IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

(1) BANK SARASIN-ALPEN (ME) LIMITED
(2) SHAHAB HAIDER
(in his capacity as Liquidator of Bank Sarasin-Alpen (ME) Limited)

Claimants

and

(1) MR ELIE VIVIEN SASSOON
(2) MR STEPHANE EMILE ASTRUC
(3) MR EDMOND CARTON
(4) BANK J SAFRA SARASIN LIMITED
(5) BANK J SAFRA SARASIN ASSET MANAGEMENT (MIDDLE EAST) LIMITED

Defendants

ORDER OF JUSTICE SIR JEREMY COOKE

UPON the Claimants' Claim No. CFI-009-2023 (the "Part 7 Claim") and the Second Claimant's Application No. CFI-005-2016/6 in Claim No. CFI-005-2016 (the "Insolvency Claim")

AND UPON the Fourth Defendant filing and serving a Defence and Counterclaim in the Part 7 Claim

AND UPON the Order of Justice Sir Jeremy Cooke at a hearing on 26 January 2024 (issued on 7 February 2024) directing inter alia that the matters raised in the Fourth Defendant's/Applicant's Counterclaim pursuant to Articles 102 and/or 103 of the Insolvency Law 2019 ("Articles 102/103") shall be pursued as an application under Part 54 of the Rules of the DIFC Courts (the "RDC")

AND UPON the Fourth Defendant's Part 54 application (CFI-009-2023/9) dated 9 February 2024 pursuant to Articles 102/103 seeking to remove the Liquidator (the "Removal Application") and referring the issue of whether the funding being provided by Mr Rafed Mohsen Bader Al Khorafi ("Mr Al Khorafi") to the Liquidator for the purposes of the Liquidation is being provided in breach of the Settlement Agreement dated 6 February 2020 between Bank J Safra Sarasin Limited, Mr Al Khorafi, Mrs Amrah Ali Abdel Latif Al Hamad and Mrs Alia Mohamed Sulaiman Al Rifai (the "Settlement Agreement")

AND UPON the Fourth Defendant's application CFI-009-2023/10 dated 22 February 2024 seeking the production of documents by the Liquidator (the "Disclosure Application")

AND UPON reading the evidence and submissions filed on the Court File

AND UPON hearing Counsel for the Applicant and Counsel for the Liquidator at a hearing held on 9 March 2024 (the "Hearing")

IT IS HEREBY DECLARED THAT:

1. It is not a breach of the Settlement Agreement for the Liquidator to receive funding from Mr Al Khorafi for the purposes of pursuing the proceedings against the Defendants in CFI-009-2023 and CFI-005-2016.

IT IS HEREBY ORDERED THAT:

2. The Liquidator is to be removed from his office as liquidator of Bank Sarasin -Alpen (ME) Ltd on publication of the Court's judgement on the Defendants' strike out applications in CFI-009-2023 and CFI-005-2016.

3. Save as set forth in paragraph 2 of this Order, the Removal Application is dismissed.

4. The Disclosure Application is dismissed.

5. The Fourth Defendant's Counterclaim made in the Part 7 Claim in CFI-009-2023 and in CFI-005-2016 is dismissed.

6. Pursuant to RDC 28.65, the documents included in the hearing bundle at E/4/457 - 465 and F/4/757-F/6/775 and any information within them may not be used for any purpose, subject to any further order of the court, being the subject of privilege.

7. All Issues of costs are reserved for further submissions to be made in writing simultaneously by the Parties within 2 working days of the publication of this Order and Judgment.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 7 February 2024
At: 2PM

SCHEDULE OF REASONS

Introduction

1. Following the Case Management Conference dated 7 February 2024, the Fourth Defendant brought an application on 9 February 2024 (the "Removal Application") in which an order was sought under Article 102 and/or Article 103 of the Insolvency law seeking various forms of relief, as follows:

1.1. That the Liquidator be disqualified from acting or otherwise removed from his position as liquidator of BSA; alternatively that the Liquidator be required to seek directions from the Court when in a position of actual, apparent or potential conflict; alternatively that the Liquidator be required to complete the winding up process of BSA by no later than 3 months following the conclusion of this case.

1.2. That the Liquidator be held personally liable for the damages suffered by BSA by reason of his abandonment of its appeal of the Additional Damages Award, or alternatively the value of the lost chance associated with successfully pursuing an appeal of the Additional Damages Award.

1.3. That the Liquidator be required to terminate the litigation funding agreements in place with Mr Al Khorafi and be held personally liable for all amounts which may be due thereunder and be required to repay personally all amounts received to date under the litigation funding agreement, by reason of the potential conflict of interest created by the Liquidator's continued receipt of litigation funding from Mr Al Khorafi.

1.4. That the liquidator be required to investigate and pursue BSA's claim against the insurance provider in order to fund BSA's estate with the amount available under the insurance cover. In the alternative, in the event that the claim is now time-barred, that the Liquidator be held personally liable to pay the amount he failed to recover from the insurance into the estate up to the limit of the insurance of USD 50 million.

2. There is also an application made by the Fourth Defendant on 22 February 2024 (the "Disclosure Application") for disclosure of documents which were said to be explicitly or implicitly referenced by the Liquidator, an application which had been foreshadowed in discussion at the Case Management conference of 7 February 2024 when it was suggested that there should be both disclosure of documents and cross examination of the Liquidator as part of the section 102/103 application. The Disclosure Application was supported by a further witness statement from Mr Devenish (Devenish 10) which set out eight categories of documents relating to the Liquidator's conduct of the liquidation, some or all of which had previously been requested and refused. At the Case Management conference, I had clearly indicated that the procedure for removal of a liquidator, as set out in the Rules of the DIFC Courts (the "RDC") made no express provision either for disclosure or cross examination and that it would be an unusual case where either of these was ordered by the court, although the court had undoubted power to do so. In due course, the Fourth Defendant sought to have the Disclosure Application determined on paper which I refused, stating that any applications of this kind would have to be pursued at the Hearing of the Removal Application.

3. These applications are part of the continuing saga of litigation which commenced with the actions of the Al Khorafis against BSA and the Fourth Defendant and has continued with the claim commenced by the liquidator of BSA (in CFI-009-2023 and CFI-005-2016) against three of its former directors/employees, the Fourth Defendant and the Fifth Defendant which is alleged to be the company to which the business of BSA was wrongfully and fraudulently transferred, directly or indirectly by the other Defendants. Hereafter, the Defendants to those actions will be referred to as the Defendants, the Fourth Defendant or the Fifth Defendant as the case may be.

4. The Liquidation begun with the appointment of the Liquidator on 2 May 2016. On any view, it has been protracted and the proceedings begun against the Defendants which were commenced on, 1 February 2023 would be barred by effluxion of time if they were not framed in fraud. Since the Liquidator's letter before action of 1 February 2022 and a standstill agreement which prevented the Liquidator from issuing proceedings, the Defendants have employed a variety of strategies and applications in order to avoid the claims against them in fraud from being pursued in the DIFC. Reference to past applications relating to service, jurisdiction and forum conveniens can be made to illustrate the point, which is borne out by the judgements of the Court in those applications in favour of the Claimants in CFI-009-2023 and CF-005-2016. This claim for removal was originally set out in the Counterclaim in that consolidated action which was not the appropriate vehicle for the relief sought and has since been the subject of this Removal Application.

5. In order to succeed in an application for the removal of the Liquidator under Article 103 (2) of the Insolvency Law of 2019, it is common ground that, although there is no statutory criterion expressed, the principles of English law and common law jurisdictions require a party seeking removal to "show cause" or "due cause". This appears to be the first occasion on which the DIFC Court has been asked to determine such an application. This Court has supervisory jurisdiction and, although it will not lightly remove a Liquidator, it will take the necessary action in a proper case. The burden lies upon the party seeking such removal. There are a good number of reported decisions in other jurisdictions, but they are, for the most part, fact sensitive and an overarching guiding principle is rarely referred to other than the interests of the creditors as a whole in the proper progression of the process of liquidation. The Liquidator is, of course, an officer of the Court and there is a public interest in the proper conduct of liquidations within its jurisdiction. Whereas there are regulatory bodies in many jurisdictions which monitor the practice of liquidators, it does not appear that there is any such body with that responsibility in the DIFC. The Court has therefore to bear that in mind in the exercise of its supervisory jurisdiction.

6. It is said by the Fourth Defendant that it is not necessary to prove specific misconduct or unfitness on the part of the Liquidator and that the Court's determination depends ultimately upon whether the removal would conduce to the better conduct of the liquidation and would be to the general advantage of the creditors as a whole. Relevant considerations are said to include the need to maintain confidence in the integrity, objectivity, impartiality and proper conduct of the winding up. It is also said that in cases involving allegations of partiality or lack of independence,

the creation of a perception of impartiality or bias is sufficient to justify removal, even if independence and impartiality have in fact been maintained. Various authorities are cited for these propositions. Some cases speak of a prima facie case of partiality or misconduct, or of good reason for suspicion of bias or apparent bias. Others speak of a prima facie case of misconduct, but at the end of the day, this Court would have to be satisfied that the Liquidator had in some way fallen short of the standards to be expected of a responsible Liquidator that it could not be seen to tolerate such conduct or that it could no longer be confident that he would properly fulfil his functions as an officer of the Court. Otherwise, it could not be right to remove him, bearing in mind the delay and additional cost that would inevitably be involved in so doing. Self-evidently it is not to the benefit of the creditors as a whole and the insolvent estate is diminished to their detriment, if additional costs and delay are so incurred.

7. There is therefore, as Neuberger J (as he then was) observed in *AMP Music Box Enterprises Ltd v Hoffman & Anor.* [2002] BCC 996 at 1001, often, a difficult balancing exercise to be carried out by the court. *"On the one hand, the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future. ... Also where the liquidator could not be seen as independent... he is perceived to be - even though he may not be - biased in favour of, say, one or more of the creditors. .. While the removal of the liquidator is not necessarily based on any fault on his part, most such cases will involve a degree of criticism. ... In an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner. On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect, his conduct has fallen short of ideal. So to hold would encourage applications under section 108 (2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason, disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. .. Further, the court has to bear in mind that in almost any case where it orders a liquidator to stand down, and replaces him with another liquidator, there will be undesirable consequences in terms of costs and in terms of delay.*

8. Ultimately, the Court must have in mind whether there is any good reason for loss of confidence in the liquidator and to have due regard to the interests of the Company in liquidation and the body of creditors as a whole in the maximisation of assets in the insolvent estate, when deciding what is most conducive to the proper progression of the liquidation.

9. There is one further principle of law which must be borne in mind, as set out in the decision of the English Court of Appeal in *Re Edennote Ltd* [1996] PCC 718 in relation to the appropriate test for setting aside a transaction entered into by a liquidator. As Nourse LJ said at page 722, the court will only interfere with the act of a liquidator if he has done something so utterly unreasonable and absurd that no reasonable man would have done it. That is to be borne in mind in relation to some elements of the relief sought by the Fourth Defendant in relation to transactions (e.g. as set out in paragraph 1.2, 1.3 and 1.4 above).

10. As counsel for the Liquidator pointed out, what is plain from the history of the matter is that the Fourth Defendant does not represent nor act for the benefit of the interests of the creditors as a whole. This appears clearly from the original complaint made by the Fourth Defendant in the Counterclaim in which he first sought the removal of the Liquidator. The prime example of the Liquidator's alleged failure to discharge his duties was said to be: *"the Liquidator has sought to bring claims against the BSA shareholder* (B JSS) [the Fourth Defendant] *that sought to preserve, rather than deplete BSA's assets"*. The underlying motivation and concern of the Fourth Defendant is the fact that the liquidator is suing it and its affiliate, together with some of its directors, and employees who held positions of responsibility in BSA. There can be no doubt that the Liquidator is seeking to maximise the assets of BSA in bringing the claim against these Defendants. Whether or not that claim is well founded is not a matter for today but will be explored on the Defendants' strike out applications in the future and, at trial, should the claims survive. What the Fourth Defendant presumably hopes to achieve by removal of the Liquidator is the substitution of a new liquidator, which would result in delay in pursuit of the claims against it and the possibility that the new liquidator might not share the same enthusiasm for pursuing the claims against it and might abandon them, though that would presumably depend upon the legal advice that he was being given. If the claims were abandoned, that would mean not just that any potential for recovery of sums from the Defendants would disappear but also that a liability for costs would inevitably ensue, which would result in a diminution of BSA's assets.

11. Furthermore, the Liquidator points out that at no stage in the prior course of the liquidation was any complaint ever made by the Fourth Defendant, one of its major creditors, that the Liquidator had failed to carry out his duties responsibly until the letter before action was sent by lawyers acting for the Liquidator to the Fourth Defendant and others on 1 February 2022. Whilst that does not mean that the complaints pursued since then are invalid, it does show an absence of any concern on the part of the Fourth Defendant at anything done or not done up to that point in time.

12. There is one feature which must be borne in mind before looking at the individual complaints. As at the date of the appointment of the Liquidator, the assets available to BSA amounted to a cash sum of USD 588,333. Additionally, although the Liquidator could not reasonably be expected to be aware of this at the time of his appointment, there were, he later discovered, potential claims which might be brought against former directors and the shareholders, which included the Defendants in the actions referred to above and the other shareholder ACCL and its chief officer, Mr Walia. There were and are no other assets. One of the earlier complaints of the Fourth Defendant was that claims were pursued against the Defendants but not against the other shareholder and its associates who were said to have acted in the same manner, or in a more nefarious manner than the Defendants

13. The insolvency had been brought about by a petition to wind up BSA presented by the Al Khorafis, on the basis of the judgement debt of USD 35,028,474, which represented the Additional Damages awarded by Sir John Chadwick in a judgement of this Court on 3 November 2015, in addition to the award of compensatory damages in the sum of US $35,028, 474. The compensatory damages had been awarded on the basis of joint and several liability on the part of BSA and the Fourth Defendant. The Additional Damages were awarded against BSA alone. The sums of USD 6,050,000 and USD 5,395,049 had been paid by BSA and the Fourth Defendant respectively by way of interim payment in November

2014. On 3 November 2015 the Fourth Defendant paid USD 24,583,425 in satisfaction of its joint and several liability with BSA for the compensatory damages, whilst the award of Additional Damages awarded to the Al Khorafis against BSA remained unsatisfied. On any view, despite the contrary submission on behalf of the Fourth Defendant, it would be clear to any liquidator that BSA was hopelessly insolvent and, at the date of appointment of the Liquidator, the Al Khorafis were the major creditors, whilst the Fourth Defendant considered itself a significant creditor in respect of the sums which it had paid out (USD 29,978,474) in respect of its joint and several liability which it attributed to the acts of BSA and for which it sought recovery.

14. Prior to the winding up of BSA, an appeal had been launched by the Fourth Defendant and BSA against the first instance decision both on the quantum of the compensatory award and the Additional Damages. Permission to appeal had been given but a stay of execution had been refused.

15. It is in these circumstances that the complaints of the Fourth Defendant fall to be considered. There are, in essence, five individual complaints in addition to a more general complaint about the overall delay in effecting the liquidation (and in particular the delay between 2016 and 2022, before the letter before action was sent to the Fourth and other Defendants) and of various errors/ failures in the manner in which the Liquidator has set out the creditors' claims and the potential liabilities of BSA in materials circulated to interested parties under the provisions of the Insolvency Act and Regulations. Those individual complaints focus on:

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15.1. The Liquidator's decision not to pursue BSA's appeal in the DIFC Court of Appeal against the Additional Damages award.

15.2. The alleged failure by the Liquidator to investigate and pursue insurance claims that might have been available to BSA in respect of the damages awarded against it.

15.3. The Liquidator's engagement of legal advisers who had previously acted for other creditors and contributors of BSA in relation to the events leading to the liquidation.

15.4. The alleged failure by the Liquidator to deal with BSA's creditors fairly and impartially in the conduct of the liquidation, it being said that the Al Khorafis had been favoured at the expense of the Fourth Defendant.

15.5. The receipt by the Liquidator of litigation funding from Mr Al Khorafi in order to pursue the claim against the Defendants.

The Evidence

16. The evidence before the Court consisted, essentially of three witness statements from Philip Devenish (Devenish 8 ,9 and 12) the third witness statement of the Liquidator himself, Mr Haider, the fifth witness statement of Mr Braganza, a solicitor at HFW which acted for the Liquidator and two reports adduced by the Fourth Defendant from Mr Fleming of Alvarez & Marshall in relation to insolvency practice and the conduct of liquidations. Much of Mr Fleming's reports consisted of what he said he would do on various factual assumptions which were set out at the beginning of his report and which did not seem to me to carry much weight in relation to the standards to be applied to the Liquidator in the circumstances of this case when considering whether there had been misconduct of any kind on the part of the Liquidator or anything which might cause this Court to consider that he could not properly fulfil his responsibilities as an officer of the court in conducting the liquidation.

The decision not to pursue the Appeal

17. What the evidence shows is that BSA (and therefore, in due course, the Liquidator) received advice from Counsel on the prospects of success on the appeal. There is a dispute as to whether this advice was also given to the Fourth Defendant so that there was common privilege between them or whether the advice was received by the directors of BSA who had been nominated by the Fourth Defendant who, in breach of duty, made this advice available to the latter. By consent, the relevant documents are not to be open to the public and are the subject of a specific order to that effect.

18. The minutes of the Board of Directors meeting on 28 January 2016 recorded that the directors, including the Fourth Defendant's nominated directors and the ACCL directors, having considered the legal advice, confirmed that the company was currently able to meet its other debts as they fell due with approximately US 2 million in the bank and unpaid invoices of approximately USD 600,000. They considered that, if BSA was successful in its appeal against the Additional Damages award, a solvent liquidation of BSA was a reasonable prospect although it was unclear what the litigation costs would be for the company. It was considered in the best interests of BSA and its creditors to continue with the appeal and the board unanimously resolved to do so.

19. However, by the time that the Liquidator was appointed, the assets of BSA had been depleted, with the result that as at the date of his appointment, as set out above, the total assets were only USD 588,333. The evidence of Mr Haider is that, by this time BSA had long since ceased trading (in 2014) and that he investigated the costs of pursuing the appeal. He liaised extensively with the lawyers on the record and considered a variety of options in relation to the pursuit of an appeal on as cheap a basis as possible. In his third witness statement, he said that it became apparent to him that he did not have sufficient funds to cover both the costs of pursuing the appeal and any adverse costs order, should the appeal fail, in circumstances where the Al Khorafis were demanding security for their costs of the order of USD 400,000 in relation to the appeal if it was to be pursued. The estimated costs to pursue the appeal were AED 1.2 million before providing for such adverse costs. This meant that the Liquidator had insufficient assets available for the pursuit of the appeal and he therefore, in July 2016, invited the two shareholders, the Fourth Defendant and ACCL to fund it. The Fourth Defendant refused, by a solicitor's letter of 25 October 2016, with the appeal scheduled to take place

on 27 - 29th of November. Whilst ACCL was prepared to contribute 40% of the Liquidator's legal cost of the appeal, it was not willing to provide any indemnity in respect of adverse costs. The Liquidator considered this significant.

20. The Liquidator considered obtaining commercial funding for the appeal but concluded that he would not be able to do so as there was no money to be recovered and he is not criticised by the Fourth Defendant for that. In consequence, he wrote to the Court on 1 November 2016, referring to the conflict between creditors (i.e. between the Al Khorafis whose interest was in maximising the claim against BSA and the Fourth Defendant whose interest was in minimising it) and, because of the absence of any funding, BSA could play no active part in the appeal although the Fourth Defendant might pursue its appeal against the damages awarded. On 14 November, in order to protect the estate from the risk of adverse costs, he wrote again to the DIFC Court stating that he wished to withdraw the appeal without incurring any liability. In his witness statement he stated that this was a decision which flowed from the Fourth Defendant's own unwillingness to fund the appeal. No one suggested at the time that this was an incorrect decision to make. The Fourth Defendant's refusal to fund the appeal at all in the circumstances is a clear indication that they did not consider the Liquidator's decision unreasonable, even if they were maintaining that there were funds available to the Liquidator, since they must have realised that the funds were insufficient to cover any adverse costs award. As already mentioned, no complaint had ever been made about this until the letter before action was sent to the Defendants in February 2022. The criticisms now made that there were other possibilities of running an appeal on a limited basis or cutting costs in such a way as to make an appeal possible without the risk of incurring a liability which could not be met are criticisms advanced by lawyers in hindsight which have, in my judgement, no reference to the realities that existed at the time.

21. Criticism is now made of the Liquidator who referred, when writing to the Court on 1 November 2016, to a conflict of interest between creditors but that appears to this Court to have been a true reflection of the position. The Al Khorafis obviously had an interest in maintaining their claim for the Additional Damages as well as the Compensatory Damages against both the Fourth Defendant and BSA, whilst the Fourth Defendant and other (much more minor) creditors would have had an interest in any reduction of that sum. In circumstances where funding could not be obtained from those interested creditors to pursue the appeal, the Liquidator's decision not to pursue the appeal cannot conceivably be seen as unreasonable and, to the contrary, appears to have been his only realistic option in order not to deplete the limited assets which remained available to the estate. It is odd to note that the Fourth Defendant, in paragraph 81 of its skeleton now refers to the Liquidator's decision to abandon the appeal as an unfair preference of the Al Khorafis' interest in the BSA liquidation over the interests of BSA and its creditors as a whole when it had previously maintained there was no such conflict of interest, but had refused to provide any funding to BSA. The Fourth Defendant pursued its own appeal which was rejected by the DIFC Court of Appeal.

22. Not only does it appear to this Court that the decision of the Liquidator not to pursue the appeal in the circumstances was justifiable, but the evidence shows that this must then have been the view of the Fourth Defendant also. This first ground of criticism of the Liquidator's conduct is therefore ill founded and cannot constitute a good reason for his removal.

The failure to pursue an Insurance claim

23. The evidence shows that the Fourth Defendant had a group insurance policy which was said to grant cover for the claims made by the Al Khorafis. The Fourth Defendant seeks an order that the Liquidator investigate and pursue BSA's claim against the insurers and, if that claim is time-barred, the Liquidator be held personally liable for non-recovery under the policy up to USD 50 million. This is a most ambitious application since the Fourth Defendant did not pursue such a claim itself and never raised a complaint about the Liquidator failing to do so, even as part of the complaints made following the letter before action in February 2022. It was on 3 November 2016 that the Liquidator wrote to the Fourth Defendant's Head of Legal, asking for information in relation to insurance cover. On 30 January 2017, he received a response from a Swiss law firm acting on behalf of the Fourth Defendant which enclosed copies of group level insurance policies and local policies which had been concluded by or on behalf of BSA (all of which had expired on 3 May 2016, the day after appointment of the Liquidator). A second letter from that firm of the same date revealed that there was a dispute between the Fourth Defendant and its insurer in relation to a professional indemnity policy, under which notification had been given on 22 May 2009 which had resulted in a provisional advance of CHF 5 million in 2015 on account of legal defence costs. By 10 December 2015 however the insurers' lawyers had notified the Fourth Defendant that coverage was in issue. Mr Haider's evidence was that, following the Court of Appeal's dismissal of the appeals of BSA and the Fourth Defendant against the compensatory damages award (pursued by the Fourth Defendant on behalf of itself and BSA), the insurers' lawyers wrote not only to deny coverage but to seek repayment of the provisional advance, stating that debt enforcement proceedings had been taken in respect of it. In a letter of 30 January 2017, those lawyers, in response to a request for assistance, informed the Liquidator that it was unprepared to help in any claim against the insurers.

24. The Fourth Defendant was the policyholder and would inevitably have been a financial beneficiary of any recovery under the policy having funded a substantial part of the damages award paid to the Al Khorafis. What the evidence shows is that the Liquidator obtained copies of correspondence between the Fourth Defendant and the insurer which showed that the insurer had denied coverage to the Fourth defendant and had taken enforcement proceedings to recover a preliminary provisional payment of CHF 5 million which it had made to the Fourth Defendant. No evidence has been adduced as to the outcome of those proceedings, but it is readily to be inferred that there could be no recovery under the policy, particularly in circumstances where Mr Walia of BSA had been found to be dishonest. The Liquidator took the view that, If the Fourth Defendant could make no recovery under the policy, there was no prospect that BSA could do so. At paragraph 93.5 of the CPOC, the Claimants set out four reasons why the Fourth Defendants professional indemnity policy would not have covered any judgement made against BSA and the Fourth Defendant. The Fourth Defendant has advanced no case that there actually was cover available to BSA under any relevant policy so it is hard to see how this complaint can have any substance at all. No provision of any policy has been referred to which would have given rise to potential liability of the insurers to a claim by BSA.

25. The Liquidator's evidence was that, in the light of the information available to him, he reached the commercial view in the exercise of his professional judgement that he could not justify expense for the liquidation estate in pursuing the Fourth Defendant's insurers under the Fourth Defendant's policy. In these circumstances the decision by the Liquidator, in the exercise of his professional judgement, that he could not justify the expense of seeking to pursue the insurer under the Fourth Defendants policy cannot be said to be unreasonable and, once again, appears to be a commercially justifiable conclusion to reach. As with the complaint about non-pursuit of the appeal, the Fourth Defendant's arguments as to what the Liquidator might have done are all pursued by lawyers in hindsight, without regard for the realities of the situation as it then appeared and the limited resources available to the Liquidator which any such action would have depleted.

The retention of HFW as the Liquidator's advisers

26. The complaint first advanced by the Fourth Defendant in a lawyer's letter of 11 August 2023 (and repeated in its Counterclaim in January 2024) was that the Liquidator's advisers HFW were subject to a conflict of interest because HFW had previously acted for ACCL and Alpen Capital (ME) Limited, the other shareholder in BSA and one of its affiliates. At paragraphs 229 - 235 of the Counterclaim, the Fourth Defendant expressed its concern that there was a conflict of interest inherent in the position of HFW because of its prior representation of ACCL. This was said to have crystallised through a failure to advance any potential claims which the Liquidator might have against ACCL (of the same nature as those which the Liquidator was pursuing against the Fourth Defendant).

27. The Letter before action of 1 February 2022 was sent by HFW so that no complaint was raised about their involvement for over 18 months until 11 August 2023 when the Fourth Defendant wrote with threats to report HFW to the regulatory authorities. HFW wrote in response on 24 August 2023, confirming HFW's appreciation of its regulatory duties in terms of conflict of interest and confidential information and its consideration of these matters when agreeing to act for the Claimants. HFW referred Jones Day, who were acting for the Fourth Defendant, to HFW's Risk Legal Team. Exchanges of correspondence followed in November and December 2023 between Jones Day and the Risk Legal Team which ought to have satisfied the Fourth Defendant that there was no conflict of interest at all.

28. The factual position is this. HFW acted for ACCL in the period between 2015 and 2017. It did not accept instructions from the Claimants in respect of these proceedings until March 2021. Before accepting such instructions Mr Braganza arranged for conflict checks to be undertaken and on becoming aware of previous instructions from ACCL, referred the matter to HFW's Risk Legal Team. Steps were then taken to ensure that any information obtained as a result of the previous instructions by ACCL was not to be available to the team acting for the Claimants. An entirely different team was involved and information barriers were implemented with the result that the existing HFW team has no knowledge either of HFW's previous instructions or of any information which came into their possession when acting for ACCL. Mr Braganza himself only joined HFW on 4 January 2021. None of the fee earners working on these proceedings did any work for ACCL or its affiliates and because of the information barrier they had no access to any work that was done for them.

29. Mr Haider's evidence on this was as follows. Prior to 10 March 2021, the law firm acting for BSA and the Liquidator was Global Associates. At the time of appointing HFW, he received confirmation from it that it had checked for conflicts and was able to accept instructions in the matter. As a reputable international SRA regulated firm, its confirmation was sufficient for his purposes. It was submitted by the Fourth Defendant that the Liquidator had not done enough to satisfy himself about the potential conflict of interest and reliance was placed upon the report of Mr Fleming which suggested what he would to satisfy himself. I do not consider that it was in any way negligent or wrongful for the Liquidator to rely upon the assurances of reputable international firms such as HFW that it had satisfied itself, in accordance with the SRA regulations, that there was no conflict of interest.

30. This point also cannot constitute a ground for removal of the liquidator and insofar as, it was at one time suggested that HFW should not act for the Liquidator, which is the logical result of the submission that there is an existing conflict, I reject that also.

31. In support of the application for removal of the Liquidator, Devenish 8 referred at paragraph 38 to the engagement of Mr Shivji KC as lead counsel for the Liquidator when he had previously acted for the Al Khorafis at first instance and in the Court of Appeal in their suit against BSA. In Devenish 12, the reply witness statement of 4 March 2024, the Fourth Defendant's concern is expressed that "the Liquidator's engagement of HFW and Mr Shivji as legal advisers compromises his capacity to maintain the independence and impartiality (including the perception of such) required to properly carry out its functions". It was said that there were critical questions, disputed facts and central aspects of the Liquidator's investigations which intersect with HFW and Mr Shivji's prior engagements. Whether or not they had satisfied themselves that they were able to act, their prior associations and engagements were sufficient to cause concern that the Liquidator had lost the independence and impartiality required of him properly to perform his functions. It was also said that the Fourth Defendant was concerned that the Liquidator's investigations and the current proceedings have become part of the Al Khorafis' attempts to pursue the Fourth Defendants for damages that they were unable to establish in their prior litigation which was the subject of a Settlement Agreement.

32. It is, of course, the case that the Al Khorafis, as a creditor in the BSA liquidation, have a substantial interest in maximising the estate of the insolvent company with a view to recovery of the judgement debt owed to them. As appears below, Mr Al Khorafi has entered into a funding agreement with the Liquidator for the pursuit of the proceedings against the Defendants, which constitutes a separate ground put forward for the removal of the Liquidator. How this is said to give rise to a problem in Mr Shivji acting as counsel for the Liquidator was not spelt out till the skeleton argument filed by the Fourth Defendant in March 2024 for the Hearing on the following day. There, for the first time at paragraphs 70 - 78 it was contended that Mr Shivji was a potential witness of fact in the dispute between the Liquidator and the Fourth Defendant by reason of his first hand witness of Mr Walia's performance in the witness box and that his prior engagement by the Al Khorafis was "an association which presents an additional dimension to the optic that the Liquidator has allowed his office to be used as cannon fodder in a collateral battle by the Al Khorafis against [the Fourth defendant". In consequence of the contention that he was a potential witness of fact, it was said that there was a contravention of the Advocate - Witness rule in Rule 6 of the DIFC Code of Conduct. It was said that his engagement as Counsel for the Al Khorafis made him one of the few first-hand witnesses to a pivotal accusation in the Liquidator's claims against the Fourth Defendant namely that Mr Walia performed so poorly as a witness at the trial on 10 July 2013 that BSA was rendered prospectively insolvent from that time.

33. I was asked by Mr Shivji to determine this point at the outset of the Hearing on 12 March 2024, because he would be unable to present arguments to the Court if this allegation was well founded. I was then addressed on the point by Ms Martin for the Fourth Defendant and by Junior Counsel, Mr Sampson for the Liquidator. I regarded the Fourth Defendant's argument as unsustainable and so ruled at the outset of the Hearing. The idea that Mr Shivji could ever be called as a witness is, to my mind, unreal. The impression that Mr Walia made on the judge appears from the terms of the judgement which is all that matters. This was an allegation which had never previously been made and was obviously a further attempt to derail the current proceedings, as were the conflict arguments in respect of HFW. In this case the attack was made upon Counsel himself, as well as on the Liquidator, whereas in the case of HFW it was unclear whether it was being said that HFW should not act, in addition to contending that the Liquidator should be removed for engaging HFW in the first place.

34. These accusations of conflict of interest do no credit to the Fourth Defendant and those advising it.

The failure by the Liquidator to deal with BSA's creditors fairly and impartially in the conduct of the liquidation.

35. It is said by the Fourth Defendant that the Liquidator has failed to deal with BSA's creditors fairly and impartially and has favoured the AL Khorafis at the expense of the Fourth Defendant or at least has "manifested a tendency to favour" them over the general body of creditors. It is also said that the Liquidator's investigations have been used by the Al Khorafis inappropriately to advance their own sectarian interests by using them as a means to exert pressure by re-agitating demands for damages of USD 1 .4 billion based on the same grounds to those put forward in the proceedings which were dismissed by the Court of Appeal as an abuse of process in 2018. Reliance is placed upon the differing treatment by the Liquidator of the proofs of debt submitted by the Fourth Defendant and the Al Khorafis which is said to support the inference that the Liquidator, whether deliberately or not, favours the latter's interests over the former. This overlaps with the allegation that the acceptance of litigation funding from Mr Al Khorafi for the Liquidator's claim against the Fourth Defendant provides evidence of his lack of independence and impartiality and the more general complaint made about the manner in which the Liquidator has processed the Liquidation over an extended period of time.

36. I will therefore determine the validity of this complaint in the course of discussing the issue of the Al Khorafi litigation funding and the general complaint in the paragraphs which follow.

The receipt of litigation funding from Mr Rafed Al Khorafi

37. There is, as set out in Mr Fleming's report and in the decision of Street J in the New South Wales Court in *RE Allebar Pty Ltd (in liquidation)* [1971] NSWLR 24 at 28, nothing unusual about a creditor funding litigation to be pursued by the Liquidator of an insolvent company. According to Street J, this is to be encouraged and a liquidator should not be diffident about accepting funds or indemnities to enable claims to be pursued. It is said by the Fourth Defendant that it is unusual for one creditor to fund litigation against another creditor but if the claim is well founded (which is a matter for another day) there is nothing for which to criticise the Liquidator. It is, nonetheless, said by the Fourth Defendant that funding in this situation is wholly inappropriate if it gives rise to a reasonable apprehension that the Liquidator may have lost the independence and impartiality required to perform his functions properly.

38. The evidence is that between October 2019 and May 2021, the Liquidator approached 10 commercial litigation funders as part of his efforts to obtain litigation funding for the claim against the Defendants. Ultimately, funding was agreed with Mr Al Khorafi in May 2021 because he offered the best commercial deal for provision of funding. Mr Al Khorafi is not entitled to any interest or other uplift on the funding he provides and has no right to control or influence the conduct of the proceedings where the Liquidator remains in full control of the litigation. Self-evidently, where another litigation funder would require recompense for funding, Mr Al Khorafi's funding comes without such strings, no doubt because the effect of any success would be to increase the insolvent estate against which he and his family have a judgement debt. The Liquidator's evidence is that this was the most favourable funding arrangement to the estate that he could obtain which, in the circumstances, comes as no surprise.

39. It is in this context that reference was made to a Settlement Agreement between the Al Khorafis and the Fourth Defendant, upon which the Fourth Defendant relies in asserting that the Al Khorafis are in breach in funding the Liquidator's claim and that the Liquidator is guilty of inducing a breach of that contract. The evidence, whether in without prejudice correspondence or not, indicates that the Liquidator was first made aware of this Settlement Agreement in August 2023 and there has been no suggestion that he was aware of it prior to that time. His evidence is that he had previously asked Mr Al Khorafi to confirm that he was not subject to any contractual arrangements that would prevent him from providing the funding and that such confirmation was given. The Settlement Agreement was eventually disclosed to him by the Fourth Defendant on 26 January 2024 pursuant to an order of this Court because it was expressly referred to in the Counterclaim. Once seen, despite taking the view that the Settlement Agreement did not prevent him receiving such funding, he has refrained from making any payments to the lawyers out of the funds which he currently has until the matter has been determined by this Court.

40. Having clearly asserted a breach and inducement thereof in the Counterclaim at paragraphs 261 - 267 and maintained that position in Devenish 8 at paragraphs 54 - 59, with expressed concerns that Mr Al Khorafi will receive preference ahead of creditors upon any realisation of assets, the Fourth Defendant has retreated from that position at Devenish 12 paragraph 59 - 65 and paragraphs 92 - 96 of its skeleton argument, now saying that the court should not determine whether the receipt of funding by the Liquidator is a breach of the Settlement Agreement. By contrast, the Liquidator, before seeing the terms of the Settlement Agreement, was saying that the matter could not be finally decided in the absence of the Al Khorafis, now, having seen the agreement submits that the court must decide the issue, as between the parties to this litigation since otherwise the liquidator would be unable to continue lawfully to accept the funding in question. Both HFW and Junior Counsel have suspended billing, as I understand it, until this matter is resolved.

41. It was in these circumstances that I said, at the Hearing, that I would determine whether or not Mr Al Khorafi was in breach of the Settlement Agreement in providing funding to the Liquidator for the claims made against the Fourth Defendant as a matter of construction of the Settlement Agreement. No arguments were then advanced by Ms Martin for the Fourth Defendant on the construction of that agreement, despite my express invitation to her to do so whether in her opening submissions or in reply. The reason is self-evident, because, as a matter of construction it cannot possibly be said that there is a breach on the part of Mr Al Khorafi or the Al Khorafis, let alone any inducement by the Liquidator to act in breach of it.

42. I need go into no details in relation to the point of construction. It suffices simply to say this:

42.1. clause 5.1 of the Settlement Agreement between the Al Khorafis and the Fourth Defendant dated 6 February 2020 provides that the Agreement is in full and final settlement of the "Released Claims" which are defined as the claims which those parties have against one another and do not in any way refer to claims made by the liquidator or BSA against any of the parties to that agreement. The claims which are now brought by BSA relate to the alleged fraudulent diversion of BSA's business to a subsidiary of the Fourth Defendant with the involvement of the latter's nominees to BSA's board and the Fourth Defendant itself. The claims are based upon alleged breaches of duty by its directors causing loss to BSA in which the other defendants were involved. They are claims which arise also under the insolvency regime of the DIFC and are personal to the liquidator. The claims in question are not claims which any of the Al Khorafis could have had at any time.

42.2. Clause 6 .1of the Settlement Agreement provides that each party is "not to sue, commence, voluntary may aid in any way, prosecute or cause to be commenced or prosecuted against the other party.. any action, suit or other proceedings concerning the Released Claims". This

can therefore have no application to the claims brought by the Liquidator in these proceedings.

42.3. Furthermore, clause 5.3 makes it clear that the parties did not intend the Settlement Agreement to preclude any claims which the Liquidator could prosecute, since that subclause specifically provides that clause 5.1 and the Settlement Agreement were not intended by the parties to, and should not have the effect of, releasing any claims which any of the Al Khorafis might have in the liquidation of BSA and in particular stated that "for clarity, the powers of the Liquidator. to recover any amount against any party and distribute that sum or part thereof to any creditor are not affected by this clause".

43. In these circumstances, as it is important to the Liquidator to know whether he can lawfully continue to accept funding and the Court needs to be satisfied about the issue, it is right that the Court should rule on the question of construction so that the Liquidator knows that this objection to his continuing to act as liquidator is groundless. I shall therefore make a declaration that, as between the parties to this action (and it is to be noted that the Al Khorafis have stated that they are content for this to be resolved here and now) the Liquidator is not inducing any breach of contract by continuing to receive funding from Mr Al Khorafi for the purposes of pursuing this litigation.

44. Regardless of the terms of the Settlement Agreement, the Fourth Defendant submits that the receipt of litigation funding from Mr Al Khorafi fatally impairs the independence and impartiality of the Liquidator. It remains the Fourth Defendant's submission that the Liquidator's evidence is not supported by any primary documentation and that the Court should not accept what he says because it is mere assertion. In the absence of disclosure of supporting documentation, the Fourth Defendant maintains that the Court should draw an inference against what is said by the Liquidator in his witness statement. This is a far-reaching submission when there is nothing to suggest that the Liquidator, as an officer of the Court, is dishonest or inaccurate in anything he has said. As is obvious in this and in other contexts, the Liquidator would not want to waive any privilege in the advice he received, a point which he makes in his witness statement.

45. The Fourth Defendant submits that, as the Al Khorafis are said to have expressed an intention to use the liquidation to investigate claims against the various Defendants (Devenish 12 at paragraph 25), as the Al Khorafis are litigious individuals who have sought to use the investigation as a means to exert pressure and re-agitate their demands for US $1 .4 billion in damages, there is sufficient to found an inference that the claims made by the Liquidator are groundless or have been pursued without any proper investigation, regardless of their strength and/or in order to further a collateral purpose of vexation and harassment in order to extract money from the Defendants.

46. There is simply no basis upon which such an inference could be drawn. Whatever the Al Khorafis may or may not have said, the Liquidator has stated in witness evidence that he controls the litigation, that the Al Khorafis have no say in its pursuit and that he has independent lawyers to advise him, without revealing the contents of that advice, as he wishes to maintain privilege.

47. I therefore reject the Fourth Defendant's submission that, by reason of the litigation funding accepted by the Liquidator from Mr Al Khorafi and/or the Settlement Agreement, there is any basis for impugning the independence and impartiality of the Liquidator and treating that as a ground for his removal.

48. The other element relied on in this context for asserting a lack of independence or impartiality arises in the context of a general complaint about the delay and manner of conduct of the liquidation and in particular an alleged failure to deal with the Al Khorafis' and the Fourth Defendant's proofs of debt in the same way. To that I now turn.

<u>The Conduct of the Liquidation. The alleged failure to complete the liquidation in a timely manner with requisite skill and diligence</u>

49. The Fourth Defendant mounted a general attack on the conduct of the liquidation, alleging incompetence, inefficiency and negligence in the pursuit of a liquidation which commenced on 2 May 2016, is not concluded nearly 8 years later and is not going to end until conclusion of the current proceedings, whenever that may be. Reliance was placed upon the two reports from Mr Fleming which largely consisted of saying how efficient he would be and what he would have done when faced with potential conflicts on the part of lawyers he instructed as a liquidator. As reflected in the judgement of Neuberger J (as he then was) it is very easy for another insolvency practitioner to come along after the event and criticize, but there can be no doubt that this liquidation has been protracted beyond anything which a Court might expect in a properly conducted liquidation.

50. What has to be borne in mind however is the limited funds available to the Liquidator here and the desire of the Liquidator, as an insolvency practitioner in a relatively small firm to keep costs down so far as possible. Litigation funding was, on his evidence, sought in 2019 and obtained only in May 2021.

51. Ms Martin for the Fourth Defendant realistically accepts that it is hard to criticise the Liquidator for any delay since the letter before action of 1 February 2022, as all efforts thereafter have been devoted to the pursuit of this litigation. Although she referred to this as unjustified blame shifting, the reality is that the Defendants have done everything they possibly can to stall the litigation and to derail it. There nonetheless remains a period prior to that which is on any view extraordinarily long. The effect of Covid must be taken into account as must the need for investigation of the alleged fraud which has led to the somewhat complex CPOC in its 174 paragraphs and accompanying schedule.

52. On 2 May 2016, the day of appointment of the Liquidator, the Al Khorafis submitted a proof of debt in respect of the judgement sum outstanding at that point of USD 35,208,401.44 plus costs. On the same day the Fourth Defendant submitted a proof of debt for USD 29,978,474, being the sum paid by it in satisfaction of the joint and several liability found by the Court against both it and BSA which it says is wholly attributable to the actions of BSA rather than itself.

53. The early stages of the liquidation required the Liquidator, following his appointment on 2 May 2016 to carry out preliminary investigations into BSA's affairs and there appears to have been difficulty in accessing its computerised records which had to be retrieved from other sources, as evidenced in correspondence. Self-evidently, the question of the appeal against the award of damages was a prime consideration at the outset.

54. The Fourth Defendant summarises the available evidence in relation to the period between 2016 and 2018 and between 2019 and 2022 at paragraphs 27 - 40 of its skeleton argument, based upon Devenish 8 paragraphs 41 - 53 and 60 - 78, Devenish 12 paragraph 37 onwards, and

paragraphs 198 onwards of the Counterclaim.

55. The Liquidator initially contacted the directors appointed by the Fourth Defendant to BSA on 20 June 2016 seeking a meeting in order to obtain information from them. The Fourth Defendant points out that paragraph 5.60.2 of the 2009 Regulations requires the Liquidator to write to all creditors and members of the company within 28 days of appointment. On 4 July 2016, a draft Statement of Affairs was provided to the directors for signature and solicitors acting for the directors appointed by the Fourth Defendant stated that this was being considered.

56. On 31 July 2016, the Liquidator made a preliminary report to the Court and to the creditors. This showed the limited cash funds available, the sum paid by BSA in respect of the Al Khorafi claim and the absence of any business income as BSA had ceased trading in 2014. It also indicated that the Liquidator was currently investigating the activities of BSA and would advise on the outcome of those investigations in subsequent reports. It is said that no such reports, updates or documents in relation to the investigation were received by the Fourth Defendant until the Liquidator wrote his letter before action on 1 February 2022.

57. The Liquidator wrote to BSA's creditors on 22 September 2016, informing them of a creditors' meeting on 4 October 2016 and advertising that meeting in the newspapers as required by statute and regulations. The first creditors' meeting was held at the Capital Club in the DIFC on 4 October 2016 at which a creditors pack was produced. This included an estimated Statement of Affairs as at 2 May 2016 showing cash at the bank of USD 588,333 and liabilities of USD 65,669,509, including an item referred to as "Khorafi judgement" of USD 64, 006, 948. It was noted that this last figure was a contingent amount based on the judgement awarded against the company in November 2015 against which an appeal had been launched which was set for hearing in November 2016. The notes to the estimated Statement of Affairs set out the two elements of the judgement on damages, subtracting the payment into court which had been made by BSA of USD 6,050,000. It was on 5 November 2015 that the Fourth Defendant had paid USD 24,583,425 in satisfaction of its joint and several liability for the compensatory damages awarded against it. As the Fourth Defendant claimed this sum from BSA, although the manner in which the estimated Statement of Affairs referred to the Khorafi judgement was strange, it was right to refer to a contingent liability for the total figures awarded against it which were subject to the appeal at that point in time. The Chairman's report in the estimated Statement of Affairs referred to the total judgement debt and interest without descending into further detail.

58. The Creditors' Meeting was attended by representatives of the two major creditors and another three creditors with small claims, including Al Tamimi which had been acting for BSA as its lawyers. The only two significant creditors were the Al Khorafis and the Fourth Defendant, both of whom had already submitted proofs of debt. No Creditors Committee or Liquidation Committee was formed.

59. The response to the 20 June 2016 requests for information from the Fourth Defendant's nominated directors came by way of a solicitor's letter of 7 August 2016, stating that they had no plans to visit Dubai but were prepared to meet by conference call after receipt of a list of questions or topics that the Liquidator would wish to discuss with them. It was on 4 January 2017 that he provided a lengthy list of detailed questions to be answered by each of the Fourth Defendants nominated BSA directors. A response was received from solicitors acting for those directors on 30 January 2017. The letter of 30 January 2017 provided a signed copy of a revised Statement of Affairs as at 2 May 2016 with revisions to all the draft supplied. This led to a further request for information to the three directors on 25 May 2017, one question being directed to locating the contents of BSA's "finance folder" which had gone missing and a response of 8 June 2017, once again from lawyers acting for the directors. It is said by the Fourth Defendant that no further correspondence was received from the Liquidator to these directors until 5 January 2020, some 2 ½ years later, when the Liquidator requested a meeting with the directors in Switzerland which was refused by them on the basis that this would contravene Article 271 of the Swiss Criminal Code. Once again willingness was expressed to meet by videoconference instead.

60. The lawyers then acting for the liquidator, Global Advocates, then arranged with the directors' lawyers for interviews of the directors in London on 10 March 2020, but the Covid pandemic intervened so that the directors were unable or unwilling to travel. On 29 March 2020, Global Advocates wrote to those directors with the questionnaire and a package of supporting documents. No response was forthcoming from the directors or their lawyers. There appears to have been no follow-up by the Liquidator nor any application to the Court to compel a response.

61. The evidence of the Liquidator is criticised by the Fourth Defendant as being at "a very high level". In his witness statement he did not accept that there had been any undue delay in completing the liquidation saying that, since his appointment, his team had taken significant steps in attempting to gather the information required in order to complete the liquidation. Apart from dealing with the outstanding appeal and the potential insurance cover, he set out what he described as "a brief summary". At paragraph 65.1 - 65.2 he stated that, from the date of his appointment in May 2016, he sought information from BSA's current and former solicitors, banks, auditors and other service providers. He also took steps to secure and obtain information from company servers. Those investigations continued through 2018, as and when additional third-party service providers (such as lawyers and auditors/accountants) became known to him and were contacted for information. He sought information from and met various officers of BSA, the DIFC Registrar of Companies and the DFSA. In the period between 2019 and 2021, he conducted further investigations into the subject matter of these proceedings and in particular the actions of the Defendants in stripping BSA of its assets. Extensive interviews of former management, including Mr Carton, clients and employees of BSA took place. He wrote to Mr Bukshi of the Fifth Defendant and sought information from the Fourth Defendant's nominated directors. He also stated that he faced delays as a result of Covid which frustrated his ability to conduct interviews, obtain information and litigation funding. In his witness statement he said that his investigations led him to the conclusion that it was in the best interests of BSA to pursue claims against the Defendants in CFI-009-2023 and CFI-005-2016 but he had not made any final decisions in respect of any other potential claims against other parties, a matter which he continued to keep under review. His current view was that the majority of BSA's business had been diverted to the Fifth Defendant and therefore the claims against the Defendants offered an important opportunity for recovery into BSA's estate. In his witness statement, the Liquidator says that the most intensive period of investigation was between 2016 and 2020 and between 2019 and 2021. He was seeking funding to bring the claims against the Defendants. In the period up to 31 March 2022, the Liquidator records liquidation costs of USD 314,577 and 580 hours spent.

62. Counsel for the Liquidator makes the important point that the details of the investigations which were carried out by the Liquidator leading to the prosecution of the claims against the Defendants could not be the subject of evidence without waiver of privilege and that to do so would potentially prejudice the Liquidator in pursuit of the litigation. Bearing that in mind and putting to one side the period after the letters before action on 1 February 2022, the fact remains that a period of over 5 ½ years elapsed between appointment of the Liquidator and these letters. According to Devenish 8 paragraph 67, the Liquidator first wrote to former employees of BSA on 31 December 2019, some 3 ½ years after his

appointment and meetings were held with them in January 2020. The legal costs paid show very limited work done before this time, as do the expenses of the Liquidator and his team, details of which are set out in Devenish 8 and are not contradicted, save to the extent that there may be costs accrued but not paid (as to which see below).

63. On 12 June 2018 the Liquidator had provided a statement of affairs. On 24 February 2020, he provided a further statement of affairs. On 31 March 2022, he circulated another report to creditors and on 9 November 2023 he circulated a further report to them. Until early March 2022, there was, under the existing Insolvency Law no obligation on the Liquidator to send a report to creditors. In early March 2022, a new Article 101 was inserted into the DIFC Insolvency Law of 2019 by DIFC Law No.2 of 2022, which now requires annual reports to be sent. The Liquidator explained in his witness statement that he took the view that it would harm the interests of BSA to issue any report whilst his investigations into its affairs were ongoing because they related to the conduct of BSA's shareholders and creditors. He did not want to tip off any proposed defendants about the investigations which were being conducted since they might be jeopardised. He considered he was fully entitled to do this under the Insolvency Regulations. As at 31 March 2022, accruals for liquidation and litigation expenses amounted to USD 1,323,968, of which some USD 314,577 was attributable to the Liquidator and his own team. Thus, it appears that over USD 1 million had been spent on lawyers and their investigations in addition to the smaller sums referred to as payments made for legal services.

64. Criticism is directed at the contents of, and inaccuracies in, some of these reports. In the Statement of Affairs of 30 June 2018, the total assets are set out at USD 459,384 with unsecured creditors totalling USD 65,743,875. Of the latter, the figure of USD 64,006,948 is attributed to the Al Khorafi Court Case and Note 1(a) again sets out the total of the compensatory and additional damages, together with costs payable with the deduction of the sum of USD 6,050,000 which had been paid. Note 1(b) then referred to the Fourth Defendant's proof of debt of USD 29,978,474 for amounts paid by it as a co-defendant in the initial award of USD 35,028,474, plus a claim for USD 4 million for costs. The note continued: "this will be reviewed by the liquidator once investigations into the affairs of the Company have been completed." Whilst, again, this may seem a strange way of setting out the position, since the Al Khorafis had received payment of the compensatory award, no one with any knowledge of the position could have been misled. The estimated statement of affairs at 31 December 2019 showed reduced assets of USD 279,439, with virtually identical entries in respect of liabilities, with legal fees paid of USD 122,966.

65. It is the Creditors' Report of 31 March 2022 that attracted the major criticism from the Fourth Defendant. Those criticisms are as follows:

65.1. it omitted the Fourth Defendant as a creditor;

65.2. it doubled the Al Khorafis' proof of debt;

65.3. it provided the first real information on the progress of the liquidation since 2016;

65.4. it did not make clear that the Liquidator had not adjudicated the proofs of debt of those listed at creditors;

65.5. it was only issued after the Liquidator had sent letters before action on 1 February 2022, following badgering by the Fourth Defendant;

65.6. no corrections were made to this report with an updated corrected report substituted, nor any mistake by the Liquidator acknowledged, despite requests from the Fourth Defendant that he should do so;

65.7. although errors are now acknowledged, the Liquidator doggedly refused to accept the mistakes for a period of 1[illegible] years.

66. This conduct is said to demonstrate the Liquidator's lack of impartiality and preference of/ favour for the Al Khorafis the Fourth Defendant.

67. This Creditors Report set out the "Current Status of the Liquidation", referring to the Liquidator's investigation of the reasons for the failure of a profitable business in collating documents, reviewing financial information and emails, interviewing and meeting former officers, employees and clients and discussing matters with former auditors, lawyers and other advisers.

> "In the course of these investigations, it became apparent to the liquidator [that] he required legal advice on his investigations and findings and he has therefore consulted legal counsel in the course of, and subsequently to, his investigation.
>
> At the conclusion of this work the liquidator concluded that there was a potential claim that could be pursued to recover sums for benefit of the creditors and the company.
>
> Therefore the liquidator engaged with several litigation funders for obtaining litigation funding to pursue the claim based on the Counsel's opinion.
>
> The liquidator has successfully managed to obtain litigation funding on the best commercial terms available. Further the liquidator has secured ATE insurance cover for any adverse costs arising from the contemplated litigation as well.
>
> The conclusion of the liquidation investigation and the steps to bring proceedings have been delayed by the Covid - 19 pandemic.
>
> This report was not previously issued as the liquidator considered that it is of such a nature that its disclosure would be commercially sensitive and it would be premature to disclose matters until he concluded matters to pursue the claim.
>
> The liquidator has issued a letter before action and is currently pursuing pre-action steps with the concerned parties. Again, due to sensitivity and confidentiality of matters the liquidator is not in a position to discuss these matters in any detail."

68. In the accompanying Statement of Affairs as at 31 March 2022, the total assets are shown as USD 166, 878. The accruals for Liquidation and litigation expenses are USD 1,323,968. Unsecured creditors are shown as USD 138,129 and the "Al Khorafi Matter", with Notes 1 (b) and 1(c), as USD 64,456,948. In Note 1(b), the same total figures appear as before in relation to the compensatory award, the additional damages, the advance on costs and the payment made by BSA. In Note 1 (c) reference is made to the Fourth Defendant submitting a proof of debt for USD 29,978,474 "for amounts paid by them as co-defendant in the initial award of USD 35,028,474 plus a claim of USD 4 million for costs. This will

be reviewed by the Liquidator once investigations into the affairs of the Company have been completed. This was all much as before, but the complaint is that, in the "Details of the Company's Creditors", the Al Khorafis appear with a debt of USD 64,006,948 and the Fourth Defendant does not appear at all. In contrast with previous statements, it is clear that the recording of the Al Khorafis' claimed debt is inaccurate, as its proof of debt was for the sum of USD 35,208,401.44 plus costs. Although the Fourth Defendant does not appear in the list of creditors, as such, Note 1(c) showed that it had submitted a proof of debt for USD 29,978,474, being the sum paid by it in satisfaction of the joint and several liability found against it and BSA. On Mr Haider's evidence, it had been made clear to the first creditors meeting that none of the proofs of debt had been adjudicated and the normal practice is that such adjudication takes place after realisation of assets.

69. Following complaint by lawyers acting for the Fourth Defendant, raising much the same points as already discussed above, HFW wrote on 21 June 2022, referring to the formal Reports to Creditors, the two Statements of Affairs provided to those lawyers on 12 June 2018 and 24 February 2020 and the updates on the status of the liquidation to the DIFC Registrar of companies on 26 June 2016, 22 September 2016, 12 July 2017, 2 April 2018, 4 July 2018, 16 October 2018, 1 April 2019, 30 September 2019, 31 December 2019, 15 April 2020, 2 July 2020, 4 October 2020, 4 November 2020, 21 December 2020, 26 December 2021, and 18 April 2022.

70. The HFW letter also made the point that updates had been given informally not only to the Fourth Defendant but to other creditors as appropriate. The letter continued:

> "However, in circumstances where investigations have been ongoing into the actions of your clients, the Liquidator has acted entirely properly as regards the extent of the information shared with them. In this regard, we refer you to Article 6.57 of the DIFC Insolvency Regulations:
>
> `Where in Insolvency Proceedings, the responsible insolvency practitioner considers, in the case of a document forming part of the records of the insolvency, that
>
> (a) it should be treated as confidential; or
>
> (b) it is of such a nature that its disclosure would be calculated to be injurious to the interests of the Shareholders or the creditors of the Company in its winding up,
>
> he may decline to allow it to be inspected by a person who would otherwise be entitled to inspect it.'
>
> Accordingly, the Liquidator was of the view that issuing a Report prematurely in light of the commercially sensitive matters could harm the investigation and success of the claim."

71. The HFW letter went on to say that the Liquidator had yet to adjudicate on the proofs of debt received and that it was unlikely that the Fourth Defendant would be entitled to a full indemnity for the sums claimed because of its own responsibility which gave rise to the joint and several liability imposed by the Court. The proof of debt submitted by the Fourth Defendant did not address the extent of any contribution which ought to be made, nor the basis upon which any claim was actually put forward. It was said that once that had been determined, the Al Khorafi Court Case liability would be reduced accordingly. That did not accept that the Al Khorafi proof of debt was of a lesser sum than set out in the list of creditors.

72. It was not until 9 November 2023 that the Liquidator issued a further Report to Creditors which stated expressly that he was yet to adjudicate upon any of the proofs of debt submitted by creditors and set out the correct figures which were being claimed by the Al Khorafi's and the Fourth Defendant.

73. The criticisms of the Liquidator in the above respects are overblown and no prejudice has resulted from the inaccurate record of the Al Khorafi proof of debt in the 31 March 2022 Statement of Affairs and omitting the Fourth Defendants from the list of creditors in it. The manner in which the "Khorafi judgement", "Al Khorafi Matter" and "Al Khorafi Court Case" figures were presented in the various reports submitted by the Liquidator could have left no one with any knowledge of the DIFC Court Decisions in any doubt as to the true position, however badly or inaccurately it was expressed. It is, in my judgement, absurd to accuse the Liquidator of bias because of the deficient presentation of the position in the 31 March 2022 Statement of Affairs, where it appears there has been confusion when transmitting figures in earlier reports and transposing figures into the List of Creditors without apportionment of the judgement sums in an appropriate manner between the Al Khorafi's and the Fourth Defendant following payment by the latter to the former. Whilst the Liquidator and HFW should have immediately corrected the figures and their refusal to do so does them no credit, there can be no doubt that, given the actual proofs of debt submitted, there was no prospect of any substantive error taking place, particularly as no adjudication had occurred (as everybody well knew) and there was no prospect of payment of any dividend to any creditor unless and until the claim against the Fourth Defendant and other Defendants is resolved one way or the other. The reality is that the Fourth Defendant has at all times been recognized as a party which had submitted a proof of debt, had been invited to the Creditors' Meeting and been sent Creditors Reports in 2016,2022 and 2023 (the last of which accurately set out the details of the proofs submitted) and Statements of Affairs in the same way as other creditors.

74. I therefore reject the allegation of failure by the Liquidator to deal with BSA's creditors fairly and impartially in the conduct of the liquidation. The Liquidator has taken the view that there is a valid claim to be pursued against the Fourth Defendant and the other Defendants following investigation which has led to the filing of a Claim Form and extensive CPOC settled by Counsel who have professional duties in pleading fraud. The bringing of that claim was only possible with litigation funding because of the minimal assets available to the Liquidator and the best offer of funding came from the Al Khorafis, who, of course, have a vested interest in maximising the assets available for satisfaction of the judgement debt owed to them and, as shown by the history, are keen to pursue the Fourth Defendant and its affiliates/associates for more money than the sums for which this Court has found them liable.

75. The reality is, as Counsel for the Liquidator submitted, that all the Fourth Defendant's complaints concerning the conduct of the Liquidator spring from his decision to prosecute claims against it and its related Defendants, as also clearly appears from the history of the matter. There is nothing in any of those complaints which impinges upon the integrity, impartiality, competence efficiency or care and skill of the Liquidator other than the fact of the delay in progressing the liquidation and prosecuting the claims against the Defendants. Whether or not that claim proves to be well founded is not a matter upon which this Court can reach a conclusion now, although it will have to take a view shortly in determining the strike

out claims which are currently scheduled to be heard in April.

76. Although the Fourth Defendant now complains about the delay in progressing the liquidation, there would be no real prejudice to it if no claim had been brought against it. If the Liquidator had not carried out the investigations which he did and had not decided to pursue a claim against the Defendants in fraud, there would never have been any possibility of any significant payout to any creditor by way of dividend because of the minimal assets in the insolvent estate. It is the need for such investigations and the conduct of those investigations which is said, together with Covid and the difficulties of obtaining information, to explain the extensive delay in progressing the liquidation which has led to a claim being brought after the expiry of the limitation period for ordinary claims without allegations of fraud, some nine years after the events which are said to have resulted in the diversion of business from BSA to the Fifth Defendant.

77. When the Liquidator was appointed on 2 May 2016, it was incumbent upon him to proceed with all due care and diligence. His position was one of difficulty because of the absence of assets, the fact that BSA had ceased trading in 2014 and because information was not readily to hand. He was faced with the immediate issues of the appeal to the DIFC Court of Appeal, but he was duty-bound to investigate the position with shareholders and directors, including any potential claims against any of them and, if there were, on proper legal advice, viable claims to be pursued, to pursue them with due diligence. Whilst he did not have large sums of money at his disposal for such investigations and he would be justified in being cautious about expending what was available, the existence of such claims would represent the only significant asset of the insolvent company and, as with any claim, the passing of time was likely to render their pursuit more difficult. It was not until October 2019, on the Liquidator's evidence that he started to approach commercial litigation funders and it was not until May 2021 that a funding deal was agreed with Mr Al Khorafi. HFW wase engaged in March 2021 and the majority of legal expenditure occurred thereafter.

78. In the morass of points raised by the Fourth Defendant, there is therefore one complaint of which this Court feels bound to take note. It is the delay between 2 May 2016 and about May 2021 when, to all intents and purposes, not very much seems to have happened. It does not seem to this Court that it can countenance a delay of this kind in the course of the conduct of a liquidation, absent some very clear and cogent explanation. The Court is not satisfied that it has received such an explanation in the witness statement of the Liquidator. Whilst there is no reason to doubt anything that he says (which is a good reason why no disclosure application ought to succeed) the fact is that there are extensive periods of time when, on his evidence, no progress appears to have been made and for which no good explanation is given. The Court is not without sympathy with a liquidator in the position of Mr Haider with limited assets at his command, difficulty in making investigations, uncooperative directors/shareholders who have run down the business prior to his appointment and who requires funding in order to pursue any claim against them. Nonetheless it is hard to see how any investigation, if properly conducted could take over 5 [illegible] years before a letter before action could be sent to potential defendants, even allowing for Covid and all the other factors to which I have already drawn attention.

79. It is with great reluctance that I come to the conclusion that the Liquidator should be removed from office, even though I have no doubt now that, with proper funding of competent lawyers, the case against the Fourth Defendant and other Defendants will be pursued with diligence and there will be no further unnecessary delay in progressing the liquidation. The past delay, however, seems to me to be so protracted that the Court must express its disapproval at the conduct of the liquidation so that it is clear that similar delays (and indeed delays far short of that involved here) are unacceptable and that liquidators must act with greater expedition than has been shown in this case. For that reason and that reason alone, dismissing all the other allegations made against the Liquidator, some of which should never have been made, I must direct the removal of the liquidator from his office because of his past failure and require that a substitute liquidator be appointed in his place. He will nonetheless be entitled to his fees up to the date of his removal. The words of Neuberger J, as he then was, are apt. *"In an appropriate case it is the duty of the court to make such an order, not merely on the merits of the particular case, but also because it sends out a clear message to liquidators that they have an important function which they should conduct in a vigorous, effective and independent manner."*

80. As to the date of his removal, I must have in mind the interests of the insolvent estate and the body of creditors as a whole which, of course, includes the Al Khorafis and the other minor creditors, in the pursuit of the litigation against the other major creditor, the Fourth Defendant and its various affiliates and associates. The removal will inevitably involve additional cost and delay but as there are strike out applications pending which are due to be heard on 18/19 April 2024, any further delay in the progression of this claim can be limited if those applications proceed and the new liquidator does not take up office until after judgement on those applications is given. The reasons for this delayed removal are, I hope, obvious. If I were to remove the Liquidator today, it would take time for a new liquidator to be appointed and, one suspects, this Court would have to decide on the identity of such a person. I regrettably have to say that I suspect that the Defendants would, if past history is anything to go by, take every opportunity to delay matters further. It is almost impossible to see how the strike out applications could be heard on 18/19 April were I to remove the Liquidator today. That would be a highly regrettable situation given the extent of delay thus far and the difficulty in finding dates for applications, let alone a trial. This is particularly the case since the strike out applications inherently carry the possibility that finality in this litigation might be achieved. It is highly desirable, in my judgement, that those applications should go ahead on the scheduled dates for the benefits of all those involved.

81. Moreover, any new liquidator, once appointed, would have to take a view about this litigation based, no doubt, on legal advice, but his consideration of the overall position would undoubtedly take time. Although, if the strike out applications go ahead and succeed, he will be faced with an immediate decision whether or not to appeal, he would then have the benefit of a reasoned Court judgement which he can consider for that purpose. If the strike out applications fail, then the proceedings (subject to any appeal by the Defendants) will otherwise move towards a trial which would present the new liquidator with the opportunity to familiarise himself with the position without the same degree of urgency and cost that would be involved if the removal was to take place immediately.

82. In these circumstances I order that the Liquidator be removed from his office immediately upon publication of the Court's judgement in the strike out applications.

83. To that extent only, the Removal Application of the Fourth Defendant succeeds, but every other form of relief sought, as set forth in paragraph 2 of this Judgment is refused. There is no basis for any personal liability on the part of the Liquidator in relation to the abandonment of the appeal; there is no basis for requiring him to terminate the funding arrangements, repay sums funded, nor to pursue insurers or be subject to any personal liability for any of his actions. In passing, I note that the tactic of the Fourth Defendant has been to target any individual person or entity it can in order to prevent the Court from grappling with the real issues in this case and the facts said to give rise to liability on its part. The logical

consequence of its arguments would be that HFW, Mr Shilvi and the Liquidator could no longer be engaged in the claims against it and the other Defendants.

84. This is a regrettable feature of the Defendants' approach and one to be denigrated lest it become a regular feature of modern litigation which is increasingly waged as a battle of attrition between lawyers with diminished professional courtesy and civilized behaviour. Such strategies ought to have costs consequences.

The Disclosure Application

85. As I have decided that the Liquidator should be removed, albeit not immediately, the disclosure application does not require determination. However, as the matter has been argued and I decided that I would hear argument on the main application for removal before finally determining that application, it is right that I should now give my decision. The disclosure application, if successful would have meant the adjournment of the Fourth Defendant's own removal application and was said to require that result.

86. The starting point must be the RDC which does not envisage either disclosure or cross examination of a witness as part of the procedure when the court has to determine whether or not to remove a liquidator. This is no doubt because of the nature of the application and the criteria to be applied by the Court in deciding that issue. The Liquidator is an officer of the Court and, absent good evidence to the contrary, can be expected to be honest in his dealings with the Court. It is, of course, open to the Court to order disclosure or indeed cross examination on a witness statement in an appropriate case where the needs of justice so require. That would represent an exceptional case and, in my judgement, this is not such a case.

87. The Fourth Defendant submitted that:

87.1. The Liquidator had stalled on every request for information as to the conduct of the liquidation and refused to disclose documents that were requested of him.

87.2. The witness statement of the Liquidator made assertions that were unsupported by any documentary evidence and those assertions could not be taken at face value without documentary support.

87.3. The witness statement of the Liquidator was a very high level summary of what he said took place without descending into any sufficient detail.

87.4. The Fourth Defendant was unable to test the veracity or accuracy of the Liquidator's witness statement without disclosure of documents which either supported or undermined it.

87.5. When faced with a request for information and documents, a liquidator acting honestly and transparently should provide what is requested.

87.6. When allegations were made of bias or apparent bias, the witness statement of a liquidator could not be given weight in the absence of supporting documents.

87.7. Whatever the ordinary position, the nature of the complaints made in the present case meant that disclosure of documents requested was appropriate.

88. The breadth of the requests for disclosure is considerable. On 30 May 2022, lawyers acting for the Defendants requested:

88.1. copies of (inter-alia) board minutes, other relevant documents, financial information, audited financial statements, emails, interview notes (between the Liquidator, former officers, employees and clients of BSA and former auditors, lawyers or other advisers of BSA (as referred to in the 2022 Creditors Report).

88.2. Legal advice in respect of his investigations and findings, as referred to in the 2022 Creditors Report.

88.3. copy of the funding terms and ATE insurance referred to in the 2022 Creditors Report.

88.4. Copies of the proofs of debt described at page 7 of the 2022 Creditors Report.

88.5. Copies of the Statement of Affairs for the years 2020 and 2021.

88.6. Breakdown of payments under the generic heading "Investigation Insurance and Other expenses for Potential Claim" at appendix 2 of the 2022 Creditors report. A breakdown of the Liquidator's settled expenses, noted as USD 202,407.

89. In circumstances where the Liquidator was carrying out investigations and interviews with a view to the prosecution of a claim against the Defendants, it is obvious why the Liquidator would not want to give disclosure of the items set out in paragraphs 87.1 - 87.3 and 87.6 above, most of which would attract privilege. On the basis of Article 6.57 of the DIFC Insolvency Regulations, he was entitled to take that line of action and there was no particular reason to supply the other documents requested when it was apparent that the Fourth Defendant was looking for any ground of challenge that could be made.

90. On 22 December 2023, lawyers acting for the Fourth Defendant (by this time, Jones Day) wrote to the Liquidator requesting provision of copies of the litigation funding agreement, the ATE insurance policy, a breakdown of the litigation and liquidation expenses and an updated creditor's report, largely as referred to in the 2023 Creditors Report. This was refused on 23 January on the basis that it was inappropriate to respond to such requests in the light of the litigation and the counterclaim that had been served in the interim period.

91. Jones Day submitted a request for document production which was declined on 8 February 2024 and the Disclosure Application was made

thereafter seeking eight different categories of documents under the following headings:

91.1. documents in respect of any potential claims against ACCL, Mr Walia, Mr Kurmann, AAA or other entities under common control.

91.2. Documents in respect of H FW's potential conflict of interest.

91.3. Documents pertaining to the selection of a litigation funder.

91.4. Documents pertaining to the Liquidator's preparation of reports, statements and other information in respect of BSA's affairs.

91.5. Documents pertaining to costs of the liquidation.

91.6. Documents pertaining to the progress of the liquidation.

91.7. Documents pertaining to the Liquidator's decision to abandon the appeal against the Additional Damages Award.

91.8. Documents pertaining to BSA's insurance policy.

92. These requests are rightly described as "fishing". The Fourth Defendant was plainly seeking wide ranging disclosure in order to find grounds for complaint against the Liquidator in a situation where there was already litigation in process and where material disclosure would have to be given in due course. The Fourth Defendant no doubt wished to bolster its case for removal of the liquidator and also to obtain advance disclosure in relation to the claims against it, which it would doubtless wish to use, whether in the strike out applications or elsewhere. If the Fourth Defendant considered that it had sufficient grounds to accuse the Liquidator of bias or negligence, and it needed only to show due cause for removal of the Liquidator from office by reference to a prima facie case, apparent bias or reasonable grounds for loss of confidence, all such disclosure would not be required. It must have considered that it did have sufficient information to advance those grounds as it did so, even though this Court has decided otherwise.

93. Moreover, as discussed at the Case Management Conference, it was always open to the Fourth Defendant to ask the Court to draw any inference from any failure on the part of the Liquidator to produce critical documentation where there were grounds for disbelieving his evidence as an officer of the court. In my judgement, prior to the hearing, I saw no reason to think that the Liquidator had been in any way dishonest in the evidence which he had given and saw every reason why he would not want to reveal the details of his investigations to the Fourth Defendant against whom suit was being brought for fraud. That would not be in the best interests of the insolvent estate, nor the general body of creditors. There was no basis for any allegation that the Liquidator was not to be trusted and his evidence was to be disbelieved.

94. In these circumstances I could see no reason to make any order for disclosure against the Liquidator and, having heard the arguments of the parties in the light of the evidence submitted, I am confirmed in that decision.

Conclusion

95. For the above reasons:

95.1. The Liquidator is entitled to a declaration that it is not a breach of the Settlement Agreement for the Liquidator to receive funding from Mr Al Khorafi for the purposes of pursuing the proceedings against the Defendants in CFI-009-2023 and CFI-005-2016.

95.2. The Liquidator is to be removed from his office as liquidator of Bank Sarasin -Alpen (ME) Ltd on publication of the Court's judgement on the Defendants' strike out applications in CFI-009-2023 and CFI-005-2016.

95.3. The Fourth Defendants applications for other relief are dismissed.

95.4. The Fourth Defendant's Counterclaim made in the Part 7 Claim is dismissed.

95.5. The Fourth Defendant's Disclosure Application is dismissed.

95.6. Pursuant to RDC 28.65, the documents included in the hearing bundle at E/4/457 - 465 and F/4/757-F/6/775 and any information within them may not be used for any purpose, subject to any further order of the court, being the subject of privilege.

95.7. Issues of costs are reserved for further submissions, to be exchanged simultaneously within 2 working days. It is obvious that the Fourth Defendant's attack on the Liquidator on a broad front has failed with rejection of some allegations that should not have been made, whilst it has succeeded in obtaining removal of the Liquidator by reason of the delay in the progress of the Liquidation and the commencement of the proceedings against it. The absence of proper motivation for seeking his removal and the basis upon which I have decided that he should be removed are factors to be considered in relation to any award of costs.