



Easter Term
[2026] UKPC 21
Privy Council Appeal No 0043 of 2025 and 0044 of 2025

JUDGMENT

**Manhattan Coffee Investment Holding (in
liquidation) (Respondent) v Stephen Mbugua
Mwagiru (Appellant) (Mauritius);
Manhattan Coffee Investment Holding (in
liquidation) (Respondent) v Stephen Mbugua
Mwagiru (Appellant) (Mauritius) No 2**

From the Supreme Court of Mauritius

before

**Lord Briggs
Lord Leggatt
Lady Rose
Lord Richards
Lord Doherty**

**JUDGMENT GIVEN ON
14 May 2026**

Heard on 19 March 2026

Appellant

Natasha Behary Paray

(Instructed by Jeeshna Radhakisson, Dentons Mauritius LLP)

Respondent

Tom Smith KC

Paul Fradley

(Instructed by Dushyant Ramdhur)

LORD RICHARDS:

Introduction

1. There are two appeals before the Board made against connected orders. The principal issue raised by the appeals is whether it is open to the court to authorise a director of a company in liquidation to bring or continue proceedings on behalf of and in the name of the company and, if so, the circumstances in which it might be appropriate to do so.

2. The appellant Stephen Mbugua Mwagiru is a director of the respondent company Manhattan Coffee Investment Holding (“the Company”), but he is neither a creditor nor a shareholder. In May 2023, the Supreme Court of Mauritius ordered the winding up of the Company on the petition of an unpaid creditor, and two joint liquidators have been appointed.

3. In March 2017 the Company had lodged a plaint (“the Plaint”) before the Supreme Court seeking the annulment of certain issues of shares in two companies in which it was a shareholder. The Plaint alleged that the issue of those shares had unlawfully diluted its own shareholdings from 46.5% to 14.5% in one company and from 51.2% to 14.6% in the other company.

4. In November 2023 the appellant made two applications to the Commercial Division of the Supreme Court. By the first application (“the Leave Application”) he sought leave under section 154(1)(c) of the Insolvency Act 2009 (“the IA 2009”) to commence against the Company (i) an application for an order pursuant to section 170 of the Companies Act 2001 (“the CA 2001”) giving him leave as a shareholder to continue the Plaint as a derivative action and (ii) an application for an interim injunction to restrain the joint liquidators from disposing of the sole assets of the Company pending determination of the Plaint. The Leave Application was issued and decided on 21 November 2023 without any notice to the Company or any hearing. Goordyal-Chitto J made the order sought (“the Leave Order”) without giving any judgment or statement of reasons.

5. By the second application (“the Derivative Application”), the appellant as a director applied under section 170(1)(b) of the CA 2001 and under section 174 of the IA 2009 for (i) an order granting him leave to continue the Plaint in the name and on behalf of the Company and (ii) an order that the whole or part of the reasonable costs of bringing the Plaint including any costs relating to any settlement or compromise should be met by the appellant. This application was issued on 27 November 2023 and decided the following day, again without any notice to the Company or any hearing, by Lau Yuk Poon J who made the order sought (“the Derivative Order”) without giving any judgment or statement of reasons.

6. On separate appeals by the Company, acting by the joint liquidators, the Court of Civil Appeal set aside both the Leave Order and the Derivative Order. The appellant appeals to the Board, with the leave of the Supreme Court.

Statutory provisions

7. It is convenient to set out at this point the relevant parts of the three statutory provisions which lie at the heart of these appeals.

8. Section 170 of the CA 2001, headed “Derivative actions”, sets out the procedure whereby the court may permit a shareholder or director of a company to bring a derivative action on behalf of the company:

“(1) Subject to subsection (3), the Court may, on the application of a shareholder or director of a company, grant leave to that shareholder or director to—

(a) bring proceedings in the name and on behalf of the company or its subsidiary; or

(b) intervene in proceedings to which the company or any related company is a party for the purpose of continuing, defending, or discontinuing the proceedings on behalf of the company or its subsidiary, as the case may be.

...

(3) Leave to bring proceedings or intervene in proceedings may be granted under subsection (1), only where the Court is satisfied that either—

(a) the company or related company does not intend to bring, diligently continue or defend, or discontinue, the proceedings, as the case may be; or

(b) it is in the interests of the company or its subsidiary that the conduct of the proceedings should not be left to

the directors or to the determination of the shareholders as a whole.

(4) Notice of the application shall be served on the company or its subsidiary.

(5) The company or related company—

(a) may appear and be heard; and

(b) shall inform the Court, whether or not it intends to bring, continue, defend, or discontinue the proceedings, as the case may be.

(6) Except as provided for in this section, a shareholder or director of a company is not entitled to bring or intervene in any proceedings in the name of, or on behalf of, a company or its subsidiary.”

9. Section 154 of the IA 2009, headed “Effect of liquidation”, provides in part:

“(1) With effect from the commencement of the liquidation of a company—

(a) the liquidator has custody and control of the company’s assets;

(b) the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part;

(c) unless the liquidator agrees or the Court orders otherwise, a person shall not—

(i) commence or continue legal proceedings against the company or in relation to its property;
or

(ii) exercise or enforce, or continue to exercise or enforce, a right or remedy over or against property of the company ...”

10. Section 174 of the IA 2009, headed “Court supervision of liquidation”, provides, among other things, for the court to give directions:

“(3) On the application of the liquidator, the committee of inspection, the Director, the Registrar of Companies, or, with the leave of the Court, a creditor, shareholder, other entitled person, or director of a company in liquidation, the Court may—

(a) give directions in relation to any matter arising in connection with the liquidation ...”

Facts

11. The Company is an investment holding company incorporated in Mauritius. Its only assets are shares in two other investment holding companies (also incorporated in Mauritius), Cedar IV Ltd and CedarSoc Ltd (the “Cedar Companies”), which indirectly hold investments in Kenya through intermediate Kenyan companies.

12. In March 2017, the Company lodged the Complaint, seeking the annulment of the issue of shares in the Cedar Companies referred to above, which it alleged were issued in breach of its statutory pre-emption rights, or damages amounting to US\$340m. It is unnecessary for present purposes to go further into the facts underlying this claim. If the Complaint were successful, there would be a very substantial increase in the value of the Company’s assets.

13. Another shareholder in the Cedar Companies, SCF Holdings II Ltd (“SCF”), had in June 2015 commenced arbitration proceedings in London against the Company. The Company defended the proceedings, supported by evidence given by the appellant. A partial final award was delivered in February 2018, awarding nearly US\$15m against the Company.

14. In February 2019, SCF presented a winding up petition against the Company in the Bankruptcy Division of the Supreme Court of Mauritius. The court appointed a provisional liquidator, as a result of which under the IA 2009 the board of directors ceased

to have any control or powers over the affairs of the Company, including conduct of the Plaintiff.

15. In May 2023, the Supreme Court made a winding up order against the Company, and the joint liquidators were appointed shortly afterwards. In August 2023, the appellant applied for leave to appeal out of time against the winding up order. In March 2024, the Court refused to extend time for appealing and set aside the application.

16. As the Board understands the position, the joint liquidators did not take steps to continue the Plaintiff. In October 2023 they advertised the Company's shareholdings in the Cedar Companies for sale, with bids to be submitted by 27 November 2023.

The proceedings

17. The joint liquidators' action in offering for sale the Company's shareholdings in the Cedar Companies led the appellant to make the Leave and Derivative Applications on 21 November and 27 November 2023 respectively. The appellant was concerned that the joint liquidators would sell the shareholdings on the basis that they represented the diluted proportions of the Cedar Companies' share capital, and that they would be purchased by SCF which would set off the debt due to it under the partial final award against the purchase price. The Leave Order was made on 21 November 2023 and the Derivative Order was made on 28 November 2023.

18. The Company's appeal against the Leave Order was heard on 23 September 2024 and its appeal against the Derivative Order was heard on 7 November 2024. Separate judgments in the appeals were given on 11 December 2024 by Mungly-Gulbul CJ, with whom Hamuth-Laulloo J agreed.

19. The appeal against the Leave Order was allowed on the following grounds. First, the Leave Order gave permission for an order under section 170 of the CA 2001 but that section had no application to a company in liquidation. Second, section 154(1)(c) of the IA 2009 is concerned with legal proceedings "against the company or in relation to its property" which does not include authority for proceedings "in the name and on behalf of the company". Third, the Leave Order should not have been made without notice to the joint liquidators and without giving them an opportunity to be heard on the application.

20. On the appeal against the Derivative Order, an issue arose as to whether the Order had been made under section 170 of the CA 2001 or under section 174 of the IA 2009. The Company submitted that the Order had been made under section 170, while the appellant submitted that "the more sensible view" was that the judge made the Order "in the exercise of her supervisory jurisdiction over the liquidation" of the Company

under section 174. Counsel for the appellant submitted that pursuant to section 174 “the court may, in the exercise of its supervisory jurisdiction of the liquidation process, allow an interested party to continue proceedings in the name of and on behalf of the company in liquidation”.

21. The principal ground on which the Court of Civil Appeal allowed the Company’s appeal was that the Derivative Application should not have been heard on an ex parte basis. It was “incumbent upon the Court to give the [Company] an opportunity to put in an appearance and inform the Court of its stand” and “only determine the issue after considering the stand and arguments, if any, of both parties”. This was a sufficient basis on which to allow the appeal.

22. For completeness, the Court of Civil Appeal went on to consider whether the appellant would have been entitled to an order under either section 170 of the CA 2001 or section 174 of the IA 2009.

23. As regards section 170 of the CA 2001, the Court held that “it can be gathered from the whole scheme and design of the section that section 170 only applies in respect of a company as a going concern and not to a company in liquidation”. Once a company is in liquidation, the liquidators have custody and control of the company’s assets, and they are the sole persons entitled to take decisions on its behalf.

24. Reliance by the appellant on section 174 of the IA 2009 was also held to be misconceived, as the section does not provide for legal proceedings on behalf of a company in liquidation to be taken by anyone other than the liquidator. Section 174 “empowers the court to supervise the liquidation process and review the actions of the liquidator” and only the liquidator may bring proceedings on behalf of and in the name of the company pursuant to the supervisory jurisdiction under section 174.

The parties’ submissions before the Board

25. As regards the Leave Order, the appellant emphasised that he regarded this as only a necessary preliminary step to making the Derivative Application. He submitted that the latter application constituted “legal proceedings against the company or in relation to its property” within section 154(1)(c) and that therefore he was required to obtain leave under that provision before he could issue the Derivative Application. Although the Court of Civil Appeal’s judgment on the appeal against the Leave Order proceeded on the basis that the appellant had been seeking leave to make an application under section 170 of the CA 2001, it could and should have treated it as an application for leave to make an application for a derivative order under section 174 of the IA 2009. The appellant accepted before the Board that an order under section 170 of the CA 2001 could not be made because the Company was in liquidation but argued, by reference to a considerable

body of case law in England, Canada, Australia and New Zealand, that the court may direct a person other than the liquidator to bring or continue proceedings on behalf of a company in liquidation.

26. It is worth noting that Ms Natasha Behary Paray, appearing for the appellant, correctly observed that proceedings brought on behalf of a company in liquidation by a person other than the liquidator would not strictly be a derivative action. In a derivative action, such as may be brought under section 170 of the CA 2001, the claimant is the shareholder, suing to recover damages or other relief for the company, and the company is joined as a defendant so that it can enforce any judgment obtained for its benefit. By contrast, in an action brought pursuant to section 154(1)(c) of the IA 2009 the company is the claimant, acting by the person authorised by the court for that purpose.

27. The Company submits that because the Leave Application sought leave to make an application only under section 170 of the CA 2001, and did not seek leave under section 174 of the IA 2009, the Court of Civil Appeal was right to treat it as restricted to leave for an application under section 170, as reflected in the terms of the Leave Order made by the judge. It follows that the Leave Order should not have been made. Further, the Court was right to hold that the Leave Order should not have been made on an ex parte application.

28. As regards the Derivative Order, the appellant submits that it is properly to be regarded as having been made under section 174 of the IA 2009. The court had power to make the order under section 174, and it is expressed to have been made under that section as well as under section 170 of the CA 2001.

29. The appellant submits that the Court of Civil Appeal was wrong to set aside the Derivative Order on the grounds that it had been made ex parte. There was no jurisdictional bar to the order being made ex parte, and the Company had suffered no irredeemable prejudice as it could have applied to the judge to discharge the order or, as it had done, to appeal the order. The Court of Civil Appeal should have considered the order on its merits.

30. The appellant challenges the Court of Civil Appeal's decision that the court has no power under section 174 of the IA 2009 to make an order authorising an interested person to commence or continue proceedings on behalf of and in the name of a company in liquidation. He relies on section 174(3)(a) which empowers the court to "give directions in relation to any matter arising in connection with the liquidation" and on the authorities in other jurisdictions which establish the court's power in this respect.

31. The Company accepts that, as a matter of jurisdiction, the court has power to make an order in respect of a claim by a company in liquidation, permitting a person with a

legitimate interest in the liquidation to commence or continue proceedings on behalf of and in the name of the company. The power is exercisable only in favour of those with an entitlement to share in the distribution of the assets of the company, ie creditors and, if there is likely to be a surplus, contributories. The court will not make an order in favour of a person in his or her capacity as a director, because a director has no legitimate interest in pursuing the claim, which if successful will go to increase the assets available for distribution to creditors and, if there is a surplus, to contributories. The Derivative Order should therefore never have been made, and the Court of Civil Appeal was right to set it aside. Further, the Court was right to set aside the Order on the grounds that it had been made ex parte, contrary to the general rule that all parties affected by a proposed order are entitled to be heard on the application and in circumstances where there was no justification for departing from that general rule.

The Leave Order

32. In the Board's judgment, the Leave Application and the Leave Order were entirely misconceived and have led to considerable and unnecessary procedural confusion.

33. As all parties agree, section 170 of the CA 2001 was inapplicable because the Company was in liquidation. This is clearly right: see the decision of the Board on appeal from the British Columbia Court of Appeal in *Ferguson v Wallbridge* [1935] 3 DLR 66 at p 83; *Hedley v Albany Power Centre Ltd* [2005] 2 NZLR 196, para 55 (New Zealand High Court); *Chahwan v Euphoric Pty Ltd* [2008] NSWCA 52; (2008) 245 ALR 780; (2008) 227 FLR 43, para 1 (New South Wales Court of Appeal); *Petroships Investment Pte Ltd v Wealthplus Pte Ltd* [2016] SGCA 17; [2016] 2 SLR 1022, para 1 (Singapore Court of Appeal). It also clearly follows from the terms of section 170 itself. First, only a shareholder or a director of the company can make an application under section 170, but once a company is in insolvent liquidation the persons with the primary interest in the assets of the company (including any claims it may be entitled to make) and in their realisation are the creditors. If it was intended that section 170 should apply to a company in liquidation, it is inconceivable that it would not make provision for an application by a creditor. Secondly, section 170(3) provides that leave to bring derivative proceedings will be given only if the court is satisfied either that the company does not intend to bring or diligently prosecute the proceedings or "it is in the interests of the company or its subsidiary that the conduct of the proceedings should not be left to the directors or to the determination of the shareholders as a whole". The quoted words make no sense in the context of a liquidation where the conduct of the company's affairs is vested in the liquidator in place of the directors and shareholders. Again, if it was intended that section 170 should apply to a company in liquidation, appropriate provision referring to the liquidator would have been made.

34. It was therefore wrong to apply for leave under section 154(1)(c) of the IA 2009 to bring an application for leave to bring derivative proceedings under section 170 of the IA 2009.

35. Although the Leave Application did not seek leave to make an application under section 174 of the IA 2009, it would have been equally misconceived to do so. An application under section 174 is not a proceeding “against the company or in relation to its property”. It is an application for directions as to steps to be taken in the liquidation, with the liquidator (not the company) joined as a respondent if the application is made by any person other than the liquidator. Similarly, if leave is sought for the applicant to bring proceedings in the name and on behalf of the company, the application for leave is not proceedings “against the company or in relation to its property”, nor are the substantive proceedings, if leave is given. They are proceedings by, not against, the company.

36. The Court of Civil Appeal was therefore correct to allow the appeal against the Leave Order. They were also correct to say that neither the Leave Application nor the Leave Order should have been made without notice to the liquidators and an opportunity for them to be heard.

The jurisdiction to make an order authorising proceedings in the name of a company in liquidation

37. It is common ground that, contrary to the view of the Court of Civil Appeal, the court has power, where a company is in liquidation, to authorise a person other than the liquidator to bring or continue proceedings in the name of the company, under its jurisdiction to supervise and give directions as to the conduct of a liquidation contained in section 174 of the IA 2009. The Board refers below to some of the authorities which established and developed this power.

38. The central issue on these appeals is whether the appellant, as a director of the Company, had standing to apply for such an order in his favour. Section 174(3) in terms permits “a creditor, shareholder, other entitled person, or director of a company in liquidation” to apply, with the leave of the court, for directions in relation to any matter arising in connection with the liquidation. The question is whether that reference to a director is sufficient to give to a director standing to apply for authority to bring or continue proceedings in the name of the company.

39. Before considering that question, it is helpful to trace the development of the jurisdiction to make such an order.

40. In bankruptcy, the assets of the bankrupt including any claims against third parties vest in the trustee in bankruptcy who will generally have sole authority to commence or continue such claims. Nonetheless, the jurisdiction of the court to permit the bankrupt to prosecute such claims was well-established in England by the start of the 19th Century but the court would give permission only if there was, or was likely to be, a surplus in the bankruptcy: see, for example, *Benfield v Solomons* (1803) 9 Ves 77, 83–84 (Lord Eldon LC).

41. A similar power was established by the English courts in the winding up of companies in the mid-19th Century.

42. *In re Bank of Gibraltar and Malta* (1865) LR 1 Ch App 69 was the first case to which the Board was referred in which this power was exercised. The company was in voluntary winding up and was solvent. The Court of Appeal in Chancery gave leave to members of the company to file proceedings on behalf of and in the name of the company alleging breach of duty against the directors. It acted under section 138 of the Companies Act 1862 which provided that the court could, on the application of the liquidator or any contributory, exercise any power which it might exercise if the company were being wound up by the court. Shortly afterwards, in *In re Imperial Bank of China, India and Japan* (1866) LR 1 Ch App 339, the Court of Appeal in Chancery followed this decision and made a similar order in favour of two members of another solvent company which was in voluntary liquidation. In both cases, it was the members who would stand to benefit from the claim if successful.

43. In *Cape Breton Co v Fenn* (1881) 17 Ch D 198, the unpaid solicitors of a creditor of a company in compulsory liquidation obtained at first instance an order permitting them to bring proceedings in the name of the company against its promoters and directors for alleged misfeasance. The Court of Appeal set aside the order, holding that, as the solicitors were neither creditors nor contributories of the company, the court had no jurisdiction to make such order. It was not suggested that the statutes governing winding up in terms authorised such an order in favour of a creditor's solicitors, but it was argued that "independently of the terms of the Act, there is a general jurisdiction to authorise contributories and creditors to institute a suit in the name of the company in a proper case" (p 206). Jessel MR accepted that such jurisdiction existed, but it did not assist the solicitors as they were not in either category. He said at p 207 that "The only parties to the proceedings in a winding up are the liquidators, the contributories, and the creditors" and that, except for persons establishing their rights or recovering their property, "there is no person who has a right to intervene in the winding up proceedings except the creditors and the contributories".

44. Jessel MR explained that the basis on which creditors and contributories might be permitted to sue in the name of the company was "the same principle on which a man could always have filed a bill in the old Court of Chancery against his trustee to be allowed

to use his name to recover the trust property”. In those cases, the power existed to enable a person interested in an estate or trust fund to commence proceedings: see *Sharpe v San Paulo Railway Co* (1873) LR 8 Ch App 597, 609–610, per Sir W M James LJ.

45. Cotton LJ’s judgment at p 208 proceeded on the basis that creditors and contributories were the only persons who, under the terms of the legislation, could intervene if they were advised that the liquidator was not properly doing his duty. He said: “They have a right in special cases to ask the Court for leave to do that which the liquidator is advised not to do, or which, because he has no funds, he does not do, viz, take proceedings in the name of the company, but in my opinion the power of the Court to give leave to use the name of the company stops there, and is confined to those who are parties to the liquidation”.

46. It should be noted that the Companies Act 1862, which then governed the winding up of companies, contained no express provision for creditors or contributories to apply to the court for directions as regards the exercise by the liquidator of his powers in the case of a winding up by the court. Section 138, which was relied on in *In re Bank of Gibraltar and Malta*, applied only to voluntary liquidations. In *Cape Breton Co v Fenn*, the court was relying on an inherent jurisdiction to be derived from the nature and purposes of a liquidation. Although Cotton LJ referred to the creditors and contributories having a right to intervene “under the terms of the Act”, this was not a reference to a specific provision. The existence of an inherent, as well as an express, power has been confirmed in later Australian cases to which reference is made below.

47. It is relevant to note that, consistently with this approach, in *In re The Scottish and Universal Finance Bank Ltd, Ship’s Case* (1865) 2 De GJ & S 544, 550, a case concerning rectification of the register of members of the company in liquidation and not involving any question of authority to bring proceedings in the name of the company, the Court of Appeal in Chancery (Knight Bruce and Turner LJJ) refused to allow an intervention by a person in his capacity as a director because as such he had no locus standi. He was allowed to intervene only when he agreed to be admitted as a contributory.

48. Although the cases referred to above established that a contributory or a creditor could be authorised by the court to bring proceedings in the name of the company, it appears to have fallen into disuse in the UK. This is probably the result of the judgment of the Court of Appeal (Jessel MR, James and Cotton LJJ) in *In re Park Gate Waggon Works Co* (1881) 17 Ch D 234, given five weeks after *Cape Breton Co v Fenn*. It was there held that a liquidator was empowered by section 95 of the Companies Act 1862 to assign a cause of action, thus providing an alternative route whereby creditors and contributories (and indeed others) could pursue claims of the company.

49. The only later case in the UK cited to the Board in which a question of authorising a contributory or creditor to bring proceedings in the name of the company arose was *Fargro Ltd v Godfroy* [1986] 1 WLR 1134. A derivative action had been brought by a shareholder before the company went into liquidation. Applying *Ferguson v Wallbridge*, Walton J held that once the company had gone into liquidation, only the liquidator had authority to bring the claim, and a shareholder had no standing to do so without a direction by the court. He relied on *Cape Breton Co v Fenn* as authority to permit the shareholder to continue the proceedings in the name of the company. He commented that the point which had arisen was “a novel one to me” and that he had “assumed it to be entirely untouched by authority”.

50. In *Lloyd-Owen v Bull* [1936] 4 DLR 273, which was a sequel to *Ferguson v Wallbridge*, the Board heard an appeal from the refusal of the courts of British Columbia to permit a shareholder of the company in question in those cases to bring proceedings in the name of the company which was in voluntary liquidation. The Board allowed the appeal. At p 275, Lord Blanesburgh quoted from his judgment in *Ferguson v Wallbridge* where he had said that if a liquidator refused to bring proceedings, it was open to any contributory to apply to the court and, under a provision for giving directions in the British Columbian Companies Act, it was open to the court to give the applicant leave to use the company’s name as plaintiff in proceedings to vindicate the company’s rights. He said at p 276 that: “A judge in winding-up is the custodian of the interests of every class affected by the liquidation. It is his duty even if it be in a voluntary liquidation that opportunity offers to see to it that all assets of the company are brought into the winding-up”.

51. Applications for permission to bring proceedings in the name of a company in liquidation appear to be quite common in Australia and New Zealand.

52. In *Aliprandi v Griffith Vintners Pty Ltd* (1991) 6 ACSR 250, McLelland J held that the court had jurisdiction to authorise a creditor or contributory of a company in liquidation to bring proceedings in the name of the company, referring to the cases mentioned above and also to a New Zealand authority (*Re Dominion Portland Cement Co Ltd* [1919] NZLR 478). He quoted Jessel MR’s explanation in *Cape Breton Co v Fenn* that the jurisdiction is based on the same principle as the old procedure in the Court of Chancery by which a beneficiary could be authorised to bring proceedings in the name of the trustee.

53. *Aliprandi* was cited with approval by the Full Federal Court in *Magarditch v Australia & New Zealand Banking Group Ltd* [1999] FCA 806; (1999) 32 ACSR 367 and by the Full Court of the Supreme Court of South Australia in *Russell v Westpac Banking Corp*n (1994) 61 SASR 583; 13 ACSR 5. The issue in the latter case was whether a guarantor of a company in liquidation, whose guarantee had not (yet) been called on and paid and who was thus a contingent creditor of the company, could be authorised to bring proceedings in the name of the company. The Full Court held that he could be so

authorised and in an important passage King CJ set out the grounds for that conclusion in particularly clear terms:

“The eligible class consists of the persons in whose interests the winding up is carried out and who are entitled to derive benefit from the assets of the company in the winding up. If the liquidator neglects the interests of such persons by failing to institute proceedings they may be authorised to do so.

The rationale, in my opinion, is that the failure of a liquidator to institute proceedings to recover assets or debts of the company ought not to operate to the prejudice of the persons in whose interests the winding up is carried out and who are entitled to benefit from the assets of the company.

I consider that that rationale extends to a guarantor. If the guarantor is called upon to pay the creditor and does so, he becomes a creditor and a beneficiary in the winding up.”

54. In *Cadima Express Pty Ltd v Deputy Commissioner of Taxation* [1999] NSWSC 1143; (1999) 157 FLR 424, Austin J held that the court’s power to give authority to bring proceedings in the name of a company in liquidation arose both under the statutory provision which permits a creditor or contributory to apply to the court with respect to any exercise or proposed exercise of the liquidator’s powers and under the court’s inherent jurisdiction.

55. These authorities, including the decision that the power may be exercised under the court’s inherent jurisdiction, have been followed and applied in other Australian cases: *Carpenter v Pioneer Park Pty Ltd* [2008] NSWSC 551; (2008) 66 ACSR 564; *In re Staway Pty Ltd* [2013] NSWSC 819; *In re Colorado Products Pty Ltd* [2014] NSWSC 64; (2014) 97 ACSR 581; and *El-Saafin v Franek* (No 2) [2018] VSC 683. In the latter case, Lyons J echoed the basis of the jurisdiction as stated in *Russell v Westpac Banking Corp*, when he said at para 165:

“It is clear, as the parties agreed, that the Court has inherent jurisdiction to grant leave for an appropriate person to bring proceedings on behalf of that company in liquidation. Those persons include creditors and contributories of a company, and others in whose interest the winding up is carried out and who are entitled to derive benefits from the assets of the company in the winding up, for example, guarantors.”

56. The courts of New Zealand have recognised this jurisdiction. In *Hedley v Albany Power Centre Ltd*, a shareholder applied for permission to bring a derivative action on behalf of the respondent company against its directors. Before the application was heard, the company went into liquidation. The liquidators were not willing to bring the proceedings. Wild J, sitting in the New Zealand High Court, treated the application as made under section 284 of the Companies Act 1993, which was in identical terms to section 174 of IA 2009. Although he adjourned the application for further information, he was in no doubt that it was open to the court to authorise the applicant to bring the proceedings in the name of the company.

Standing to make an application for authority to bring proceedings in the name of a company in liquidation

57. Aside from confirming the existence of the power to authorise proceedings to be brought by a creditor or contributory in the name of a company in liquidation, these authorities establish two points of importance relevant to the present appeal. First, as in particular the passages quoted above from the judgments in *Cape Breton Co v Fenn* and *Russell v Westpac Banking Corp*n show, the basis of the power is to enable in appropriate cases those who have an interest in the collection, realisation and distribution of the company's assets to pursue claims for the benefit of the estate. Second, although many of the cases identify statutory provisions giving the court a supervisory role as the source of this power, *Cape Breton Co v Fenn* and several of the Australian cases demonstrate that it is also based on the court's inherent power to supervise the liquidation. It is not therefore necessary for creditors or contributories to rely on an express statutory provision for standing to make an application for such an order. It is their interests in the liquidation which gives them standing.

58. These elements are in no way surprising, when set in the context of some fundamental aspects of a liquidation. The principal purpose of a liquidation is to get in and realise the assets of the company and to distribute the net proceeds of realisation, after payment of the costs and expenses of the liquidation, among the creditors and, if there is a surplus, the contributories. It has always been well understood that the effect of a liquidation is to impose a form of statutory trust whereby, in accordance with the applicable legislation, the assets are to be realised for the benefit of creditors and contributories. In his judgment in *In re Albert Life Assurance Co, The Delhi Bank's case* (1871) 15 SJ 923, 924, Lord Cairns spoke of the assets being "impressed with the trust declared by the 98th section [of the Companies Act 1862], a trust by which all the assets of the company are to be applied in discharge of the liabilities of the company". See also *In re Oriental Inland Steam Co, Ex p Scinde Railway Co* (1874) LR 9 Ch App 557. Drawing on familiar analogies, the courts equated the position with that in the administration of a deceased's estate or a bankruptcy: see *In re General Rolling Stock Co* (1872) LR 7 Ch App 646. These and other authorities were reviewed by Lord Diplock in *Ayerst v C & K (Construction) Ltd* [1976] AC 167, 179–180 who concluded that "the effect of the statute was to give to the property of a company in liquidation that essential

characteristic which distinguished trust property from other property, viz, that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons”.

59. It is apparent from the statutory scheme that the persons interested in the realisation and distribution of the assets of a company in liquidation are the creditors and contributories for whose benefit that scheme exists. Claims that the company may have against third parties, such as that advanced in the Plaint in this case, are assets of the company which are subject to the scheme. The interests of contributories depend on there being a reasonable prospect of a surplus available for distribution among them, save in those now unusual cases where the contributory is liable to pay calls on partly or nil paid shares. In those unusual cases, they would have an interest even if the company is insolvent, at least if there was a reasonable prospect that recovery in the proceedings would reduce or extinguish their own liability.

60. Consistently with that principle, the power to authorise a person other than the liquidator to bring a claim in the name of the company has always been treated as one available to creditors and contributories, but not to others.

Does a director have standing?

61. In submitting that under the Mauritian legislation a director who is not a creditor or a contributory may be empowered to bring proceedings in the name of a company in liquidation, Ms Behary Paray relied on two points in particular. First, the cases cited above establish that creditors and contributories may be authorised to bring such proceedings, but they do not establish that directors may not be so authorised. This point can be shortly dealt with. In some cases, it is expressly stated that only creditors and contributories can be so authorised but, more importantly, the basis running through all the cases is that the reason why they may be so authorised is their interest in the distribution of the company's assets, which necessarily excludes others including directors in their capacity as such.

62. The second and more substantial point is that section 174(3) of the IA 2009 provides that not only creditors and contributories but also (among others) directors may apply for directions. It follows, it is submitted, that directors are persons who may apply to be authorised to bring proceedings in the company's name. Ms Behary Paray informed the Board that there was no reported case in Mauritius in which any order, whether to bring proceedings in the name of the company in liquidation or otherwise, had been made under section 174(3) on the application of a director.

63. It does not follow from the simple fact of being identified as a person who may apply for directions that such a person has standing to apply for any direction under the

section. The applicant must demonstrate a legitimate interest in the directions sought: *Deloitte & Touche AG v Johnson* [1999] 1 WLR 1605, 1611.

64. The question of a legitimate interest was discussed by the UK Supreme Court in *Brake v The Chedington Court Estate Ltd* [2023] UKSC 29; [2023] 1 WLR 3035 (“*Brake*”). Section 303(1) of the Insolvency Act 1986 provides that “a bankrupt or any of his creditors or any other person” who is dissatisfied by any act, omission or decision of the trustee of the bankrupt’s estate may apply to the court for appropriate orders. The issue was whether two bankrupts had standing to challenge the trustee’s decision to enter into arrangements with a purchaser of a property forming part of the bankrupt estate which enabled the purchaser to obtain possession of the property from the bankrupts (see para 72 of the judgment). The court unanimously held that, although a bankrupt is expressly permitted to make an application under section 303(1), the bankrupts did not have standing to make the application in question. A related application had been made under section 168(5) of the Insolvency Act 1986 in respect of a partnership in liquidation. Section 168(5) is in very similar terms to section 303(1) save that the application may be made by “any person [who] is aggrieved by an act or decision of the liquidator”. The Supreme Court held that there was no difference between the two provisions as regards the principles applicable to determining standing to apply to the court.

65. Having reviewed the authorities on standing under section 303 and the equivalent section applicable to a liquidation, the judgment stated:

“74. As the review of the authorities earlier in this judgment shows, standing under section 303(1) has been limited to (i) creditors applying in respect of conduct by a trustee which is adverse to their interests as creditors, (ii) bankrupts applying in respect of conduct by a trustee which is adverse to their interest in the estate, which necessarily requires showing a real prospect of a surplus in the estate, and (iii) persons (whether creditors, bankrupts or others) whose rights or interests arise specifically from the bankruptcy itself. The same approach has been applied to standing under section 168(5) of the [Insolvency Act 1986], with the necessary modification that, in the case of a company, there is not a bankrupt individual but there are contributories.

75. The first two categories reflect the legal position that a bankrupt’s estate, and the assets of a company in liquidation, are held to be applied in accordance with the terms of the statutory trusts created by the applicable provisions of the [Insolvency Act 1986]. As with any other trust, those interested in the assets or in their proper application are entitled to apply to court for relief for the protection of those interests. These

categories are necessarily restricted to creditors in a bankruptcy or liquidation and, in the case of a bankruptcy or liquidation where there is or is likely to be a surplus, the bankrupt and contributories. Members of a company in a liquidation who may be liable to make contributions, for example members with nil-paid or partly paid shares or members of an unlimited company, would, I consider, be in the same position as creditors but this has not, so far as I am aware, been considered in any case.

76. The third category comprises a very small number of other applications which have arisen directly out of provisions which are peculiar to the insolvency regime. As discussed above, the relevant cases have concerned the disclaimer of a lease ... and the quantification of a trustee's expenses for the purposes of securing an annulment of the bankruptcy ...”

66. Whether a former director of a company in liquidation could qualify as “a person aggrieved” for the purposes of section 273 of the Insolvency Act of the British Virgin Islands arose for decision by the Board in *Stevanovich v Richardson* [2025] UKPC 18; [2025] BPIR 832. The appellant former director was being sued for breach of fiduciary duty by the company acting by its liquidators who sought by way of compensation a contribution to the company's assets to reduce the deficit caused by the liquidators' decision to admit a claim for over US\$398m. A central part of the appellant's defence in those proceedings was that this claim was ill-founded and should not have been admitted to proof by the liquidators. He issued an application under section 273 for an order that the decision to admit the claim be reversed.

67. The Board, in a judgment given by Dame Janice Pereira, applied the approach adopted in *Brake*. The appellant was neither a creditor nor a contributory of the company and could not therefore claim any interest in the recovery and distribution of its assets. If he had standing, it could arise only under the third category identified in *Brake* at para 76. His only interest in the liquidators' decision to admit the claim for US\$398m was that, without that claim, the liquidators would have no claim against the appellant. Since that decision was itself an issue in the liquidators' proceedings, the appellant had no legitimate interest which would give him standing under section 273.

68. The standing of a former director to be authorised to conduct proceedings in the name of a company in liquidation arose in the Malaysian case of *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd* [2010] 2 MLJ 749 (“*Zaitun*”). The case did not turn on any statutory restriction on the persons who could apply to the court, because under section 279 of the Malaysian Companies Act 1965, which was then in force, “[a]ny person aggrieved” could apply to challenge an act or decision by a liquidator. The liquidator of

the company had authorised a former director to conduct a claim in the name of the company. On appeal, the Federal Court (Zaki Azmi CJ, Alauddin PCA and Gopal Sri Ram FCJ) held that it was not open to a liquidator to give that authority to a director or former director. The court considered that this was governed by the principles applicable when the court authorises a person to conduct proceedings in the name of the company. Reference was made to *Russell v Westpac Banking Corpn* and *Cape Breton Co v Fenn*. In his judgment, Gopal Sri Ram FCJ said at para 20:

“Since a director—or more appropriately a former director—of a company in liquidation is not a party to the liquidation a court will not authorise him or her to launch or to continue proceedings or indeed to defend them. A fortiori, the liquidator has no power to confer such authority, since he cannot do what the court will not do on his default. It follows that Khaidzir bin Hj Ishak ought not to have been authorised to continue with the proceedings. I would on that ground support the ultimate order made by the learned judge in the High Court. It may well have been different if Khaidzir had also been a creditor or a contributory.”

69. These cases demonstrate two points of central significance to this appeal. First, *Brake* shows that the fact that a particular category of person (a bankrupt in that case) is identified in the statutory provision for applications for directions in the liquidation does not of itself entitle that person to make any type of application. To have standing to do so, the applicant must show a legitimate interest in the relief sought, such interest to be determined in accordance with the principles set out in *Brake* and applied in *Stevanovich v Richardson*. Secondly, the latter case and *Zaitun* show that a director or former director, unlike a creditor or contributory, does not in that capacity have any interest in the claims which a company may have or in any recovery which may be made on those claims. A director or former director does not therefore have any legitimate interest in pursuing claims in the name of the company, at any rate in the absence of exceptional circumstances.

70. The issue is therefore whether on the facts of this case the appellant can show circumstances which give him a legitimate interest in seeking an order that he be authorised to continue the Plaint in the name of the Company, notwithstanding that his only surviving involvement with the company is as a director.

71. The appellant submits that exceptionally such circumstances exist in this case, because under section 154(1) of the IA 2009 a director does not cease to hold office when a winding up order is made. It provides that “the directors remain in office but cease to have powers, functions, or duties other than those required or permitted to be exercised by [Part III of the IA 2009]”. Instead, the liquidator “has custody and control of the

company's assets" (section 154(1)(a)) and has the extensive powers to deal with those assets and to act on behalf of the company conferred by the IA 2009. Although it was suggested that the continuation in office of a director after the commencement of the liquidation is an unusual feature of Mauritian insolvency law, it is in fact a common feature of insolvency law in other countries. By way of example, it appears in section 248(1) of the New Zealand Companies Act 1993, on which section 154(1) is based, and in section 175(1) of the Insolvency Act 2003 of the British Virgin Islands. Legislation in the UK has since the Companies Act 1862 contained a provision applicable in a voluntary winding up that all the powers of the directors cease except so far as their continuation may be sanctioned in accordance with the Act (now sections 91(2) and 103 of the Insolvency Act 1986). The same is true in Malaysia: see sections 445(2) and 450(6) of the Companies Act 2016. There is no similar statutory provision in the UK as regards a compulsory liquidation, but it has long been held that the position is the same as in a voluntary liquidation: see *Madrid Bank Ltd v Bayley* (1866) LR 2 QB 37, *Buckley on the Companies Acts*, 14th ed (1981) at pp 653, 673.

72. It was submitted on behalf of the appellant that it followed from the fact that directors of a company remain in office notwithstanding the liquidation of the company that, although as a general matter their powers as directors ceased, they must retain some residual powers which could justify them in seeking to bring or continue a claim in the name of the company when the liquidator refused to do so. The appellant considered that the Plaintiff was well-founded and that success in the proceedings would greatly benefit the Company and its creditors and contributories. As the liquidators had decided not to pursue the Plaintiff, he considered that, as a director, he was acting in accordance with his duties and powers to continue the Plaintiff on behalf of the Company with the court's authority.

73. The Board is satisfied that there is no basis for saying that directors in this position retain any powers, however residual, save as expressly allowed under the legislation. The language of section 154 of the IA 2009 is clear: with effect from the commencement of the winding up, the directors "cease to have powers, functions, or duties other than those required or permitted to be exercised by this Part". Apart from the saving as regards powers required or permitted to be exercised by Part III, on which no reliance was placed, the terms of section 154 leave no room for the survival of any powers, functions or duties. As it was put in language appropriate to New Zealand by Wild J in *Hedley v Albany Power Centre Ltd* at para 38, "the directors, while they remain in office, are shorn of their powers and functions in favour of the liquidators". It is not surprising that Ms Behary Paray was unable to refer to any authority for the appellant's submission from any jurisdiction with a similar provision.

74. It is relevant to ask why directors are included at all as persons who may apply under section 174(3). The most obvious reason arises from the provisions relating to directors in a voluntary liquidation (sections 140(2) and 143(4)), under which all their powers cease except so far as the liquidator or the members (in a members' winding up) or the committee of inspection or the creditors (in a creditors' winding up) decide

otherwise. If the directors are given authority to conduct certain matters, they may need the same ability to apply to the court for directions as regards any aspect of those matters under section 174(3)(a) (“directions in relation to any matter arising in connection with the liquidation”). It may be noted that those directions might include authority to bring proceedings in the name of the company where they fell within the matters being conducted by the directors. By way of another example, an application by directors for an order under section 174(3)(g) (a declaration whether the liquidator was validly appointed) might be necessary where, in a voluntary liquidation, an issue arose as to the validity of the appointment of the particular liquidator. In such a case the directors would need to know whether they should give control of the company’s assets to that person. But these are exceptional circumstances, none of which apply in this case.

75. For these reasons, the Board considers that the appellant had no standing to apply for an order under section 174 of the IA 2009 for authority to continue the Complaint on behalf of and in the name of the Company. The Derivative Order was wrongly made at first instance, whether based on section 170 of the CA 2001 or section 174 of the IA 2009.

Procedural unfairness at first instance

76. The Court of Civil Appeal was rightly critical that both the Leave Order and the Derivative Order were made without notice to the joint liquidators and without any opportunity for them to be heard. Orders should be made on an ex parte basis only in exceptional circumstances, such as where giving notice might well frustrate the order sought (for example, in the case of an application for a freezing order), or where the urgency makes it impossible to give notice. In cases of urgency, every effort should be made to give some notice of the application to enable the respondent to make representations and, so far as time permits, to provide evidence.

77. It appears in the present case from what the Board was told by counsel that the applications were filed online with the court and the appellant expected that a hearing date would be set, at which time he would have served the Company with the process. Instead, however, the judges concerned dealt with them and made their orders without a hearing and without any further communication with the appellant or his lawyers. This was clearly not an appropriate process, and notice should have been given to the joint liquidators who should have had an opportunity to make representations and provide evidence. No doubt the courts will in future ensure that administrative efficiency does not prejudice procedural fairness.

Conclusion

78. For the reasons given in this judgment, the appeals are dismissed.