EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM2021/0039

BETWEEN:

PT VENTURES, SGPS, S.A.

Claimant

and

VIDATEL LIMITED

Defendant

Appearances:

Mr. Christopher Harris, QC with him Ms. Georgina Peters for PT Ventures, SGPS, S.A.
Mr. Hermann Boeddinghaus, QC with him Ms. Meenaa Azmayesh for Vidatel Limited

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2022: February 9, 10
June 27.

JUDGMENT

[1] **WALLBANK, J. (Ag.)**: This judgment concerns what is to be done about an order which appointed liquidators, made in error after the application for their appointment has already been deemed by statute to have been dismissed. Counsel indicated that this is the first time the problem appears to have arisen in the context of the Insolvency Act, 2003 ('the Act'),[1] of the Territory of the Virgin Islands ('BVI').

Introduction

[2] On 5th March 2021 PT Ventures, SGPS, S.A. ('PTV') filed an Originating Application to wind up Vidatel Limited ('Vidatel'). This led to a contested hearing taking place on 16th June and 7th July 2021, with both sides represented by senior and junior Counsel, at the end of which the

[1] No. 5 of 2003.

Court reserved its decision. On 30th September 2021 the Court delivered the result and announced circulation of draft written reasons. The Court made an order on 30th September 2021 that Vidatel be wound up and appointing liquidators ('the Appointment Order').

[3] Both parties were represented by junior Counsel only at that hearing. Neither side raised the fact that the statutory six-month period for determination of the application to appoint liquidators had by then already expired on 5th September 2021, and thus that the application to appoint liquidators had already been deemed to have been dismissed. The legal practitioners for PTV had inquired as to the likely delivery date (in the vernacular, 'chased') of the Court's judgment on 8th September 2021, without mentioning the expiry and deemed dismissal which by then had already occurred. The judgment delivery hearing had been convened at short notice for 30th September 2021 as soon as the judgment was ready.

[4] The Court's order of 30th September 2021 was entered on 6th October 2021. Five days later, on 11th October 2021, Vidatel filed an Ordinary Application ('Vidatel's Set Aside Application') seeking orders to:

(1) set aside the Appointment Order; alternatively;

(2) stay the Appointment Order permanently;

(3) stay the Appointment Order pending determination of the Set Aside and Stay Application; and

(4) require PTV to pay Vidatel's costs of these proceedings.

[5] The ground, in short, for this application was that pursuant to section 168(3) of the Act, the application to wind up Vidatel was deemed to have been dismissed on 5th September 2021, being six months after 5th March 2021, since no extension of that period had been sought nor granted pursuant to section 168(2) of the Act.

[6] Section 168 of the Act materially provides:

> "(1) Subject to subsection (2), an application for the appointment of a liquidator shall be determined within six months after it is filed.
>
> (2) The Court may, upon such conditions as it considers fit, extend the period referred to in subsection (1) for one or more periods not exceeding three months each if
> (a) it is satisfied that special circumstances justify the extension; and

(b) the order extending the period is made before the expiry of that period or, if a previous order has been made under this subsection, that period as extended.

(3) If an application is not determined within the period referred to in subsection (1) or within that period as extended, it is deemed to have been dismissed."

[7] In basic terms, Vidatel wants to get rid of the Appointment Order, but Vidatel does not want to go to the trouble and expense of bringing appeal proceedings in the Court of Appeal to achieve this. This is entirely understandable. Vidatel submits that an appeal is not necessary anyway: it says this Court has an inherent jurisdiction to set aside or stay permanently that order.

[8] PTV responded to this application by trying to maintain the Appointment Order. This too is entirely understandable, for a number of reasons, not least because PTV otherwise faces a significant potential costs liability towards Vidatel in respect of the present winding up proceedings, having allowed the six-month period for its determination to expire without obtaining an extension. It is not lost on me that the error, although ascribable to PTV, is a legal error or omission, more probably made by PTV's legal practitioners than by PTV itself. If that is the case, I stress that I have every sympathy, and indeed empathy, for those legal professionals who made the error or omission, but I am bound to follow and apply the law.

[9] PTV sought to maintain the Appointment Order by filing an Ordinary Application of its own ('PTV's Slip Rule Application'), on 12th October 2021. By this application, PTV sought an order pursuant to Part 42.10 of the Civil Procedure Rules, 2000 ('CPR'), commonly referred to as the 'slip rule', with the purpose of:

> "correcting the error arising from an accidental slip or omission made in the order pronounced by the Honourable Mr Gerhard Wallbank [Ag.] on 7 July 2021 and/or the formal written order made on 2 June 2021, so as correctly to reflect the intention of the Court and the parties that the period in which PT Ventures' application to appoint liquidators over Vidatel Limited (the "Application") shall be determined be extended three months after the expiry date of the Application."

[10] The orders referenced in the Slip Rule Application were the orders made at the close of the hearing on 7th July 2021 simply reserving judgment – no written order was entered to this effect – and an order made on 2nd June 2021. The order of 2nd June 2021 had been a consent order presented to the Court by the parties, in which they had agreed that PTV should have until 31st May 2021 to file evidence, ahead of the hearing of the application to appoint liquidators on 16th June 2021. Neither of those orders extended the period for determination of the Originating

Application for winding up Vidatel. Nor had there been any application made, as at 2nd June 2021 or 7th July 2021, seeking an extension of the six-month period.

[11] PTV has argued, furthermore, that upon a review of the Appointment Order, the interests of justice would be served by maintaining it.

[12] The matter came back before the Court on 28th October 2021. The Court ordered that the Appointment Order be stayed pending determination of Vidatel's Set Aside Application and PTV's Slip Rule Application and gave directions for these two applications to be heard together.

[13] These two applications were heard on 9th and 10th February 2022. Judgment was reserved. This is the Judgment on Vidatel's Set Aside Application and PTV's Slip Rule Application. In my respectful judgment, Vidatel's Set Aside Application and PTV's Slip Rule Application both fail, for the reasons I shall now explain.

Vidatel's Set Aside Application

[14] Vidatel's primary position is that the Appointment Order had been made at a time when the Court lacked jurisdiction to make that order, that the Court has power to set aside its own order in exceptional circumstances and indeed it must, in the present circumstances, do so.

[15] Vidatel relies in this regard upon *dicta* of Lord Sumption in **Sans Souci Ltd v VRL Services Ltd**:[2]

> "The importance of finality in litigation has been emphasised by generations of common lawyers. Ultimately there must come an end to the parties' opportunities for reopening matters procedural or substantive which have been judicially decided. This principle is, however, founded on an assumption that they were decided in accordance with the rules of natural justice. Notwithstanding the importance of finality, the rule of practice is that until either (i) a reasonable time has elapsed, or (ii) the order has been perfected, a party who has not been heard on costs or other matters arising out of a judgment, is entitled as of right to be heard. **Thereafter, the Court still has an inherent jurisdiction to hear him, but the test is more exacting. The order will be varied only in exceptional circumstances, when the party can demonstrate that the form of the order can be attributed to a miscarriage of justice: *Taylor v. Lawrence* [2002] EWCA Civ. 10, [2003] QB 528 at [55].** The Board would endorse the test which was formulated in *Re Uddin* [2005] I WLR 2398, at [4], and applied by the Court of Appeal in

[2] [2012] UKPC 6 at paragraph 23.

this case, that there must be "special circumstances where the process itself has been corrupted." This is not the occasion for extended review of the circumstances which will satisfy this test, but the Board has no doubt that one of the circumstances which will satisfy it is that the party desiring to be heard did not have a reasonable opportunity to be heard at an earlier stage when the test would have been less formidable." (Emphasis supplied.)

[16] **Sans Souci** concerned the entitlement of a party to be heard, in relation to a costs order, which had been made without hearing either side on it, and not a winding up order made after the application to appoint liquidators had already been deemed dismissed.

[17] Vidatel develops its reliance upon this principle by submitting that one of the exceptional situations which requires the Court to set aside its own order is where it lacked jurisdiction to make the order: *per* the Privy Council's decision in **Chief Kofi Forfie v Barima Kwabena Seifah**[3] (following the decision of Lord Greene MR in the English Court of Appeal decision **Craig v Kanssen**[4]). The material passage from the Privy Council's decision in **Chief Kofi Forfie** is as follows:

> "A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene M.R. in *Craig* v. *Kanssen,* after referring to several decisions, said: "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it." Their Lordships are of the same opinion."

[18] Vidatel concedes that there are *obiter dicta* in **Strachan v The Gleaner Co Ltd and Another**[5] to the opposite effect (i.e. that the Court's error as to its jurisdiction can only be corrected by the appellate court): *per* Lord Millett at paragraphs [27]-[32]. The passage is important for our present consideration, and I will come back to particularly important parts of it. To understand the passage properly, it is appropriate to start the quotation from paragraph 24:

> "24. Since their Lordships are of opinion that Walker J did have jurisdiction to make the order he did, it is not strictly necessary to discuss the question whether Smith J would have had jurisdiction to set it aside as a nullity if he did not. But the question is an important one and, since the Court of Appeal were led astray by the confusing terminology in which such questions are discussed in the cases, in particular by the distinction between "irregularities" and "nullities", and their attention was not drawn to the leading English authority, their Lordships consider it right to state the true position.

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[3] [1958] AC 59, at 67.
[4] [1943] KB 256 at 262.
[5] [2005] UKPC 33; [2005] 1 WLR 3204.

25. The distinction between orders which are often (though in their Lordships' view somewhat inaccurately) described as nullities and those which are merely irregular is usually made to distinguish between those defects in procedure which the parties can waive and which the Court has a discretion to correct and those defects which the parties cannot waive and which give rise to proceedings which the defendant is entitled to have set aside *ex debito justitiae.* The leading example is *Craig v Kanssen* [1943] KB 256, where the proceedings were not served on the defendant at all. The Court of Appeal held that the proceedings were a nullity which the defendant was entitled as of right to have set aside. Unfortunately Lord Greene MR expressed the view that the court of first instance had an inherent jurisdiction to set aside an order made in such proceedings and that it was not necessary to appeal from it. But this was expressed in cautious terms, was *obiter,* and has since been doubted. Moreover, Lord Greene left open the question, on which there was clear authority and which would seem to be highly relevant, whether the order had sufficient existence to found an appeal. Their Lordships respectfully think that he was mistaken.

26. In *In re Pritchard, decd* [1963] 1 Ch 502, 520 Upjohn LJ observed:

"part of the difficulty is that the phrase *'ex debito justiciae'* had been taken as equivalent to a nullity, but, with all respect to Lord Greene's judgment in *Craig v Kanssen*, it is not. The phrase means that the [defendant] is entitled as a matter of right to have it set aside."

Upjohn LJ distinguished between defects in proceedings which could and should be rectified by the [Court]and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served. None of them is an example of a case where an order has been made in proceedings which have been properly begun and continued. *In re Pritchard* itself was an example of the second class; the proceedings had never been started at all. According to Danckwerts LJ, the originating process had no more effect to commence proceedings than a dog licence.

27. In the present case the validity of the proceedings themselves is beyond challenge. The only question is whether an order of a judge of the Supreme Court made without jurisdiction is a nullity, not in the sense that the party affected by it is entitled to have it set aside as a matter of right and not of discretion (of course he is) nor in the sense that the excess of jurisdiction can be waived (of course it cannot) but in the sense that it is has no more effect than if it had been made by a traffic warden and can be set aside by a judge of co-ordinate jurisdiction.

28. An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and (as will appear) it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess.

29. The effect of such an order was authoritatively stated by a powerful English Court of Appeal (Sir George Jessel MR, Brett and Lindley LJJ) in *In re Padstow Total Loss and Collision Assurance Association* (1882) 20 Ch D 137. The High Court made a winding up order against an insolvent association under a section of the Companies Act 1862 (25 & 26 Vict c 89) which applied to unregistered companies. The Act prohibited the formation of an unregistered company with more than twenty members. The association, which was not registered under the Act, consisted of more than twenty members. The Court of Appeal held that the statutory provision under which (if at all) the association could be wound up applied only to companies which could be lawfully formed and not to companies like the association the formation of which was forbidden. Accordingly the winding up order was made without jurisdiction.

30. The next question concerned the effect of the order. Sir George Jessel MR said, at p142:

"The first point to be considered is whether, assuming that the association was an unlawful one, and that the Court had no jurisdiction to make the order, an appeal is the proper method of getting rid of it. I think it is. I think that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous."

At p. 145 Brett LJ said:

"In this case an order has been made to wind up an association or company as such. That order was made by a superior Court, which superior Court has jurisdiction in a certain given state of facts to make a winding-up order, and if there has been a mistake made it is a mistake as to the facts of the particular case and not the assumption of a jurisdiction which the Court had not. I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that the only way of getting rid of it was by appeal."

31. A similar situation arose recently in Hong Kong. In *Hip Hing Timber Co Ltd v Tang Man Kit* (2004) 7 HCKFAR 212; a two-man Court of Appeal, being assured by counsel for both parties that the order under appeal was an interlocutory order, heard and allowed an appeal. On further appeal to the Court of Final Appeal, that Court expressed concern that the judge's order may have been a final order, in which case, in the absence of the prior written consent of both parties, a two-man Court of Appeal would have had no jurisdiction to determine the appeal. Before the Court of Final Appeal counsel for both parties sought to waive the defect and argue the appeal on its merits without going into the difficult question whether the judge's order was interlocutory or final. The Court refused to take this course:

"An order of the Court of Appeal, if not properly constituted, is a nullity. It is, of course, a proper ground of appeal that the court from which the appeal is brought had no jurisdiction to make the order in question; but if that is found to be the case the court hearing the appeal has no jurisdiction to determine the appeal on its merits but is bound to confirm the position by setting aside the order below as a nullity.

> The parties cannot confer on us by consent a jurisdiction which we do not possess, and since the issue goes to our own jurisdiction then, contrary to the advice given to the parties by the Court of Appeal ... we are bound to enquire into it whether the parties raise it or not."
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> In the event the Court of Final Appeal held that the original order was a final order from which a two-man Court of Appeal had no jurisdiction to hear an appeal, and set aside its order.
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> 32. The Supreme Court of Jamaica, like the High Court in England, is a superior court or court of unlimited jurisdiction, that is to say, it has jurisdiction to determine the limits of its own jurisdiction. From time to time a judge of the Supreme Court will make an error as to the extent of his jurisdiction. Occasionally (as in the present case) his jurisdiction will have been challenged and he will have decided after argument that he has jurisdiction; more often (as in the *Padstow case* 20 Ch D 137) he will have exceeded his jurisdiction inadvertently, its absence having passed unnoticed. But whenever a judge makes an order he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it."

[19] Vidatel contends that these *obiter dicta* do not bind this Court. Vidatel observes that the Board in **Strachan** do not appear to have been made aware of the Board's own decision in **Chief Kofi Forfie**. Vidatel conceded that **Strachan** has been 'treated as authoritative' by the Court of Appeal. Vidatel is aware in particular of the following Eastern Caribbean Supreme Court, Court of Appeal cases: **Thomas v. Gonsalves**;[6] **Jeffers v. Personal Representatives of Wyndham Weste and ors**;[7] **Browne v. The Public Service Commission**;[8] **Smith v. Heirs of St Catherine**.[9] Vidatel accepts (in light of **Baker v R**[10]) that it cannot contend that the Court of Appeal should not be followed on the *per incuriam* basis (even though in fact a relevant Privy Council decision was not cited to it). Vidatel does however submit that the Court of Appeal decisions do not bind this Court on the point. It does not appear that the Court Appeal heard argument in any of those cases on the correctness of the *dicta* in **Strachan**. Vidatel cites a proposition that '*decisions without argument must be viewed as a general exception to* stare decisis'.[11] The same point, argues Vidatel, applies to the Privy Council's reference to

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[6] SVGHCVAP2014/0009 (unreported, delivered 6th April 2016) at paragraph [34]-[36] (Michel JA, dissenting on application of the law to the facts).
[7] ANUHCVAP2017/0029 (unreported, delivered 16th January 2019) at paragraph [23] (Webster JA (Ag.))
[8] HCVAP 2010/023 (unreported, delivered 15th December 2010) at paragraph [25] (Edwards JA).
[9] SLUHCVAP2013/0006 (unreported, delivered 29th January 2015 at paragraph [37] (Michael JA).
[10] (1975) AC 774, 788.
[11] See Cross & Harris: Precedent in English Law (4th edn., Oxford University Press 1991) at p.159; Baker v R (1975) AC 774 at 779.

Strachan in **Durity v. The Attorney General of Trinidad and Tobago**,[12] in which again **Chief Kofi Forfie** was not cited.

[20] Vidatel urges that this Court should follow **Chief Kofi Forfie**, in which the proposition advanced was part of the *ratio decidendi* and not **Strachan**, in which the contrary proposition was *obiter*.

[21] Vidatel submitted that, applying **Chief Kofi Forfie**, this Court can and should set aside the Appointment Order, because (i) it was an order made without jurisdiction, the effect of section 168(3) of the Act being to deprive the Court of jurisdiction to make the order and/or (ii) it was an order in proceedings which as at the date of the Appointment Order should be regarded as a nullity, because, while the Originating Application had been validly commenced, it was in fact no longer pending before the Court when the Appointment Order was made, and so in that sense had not been properly continued.

Vidatel's permanent stay application

[22] Vidatel argued, in the alternative, that if the Court is not persuaded to set aside the Appointment Order, it should stay the Appointment Order permanently, on the basis that it was made without jurisdiction. In support of this proposition, Vidatel relies upon the Privy Council case of **PricewaterhouseCoopers v. Saad Investments Co Ltd**.[13] Vidatel contends, on the basis of this case, that if a winding-up order has been made without jurisdiction, and there is a power to stay the order, the Court should stay the order unless there is good reason not to do so: **PricewaterhouseCoopers v. Saad Investments Co Ltd** at [34] and [44], noting at [44][14] that:

> "In many cases, it may be that a court could be persuaded that it was too late for a winding up to be stayed even if it was plainly granted without jurisdiction. The liquidation will very often have proceeded too far for matters to be satisfactorily capable of being restored or otherwise reorganised, as would be required if there was to be a stay, or third party rights may have been created or varied in such a way as would render it unjust to stay the winding up (or more unjust to stay than not to stay)."

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[12] [2008] UKPC 59 at paragraph 27 (Cross LJ).
[13] [2014] 1 WLR 4482.
[14] *Per* Neuberger LJ.

[23] Vidatel argued that the Court has an inherent jurisdiction to stay its orders: see *e.g.* **Tethyan Copper Company Pty Ltd v Pakistan and ors**,[15] in which our Court of Appeal, in a judgment given by the Honourable Chief Justice, Dame Janice Pereira, DBE, stated at paragraph [11]:

> "Section 18 of the Supreme Court Act confirms that the Court of Appeal and the High Court have [inherent] jurisdiction to grant a stay of proceedings in any matter before it, if it thinks fit to do so."

[24] Section 18 of the Eastern Caribbean Supreme Court (Virgin Islands) Act ('Supreme Court Act'[16]) is, in its totality, a complex and involved provision, but the heart of it provides:

> "(a) nothing in this Act shall disable the High Court or the Court of Appeal, if it thinks fit so to do, from directing a stay of proceedings in any cause or matter pending before it; ..."

[25] Vidatel argued that as the Appointment Order had been stayed almost immediately, this is not a case in which any irreversible steps have been taken in the winding up or third parties have been affected (and none have been alleged). No good reason has been advanced by PTV against a stay, urged Vidatel.

[26] Thus, urged Vidatel, there is no reason for the Court of Appeal to be troubled with the Appointment Order (and any appeal would be a foregone conclusion, and a waste of public and private resources).

PT Ventures' position in relation to the Set Aside and Permanent Stay Application

[27] PTV's position in relation to Vidatel's application to have the Appointment Order set aside or stayed permanently is that:

(1) Vidatel's position is legally and procedurally flawed. The Court does not have jurisdiction to set aside or stay permanently the Appointment Order. Vidatel's only route to challenge the Appointment Order is to appeal it; and

(2) even if Vidatel were eventually to pursue the correct route for challenge (an appeal), this is not a case where the interests of justice would weigh in favour of discharging the order.

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[15] BVIHCMAP2021/0014 (unreported, delivered 4th June 2021) at paragraphs [7] & [11].
[16] Cap. 80.

[28] PTV explained that the expiry of the six-month statutory time period, falling as it did in the period during which judgment on PTV's liquidation application was reserved, was not known to PTV or its legal advisers until it was raised in a letter from Vidatel's legal practitioners dated 7th October 2021. PTV stated that had the issue been appreciated earlier, an application would have been made by PTV to extend time under section 168(2) of the Act, to allow time for the delivery of the judgment. That PTV had not appreciated the issue earlier is underlined by the fact that on 8th September 2021, some three days after the six-month period expired on 5th September 2021, PTV's legal practitioners had sent an enquiry to the Court Office as to the likely timing for hand-down of the judgment.

[29] In terms of the legal effect of the failure to extend the six-month period, PTV observed that section 168 of the Act is silent in relation to the effect of an order that has been made after the expiry of the statutory time period.

[30] PTV submitted that the effect of section 168 has been considered by the courts of this jurisdiction on several occasions to date: by the Court of Appeal in **KMG International NV v DP Holding SA**[17] (**'KMG v DPH'**); see also: **Asiacorp Development Ltd v Firstlink Investments Corporation Ltd**,[18] *per* Hariprashad-Charles J (**'Asiacorp'**); **Safe Solutions Accounting Ltd v French Connections Ltd**,[19] *per* Hariprashad-Charles J; **Citco Global Custody NV v Y2K Finance Inc**,[20] *per* Hariprashad-Charles J (**'Citco Global'**); and most recently, **Tall Trade Ltd v Capital WW Investment Ltd,**[21] *per* Jack J.

[31] PTV observed that in none of these cases had the hearing of the winding-up application already taken place, prior to the expiry of the six-month period. Equally, and critically, said PTV, in none of these cases had the Court granted a winding-up order, prior to the section 168 point being drawn to its attention.

[32] PTV argued that it is a firmly-established principle, following the Privy Council decision in **Isaacs v Robertson**[22] ('Isaacs') that an order – once it has been made – is valid and effective

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[17] BVIHCMAP 2017/0013 (unreported, delivered 18th April 2018).
[18] BVIHC 2005/0189 (unreported, delivered 31st May 2006).
[19] BVIHC 2005/0242 (unreported, delivered 24th May 2006).
[20] BVIHC 2008/0146 (unreported, delivered 10th February 2009).
[21] BVIHC 2020/0025 (unreported, delivered 3rd December 2020)
[22] [1985] AC 97.

until and unless it has been set aside, notwithstanding that such order may have been made in circumstances where effluxion of a time-period prescribed by statute has already occurred (unknown to the court) at the time of the order and notwithstanding statutory provision for the cause or matter to be deemed abandoned and incapable of being revived.[23]

[33] PTV argued that as a matter of English procedural law (under the English Civil Procedure Rules[24]), the power of the court to set aside or vary its own order is engaged only in heavily circumscribed circumstances, principally where a judgment has been obtained by fraud or new evidence is discovered that would have had a material effect on the decision of the court: see Halsbury's Laws (5th edn., 2020), Vol 12A, para 1213 (*Setting aside or varying a judgment or order*); the recent authoritative statement of the test for setting aside a final order of a court of unlimited jurisdiction is that of Hamblen LJ in **Daniel Terry v BCS Corporate Acceptances Ltd**.[25]

[34] PTV argued that it is long established that an order which is subsequently overturned or set aside is not automatically a nullity from the start; it has to be treated as a valid order until it has been set aside: see the Privy Council decision in **Isaacs**;[26] as applied recently by the English Court of Appeal in **Antoine v Barclays Bank plc**.[27] In **Isaacs,** Lord Diplock at 102E-103E held as follows (emphases added):

> "Both Glasgow J. and the Court of Appeal were of opinion that, upon the facts as to the course of the proceedings in the instant case, the rule had become applicable before 31 May 1979 when the interlocutory injunction was granted; the only, but crucial, difference between the judge and the Court of Appeal being that the former held (erroneously) that the rule operated ipse jure to render the interlocutory injunction an order which the court was obliged upon its own initiative to treat as having never been made; whereas **the Court of Appeal held (rightly) that the rule entitled the defendant as defendant in the action to apply for an order setting aside the interlocutory injunction if he elected to make such application.** The rule, which is for the benefit of defendants, is not one upon which a defendant is under any compulsion to rely. It may be to his interest that the action should proceed, particularly if the limitation period for the cause of action has not expired. But these are matters of practice and procedure under a rule of the Supreme Court of Saint Vincent which has no counterpart in the rules of the Supreme Court of England. They are best left to be developed by the

[23] Isaacs v Robertson [1985] AC 97.
[24] English CPR 3.1(2)(m); CPR 3.1(7).
[25] [2018] EWCA Civ 2422, at paragraph 75.
[26] [1985] AC 97.
[27] [2018] EWCA Civ 2846 at paragraph 48 (Asplin LJ).

courts of the country concerned, with whose decisions as to the operation of the rule this Board would be reluctant to interfere.

Their Lordships would, however, take this opportunity to point out that in relation to orders of a court of unlimited jurisdiction it is misleading to seek to draw distinctions between orders that are "void" in the sense that they can be ignored with impunity by those persons to whom they are addressed, and orders that are "voidable" and may be enforced unless and until they are set aside. Dicta that refer to the possibility of there being such a distinction between orders to which the descriptions "void" and "voidable" respectively have been applied can be found in the opinions given by the Judicial Committee of the Privy Council in the appeals Marsh v. Marsh [1945] A.C. 271, 284 and MacFoy v. United Africa Co. Ltd [1962] A.C. 152, 160; but in neither of those appeals nor in any other case to which counsel has been able to refer their Lordships has any order of a court of unlimited jurisdiction been held to fall into a category of court orders that can simply be ignored because they are void ipso facto without there being any need for proceedings to have them set aside. **The cases that are referred to in these dicta do not support the proposition that there is any category of orders of a court of unlimited jurisdiction of this kind,** what they do support is the quite different proposition that there is a category of orders of such a court which a person affected by the order is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make. The judges in the cases that have drawn the distinction between the two types of orders have cautiously refrained from seeking to lay down a comprehensive definition of defects that bring an order into the category that attracts ex debito justitiae the right to have it set aside, save that specifically it includes orders that have been obtained in breach of rules of natural justice.

The contrasting legal concepts of voidnesss and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation. Such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it upon application to that court; if it is regular it can only be set aside by an appellate court upon appeal if there is one to which an appeal lies". [Emphasis added.]

[35] PTV contended that in the case of winding-up orders, the same principle applies: if the court makes a winding-up order without having jurisdiction to do so, the order cannot be treated as a nullity and, unless and until it is discharged on appeal, it is binding on the company's creditors: see, for a clear statement of the law, Halsbury's Laws (5th edn., 2017), Vol 16, para 353 (*When a court has jurisdiction*); see also: **Re Padstow Total Loss and Collision Assurance Association**[28] (*'the only way of getting rid of it was by appeal'*, at p. 145); **Re London Marine**

[28] (1882) 20 ChD 137 (CA).

Insurance Association;[29] **Re Arthur Average Association**;[30] **Re Mid East Trading Ltd**;[31] **PriceWaterhouseCoopers v Saad Investments Co Ltd**.[32]

[36] PTV submitted that the principle was applied (at the highest appellate level) by the Privy Council in **PricewaterhouseCoopers v Saad Investments Co Ltd**,[33] at [40] (a winding-up order was set aside on appeal by the Privy Council, on the basis that it was made without jurisdiction in respect of an overseas company (at [23] and [46]) ('**Saad**')). Lord Neuberger, having accepted that the order must be effective until set aside (at [25] and [40], applying the principle explained above in **Isaacs**), went on to approach the issue in this way (at [32]) (emphasis added):

> "... if, as in this case, the contention [that a winding-up order should not have been made] raises a well arguable point that, on the face of the court papers, **there was no jurisdiction to make the order, it would have to be seriously addressed, and if the contention was made out, the court would have to consider what the interests of justice require.** Indeed, that possibility seems to have been at least left open by Chadwick LJ in his judgment upholding the decision of Evans-Lombe J in **In re Mid East Trading Ltd**, at p 747A–B".

[37] PTV continued, saying that in the decision of the English Court of Appeal in **Re Mid East Trading Ltd; Phillips v Lehman Brothers**[34]– to which Lord Neuberger referred in **Saad** in the above-cited passage – Chadwick LJ rejected the appellants' contention that the winding-up order ought to be treated as a nullity, holding (at 744F-G):

> "Save in proceedings to set the order aside, it is not open to [the Court of Appeal] to treat as a nullity an order which has been made by the High Court in its winding-up jurisdiction and which is not the subject of any appeal".

[38] PTV observed that Chadwick LJ considered the circumstances in which a winding-up order may be impeached (at 744D-747B). He concluded (at 746H) (emphasis added):

> "If [the winding-up order] is to be held ineffective in relation to all that decision must be made in proceedings – **whether on an application to rescind the winding-up order or on an appeal from it** – in which all those affected have an opportunity to be heard".

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[29] (1869) LR 8 Eq 176 at 189, 193.
[30] (1876) 3 ChD 522.
[31] [1998] BCC 726 (CA).
[32] [2014] 1 WLR 4482.
[33] [2014] 1 WLR 4482.
[34] [1998] BCC 726 (CA).

[39] Vidatel has attempted to deal with the above authorities by contending that they in fact 'indicate that ... an irregular order made in such circumstances can and should be set aside for want of jurisdiction'[35]. This demonstrates a fundamental misunderstanding of the import of those decisions: (i) the authorities make consistently clear that the only basis of setting aside the order is by an appeal (whether or not the ground for appeal is want of jurisdiction, *viz.* **Saad**); and (ii) certain of those decisions need to be understood in their factual context, where the appeal was also founded on particular provisions of English insolvency legislation that have no counterpart under BVI law.

[40] As to this, the reference in **Re Mid East Trading** to an application to rescind the winding-up order, is a reference to (what is currently) rule 12.59(1) of the Insolvency (England and Wales) Rules 2016 (the '**IR 2016**'). The jurisdiction to wind-up a company is wholly statutory in nature. Under English insolvency law, there exist two additional, statutory bases on which the court has jurisdiction to review a winding-up order (and which therefore operate by way of exception to the general rule that a winding-up order can only be revoked on appeal). However, BVI insolvency legislation contains no equivalent provision for the court to rescind or stay its own order: the only available route to revoke an order that has been wrongly made is, applying ordinary principles, to appeal it. It follows, contended PTV, that there is no statutory basis, as a matter of BVI insolvency law, for a first instance court to set aside (or permanently stay) its own winding-up order.

[41] Similarly, submitted PTV, the auditors' application to set aside the winding-up order in **Saad** was founded on section 184 of the Bermuda Companies Act 1981, which – in terms materially similar to section 147(1) of the English Insolvency Act 1986 – affords the court the power to stay proceedings in relation to a winding-up (**Saad**, at [28] and [46]). Accordingly, whilst, in that case, the Privy Council accepted that (on the facts of that case) the Bermuda Supreme Court would have had the power to '*stay*' the winding-up (see [27]), this was expressly premised on section 184 of the Bermuda Companies Act 1981: see [40] to [43]. Indeed, the Board said expressly that if section 184 had not been available, the route of challenge would have been to appeal the winding-up order.[36]

[42] PTV urged that applying both principle and authority to the present case, the fact that there has been an actual Appointment Order made before the section 168 issue was drawn to the attention of the Court, is material:

(1) the Appointment Order is valid and effective, and binding on the company and all creditors, absent an order setting it aside;

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[35] *Per* Vidatel's skeleton argument for the hearing on 28 October 2021, para 29.1.

[36] See paragraph [46].

(2) Vidatel's Set Aside Application is procedurally flawed, because whilst an appeal against the order lies to a higher court (on the basis that the Appointment Order was wrongly made), there is no statutory basis on which an order under section 162 of the Act can be set aside (or '*permanently stayed*') by the first instance court which made the order. Vidatel's only recourse is now to appeal against the Appointment Order in the usual way.

[43] Thus, submitted PTV, the Set Aside Application, including the permanent stay application, should be dismissed.

[44] PTV went on to argue that upon any appeal, the factual merits and circumstances of the case would in any event warrant maintenance of the Appointment Order, in the interests of justice.

Discussion on the Set Aside Application

[45] The main issue which presently falls for determination is whether the Appointment Order is capable of being set aside by this Court or whether that would require an appeal to the Court of Appeal.

[46] It is common ground that the Appointment Order, made on 30th September 2021 and entered on 6th October 2021, had been made after the expiry of the statutory six-month period on 5th September 2021. That six-month period had not been extended.

[47] It is also common ground that the Originating Application to appoint liquidators in respect of Vidatel was deemed to have been dismissed, by the operation of section 168(3) of the Act, on 5th September 2021.

[48] I will first address the issue of whether this Court should follow and apply the Privy Council decision in **Chief Kofi Forfie v Barima Kwabena Seifah**,[37] which is to the effect that since the Appointment Order had been made without jurisdiction this Court has an inherent jurisdiction to set it aside.

[49] The alternative is whether this Court should follow and apply **Strachan v The Gleaner Co Ltd and Another**,[38] which is to the effect that in making the Appointment Order, the Court made an error of fact or law as to its own jurisdiction, and thus that the Appointment Order can only be overturned by way of an appeal.

[50] I will conclude that **Chief Kofi Forfie** is distinguishable from the present case and that this Court ought to follow our Court of Appeal in applying **Strachan**. I now explain why.

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[37] [1958] AC 59, at 67.
[38] [2005] UKPC 33; [2005] 1 WLR 3204 at paragraph 25.

[51] Vidatel takes the position that the Appointment Order was a 'nullity', since it was made at a time when the Court no longer had jurisdiction to make the Appointment Order. Vidatel principally relies upon the Privy Council decision in **Chief Kofi Forfie**[39] to support a proposition that this Court has an inherent jurisdiction to set aside its own order, where such an order is a nullity as having been made without jurisdiction, with no need to appeal from it. The Board in that case comprised of Lord Reid, Lord Somervell and the Rt. Hon. De Silva. Vidatel recognises that there are a considerable number of high-level authorities to the contrary, but Vidatel urges that **Chief Kofi Forfie** appears not to have been cited or considered in them.

[52] PTV contends, on the other hand, that it is only a higher court (here, the Court of Appeal), and not this Court, that has jurisdiction to determine an application to set aside the Appointment Order.

[53] Historically, the authorities have not spoken with one voice on this question. The principal case Vidatel relies upon, which is the **1957** Privy Council decision in **Chief Kofi Forfie**;[40] applied a *dictum* of Lord Greene M.R. in the **1942** English Court of Appeal decision in **Craig v. Kanssen**.[41] That *dictum* was disapproved of in the **2005** Privy Council decision of **Strachan**[42] in the unanimous judgment of the Board, which comprised of Lord Millett, Lord Hoffmann, Lord Rodger of Earlsferry, Lord Carswell and Sir Charles Mantell. The Board in **Strachan** preferred the analysis of what it called a 'powerful'[43] English Court of Appeal (Sir George Jessel MR, Brett and Lindley LJJ), in the considerably earlier (**1882**) decision **In re Padstow Total Loss and Collision Assurance Association**,[44] that an appeal is the proper and only method of 'getting rid of' a winding up order made without jurisdiction.[45] The Board in **Strachan** specifically mentioned (and effectively adopted) the reason for this, which Sir George Jessel MR had postulated in **Padstow**, namely:

> "...that an order made by a Court of competent jurisdiction which has authority to decide as to its own competency must be taken to be a decision by the Court that it has jurisdiction to make the order, and consequently you may appeal from it on the ground that such decision is erroneous. ... I am inclined, therefore, to say that this order could never so long as it existed be treated either by the Court that made it or by any other Court as a nullity, and that **the only way of getting rid of it was by appeal**".[46] [Emphasis added.]

[54] At paragraph 28, the Board in **Strachan** explained that:

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[39] [1958] AC 59, at 67.
[40] [1958] AC 59, at 67.
[41] [1943] K.B. 256, 263.
[42] [2005] UKPC 33; [2005] 1 WLR 3204 at paragraph [25].
[43] Strachan at paragraph [29].
[44] (1882) 20 Ch D 137.
[45] Strachan at paragraph [30].
[46] Strachan at paragraph [30].

> "An order made by a judge without jurisdiction is obviously vulnerable, but it is not wholly without effect; it must be obeyed unless and until it is set aside and ... it provides a sufficient basis for the Court of Appeal to set it aside. On the other hand, since the defect goes to jurisdiction, it cannot be waived; the parties cannot by consent confer a jurisdiction on the court which it does not possess."

[55] The Board in **Strachan** distinguished such a case from one where orders are made in proceedings which are entirely null. Such cases:

> "included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served."[47]

[56] However, the Board in **Strachan** did not then go on to state expressly that a court of concurrent jurisdiction had inherent jurisdiction to set aside an order made in null proceedings. In that regard, the Board in **Strachan** did not interfere with its own earlier (1984) decision in **Isaacs v Robertson**,[48] which held that if an order is 'irregular', in the sense that it has been made in proceedings that are a nullity, then 'it can be set aside by the court that made it upon application to that court'.

[57] Rather, the Board in **Strachan** asked itself the question whether or not the order in question 'had sufficient existence to found an appeal'.[49] If it did, the Board considered that, upon the authority of **Padstow**, an appeal is the proper and only method of getting rid of the order.

[58] The Board's reasoning in **Strachan** was applied by the Privy Council itself in its **2008** decision in **Durity v. The Attorney General of Trinidad and Tobago**.[50] There, the Board stated as follows, in the context of the handling by a magistrate of a certain bail application:

> "The High Court of Trinidad and Tobago is a superior court of unlimited jurisdiction. It has jurisdiction to determine the limits of its own jurisdiction, unless otherwise directed by statute. So whenever a judge of that court makes an order he must be taken implicitly to have decided that he had jurisdiction to make it: *Strachan v The Gleaner Co Ltd* [2005] UKPC 33, [2005] 1 WLR 3204, para 32. This is not to say that his decision cannot be challenged. If he makes an error he can be corrected by the Court of Appeal. But it is not for a magistrate to take this function upon himself, even if he is invited to do so."

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[47] Strachan at paragraph [26].
[48] [1985] AC 97
[49] Strachan at paragraph [25].
[50] [2008] UKPC 59 at paragraph [27](Lord Hope).

[59] Vidatel argued that our own Court of Appeal has treated **Strachan** as 'authoritative'. Vidatel cites the following cases to illustrate this submission: **Thomas v Gonsalves**;[51] **Jeffers v. Personal Representatives of Wyndham Weste and ors**;[52] **Browne v The Public Service Commission**;[53] **Smith v Heirs of St Catherine**.[54] That, however, with all respect to Vidatel's learned Counsel, understates our Court of Appeal's treatment and view of **Strachan**. In **Jeffers**, **Browne** and **Smith**, our Court of Appeal did not just treat **Strachan** as 'authoritative': the Court of Appeal applied it. In **Browne v The Public Service Commission**, Edwards JA, giving the judgment of the Court, described as '**eminently applicable**' Lord Millett's *dictum* in **Strachan** that 'whenever a judge makes an order, he must be taken implicitly to have decided that he has jurisdiction to make it. If he is wrong, he makes an error whether of law or fact which can be corrected by the Court of Appeal. But he does not exceed his jurisdiction by making the error; nor does a judge of co-ordinate jurisdiction have power to correct it'.[55] In **Jeffers v Personal Representatives of Wyndham Weste and ors**;[56] Webster JA (Ag.), giving the judgment of the Court of Appeal, stated that **Strachan** was '**highly persuasive**'. In **Thomas v Gonsalves**;[57] the majority decision, given by the Honourable Chief Justice, Dame Janice Pereira, DBE, distinguished **Strachan** on the basis that what had been before the lower court had been a default judgment and that court had jurisdiction to set aside a default judgment. The Honourable Chief Justice did not disapprove of **Strachan**, finding that it simply did not apply to the facts of that case. There was a dissenting judgment, of Michel JA, who considered that the procedural circumstances of that case did engage the principles enunciated in **Strachan**, and he proceeded to apply them.[58]

[60] Thus, it is clear that our Court of Appeal treats the principles enunciated in **Strachan** as applicable.

[61] I consider myself bound to follow the approach taken by the Court of Appeal. Irrespective of the doctrine of precedent, the fact that our Court of Appeal has consistently and repeatedly applied – and strongly endorsed – **Strachan** firmly persuades me to follow the Court of Appeal in this regard.

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[51] SVGHCVAP2014/0009 at [34]-[36].
[52] ANUHCVAP2017/0029 at [23].
[53] HCVAP 2010/023 at [25].
[54] SLUHCVAP2013/0006 at [37].
[55] HCVAP 2010/023 at [25]
[56] ANUHCVAP2017/0029 at [23].
[57] SVGHCVAP2014/0009 at [18].
[58] SVGHCVAP2014/0009 at paragraphs [36] and [37].

[62] What then about Vidatel's objection that our Court of Appeal appears not to have had cited before it the decision in **Chief Kofi Forfie**?[59] After all, urged Vidatel, this was a decision of the highest authority (the Privy Council), decisions of which are binding upon this Court, and the statement of principle contained therein was part of the *ratio decidendi* of that case. That statement was in these terms:

> "A court has inherent power to set aside a judgment which it has delivered without jurisdiction. Lord Greene M.R. in *Craig* v. *Kanssen,* after referring to several decisions, said: "Those cases appear to me to establish that "a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it." Their Lordships are of the same opinion."

[63] Here there are three propositions:

(1) a court has inherent power to set aside a judgment which it has delivered without jurisdiction;

(2) in such a case the court in its inherent jurisdiction can set aside its own order; and

(3) there is no need to appeal from it.

[64] However, these were bald statements in **Chief Kofi Forfie**, unsupported by any reasoned analysis. The decision in **Chief Kofi Forfie** is compelling, not through force of reasoning, for there is none, but purely by dint of the doctrine of precedent.

[65] This is in stark contrast with the Privy Council's decision in **Strachan**, which, although *obiter*, proffered a carefully considered, detailed and reasoned analysis of principle with the express purpose of providing guidance on what the Board considered to be an important issue.[60] Those observations of the Board were not sparse remarks made in passing but carefully enunciated explanations clearly intended to be treated as highly persuasive guidance. It should also not be overlooked that **Strachan** was decided at a point in time when this legal area as a whole had, since **Chief Kofi Forfie** in 1957, already seen much judicial debate, division, and development of thought and linguistic expression.[61] It is plain that the Board in **Strachan**

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[59] [1958] AC 59 at 67.
[60] Strachan at [24].
[61] See e.g. In re Pritchard [1963] 1 Ch 502 where the English Court of Appeal was split, Lord Denning MR dissenting.

intended that its reasoning should be followed in similar cases, even if it would not be strictly binding.

[66] What Vidatel seeks to do is to pluck the propositions referred to in **Chief Kofi Forfie** out of their context and treats them as applying to all types of lack of jurisdiction. In my respectful judgment, this approach is mistaken. It is worth recalling that **Chief Kofi Forfie** was dealing with only one type of lack of jurisdiction on the facts before it. There is nothing in the Board's judgment in **Chief Kofi Forfie** which suggests that it was pronouncing a principle applicable to all cases of a lack of jurisdiction, admitting of no qualifications or exceptions. Indeed, it is difficult to think of any legal doctrine which admits of no qualifications or exceptions. Rather, what the Board appeared to have been doing there was to take a general principle, state it in a manner sufficient for its immediate purpose in respect of that case at Bar and apply it to the facts of that case.

[67] **Chief Kofi Forfie** is moreover distinguishable in a number of respects:

(1) **Chief Kofi Forfie** was not a case where a winding up order was made after the winding up petition had already been deemed dismissed by statute. The lack of jurisdiction in **Chief Kofi Forfie** was of a different type. It concerned lack of judicial office of the gentleman who purported to make the order. The case concerned a situation where someone who thought he held a certain judicial office had made a ruling. He then realised that there was a problem with his appointment, or at least he believed there was. After his appointment had been put beyond doubt, he then reviewed his earlier decision, and made another ruling on the same terms. The issue was whether he had the power to review his earlier decision if he had not held office when he made his original decision. The country where he sat had a specific power in a particular civil procedure rule which enabled a judicial officer of the same tribunal to review earlier decisions. The Board was of the view that the tribunal anyway had an inherent jurisdiction to review earlier orders made without jurisdiction, without the need for an appeal.

(2) In **Chief Kofi Forfie**, the earlier order had putatively been made by someone with no more power to do so than a proverbial traffic warden.[62] At that point, the decision maker did not even have the power to make an error of law or fact in respect of a judicial decision because he held no judicial office. In such a case, it is understandable that the same court of unlimited jurisdiction, once properly seised of the proceedings, should be able to determine that it had not been properly constituted (i.e., had no jurisdiction) the first time round.

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[62] Cf Strachan at paragraph 27.

(3) Here, by contrast, the Judge and the Court clearly had and have power to make orders in the present proceedings. Vidatel accepts this: indeed, Vidatel wants this Court (and the same Judge) to make a further order in these proceedings staying the Appointment Order permanently if the Court will not set it aside, and the Judge and Court can only do so if they have the necessary jurisdiction to do so. Here, the lack of jurisdiction arises not through lack of office but because the Court's power to make a particular kind of order (an order appointing liquidators) was, by statute, already spent. Here, the Judge and the Court made an error, mistakenly supposing themselves to have the power to make an appointment order when they no longer did.

(4) **Strachan** and **Padstow** reasoned that this type of mistake is an error by the court as to law and/or fact, which only a higher court can review and overturn. This error is no different from any other error of law or fact that a court might make in a judgment that is amenable to review only upon appeal. The decision in **Chief Kofi Forfie** concerned a different type of error: the error of someone who was not a judicial officer at the time he purported to make the decision in question.

[68] I therefore do not consider myself bound to follow and apply **Chief Kofi Forfie** in the present case.

[69] I do, however, consider myself bound to apply **Strachan** here, following our own Court of Appeal's application and firm endorsement of **Strachan** in the cases I have mentioned above, and by dint of the persuasive quality of that decision. I derive support for this view from the same conclusion succinctly stated in Halsbury's Laws (5th edn., 2017), Vol. 16, paras 1–568; Vol. 17, paras 569–1286/8. Winding Up by the Court/(1) Jurisdiction/353 (When a court has jurisdiction – **353):**

> "If, however, the court does make an order to wind up a company without having jurisdiction, the order cannot be treated as a nullity and, **unless and until it is discharged on appeal**, it is binding on the company's creditors and contributories, (*Re Padstow Total Loss and Collision Assurance Association* (1882) 20 ChD 137, CA; *Re London Marine Insurance Association, Andrews' and Alexander's Case, Chatt's Case, Cook's Case, Crew's Case* (1869) LR 8 Eq 176 at 189, 193; *Re Arthur Average Association* (1876) 3 ChD 522; *Re Mid-East Trading Ltd, Lehman Bros Inc v Phillips* [1998] 1 All ER 577, [1998] 1 BCLC 240, CA; *PriceWaterhouseCoopers v Saad Investments Co Ltd* [2014] UKPC 35, [2014] 1 WLR 4482, [2014] 2 BCLC 583) but not on strangers (*Re Bowling and Welby's Contract* [1895] 1 Ch 663, CA; *Russian and English Bank and Florence Montefiore Guedalla v Baring Bros & Co Ltd* [1936] AC 405 at 416, [1936] 1 All ER 505 at 510, HL, per Lord Blanesburgh. Cf *Re Racal Communications Ltd* [1981] AC 374, [1980] 2 All ER 634, HL)." [Emphasis added.]

[70] I will now address an alternative argument raised by Vidatel, that the Appointment Order was made when the proceedings had already come to an end, by reason of the statutory dismissal of the winding up petition, and thus that the Appointment Order should be treated as having been made in similar circumstances to those where **Strachan** countenanced that the same court could set it aside.

[71] In this regard, Vidatel draws upon the following exposition in paragraph 26 of **Strachan**:

> "Upjohn LJ [in **In re Pritchard**[63]] distinguished between defects in proceedings which could and should be rectified by the [sc. Court] and those which were so fundamental that they made the whole proceedings a nullity. These included (i) proceedings which ought to have been served but which have never come to the notice of the defendant at all; (ii) proceedings which have never started at all owing to some fundamental defect in issuing them; and (iii) proceedings which appear to be duly issued but fail to comply with a statutory requirement. These are all examples of orders of the court made in proceedings which are nullities because they have not been properly begun or served".

[72] Vidatel argued that this case is an example of the third category, namely proceedings which were duly issued but which failed to comply with a statutory requirement. Upon the failure to comply with the statutory requirement, the order then made was a nullity, argued Vidatel, such that this Court retains jurisdiction to set it aside. Vidatel submitted that the Appointment Order was an order in proceedings which as at the date of that order should be regarded as a nullity, because, while the Originating Application (*nota bene*) had been validly commenced, it was in fact no longer pending before the Court when the Appointment Order was made, and so in that sense had not been properly continued.

[73] I respectfully disagree with Vidatel's argument. The flaw in it is that Vidatel confuses situations where the underlying proceedings as a whole are nullities, with cases where the underlying proceedings continued throughout to be perfectly regular.

[74] To see this more clearly, we need to remind ourselves **precisely** what it is that statute deems to have been dismissed if the six-month statutory period has expired and has not been extended. Section 168(1) and (3) of the Act provide the answer:

> "(1) Subject to subsection (2), an application for the appointment of a liquidator shall be determined within six months after it is filed.
>
> ...
>
> (3) If an application is not determined within the period referred to in subsection (1) or within that period as extended, it is deemed to have been dismissed."

[75] Thus it is the ***application to appoint a liquidator*** that is deemed to have been dismissed.

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[63] [1963] 1 Ch 502, 520.

[76] Conversely, section 168 does not deem ***the proceedings as a whole*** (here started by the Originating Application) to have been dismissed or struck out, or otherwise brought to an end. The Originating Application contains the application to appoint a liquidator, but the Originating Application does more than make that application: it starts proceedings for other relief as well and, where successful, it commences the winding up proceedings over the company in question. Throughout the life of such winding up proceedings, the legal proceedings commenced by the Originating Application are the operative legal proceedings. To illustrate this, as and when liquidators need to apply for the Court's sanction, they make their application within the same proceedings; they do not commence new, separate, proceedings.

[77] As illustrated by the BVI High Court decision in **Asiacorp Development Ltd v Firstlink Investments Corporation Ltd**,[64] where an application to appoint a liquidator has been deemed to have been dismissed, the proceedings continue, at least for the purpose of resolving consequential issues such as the incidence and quantum of costs.

[78] The deemed dismissal, here, on 5th September 2021 of the application to appoint a liquidator over Vidatel is no different in effect than if a hearing of this Court had been convened on that date, with the Court delivering a ruling that the application be dismissed with immediate effect, and reserving all consequential matters, including as to costs, to a further hearing.

[79] This is hardly a surprising proposition, as the etymology of 'to deem' goes back to an old word, the meaning of which includes 'to judge, decide on consideration, condemn, think, judge, hold as an opinion'.[65] Hence, or rather, whence, the designation of a judge in the Isle of Man as a 'deemster'.

[80] In the ensuing paragraph in **Strachan**, paragraph 27, the Board drew a clear distinction between cases where the validity of proceedings was in issue, as it had summarised in paragraph 26, and those cases where the validity of the proceedings was beyond challenge. The Board stated:

> "27. In the present case, the validity of the proceedings themselves is beyond challenge."

In such a case, the Board proceeded to explain, the way to 'get rid of' an order made without jurisdiction is to appeal it.

[81] Whilst the Board in **Strachan** was at pains to draw a distinction between situations involving invalid and valid proceedings, Vidatel's Counsel did their best, through deft use of language

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[64] BVIHCV 2005/0189 (unreported, delivered 31st May 2006).
[65] https://www.etymonline.com/word/deem.

that blurs this distinction, to shift this case, which involves valid proceedings, into the category concerning invalid proceedings. The fundamental flaw here in Vidatel's approach is that it is beyond doubt that section 168(3) does not end nor render the proceedings invalid upon the dismissal of the application to appoint a liquidator. Those proceedings can properly continue to deal with consequential matters. As **Strachan** holds at paragraph 27 *et seq*., an appeal is then the proper and only way to have an order made without jurisdiction set aside.

Discussion on a permanent stay of the Appointment Order

[82] I am satisfied that the Court has an inherent jurisdiction to stay an order it has made, following the Court of Appeal's statement in **Tethyan Copper Company Pty Ltd v Pakistan and ors**,[66] at paragraph [11] that:

> "Section 18 of the Supreme Court Act confirms that the Court of Appeal and the High Court have [inherent] jurisdiction to grant a stay of proceedings in any matter before it, if it thinks fit to do so."

[83] This inherent jurisdiction is quite apart from the fact that the Insolvency Act and Insolvency Rules do not confer a jurisdiction upon the Court to grant a permanent stay, following the distinction drawn between inherent jurisdiction and statutory jurisdiction in **Tethyan**[67] at paragraph [7].

[84] As section 18 of the Supreme Court Act makes clear, the criterion for granting or refusing a stay of any proceedings is whether the Court considers it just to do so.

[85] In **PricewaterhouseCoopers v. Saad Investments Co Ltd**.,[68] the Bermudan statute which governed applications to wind up companies (the Companies Act 1981) contained an express provision conferring a statutory jurisdiction upon a court of concurrent jurisdiction to stay winding up proceedings. Section 184(1) of that Act provided:[69]

> "The [Supreme] Court may at any time after an order for winding up, on the application either of the liquidator or the official receiver or any creditor or contributory and on proof to the satisfaction of the court that all proceedings in relation to the winding up ought to be stayed, make an order staying the proceedings, either altogether or for a limited time, on such terms and conditions as the court thinks fit."

[86] Our own Insolvency Act and Insolvency Rules contain no such provision. This is not to say that the Act and Insolvency Rules are silent upon stays. They are not.[70] Even in the context of the hearing of an application to appoint liquidators, section 167(1) of the Act provides that:

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[66] BVIHCMAP2021/0014 at [11] (Pereira, CJ).
[67] BVIHCMAP2021/0014 at [7] (Pereira, CJ).
[68] [2014] 1 WLR 4482.
[69] See paragraph 28 of PricewaterhouseCoopers v. Saad Investments Co Ltd. [2014] 1 WLR 4482.
[70] See e.g. section 52 of the Act.

"...the Court may:

...

(c) adjourn the hearing conditionally or unconditionally; or
(d) make any interim order or other order that it considers fit."

[87] These forms of relief include, in my judgment, a permanent stay of winding up proceedings. They represent a third possibility, between the grant or dismissal of an application to appoint liquidators.

[88] But the legislature did not confer an express power upon the Court to make such orders after an order appointing liquidators had been made. The Act includes various provisions for removal of a liquidator (section 175), resignation of a liquidator (section 176 to 178), and death of a liquidator (section 179), but in each of these cases the Act assumes that the underlying winding up proceedings continue.

[89] Thus, it would appear that litigants and the Court are thrown back upon the Court's inherent jurisdiction whether or not a permanent stay should be ordered. This would be a case management decision, to be taken with a view to dealing with the case justly, the due administration of justice, and weighing the balance of potential harm between the parties. Other factors would ordinarily include the saving of costs and the Court's limited resources. These are amongst ordinary case management principles applicable to contentious litigation in general.

[90] There is a further consideration, which is clearly so important that the legislature considered it fitting to spell it out. The Supreme Court Act, by section 20, stipulates that

> '...as far possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.'

[91] This is a public policy consideration which the legislature expects the Court to observe when exercising its discretion.

[92] Vidatel's application for a permanent stay is to be considered against this backdrop. In essence, Vidatel advanced three reasons why a stay should be granted:

(1) the Appointment Order had been made without jurisdiction and there is no good reason why it should not be stayed;

(2) the Appointment Order had been stayed on an interim basis not long after it had been made, such that steps taken in pursuance thereof are not irreversible; and

(3) an appeal would be a foregone conclusion and a waste of public and private resources.

[93] In my respectful judgment, none of these reasons, whether taken individually or together, amount to sufficient grounds for imposing a permanent stay of the Appointment Order, for the following reasons:

(1) Where an application to appoint a liquidator has been made without jurisdiction, the interests of finality would not *generally* be served by staying such an order. A permanent stay would leave the Appointment Order in existence, even if not in operational effect. For a variety of reasons, this would be undesirable. It would maintain a question mark of uncertainty over the financial status and reputation of the company. It would also maintain the liquidator(s) in office, albeit with suspended operational effect, rendering them unable to close their file on the matter, possibly with enduring professional liability insurance reporting and premium payment requirements, until such time as they should apply to the Court to be relieved. These are examples of reasons why the scheme of many contemporary insolvency schemes (our own included) is geared towards a prompt and definitive resolution of winding up applications. In accordance with section 20 of the Supreme Court Act, the Court should strive as far as possible for winding up proceedings to be completely and finally determined.

(2) Where, as in the present case, an appeal is (or has been) available and indeed, upon the authorities of **Strachan** and **Padstow** an appeal is the proper and only way of 'getting rid of' an appointment order made without jurisdiction, the Court should prefer the remedy that provides finality over an order that keeps such an order in existence.

(3) This is not a situation where a permanent stay is (or was) the only reasonably accessible remedy available.

(4) Whilst it is undoubtedly correct that the steps taken by the liquidators in the relatively short period of time between the making of the Appointment Order and the interim stay are unlikely to have had irreversible effects, provision needs to be made to bring their work to an orderly close, including, where appropriate, for them to be paid. In this regard, a permanent stay has no advantage over an appeal. If anything, a permanent stay carries with it the prospect of incompletion, which would inevitably require further

applications to resolve. This would contribute to the multiplicity of proceedings that section 20 of the Supreme Court Act seeks to avoid.

(5) In submitting that an appeal would be a waste of public and private resources, Vidatel shies away from two rather obvious points:

(a) the Court, and the Court of Appeal, exist to apply appropriate legal remedies. Thus, if an appeal entails greater public funds being expended than a permanent stay, that is simply the price of supplying the more appropriate remedy. It is not a sufficient reason for preferring a remedy that is inferior on account of its lack of finality and completeness in resolving the matter;

(b) the Court of Appeal has jurisdiction to compensate Vidatel for its costs of an appeal, if a costs order in Vidatel's favour is then appropriate. Equally there is no suggestion here, nor evidence, that Vidatel has insufficient financial resources available to it to embark upon an appeal. Nor is there any suggestion, or evidence, that PTV has insufficient financial resources to meet a costs order in Vidatel's favour.

(6) Vidatel is right, I am persuaded, that the outcome of an appeal is a foregone conclusion, at least assuming Vidatel adheres to the procedural requirements. That, though, underlines that an appeal is (or was) an available and suitable remedy here. PTV disputes that an appeal would be a foregone conclusion and advances an array of points why, in its submission, the Appointment Order should be maintained in the interests of justice. Since I hold that an appeal is the proper and only way for the Appointment Order to be challenged, and further that a permanent stay should not be ordered, the merits of PTV's contentions in this regard are in principle a matter for the Court of Appeal to determine. So, this Court need not rule upon these contentions. To the extent that I should nonetheless rule on them, I confess that I see the issue in quite straight-forward terms: either the Court had jurisdiction to make the Appointment Order or it did not. If, as it so appears, the Court did not have jurisdiction, then no amount of 'interests of justice' can supply the necessary but missing jurisdictional underpinnings. I can do no better than to follow and adopt the reasoning and language of Lord Millett in **Strachan v The**

Gleaner Co Ltd and Another[71] at paragraph 27 and observe that Vidatel is 'of course' entitled as of right, and not of discretion, to have the Appointment Order set aside and that the excess of jurisdiction 'of course' cannot be waived.

[94] For the reasons given, I am persuaded to follow **Strachan,** at paragraph 30, that 'an appeal is the proper method of getting rid of' the Appointment Order, in turn following Sir George Jessel MR in **Padstow,** and indeed the 'only' way of doing so, following Brett LJ also in **Padstow**.

[95] That in turn is sufficient reason to refuse a permanent stay of the Appointment Order. I have gone further, however, and considered whether discretionary factors persuade me to make a permanent stay order. For the reasons I have given they do not.

PTV's Slip Rule Application

[96] PTV's Slip Rule application is deeply flawed in a number of ways. I shall first recite the terms of the part of the CPR with which we are here concerned, then PTV's main arguments and Vidatel's main arguments.

[97] CPR 42.10 provides:

> "42.10
>
> 1. The court may at any time (without an appeal) correct a clerical mistake in a judgment or order, or an error arising in a judgment or order from any accidental slip or omission.
> 2. A party may apply for a correction without notice."

[98] PTV argued that this Court should look to Australian jurisprudence, which shows, PTV submitted, that in a significant number of cases the Australian courts have consistently held that subsequent to the expiry of the six-month time limit in their section 459R(1) of the Corporations Act, the courts have, in principle, the power under the slip rule (codified in materially identical terms to CPR 42.10(1) under Order 35, rule 7(3) of the Federal Court Rules, Rule 36.07 of the Supreme Court (General Civil Procedure) Rules 2015 (Vic) and Rule 10 of the Rules of the Supreme Court 1971 (WA)), to correct previous procedural orders in the proceedings by inserting an order to extend time.

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[71] [2005] UKPC 33; [2005] 1 WLR 3204.

[99] PTV cited the following cases to illustrate its point:

(1) **Elyard Corporation Pty Ltd v DDB Needham Sydney Pty Ltd** ('**Elyard**');[72]

(2) **Edwards v Waterproofing Manufacturers (Chendu) Pty Ltd** ('**Edwards**');[73]

(3) **Timms v Dellaplus Pty Ltd** ('**Timms**');[74]

(4) **Soil and Contracting Pty Ltd v Boban Pty Ltd** ('**Soil and Contracting**');[75]

(5) **T-S Capital Partners LLC v Paltar Petroleum Ltd**.[76]

(6) **Merrion B Pty Ltd v Donchiod Pty Ltd** ('**Merrion**').[77]

[100] PTV argued that in those cases:

(1) the jurisdiction to invoke the slip rule to extend time under section 459R of the Corporations Act was expressly affirmed; the slip rule in those jurisdictions deriving from relevant rules of court (or an inherent jurisdiction to the same effect), as opposed to under the Corporations Act itself;

(2) the court took into account the fact that the issue was not raised (at the relevant time) as a result of the accidental slip or omission by the legal representatives or the court (e.g. **Merrion**, at [32]), and applied the slip rule even in cases of '*bare omission*' where neither party, nor the court, turned their mind to the issue (**Soil and Contracting**, at [41]);

(3) it was held to be well settled that the application of the slip rule was not confined to giving effect to the intention of the court at the time when the relevant order was made; rather, it extends to the intention that the court would have had, but for the failure that caused the accidental slip or omission (**Elyard**, at 210);

(4) in exercising its discretion, the court took into account factors including: the length of time between the order sought to be corrected and the expiry of the time limit; the likely

[72] (1995) 61 FCR 385 (Federal Court of Australia).
[73] [2000] NSWSC 1227 (New South Wales Supreme Court).
[74] (2008) 99 SASR 578 (Supreme Court of South Australia).
[75] [2014] WASC 402 (Supreme Court of Western Australia).
[76] [2019] FCA 635 (Federal Court of Australia).
[77] [2020] VSC 499 (Supreme Court of Victoria).

approach of the court if the application to extend time had been made at the relevant time, and the degree to which any extension would have been controversial; the fact that relitigating a subsequent winding-up application would lead to an outcome at the expense of the court's resources, causing injustice; and whether any prejudice could be demonstrated to the debtor if time were extended (e.g., **Merrion**, at [32]; **Timms**, at [49]).

[101] PTV argued that the application of the slip rule to reflect the intention that the court would have had, but for the failure that caused the slip or omission, is not dissimilar from the approach of the English courts when considering whether to apply the slip rule under English CPR 40.12(1) (being in materially identical terms to our CPR 42.10). As a matter of English law, urged PTV, it is possible under the slip rule to amend an order to give effect to the intention of the court: see, e.g., **Bristol-Myers Squib Co. v Baker Norton Pharmaceuticals Inc. (No 2)**;[78] and **Riva Bella S.A. v Tamsen Yachts GmbH**,[79] *per* Eder J, at [22]. Under the Australian line of authority relating to section 459R, the intention of the court is treated as being that which ought to be attributed to the court, at the time when the order sought to be corrected or amended was made, having regard to the timetable and extant procedural steps which the court (and the parties), at that time intended or envisaged occurring in the winding-up proceedings.

[102] PTV went on to argue that so far as the legislative intention behind the statutory time period is concerned, the Australian cases make clear that section 459R has as its legislative purpose the need to ensure that an applicant for a winding-up order takes all available steps to prosecute it promptly, and equally, that an insolvent debtor is not able to delay the process as a means of avoiding its debts. In other words, applicants must get on with a winding-up petition; and (insolvent) debtors must not drag out the process any longer than necessary (causing further delay to payment of its debts, and further cost to the applicant, for no purpose).

[103] For example, PTV urged, in **Edwards** Hodgson CJ observed as follows (at [18]):

> "There is a very clear policy indicated by section 459R and associated sections of the Corporations [Act] that **applications to wind up companies in insolvency should be promptly dealt with. Where there is plain error made by the Court,** and perhaps by the **parties, in omitting to obtain an extension of time within the time limit, and that error is sought to be corrected very soon afterwards, then it seems to me that that policy of the legislature is not seriously departed from.**" (Emphasis added.)

[104] PTV contended that:

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[78] [2001] RPC 45 (CA), *per* Aldous LJ, at [20].
[79] [2011] EWHC 2338 (Comm).

(1) This Court should treat the established line of Australian authority under section 459R(1) of the Australian Corporations Act as persuasive authority, of a common law jurisdiction, as to the approach which can, as a matter of principle, be applied to a provision in materially similar terms to section 168 of the Act.

(2) To the extent that such an approach might be viewed as inconsistent with prior decisions of this Court in the **KMG v DPH** line of authority addressed above, those decisions ought to be distinguished on the basis that in those prior cases: (i) the hearing of the liquidation application had not even taken place within the six-month time period, so that the creditor had not taken reasonable steps to have the application determined within the statutory period; and (ii) no request was made under the slip rule and/or the application of the slip rule was not considered by the Court, such that the Court did not consider whether it had the relevant jurisdiction (let alone whether it should be exercised on the facts of those cases).

(3) Applying the Australian line of authority referred to above, the Court should exercise its slip rule discretion under CPR 42.10(1) in favour of correcting the error arising from the order of this Court pronounced on 7th July 2021, alternatively the formal written order of this Court dated 2nd June 2021, so as correctly to reflect the intention of this Court and the parties that the period in which the liquidation application be determined be extended, to take account of the fact that the Appointment Order was made on 30th September 2021.

(4) There are obvious and compelling reasons why the Court should exercise its discretion in this way, which include (at least) the following:

(a) the length of time between the order sought to be corrected (2nd June or 7th July 2021) and the expiry of the statutory time period (5th September 2021) is relatively short, being (approximately) two or three months (i.e. within the period that is permitted under section 168(2)), with the Slip Rule Application being brought very soon thereafter (12th October 2021);

(b) the length of time between expiry of the statutory time period (5th September 2021) and the making of the Appointment Order (30th September 2021) is extremely short, being around three weeks (25 days);

(c) if the application to extend time had been made at the relevant time(s), it is overwhelmingly likely that the Court would have granted the extension, particularly taking into account the facts that: the hearing took place well within the six-month

period (and it was already listed at the time of the 2nd June 2021 order, alternatively on 7th July 2021, being the second day of the part-heard hearing); all the necessary steps to have the application heard in the six-month period had therefore been taken as at 2nd June 2021 or 7th July 2021; all that remained for the application to be '*determined*' (*cf.* the language of section 168(1)) following 7th July 2021 was the delivery of the Court's judgment; and the timetable clearly indicated that the Court envisaged (and intended) the application remaining on foot through to the end of the hearing on 7th July 2021 and the delivery of the judgment. The case would have been a particularly strong one for the grant of an extension: it is clear that all parties involved (including the Court) contemplated that the six-month time period would not end the proceedings, and as such, the grant of an extension would have been uncontroversial. Significantly, Vidatel has not even contended that it would have opposed any application to extend time, still less that it would have been successful in any putative opposition;

(5) as has been emphasised in the Australian case law, relitigating a second liquidation application would lead to an outcome at the expense of this Court's resources (as well as PTV's), thereby causing injustice;[80]

(6) as the Supreme Court of Victoria held in **Merrion** (at [32]), the above factors ought to outweigh the underlying legislative policy of section 168 of the Act to determine a winding-up application expeditiously. In particular, in this case:

(a) Vidatel was subject to an (unresolved) liquidation application for a period of only 25 days following the expiry of the time period (before the Liquidation Order was made on 30th September 2021);

(b) As a holding company, which was not trading, whose assets have been 'frozen' by the Angolan Freezing Order ('AFO'), there is no conceivable prejudice to Vidatel by the application not having been determined only three weeks earlier;

(c) Significantly, and in light of the impact of the AFO, the financial information upon which this Court proceeded when delivering its judgment on 30th September 2021 and found Vidatel to be insolvent (on a cash flow basis), was contemporaneous;

(d) PTV did not drag its heels in seeking a listing of the application, nor in prosecuting it: on the contrary, as the chronology shows, PTV immediately took steps to

[80] Cf. Tall Trade Ltd v Capital WW Investment Ltd (BVIHC 2020/0025 and 2020/0026) (unreported, delivered 24th January 2022.

ensure the expeditious hearing of the application – the timing of which was delayed as a result of Vidatel's opposition (as was its right) to the application and the need to ensure a hearing of sufficient length to enable Vidatel to oppose it (which Vidatel did, at further cost and expense to PTV, which PTV has yet to recover);

(e) Thus, to accede to the Slip Rule Application would, in this case, in no way risk departing from the underlying policy that winding-up applications should be heard expeditiously, that the applicant should prosecute it promptly, and that any winding-up order is based on contemporaneous information as to solvency.

(7) In any event, the application was determined expeditiously: Vidatel was wound up by this Court on 30th September 2021, a little over six months after it had been filed.

[105] PTV submitted that in the circumstances the relief sought in the Slip Rule Application constitutes a just and appropriate means of redressing the issues to which the (short) effluxion of time beyond the six-month period under section 168 of the Act has given rise.

[106] Vidatel disagreed. Vidatel observed that when the Court made its orders on 2nd June 2021 and 7th July 2021, there was no application of any sort before the Court for an extension of the six-month period. Indeed, the expiry of that period was still some three and two months away respectively. There was no reason for an extension to have been in the contemplation of the parties or the Court at that point. It thus cannot be sensibly said that there had been a 'clerical mistake', or any 'accidental slip or omission'.

[107] Vidatel also argued:

(1) The current (2021) version of the White Book commentary on the English CPR notes at para. 40.12.1: '*Essentially the rule exists to do no more than correct typographical errors such as where the order says 'claimant' where it should say 'defendant'…'.*

(2) Recent decisions of the BVI High Court on the slip rule have emphasised that the rule is concerned with ensuring that Court's intention is reflected. See *e.g.* **O'Carol Williams v. Jarl Claxton**,[81] approved by Justice Moise in the St Christopher and Nevis High Court in

[81] BVIHCV2016/0315 (unreported, delivered 30th March 2020 at paragraph [13] (Sandcroft M (Ag.)).

Trustee in bankruptcy of the estate of Pelletier v. Pelletier and ors.[82] Justice Moise also referred to other authorities to similar effect at [13]-[15].

(3) This is also the approach which has been taken in England to its current equivalent of the Slip Rule. Snowden J (as he then was) recently summarised the position in **Santos-Albert v. Ochi** at [27]:[83]

> "In my view, as stated in **Bristol-Myers Squibb**[84], **the key requirement in every case is simply that the order should reflect the actual intention of the court.** The limitation discussed in the authorities, and which I think is what is meant by the sentence in the White Book [i.e. "Although not limited to errors by the court or court officers, the rule is limited to genuine slips and cannot be used to correct an error of substance nor in an attempt to get the court to add to its original order (e.g. to add a money judgment where none was sought, and none given at the trial)"], **is that there should genuinely have been an accidental error or omission: the slip rule should not be used to permit the court to have second or additional thoughts or to add a provision having substantive effect which was not in the contemplation of the parties or the court at the hearing.**" (Emphasis supplied.)

(4) There is no reason to interpret the slip rule any more expansively than its English equivalent, as interpreted by Snowden J. Rawlins J (as he then was), deciding an appeal concerning the slip rule (**Saint Christopher Club Ltd v. Saint Christopher Club Condominiums**,[85]) based himself squarely on authorities on English CPR 40.12 and the White Book commentary thereon, without any suggestion that the law in England was different.

(5) PTV's case is that the slip rule should be interpreted more expansively (as certain of the equivalent provisions in Australia appear to have been – see e.g. **L Shaddock & Associates Pty Ltd v. Parramatta City Council (No2)**[86]) so that a provision <u>not</u> contemplated by the parties or the Court at the relevant time may be included via the slip rule if it was a provision which a party omitted to ask for but which the Court would have included had it been asked.

[108] Vidatel argued that the attempt by PTV to import this expansive Australian approach should be rejected for several reasons, which in summary are that (i) the Australian authorities are

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[82] NEVHC2020/123 (unreported, delivered 8th March 2021) at paragraph [16].
[83] [2018] 4 WLR 88; [2018] EWHC 1277 (Ch) 88.
[84] Bristol-Myers Squibb v. Baker Norton Pharmaceuticals Inc (Costs) [2001] EWCA Civ 414; [2001] RPC 45.
[85] Civil Appeal No.4 of 2007 (unreported, delivered 15th January 2008).
[86] (1982) 151 CLR 590 at 594-595).

contrary to recent cases on the CPR and the English CPR - **O'Carol Williams** (*supra*) and **Santos-Albert** (*supra*); (ii) the Australian authorities carry little weight in circumstances where they are concerned with the interpretation of procedural codes which are different from those in the CPR and English CPR (which are themselves similar); (iii) the Australian authorities themselves are based on English pre-CPR authorities which if only for that reason are to be treated with caution (see **Saint Christopher Club Ltd** (*supra*) at [18]); and (iv) the line of English authority which is the ultimate source of the Australian authorities on which PTV apparently rely has been expressly doubted by the English Court of Appeal in **Tibbles v. SIG plc (trading as Asphaltic Roofing Supplies)**[87] per Rix LJ at [53], and it can no longer be regarded as representing English law (whatever the position may be in Australia).

The Court's view in relation to the Slip Rule Application

[109] Having had the benefit of both sides' arguments on PTV's Slip Rule Application, it appears to me that Vidatel was correct.

[110] In **Saint Christopher Club Ltd v. Saint Christopher Club Condominiums**,[88] our Court of Appeal considered the ambit of CPR 42.10. At paragraph [22], Justice of Appeal Hugh Rawlins (as he then was), sitting as a single judge of the Court, stated:

> "... An amendment of an order or judgment under the slip rule may therefore only be done to correct clerical errors or accidental slips or omissions. That this is limited to genuine slips was confirmed in **Markos v Goodfellow No. 2** ([2002] EWCA Civ. 1542 (11th October 2002)) and **Smithkline Beecham Plc. v Apotex Europe Ltd**.([2005] EWHC 1655 (Ch.))".

[111] Rawlings JA continued at paragraph [23]:

> "[23] It is not always easy, however, to determine what constitutes an accidental slip or omission as the present matter shows. Thus the commentary on the slip rule contained in the White Book 2007 states as follows: (at paragraph 40.12.1, page 1079):
>
> "The so-called "slip rule" is one of the most widely known but misunderstood rules. The rule applies only to "an accidental slip or omission in a judgment or order". **Essentially it is there to do no more than correct typographical errors (e.g. where the order says claimant when it means defendant; where it says 70 days instead of seven; where it says "January 2001" instead of "January 2002".** Of course, such errors ought not to occur in important documents like a court order but they are regrettably common). ... **the rule is limited to genuine slips and cannot be used to correct an error of**

[87] [2012] EWCA Civ 518; [2012] 1 WLR 2591.
[88] Civil Appeal No.4 of 2007 (unreported, delivered 15th January 2008).

> **substance nor in an attempt to get the court to add to its original order** (e.g. to add a money judgment where none was sought, and none was given at the trial). ... **The slip rule cannot be used to enable the court to have second thoughts or to add to its original order** (see para.4.2.1 above). A judge does have the power to recall his order before it is issued but not afterwards. Once the order is drawn up, judicial mistakes have to be corrected by an appellate court. However, the court has an inherent jurisdiction to vary its own order to make the meaning and intention of the court clear and can use the slip rule to amend an order to give effect to the intention of the court. See *Bristol-Myers Squibb v Baker Norton Pharmaceuticals Inc* [2001] EWCA Civ 414; applied in *Foenander v Foenander* [2004] EWCA Civ 1675 (Wall L.J.) (correction of order referring to civil restraint order)." [Emphasis added.]

[112] That, I apprehend, is the law in this jurisdiction, and this Court is bound to follow this Court of Appeal decision. The omission of PTV to apply for and obtain an extension of the six-month period was an error on the part of PTV and not the Court, and the slip rule cannot be used to add something to the orders in question. There is no room under the law of this jurisdiction to apply the more expansive approach which PTV says has been adopted by the Australian courts. Specifically, correcting 'genuine slips' of an essentially typographical or clerical nature in order to give effect to the intention of the court does not include the exercise in manifold supposition that the Australian approach is prepared to countenance. By exercise in manifold supposition, I mean that this Court would need to suppose that PTV had applied for an extension of the six-month period before the orders in question were made (in June and July 2021), and suppose that Vidatel would at that point not have opposed such an application, or suppose that Vidatel would have had no good grounds for opposing it, or suppose that the Court would have granted such an application at that point in time as a matter of course (even though such an application in June or July 2021 might have been seen as premature, as the deadline would expire only in September 2021). If such an exercise in mental gymnastics were to be treated as available under our slip rule, the need for an application made in or out of time, and statutory rules imposing time limits, would become academic.

[113] Moreover, the expiry of the six-month period is determinative of an application to appoint a liquidator and its deemed dismissal cannot simply be waived. Whilst in practice extensions of the period are routinely and readily granted, even upon an oral application made (as long as the application is made before its expiry), and they are almost never opposed, this does not mean that an omission to apply for such an extension can properly be described as typographical or clerical.

[114] To add an extension to the orders made in June or July 2021 would be a clear case of the Court impermissibly adding to its original orders.

[115] Furthermore, it seems to me that our own procedural law, as expressed in the CPR, is more restrictive than in England and Wales. The current position in England and Wales appears to be as stated by Rix LJ in the English Court of Appeal case of **Tibbles v. SIG plc (trading as Asphaltic Roofing Supplies)** at [53]:[89]

> "53. There was little if any discussion in the present appeal of the "slip rule", now found in CPR r 40.12. I would therefore be reluctant to say much about it. The current form of the rule permits an application under it to be made "at any time" ("The court may at any time correct an accidental slip or omission in a judgment or order.") The note in the White Book at para 40.12.1 (*Civil Procedure 2012* , p 1228) says that it is "there to do no more than to correct typographical errors" and that it "cannot be used to enable the court to have second thoughts or to add to its original order". **It may be, however, that in the past it was used more expansively to put right a defect in an order due to "an accidental omission of counsel or solicitor to ask for, or of the court to provide for, something which ought to have been provided for**" (see *In re Earl of Inchcape [1942] Ch 394* , 398 where Morton J referred back to Fry J in Fritz v Hobson (1880) 14 Ch D 542 and applied its learning. I am grateful to Lewison LJ for supplying this reference. **That may be stretching the slip rule, but, as I have ventured to suggest above, in an appropriate case, and on prompt application, and in the absence of prejudice, it may well be the sort of case in which CPR r 3.1(7) would be available today, even though there was no misleading or misunderstanding**. Since the court has asserted this power since 1880, **it may be doubtful whether it would be opening the door too wide to find it now within CPR r 3.1(7).**"

[116] The English CPR r 3.1(7) is a case management power in terms of:

> "(7) A power of the court under these Rules to make an order includes a power to vary or revoke the order."

[117] Our CPR does not provide the Court with an equivalent power. The closest provisions in our CPR would appear to be CPR 42.10 and 26.9. The latter gives the Court power to 'put matters right' when there has been an 'error of procedure' or a 'failure to comply with a rule, practice direction, court order or direction'. Pointedly, CPR 26.9 does not include a failure to abide by a statutory deadline.

[118] Thus, I am persuaded that our own law is, certainly as it is expressed in the CPR, more restrictive than that which pertains in England and Australia, such that it is not open to PTV to

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[89] [2012] EWCA Civ 518; [2012] 1 WLR 2591.

invoke our slip rule, CPR 42.10, nor indeed any other case management power, to obtain an extension of the six-month statutory period after its expiry.

Disposition

[119] For those reasons both Vidatel's Set Aside Application and PTV's Slip Rule Application fail. The Court will hear the parties further in respect of costs.

[120] I take this opportunity to thank the parties' learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar