard *ex parte*. Rule 21 states:

"21. (1) Where the Act or the Rules do not require service of an application on, or notice of it to be given to, any person, the Court may hear the application ex parte.

(2) Where the application is made ex parte in the circumstances specified in paragraph (1), the Court may

(a) hear it forthwith, without fixing a venue as required by rule 16(2); or

(b) fix a venue for the application to be heard, in which case rule 16(2) applies."

Discussion and Conclusion

[43] In the main, Showa's appeal challenges the judge's exercise of his discretion to make the Adjournment and Removal Orders as well as the findings of fact and law and the evaluations of facts on the basis of which the judge exercised his discretion. The starting point of this discussion must, of necessity, therefore pay cognisance to the fact that an appellate court will not interfere with the judge's exercise of discretion except, in limited circumstances. There is a high threshold to be satisfied. In our Court, **Dufour** is regarded as the leading authority on this principle. In **Dufour,** Sir Vincent Floissac CJ stated that the appellate court could only interfere if it is satisfied:

"(1) that in exercising his or her judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations, or by taking into account or being influenced by irrelevant factors and considerations; and (2) that, as a result of the error or the degree of the error, in principle the trial judge's

[8] S.I.No. 45 of 2005.

> decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[44] These principles apply even more so in the context of discretionary case management decisions, as obtains in the appeal at bar. There is a consistent stream of jurisprudence in which this Court has applied these well-known principles. These are cases such as **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**,[9] **Ian Hope-Ross v Martin Dinning et al**[10] and **Throne Capable Investment Limited v Agile Star Group Limited**.[11] In **Ian Hope-Ross**, this Court affirmed the principles set out in **Dufour** and stated further that '[a]n appellate court will not lightly interfere with the exercise of a discretionary case management power'. The principles expressed in **Dufour** have also been judicially acknowledged by the Privy Council in its recent decision in **Byers and Others v Chen Ningning**.[12]

[45] Additionally, it is settled law that the appellate court should not easily substitute its own exercise of discretion for the discretion already exercised by the judge. This principle has been adopted by Gordon JA in his judgment in **Edy Gay Addari v Enzo Addari**,[13] reciting, the words Viscount Simon LC in **Charles Osenton & Co v Johnston**,[14] which states:

> "The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way" .

[46] Against the above principles, Showa, in the appeal at bar, has the heavy burden to discharge of showing that judge was plainly wrong in the exercise of his discretion in making the Adjournment Order and the Removal Order and therefore, his decision

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[9] BVIHCVAP2020/0006 (delivered 16th April 2021, unreported).
[10] AXAHCVAP2020/0005 (delivered 30th April 2021, unreported).
[11] [2021] ECSCJ No. 433, (delivered 14th January 2021).
[12] [2021] UKPC 4.
[13] [2005] ECSCJ No. 125, (delivered 27th June 2005).
[14] [1941] 2 ALL ER 245.

was outside the generous ambit within which reasonable disagreement is possible as set out in **Dufour**. Only if, Showa satisfies this high threshold is this Court then able to interfere with the judge's orders.

[47] There are several findings of facts that undergird the judge's exercise of discretion. Also, it is not open to the appellate court to overturn the learned trial judge's exercise of discretion on the basis of the judge's findings of facts and evaluations of those facts, unless those facts were not open to the judge on the evidence. This much is settled and in **Flat Point Development Limited v Mary Dooley**,[15] writing on behalf of this Court, I stated that:

> "The law on the appellate court's ability to interfere with the findings of fact of a trial judge is settled. There is a strong stream of jurisprudence from this Court which has been consistently applied. The principles that were first laid down in Watt (or Thomas) v Thomas. Indeed, In Yates Associates Construction Company Ltd v Blue Sand Investments Limited this Court stated as follows**:**
>
> > '1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.
> >
> > ...
> >
> > 2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have given oral evidence, and of the weight to

[15] [2019] ECSCJ No. 116 (delivered 13th March 2019).

> be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.
>
> ...
>
> 3.Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong.'"

I remain of that view.

[48] Further, recently, in **Shaista Trading Company Limited d.b.a Diamond Republic v First Caribbean International Bank (Barbados) Ltd**,[16] Pereira CJ stated:

> "The principles governing appellate intervention with respect to the review of findings of fact, the evaluations of those facts and the inferences drawn from them by a trial judge are well established. Indeed, there is a strong stream of jurisprudence which has been consistently applied, having been first laid down in Watt (or Thomas) v Thomas. These authorities emphasise the reluctance of appellate courts to interfere with a judge's findings of primary fact, particularly when these findings depend largely upon the trial judge's assessment of witnesses he or she has seen and heard give evidence".

[49] I propose to commence by addressing the Adjournment Order against the backdrop of the above pronunciations.

The Adjournment Order

[16] ANUHCVAP2018/0021 (delivered 26th April 2021, unreported).

[50] This appeal against the Adjournment Order centres on the claim by Showa that the judge refused to read, and failed to take into account the vast majority of the evidence before him which was directly relevant to the issues advanced by Showa. By way of emphasis, the law is clear that this Court will rarely interfere with a judge's discretionary case management decision.[17] In this context, the question this Court has to determine is whether the judge's Adjournment Order is plainly wrong or, exceeded the generous ambit within which reasonable disagreement is possible.

[51] With the above principles firmly in mind, I have given deliberate consideration to the numerous complaints provided in Schedule 1 to the grounds of appeal and the oral arguments advanced in this Court by Showa in support of its appeal against the Adjournment Order and the countervailing submissions advanced in opposition to them. In my view, the arguments that were put forward by JTrust and the Receivers are far more persuasive and attractive and I accept them, without any reservation. I can see no prospect for Showa persuading this Court that the judge's determination as encapsulated in the Adjournment Order can be properly impugned.

[52] It is noteworthy, that the broad theme running through the majority of the complaints made in relation to the learned judge's decision on the Adjournment Application is that the judge did not expressly consider all the matters that were put before him in evidence, by Showa, and therefore arrived at an incorrect decision. The several matters of which Showa complains relate both to matters of primary fact and evaluations of those facts. In my view, nothing would be gained, other than unnecessarily lengthening this judgment, if this Court were to scrutinise each complaint and seek to record its conclusion in relation to each of Showa's criticism of the judgment. I will therefore refrain from doing so. However, I have given deliberate consideration to all of the complaints and let me say straight away that there is no principle that requires a judge to discuss every point or all of the evidence in depth, in the judgment, failing which the decision would be impugned. Indeed, this

[17] See for example **Ian Hope-Ross v Martin Dinning et al** AXAHCVAP2020/0005 (delivered 30th April 2021, unreported).

does not provide any basis for an appellate court to interfere with the judge's findings of fact nor the evaluation of these facts and inferences drawn from them. Neither is there any duty on a judge to address every argument presented by counsel. This much has been established since **English v Emery Reimbold & Strick Ltd; DJ & C Withers (Farms) Ltd v Ambic Equipment Ltd; Verrechia (trading as Freightmaster Commercials) v Commissioner of Police of the Metropolis**.[18]

[53] Indeed, in **Emery Reimbold and Strick**, the English Court of Appeal, in addressing a judge's failure to give reasons for conclusions made in a judgment, adopted **Eagil Trust Co Ltd v Pigott-Brown and another**,[19] where Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case:

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted, and the reasons which have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons to deal with every argument presented by Counsel in support of his case. It is sufficient if what he says shows the parties, and if need be the Court of Appeal the basis on which he has acted..."

[54] It is indeed enough that the learned judge makes a finding on matters which he needs to resolve before coming to his conclusion. The corollary to this is that there is no obligation on the judge to make findings on all matters if after, having considered a matter the judge conscientiously forms the view that it is impossible to make a particular finding if it does not detract from the correctness of the conclusion on the matters that are at the heart of the dispute. In **Sohal v Suri and another**,[20] the English Court of Appeal expressed this considered view, holding that the position is that judgments on questions of fact can be expressed in different ways. The Court of Appeal continued:

> "Consistently with the independence of the judiciary, it is left to the judge to decide how to express his conclusions, subject to review on appeal in

[18] [2002] EWCA Civ 605 at paragraph 17.
[19] [1985] 3 All ER 119 at 122.
[20] [2012] EWCA Civ 1064 at paragraph 6.

> accordance with what are for the most part well-established principles. It is not for this court to retry the case: our task is to review the judgment of the judge for error. The judge does not have to make a finding on every disputed item of evidence. It is enough if he makes findings on matters which he needs to resolve before coming to his conclusion. Likewise, there is no obligation on the judge to make findings if, after having considered the matter conscientiously, he forms the view that it is not possible to make a particular finding."

[55] All the above pronouncements, which I gratefully adopt, underscore the need for care and restraint by an appellant court in its review of a judge's exercise of discretion and his findings of facts. Against these principles, it is almost self-evident that an appellate court should refrain from taking too stringent or literalistic of an approach to the interpretation of a judge's judgment to determine whether the judge erred in the exercise of his discretion. In this regard, and quite instructively, Lord Hoffmann in **Piglowska v Piglowski**,[21] stated:

> "An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

[56] I can do no more than adopt the above helpful pronouncements.

[57] Upon carefully examining the materials relied upon by Showa, in Schedule 1 and applying the above principles to the appeal at bar, it cannot be said that there was no evidence to support the challenged findings of fact or that the findings were ones which no reasonable judge would have reached. It is not in dispute that the learned judge has been hearing related matters between the parties including this one before the Court, for many months and there is no basis upon which it could be said that the judge plainly failed to take into account evidence or arrived at a conclusion which the evidence could not on any view support. Cognisance must be paid to the fact that the weight placed on evidence is a matter that is exclusively for the trial judge. The judge has been immersed in all aspects of the case and as such he would be able to better assess the evidence and has advantages which the

[21] [1999] 1 WLR 1360 at 1372.

appellate court does not have. It was clearly open to the judge to conclude that there was urgency in hearing the Adjournment Application; it was left to the judge to decide how to express his conclusions. It is not open to the appellate court to go trawling through the evidence in the manner that a first instance judge is required to do in order to make findings of fact. This has been the Court's position as seen in **Flat Point Development Limited.**

[58] As it relates to Showa's challenge to the time given by the learned judge to file and serve any evidence in response to the Removal Application, on the basis that it was not given ample or reasonable time to adduce the evidence required, I find this too to be without merit and wholly unreasonable.

[59] This Court cannot view the Adjournment Application and decision in a vacuum. The learned judge was enjoined by the overriding objective of the **Civil Procedure Rules 2000**, to deal with the matter before him justly and expeditiously. He had been dealing with related matters involving the parties to this appeal for several months and had a very good feel and appreciation of the matters. Based on the time given by the learned judge in the Directions Order, Showa would have been afforded one month to deploy its evidence. In my view, this was quite generous of the learned judge, as normally, a party is afforded fourteen days to do so. The Adjournment Order also involved the exercise of the judge's case management discretion. Here again, Showa has failed to attain the high threshold for the appellate court to interfere with the judge's exercise of his case management discretion.

[60] Of significance, is the fact that when this Court enquired of learned counsel who appeared on behalf of Showa, during the hearing of the appeal, whether he could point to any specific evidence that Showa would have provided had the period been longer, counsel candidly indicated that he could not. How then can Showa seriously argue that it was prejudiced by not being given an opportunity to provide evidence in support of its application? The response by learned counsel, together with other matters that need not be spelt out here, in my view, brings into question whether

Showa is genuine in their complaints that it has advanced against the judge's exercise of discretion in the context of the adjournment. Furthermore, as it relates to Showa's complaint about the learned judge's refusal to accede to its revised time estimate of one day, I am compelled to say that a request for the Commercial Court to dedicate an entire day to hearing an application to merely adjourn another matter with directions is, on any view, more extravagant and exorbitant than it is reasonable.

[61] Having reviewed the grounds of appeal and the specific complaints in Schedule 1 which undergird them, and based on everything that I have stated, it is apparent that I am clearly of the considered view that there was no discernible error committed by the judge which could justify appellate interference. In my considered opinion, Showa has not even come close to meeting the high threshold so as to persuade this Court to interfere with the judge's exercise of discretion in making the Adjournment Order. Showa's appeal on this issue is unmeritorious, and accordingly fails.

[62] I turn now to the Removal Order.

Removal Order
The Correct Legal Test Issue

[63] On this issue, Showa's primary criticism is that the learned judge made several errors of law and fact and failed to correctly apply the **Re Nortel** principles which were confirmed and followed by this Court in **Phoenix**. The gravamen of Showa's case is that, as a consequence of so doing, the judge committed errors of law and fact which undermined the correctness of the decision to grant the Removal Application and thereby sanction the reconstitution of the Board.

[64] In the interest of the efficient consideration and disposition of this issue, without repeating them, I underscore that, the legal principles that were analysed and applied in relation to the appellate court's approach to the judge's exercise of

discretion and findings of fact in relation to the Adjournment Order, apply with equal force to the Removal Order. In the appeal at bar, I hope I will be forgiven for not repeating the very numerous factual matters which Showa has drawn to our attention, even though I have fully considered them.

[65] Having reviewed the totality of the circumstances, including the reasons provided by the judge, I am unpersuaded that the judge made the errors of fact complained of or, at all. Neither am I satisfied that there is any basis for this Court to deviate from the judge's evaluation of the facts that were made and to more importantly deviate from the approach of the appellate court to review the findings of facts by the court below as stated in **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**,[22] **Flat Point Development Limited** and **Shaista**. Unless the judge's findings of facts, evaluation and inferences drawn were perverse, the appellate court is prevented from interfering with the evaluation. I reiterate that the threshold that Showa is required to meet in order to establish that the learned judge's evaluation of the evidence should be interfered with, is a very high one. It is not open to Showa to focus on discrete aspects of the full evaluative process that was conducted by the judge in order to assert that the judge did not get it right.

[66] By way of emphasis, the judge had a very long history of dealing with related applications and was very knowledgeable of the materials before him. He had a very distinct advantage over this Court, and which this appellate court can never obtain by simply going through selective aspects of the evidence. There was evidence adduced by the Receivers which it was clearly open to the judge to accept in preference to the evidence Showa deployed. The fact that the judge considered the evidence that was deployed by Showa but rejected it, is nothing to the point. In any event, and in my opinion, a perusal of the judge's *ex tempore* judgment indicates the close reasoning and care with which the judge approached the assessment and factual determinations. They withstand scrutiny and do not indicate any errors of

[22] [2016] ECSCJ No. 63 (delivered 20th April 2016).

fact which could be subjected to the appellate court's interference. On any view, the findings at which the judge arrived were clearly open to him on the evidence.

[67] I turn now to the matter of the judge's application of the **Re Nortel** test which is inextricably linked to his findings of fact. By way of emphasis, the application that engaged the judge's attention was one for the sanction of the court appointed Receivers' request to have Showa's Board reconstituted. The legal test was stated in **Re Nortel** and confirmed in the recent decision of this Court in **Phoenix**, delivered on behalf of the Court by Farara JA [Ag.]. There is no dispute between the parties that the test in **Re Nortel**, which was adopted by the Court of Appeal in **Phoenix** is applicable to the proceedings before the learned judge and before this Court. In **Re Nortel**, the legal test was helpfully set out by Snowden J at paragraphs 49 and 50, as follows:

> "49. For my part, whilst noting that the position of an administrator seeking directions under the Insolvency Act, and a trustee seeking directions under the Trustee Act are not identical, I see no obvious reason why most of the same considerations should not apply when the court considers giving directions to an administrator who wishes to enter into a compromise which is particularly momentous. In short, the court should be concerned to ensure that the proposed exercise is within the administrator's power, that the administrator genuinely holds the view that what he proposes will be for the benefit of the company and its creditors, and that he is acting rationally and without being affected by a conflict of interest in reaching that view. The court should, however, not withhold its approval merely because it would not itself have exercised the power in the way proposed.
>
> 50. In these respects the approach of the court will mirror the attitude which the court would take to a subsequent challenge to the decision by a creditor: see e.g. *Re Longmeade Limited* [2016] EWHC 356 (Ch) at paragraphs 61-65. But having regard to the fact that its approval will prevent subsequent challenge, the court will require the administrator to put all relevant material before it, including a statement of his reasons, and the court will not give its approval if it is left in any doubt as to the propriety of the proposed course of action."

[68] In a comprehensive and closely reasoned judgment, Farara JA [Ag.], in **Phoenix**, accepted the principles that were relevant to sanction applications as were reformulated by Snowden J in **Re Nortel**. I have considered in detail the judgment

of Farara JA [Ag.] in **Phoenix**, and have distilled from it the following principles, which he applied and adopted as part of the jurisprudence of this Court when considering sanction applications:

(a) The principles from **Re Nortel** apply to situations where an office holder under the Insolvency Act seeks the sanction of the court to take a significant course of action, in circumstances where the applicant/officeholder (as defined by the Insolvency Act) has not surrendered to the court its power to decide whether to enter upon the particular course.

(b) The effect of the court's decision to sanction in circumstances where the officeholder has not surrendered its powers to the court is that the creditors are unable thereafter to challenge the decision as flawed.

(c) If the court is left in doubt as to the propriety of the course of action proposed to be undertaken by the officeholder, the court's sanction should be withheld.

(d) The burden rests on the officeholder to put relevant material before the court to show that: (i) the course of action sought to be adopted by the officeholder is a lawful exercise of its powers; (ii) the officeholder genuinely holds the view that the proposed course of action is in the best interests of the company, its creditors and beneficiaries; and (iii) that in coming to that decision, the officeholder acted rationally and without any conflict of interest.

(e) The evidential burden is on the applicant/officeholder to put all relevant material before the court so that the court is not left in doubt as to the propriety of the proposed course of action.

(f) The "relevant material" to be placed before the court will include the officeholders' reasons for taking the proposed course of action – this

may include the advice given to the officeholder by its legal practitioners.

(g) The officeholder is usually better placed to know what is in the best interest of the company - accordingly the court will usually defer to the assessment of the officeholder unless it is shown that the assessment of the officeholder is perverse.

[69] In my view, in this appeal, 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.

[70] For completeness, cognisance must be paid to the fact that Snowden J in **Re Nortel** relied on the decision in **Re MF Global UK Ltd (in special administration) and another**[23] in which the judge cited with approval a passage from paragraphs 27-079 of Lewin on Trusts at paragraph 48 of the judgment. It is as follows:

> "In a category two case involving trustees, the approach of the court was summarised by Mr. Justice David Richards in *Re MF Global UK Ltd* at para 32, where he cited with approval the following paragraph from *Lewin on Trusts* (18th edn., 2008):
>
> > 'The court's function where there is no surrender of discretion is a limited one. It is concerned to see that the proposed exercise of the trustees' powers is lawful and within the power and that it does not infringe the trustees' duty to act as ordinary, reasonable and prudent trustees might act, ignoring irrelevant, improper or irrational factors; but it requires only to be satisfied that the trustees can properly form the view that the proposed transaction is for the benefit of beneficiaries or the trust estate and that they have in fact formed that view. In other words, once it appears that the proposed exercise is within the terms of the power, the court is concerned with limits of rationality and honesty; it does not withhold approval merely because it would not itself have exercised the power in the way proposed. The court, however, acts with caution, because the result of giving approval is that the beneficiaries will be unable thereafter to complain that the exercise is a breach of trust or even to set it aside as flawed; they are unlikely to have the same

[23] [2014] EWHC 2222 (Ch).

> advantages of cross-examination or disclosure of the trustees' deliberations as they would have in such proceedings. If the court is left in doubt on the evidence as to the propriety of the trustees' proposal it will withhold its approval (though doing so will not be the same thing as prohibiting the exercise proposed). Hence it seems that, as is true when they surrender their discretion, they must put before the court all relevant considerations supported by evidence. In our view that will include a disclosure of their reasons, though otherwise they are not obliged to make such disclosure, since the reasons will necessarily be material to the court's assessment of the proposed exercise."

[71] A review of Wallbank J's decision indicates that he was alive to the relevant principles in **Re Nortel** and applied them in granting the Removal Order in respect of the Board. I have no doubt that the judge correctly applied the principles in **Re Nortel** in determining whether the Receivers had satisfied its requirements in order for the court to sanction the approval of Showa's board of directors. The judge in his *ex tempore* judgment, stated:

> "Now the question, the main question before the Court today is set out at paragraph 10 of the Receivers' submissions. And it is mainly that can Showa satisfy the Court on the balance of probabilities as the burden must be on them, on the principle that he who asserts must prove, that the proposed decision to remove and/or replace directors of Showa is one that no reasonable Receiver could take in all the circumstances of this case.
>
> Now this refers to the test which the Court has to apply which was set out on page 6 of those submissions and that is the Nortel test. In fact, when we look at the Nortel test, we will see that what the Receiver in their little summary called 'reasonable' is actually rational. And there is a distinction there to be taken. But anyway, the Nortel test involves three limbs. In essence it is that the Court must be concerned to ensure that:
>
> One, the proposed exercise is within the Receivers' power; Two, that the Receivers genuinely hold the view that what they propose to do will be for the benefit of the receivership and those who may benefit under it. And, thirdly, that the Receiver is acting rationally and without being affected by the conflict of interest in reaching that view."[24]

[72] In my judgment, and by way of emphasis, the learned judge's consideration of the legal test was not only consistent with that of **Re Nortel** but also **Re Greenhaven**

[24] Pages 91 to 92 of the Transcript of Proceedings dated 30th November 2020.

Motors Limited (in liquidation),[25] **Re Edennote Limited; Tottenham Hotspur plc and others v Ryman and another**,[26] **Re Hans Place Ltd (in liquidation)**.[27]

[73] In **Greenhaven Motors** Chadwick LJ set out the legal test as to rationality as follows: '… the court should not interfere in such a case unless the liquidator is acting mala fide or his decision is one which no reasonable liquidator could take'. In deciding the question of rationality, Nourse LJ in **Edennote** held: 'the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable person would have done it'. In the case of **Re Hans Place**, Mr. Edward Evans-Lombe QC, held: '[t]he court would only interfere with the exercise of the liquidators' discretion where he acted in bad faith or his decision was perverse and since there were no allegations of this nature the court would not interfere'.

[74] These above enunciated principles have been applied by this Court in a number of cases. For example, in **Kevin Gerald Stanford v Stephen John Akers and another**[28] I stated that**:**

> "It is an important feature of the test that the threshold applied is a high one. It is not open to a court to seek to substitute its opinion for that of the joint liquidators; the court is required to ascertain whether the decision is so absurd that no reasonable liquidator could have arrived at it."

[75] I am still of this view.

[76] The judge's judgment was clear and concise and indicates that Showa's complaints are not made out. I am satisfied that the judge committed no error in his determination that the application to sanction the Removal Order should have been granted. The learned judge showed fidelity to the law and faithfully applied the principles in **Re Nortel**. The *ex tempore* judgment shows that the judge had a very

[25] [1999] BCC 463.
[26] [1996] 2 BCLC 389.
[27] [1993] BCLC 768.
[28] [2018] ECSCJ No. 200 (delivered 12th July 2018).

good understanding of his role and he stayed within the confines of it. The judge's decision therefore cannot be impugned on this basis.

[77] In any event, I observe that real contest between the parties in the court below was as to the requirement for rationality on the part of the Receivers in their decision to seek the approval of the removal of Showa's Board. The Receivers, by virtue of the terms of the December Order, had already been permitted to carry out the terms of the Removal Order. In the totality of the circumstances, it seems clear to me that there was no bad faith on the part of Receivers in seeking approval of the removal and in the circumstances it was clearly within the judge's discretion to give sanction to the Receivers' application in relation to the Removal Order.

[78] In sum, I am of the view that Showa's grounds of appeal, which are supported by Schedule 1 which complements them and indicates the particulars of the grounds, when viewed in the context of the issues identified by this Court, are unsustainable. There is no justification, at all, for attributing errors of law to the judge in relation to the Removal Order. The judge directed himself impeccably as to the law and properly applied the **Re Nortel** principles to the facts of the case when he concluded that the Removal Order should have been granted. In the circumstances, where the judge was satisfied that the prerequisites for the Removal Order as stipulated in **Re Nortel** (as confirmed by **Phoenix**) were met, and applying the **Dufour** principles, I am of the considered opinion that it is not open to this Court to interfere with the judge's determination to do so, since it was not outside of the generous ambit within which reasonable disagreement is possible. His decision, was not plainly wrong.

[79] Finally, I turn now to address the issue of fair hearing.

The Fair Hearing Issue

[80] Showa has challenged the fairness of the process and the judge's objectivity and independence in the hearing and determination of the application to have the Board reconstituted.

[81] The wide-ranging nature of the allegations that have been made by Showa against the conduct of the hearing and the posture of the judge are of such importance that they warranted complete and careful examination. In order to ascertain whether there is any merit in the contention that the judge was partisan and predisposed to grant the Removal Application and to have the Board reconstituted, I have given these matter my deliberate consideration. This Court was referred to voluminous documents which were aimed at substantiating Showa's complaints. However, these documents, including the transcripts, when read together with the judge's *ex tempore* judgments, paint a very different picture. I am of the view that they point to the judge seeking to ensure that the matters were dealt with fairly and professionally with the requisite expedition. The judge is very experienced in these matters and, in particular, is very knowledgeable of the materials since he has been dealing with them and the parties for many months.

[82] I will now address Showa's assertion that the hearing process was unfair and that it was not given adequate opportunity to defend the Removal Application. The difficulty is that Showa was unable to illustrate or substantiate these allegations. It seems to be a bit unfair to level those sort of criticisms against the judge given the protraction of the process which the judge was trying to have move along in a fair manner. In my opinion, much of the arguments that Showa launched before the judge were deployed before this Court and, with respect, did not get any better before us. It is, in my view, passing strange that, even in the face of such an extended period of six months and the care and balance with which the judge engaged with related matters involving the parties, Showa would assert at this stage that the judge was partisan and predisposed to grant the relief he did. The circumstances of this case do not indicate that the judge was predisposed against

Showa or unfair to it. To the contrary, the judge displayed balance and good case management skills.

[83] Applying the approach of the Board in **Byers** to the factual circumstances of this appeal, it is obvious that the judge's case management of the application confirms that the judge was impartial and did not have any predisposition. Very helpfully, the Board in **Byers** had reason to consider allegations that the judge in that case was hostile and biased towards a party. At paragraphs 17, 24 and 36 of the decision, Lord Kitchin, who wrote on behalf of the Board, referred to the impugned comments that were made by that learned judge of the Commercial Court. Of great significance, at paragraph 36 of the judgment, the Board in addressing the matters of fair trial and partiality on the part of the judge, said this:

> "It is of course a fundamental principle of civil justice that everyone is entitled to a fair trial before an independent and impartial tribunal. The Board has reviewed with care the judgment of Bannister J and those parts of the transcripts which record the remarks about which complaint is made and reveal the circumstances in which they were uttered. The Board also has in mind that these are proceedings of a commercial nature and that the parties were represented by experienced leading counsel, both before the judge and on appeal. There can be no doubt that the judge's remarks at the case management conference and during the trial were forthright and robust and it would have been better had he expressed himself in a more moderate manner. But they must be considered in context. Some of them were made in the course of interchanges with counsel in which the judge was seeking to make clear the aspects of the claim which, as a matter of principle, he found difficulty accepting; others were made so that counsel understood his preliminary views on particular issues. The remarks he made when handing down his judgment reflected the decision he had reached. It is also apparent from the transcript that all of these remarks were of a kind with which the counsel before him, both of whom were highly experienced, were well equipped to deal. The Board is satisfied that, having regard to the nature of these proceedings, the parties to them and the skill and experience of those representing them, a fair minded observer, who heard these remarks in the context in which they were made, would not conclude that the judge had set his mind against the Liquidators or had predetermined the case against them. Indeed, the judge's evaluation of Miss Chen's evidence, accepting some parts but rejecting others indicates that he applied a critical mind to the case. The decision of the Court of Appeal on this issue was correct."

[84] In this case, permeating throughout the record of proceedings, is the fact that the judge was alive to the need to ensure that the applications were dealt with fairly, expeditiously and that the Receivers remain mindful of their obligations to the court. There is, in my view, no basis upon which it could be said that the judge was unfair or partisan to Showa. Neither is there any evidence to substantiate Showa's complaint of predisposition. It is very instructive that in **Byers** the Board determined that the judge's comments were robust and forthright. I am fortified by the pronouncements of the Board in **Byers** and apply them. The comments made by the judge, in this case and in the circumstances, were similarly robust and forthright.

[85] In fact, I am unable to understand how given everything that has transpired, Showa could take a jaundiced view of the judge's case management of the applications and interaction with the parties, all of which were aimed at dealing with the applications efficiently and justly. In my view, there were very good reasons for the judge to have adopted the fair and robust approach that he did. These are self-evident and need no recitation. There is simply no force in the criticisms that have been levelled against the judge.

Conclusion

[86] Given the totality if the circumstances, I remain of the clear view that there is no basis for overturning the learned judge's decisions. Accordingly, the overall conclusion is that I would dismiss Showa's appeal in its entirety, and allow JTrust's counter-appeal.

Costs

[87] Showa, having failed in prosecuting its appeal against the Receivers, and JTrust having succeeded on its counter-appeal against Showa, shall pay the Receivers and JTrust no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court unless agreed to within 21 days of the date of this judgment.

Disposition

[88] For all the reasons which I have given, I would make the following orders:

(1) Showa's appeal against the Adjournment and Removal Orders is dismissed, and the orders of the learned judge are affirmed in their entirety.

(2) The counter-appeal by JTrust is allowed.

(3) On this appeal, Showa shall pay the Receivers and JTrust no more than two-thirds of the costs in the court below, to be assessed by a judge of the Commercial Court unless agreed to within 21 days of the date of this judgment.

[89] I gratefully acknowledge the assistance of all learned counsel for their helpful written and oral submissions.

I concur.
Gerard St. C Farara
Justice of Appeal [Ag.]

I concur.
Vicki-Ann Ellis
Justice of Appeal [Ag.]

By the Court

EASTERN CARIBBEAN SUPREME COURT
SEAL
COURT OF APPEAL

Chief Registrar