IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 226 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION)
AND IN THE MATTER OF PORTON CAPITAL INC AND PORTON CAPITAL LIMITED

ENIGMA DIAGNOSTICS LIMITED (IN LIQUIDATION)

Petitioner

AND

HARVEY ERIC BOULTER

Respondent

Appearances:	Charles Samek QC, Peter Hayden and Jonathan Moffatt of Mourant Ozannes (Cayman) LLP for Enigma Diagnostics Limited (in liquidation), the Petitioner David Quest QC, Peter Tyers-Smith and Ilona Groark of Kobre & Kim (Cayman) for Harvey Eric Boulter, the Respondent
Before:	The Hon. Justice David Doyle
Heard:	3 and 4 March 2022
Draft Judgment circulated:	18 March 2022
Judgment approved:	24 March 2022

HEADNOTE

Dismissal of petition for an order that the dissolution of certain companies be declared void on the basis of an alleged fraud in the liquidation and that such companies be restored to the register and that joint official liquidators be appointed

JUDGMENT

Introduction

1. On 3 March 2022 I heard opening submissions and evidence in respect of this case. On 4 March 2022 I heard closing submissions and I reserved judgment. I now deliver my judgment. It will be seen that, for reasons which follow, I have dismissed the petition as the Petitioner has failed to prove a fraud in the liquidation on the part of Harvey Eric Boulter ("Mr Boulter").

2. By petition dated 29 July 2021, Enigma Diagnostics Limited (in liquidation) (the "Petitioner") applies for an order that (1) the dissolution of certain companies is declared void; (2) they be restored to the Register of Companies; (3) the liquidations of the companies continue under the supervision of the court; (4) the companies be deemed to have continued in existence as if they had not been struck off; (5) the property vested in the Minister for Financial Services and Commerce be restored to the companies on their restoration to the Register of Companies; and (6) Gordon MacRae and Elizabeth Mackay of Kalo (Cayman) Limited, of an address in the Cayman Islands, together with Paul David Allen ("Mr Allen") of FRP Advisory Trading Limited of an address in London be appointed as joint official liquidators of the companies and that they be given certain powers and other consequential orders be made. Mr Allen is also one of the Joint Liquidators of the Petitioner, which he describes as "a UK limited company with company number 05114005 in the United Kingdom."

The background and the allegations of fraud

3. Porton Capital, Inc. ("PCI"), a company incorporated in the Cayman Islands, was placed into voluntary liquidation on 15 May 2017 and dissolved on 28 February 2018.

4. Porton Capital Limited ("PCL"), a company incorporated in the Cayman Islands, was placed into voluntary liquidation on 15 May 2017 and dissolved on 13 March 2018.

5. Andrew Childe of FFP (Cayman) Limited and Stephen Briscoe of FFP (BVI) Limited were appointed Joint Voluntary Liquidators (the "Porton JVLs") of PCI and PCL. I refer to PCI and PCL together as the Porton Companies.

6. Mr Boulter was the sole director and beneficial owner of PCI and PCL when they were placed into voluntary liquidation. Mr Boulter was also a director of the Petitioner at certain times.

7. Mr Boulter made declarations of solvency in respect of each of PCI and PCL on 15 May 2017 stating:

> "I, Harvey Boulter, being the sole Director of the Company do solemnly and sincerely declare that I have made a full enquiry into the affairs of the Company and that having done so, I believe that the Company will be able to pay its debts in full, together with interest at the prescribed rate within a period of twelve (12) months from the commencement of the winding up."

8. These statutory declarations were required pursuant to the Companies Act. I refer to them as the "Declarations of Solvency". If the Declarations of Solvency had not been made then the Porton JVLs would have been obliged to make an application pursuant to section 131 of the Companies Act for supervision orders and the liquidations would have continued as court supervised liquidations.

9. By letters dated 15 May 2017 Mr Boulter in respect of PCI and PCL wrote in the following terms:

> "I confirm that as at 15th May 2017, the Company is no longer carrying on business and has no assets or liabilities (except in respect of share capital).
>
> I further confirm that the Company….2. Has no contingent liabilities, potential creditors or unrecognised claims, including any foreign tax liabilities" (the "Letters").

10. The Letters were not required pursuant to statute but had been requested by the Porton JVLs.

11. The Petitioner alleges that the dissolutions of PCI and PCL are void and/or should be set aside because Mr Boulter made fraudulent Declarations of Solvency and/or fraudulent misrepresentations in the Letters that PCI and PCL had no contingent liabilities, potential creditors, or unrecognised claims. These are the primary allegations of fraud.

12. There are other secondary allegations namely that:

    (1) Mr Boulter acted in fraudulent breach of his fiduciary duties owed to PCI and PCL in the course of the process leading up to their dissolutions;

    (2) Mr Boulter made fraudulent misrepresentations to the Porton JVLs during the course of the voluntary liquidations; and/or

    (3) Mr Boulter fraudulently approved the final reports and accounts of PCI and PCL.

13. Mr Boulter denies that he made fraudulent Declarations of Solvency and/or fraudulent misrepresentations in the Letters that PCI and PCL had no contingent liabilities, potential creditors or unrecognised claims. Mr Boulter admits signing the Declarations of Solvency

and the Letters but says that the representations amounted to statements of his opinion and they were not fraudulent. Mr Boulter denies all the allegations of fraud levied against him.

Determination

14. In this determination section of the judgment I refer to the relevant law on the court's jurisdiction, the burden and standard of proof, my findings in respect of the allegations of fraud, the "causation and injury" issue and the "acquiescence" issue.

The relevant law on the court's jurisdiction

15. It is common ground that this court has jurisdiction to restore a company to the register when it has been dissolved following a voluntary liquidation if an applicant for such relief can prove that there was a fraud in respect of the liquidation (*Schramm and Hiscox Syndicate 33 v Financial Secretary* 2004-05 CILR 39 Chief Justice Smellie applying *Pinto Silver Mining Co.* (1878) 8 Ch. D. 273 dicta of James LJ and Cotton LJ and *London and Caledonian Marine Ins. Co.* (1878) 11 Ch. D 140 dicta of James LJ and on appeal [2004-05 CILR 104] considering *Pinto*, *London & Caledonian* and *Russian & English Bank v Baring Brothers & Co Ltd* [1936] A.C. 405). I therefore determine that this court has jurisdiction to grant the relief claimed if satisfied that a fraud in the liquidations has been proved.

16. It is not a statutory jurisdiction. In his skeleton argument Mr Quest described it as a "general or inherent jurisdiction" but in his oral submissions stated that it was better described as an equitable jurisdiction rather than a common law jurisdiction. Mr Quest also submitted that it was a discretionary jurisdiction. Mr Samek submitted that it was not a discretionary jurisdiction and seemed to suggest that once fraud was proved the court must set aside the dissolutions. Mr Samek submitted that by 1878 common law and equity had been fused in England so it was wrong to refer to it as an equitable jurisdiction. Mr Samek's fall back position was that if the jurisdiction was discretionary then it should only

be in the rarest and most exceptional cases that the discretion would be exercised so as not to visit upon the fraudster the consequences of his fraud.

17. However the jurisdiction is described, it is a jurisdiction which a court must exercise with great caution. I note the cases on the policy principle that "fraud unravels all" but attention must also be given to the policy principles of certainty and finality. In other jurisdictions the elected representatives have passed laws which permit applications for companies that have been dissolved to be restored within a limited period (usually 2 years).

18. Collett JA sitting in the Court of Appeal in the Cayman Islands in *Schramm* at paragraph 8 stated:

> "That decision [not to follow later UK models] must be regarded as a deliberate one on the part of the well-informed local legislature and is readily to be understood as a reaction to the establishment of the formidable array of offshore companies registered in these Islands, which present a scenario unlike that of the United Kingdom, Canada, Australia or other established countries of the Commonwealth: they do not, to anything like the same extent, seek to attract overseas business incorporations. Occasional injustice must be regarded as the price which the local legislature has considered to be worth permitting to occur rather than to introduce the uncertainties which might plague the Law if the more recent English precedents, or indeed those very recently introduced in Australia, were to be adopted here. Indeed, Australia has radically reformed its legislation within the recent past."

19. Relying on those important appellate observations Mr Quest submits that the local legislature of the Cayman Islands is to be taken to have made a deliberate decision not to introduce a statutory power to restore companies deemed to have been dissolved and to have preferred, in the interests of certainty and at the risk of occasional injustice, that dissolutions once concluded should not be disturbed. Mr Quest suggests that this should militate strongly towards keeping the fraud jurisdiction within very narrow bounds indeed.

20. I took all these submissions into account when considering the jurisdiction of the court in this case.

The burden and standard of proof

21. The burden of proof is on the Petitioner to prove its allegations of fraud.

22. It is well-established that the standard of proof is the civil standard of the balance of probabilities without a sliding scale depending on the gravity of the allegation (*Takhar v Gracefield Developments Limited* [2020] AC 450; *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; *Re B (Children)* [2009] AC 11 and *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408). Lord Sumption in *Takhar*, a case concerning an allegation that a judgment had been obtained by fraud, at paragraph 64 stated:

> "The standard of proof for fraud is high, and rightly so. But once it is satisfied, there are no degrees of fraud which can affect the right to have the judgment set aside."

23. When at paragraph 76 of Mr Boulter's skeleton argument Mr Quest stated that "it is well-established that a heightened standard of proof is applied in respect of fraud and dishonesty allegations" he made the same mistake as Lord Steyn in *R (McCann) v Crown Court of Manchester* [2003] 1 AC 787, 812 where Lord Steyn made reference to a "heightened civil standard." As Lord Hoffmann made clear in *Re B (Children)* [2009] AC 11 there is only one civil standard of proof and that is the balance of probabilities. The court must be satisfied that the occurrence of the fact in question was more likely than not. The standard of proof does not vary with the gravity of the misconduct alleged but when assessing probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. This does not mean that where a serious allegation is in issue, such as in a fraud case, the standard of proof required is

higher. There is only one rule, namely that the occurrence of the fact in issue must be proved to have been more probable than not. Baroness Hale in *Re B (Children)* [2009] AC 11 at paragraph 70 stated:

> "Neither the seriousness of the allegation nor the seriousness of the consequences should make any difference to the standard of proof to be applied in determining the facts. The inherent probabilities are simply something to be taken into account, where relevant, in deciding where the truth lies."

24. *Re B (Children)* has been applied in numerous subsequent cases. To take just one relatively recent example the English Court of Appeal in *Bank St Petersburg PJSC v Arkhangelsky* [2020] EWCA Civ 408, in the context of an appeal in a dishonesty case, applied these well-established principles and referred to other authorities to the effect that "cogent evidence is required to justify a finding of fraud or other discreditable conduct" with Sir Geoffrey Vos, the Chancellor of the High Court, delivering the main judgment. He cautioned judges at first instance against applying too high a standard of proof in dishonesty cases. Males LJ at paragraph 117 added:

> "In general it is legitimate and conventional, and a fair starting point, that fraud and dishonesty are inherently improbable, such that cogent evidence is required for their proof. But that is because, other things being equal, people do not usually act dishonestly, and it can be no more than a starting point. Ultimately, the only question is whether it has been proved that the occurrence of the fact in issue, in this case dishonesty in the realisation of the assets, was more probable than not."

25. In this case I apply the only relevant standard of proof, namely the civil standard of a balance of probabilities.

Findings in respect of the allegations of fraud

26. The core allegations in this case are that Mr Boulter made fraudulent Declarations of Solvency and provided fraudulent representations in the Letters and on that basis there was a fraud in connection with the voluntary liquidation and the consequent dissolutions of the Porton Companies such that the dissolutions are to be impeached as fraudulent and must be set aside.

27. It appears to be common ground that as a minimum in this case the Petitioner must prove, on a balance of probabilities, that:

(1) there was a false representation in the Declarations of Solvency and/or the Letters; and

(2) Mr Boulter knew that the representation was false, had no belief in its truth or was reckless as to whether it was true or false.

Findings in respect of the Declarations of Solvency and the Letters

28. I do not find that, at the time he signed the Declarations of Solvency and the Letters, Mr Boulter knew of the existence of claims intimated against the Porton Companies such that he knew or was reckless as to whether any of the representations contained in the Declarations of Solvency and the Letters were false.

29. In its Amended Particulars of Fraud (adopting a somewhat unsatisfactory "kitchen sink/scattergun" approach) the Petitioner pleads that when Mr Boulter signed the Declarations of Solvency and the Letters he knew of the existence of various claims by reason of certain specified matters and such was evidence of the falsity and fraud in this case. I can deal with the specified matters quite shortly as follows:

(1) *Jones Day's correspondence with DLA*

The letter is dated 16 January 2015. The claim is against DLA. No claim is asserted against PCI. PCL is not referred to. I accept Mr Boulter's evidence to the effect that he believed that the complaint was groundless and there was, in any event, no complaint against PCI or any grounds for such. Mr Boulter said it was a complaint levelled against DLA and it was their duty to respond to it. Mr Boulter did not think that any claims were being made against the Porton Companies. Mr Boulter felt that by May 2017 it was "ancient history";

(2) *The South China Morning Post article 18 January 2015*

Again I accept Mr Boulter's evidence that when he came to sign the Declarations of Solvency and the Letters he regarded the South China Morning Post article as "purely historic in nature" and "no more than anonymous grumblings that had never been articulated in direct complaints.";

(3) *The Porton Capital Investor Action Group*

The group was incorporated on 5 February 2015. I accept Mr Boulter's evidence that he was never contacted by the group or anyone purporting to represent it. I agree with Mr Quest that the basis under this heading is a "pretty flimsy basis for alleging that Mr Boulter knew that the company was indebted, had a liability…". In his evidence Mr Boulter said they tried to reach out to see what the group's intentions were but they could not find a representative to engage with and accepted that they did not send a letter to its registered office. I accept Mr Boulter's statement that the mere incorporation of the group did not give rise in his mind to a debt, contingent liability, potential liability or unrecognised claim;

(4) *David Lewnes*

Mr Boulter referred to Mr Lewnes creating a negative online blog and media campaign and he was referenced in the South China Morning Post article. Mr Boulter felt Mr Lewnes was simply trying to put leverage over the Porton Companies to extract money from them but Mr Lewnes never articulated any claim that had merit and he never threatened to sue. The evidence reveals that Mr Lewnes entered into a settlement agreement on 13 May 2015 with a release clause. As at 15 May 2017 Mr Lewnes was not a creditor or contingent creditor and had no valid claim potential or otherwise;

(5) *Henk Herfst*

Henk Herfst entered into a settlement agreement on 18 December 2015 and was not a creditor or contingent creditor and had no valid claim potential or otherwise;

(6) *Dr S Ali A Samad*

I accept Mr Boulter's evidence that he genuinely felt that Dr Samad's complaints dating back to 2013 were "groundless", "inaccurate" and based on mathematical misunderstandings and that Dr Samad had no grounds whatsoever for a complaint. Mr Boulter says that Dr Samad did not have a claim and he asked him repeatedly to articulate a claim which he failed to do. Mr Boulter heard nothing further from June 2015 and no claim was ever brought. I accept as genuinely held Mr Boulter's view that the email exchanges with Dr Samad did not give rise to a debt, liability of whatever nature or unrecognised claim;

(7) *Ben Buitendag*

The correspondence on 13 May 2015 refers to the possibility of making regulatory complaints and his wish to have his investment funds returned and "to expose

irregularities if any." I accept that Mr Boulter genuinely held the view that Mr Buitendag was making "a clumsy attempt to extort a payment from Porton, when he had no entitlement to any such payment." These email exchanges do not prove that Mr Boulter knew or was reckless as to whether any of the representations he made in the Declarations of Solvency and the Letters were false. These email exchanges do not assist the Petitioner in advancing its allegations of fraud;

(8) *The Offshore Alert Forum*

I note the letter dated 11 December 2017 from Nelson Mullins which asserts a claim on behalf of Mr Boulter and "Porton Capital" and is not evidence of a claim against the Porton Companies. Mr Boulter said that the posts "were from anonymous bloggers that we have no clue who they were … The whole site was fabricated. It was all manufactured. It is as close as you are going to get to fake news." I accept as genuine Mr Boulter's evidence that in his mind "anonymous posts on a web-based chat room" fell far short of what would be required to give rise to a relevant liability. Again such is not evidence of fraud against Mr Boulter;

(9) *Various settlement agreements*

Again the vague and generalised pleas in this respect get nowhere near jumping the hurdle in respect of fraud;

(10) *Pinsent Masons' letter dated 29 March 2016*

Mr Boulter asked Pinsent Masons' to be more specific rather than providing a "laundry list". Mr Boulter said he was hoping that if amongst the "laundry list" there was something they thought was important they would write with "some specificity, but he didn't… that was the end of the matter which proved to me that there was nothing else there." I accept Mr Boulter's evidence that he reasonably concluded that this correspondence did not give rise to a relevant liability;

(11) *Macfarlanes' correspondence in July and August 2016*

Mr Boulter during his cross-examination stressed that it was important to consider "the context of the whole correspondence" but Mr Samek was not interested in the context. Mr Boulter gave the context in re-examination stressing that "the correspondence basically ended at the end of August." Mr Boulter had stated during his cross-examination that he felt that Macfarlanes were conflicted but did not accept that there was "the potentiality for claims" adding: "I didn't think any of the claims that they had here had any merit, but under the rules of insurance, when you get a laundry list like this, it's prudent to notify the insurers, and we did that, but I don't believe anything here had any merit. I think that there was an underhanded strategy to scupper the deal that we had in hand, and that was the first part of the correspondence where they basically wanted to vote against the sale of Enigma … and at the end of August, it all stopped…" Mr Boulter says "I actually went further and I invited Macfarlanes, if you have got a claim, litigate it, because it was becoming tiresome" but nothing was forthcoming. I accept that there was never any suggestion of a financial claim against the Porton Companies. Again I accept Mr Boulter's evidence that the correspondence did not give rise in his mind to any relevant liabilities; and finally

(12) *Rosenblatt's letter dated 26 July 2016 and claim form*

Mr Boulter was not cross-examined in respect of the Rosenblatt letter and claim form. This was in respect of a claim for breach of trust against DLA with a claim form issued on 18 April 2016 in order to preserve the limitation period. No claim was asserted against PCI. PCL was not even mentioned. Mr Boulter says he was told the claim form was not served and expired later in 2016. I accept Mr Boulter's evidence that he genuinely believed that the claim had been abandoned and concluded that it did not give rise to any relevant liability.

30. I am not satisfied, on the evidence presented to this court, that Mr Boulter knew that any of the representations he made in the Declarations of Solvency and the Letters were false, had no belief in their truth or was reckless as to whether they were true or false. In light of this conclusion I do not need to decide on the objective falsity of any of the representations, as if any could objectively be regarded as false the Petitioner has not proved the necessary subjective mental element on the part of Mr Boulter.

31. Mr Boulter's oral evidence was unshaken during a lengthy cross-examination that continued well into the night, his time. I accept Mr Boulter's evidence that he made full enquiry into the affairs of the Porton Companies and that having done so he honestly believed that the Porton Companies would be able to pay their debts in full together with interest at the prescribed rate within a period of twelve months from the commencement of the winding up. I accept Mr Quest's submissions that there is no basis for rejecting Mr Boulter's evidence that he made full inquiry and that "it is not the job of a director to solicit claims, or to solicit liabilities."

32. I also accept Mr Boulter's evidence that he honestly believed that the Porton Companies had no contingent liabilities, potential creditors or unrecognised claims.

33. Mr Boulter, a qualified accountant, explains in detail in his evidence the process he went through and his consideration of the various categories of possible claims before concluding that the Porton Companies had no relevant liabilities. Mr Boulter identifies the five factors that he says "strengthened his belief" that neither PCI nor PCL had any relevant liabilities as follows:

(1) only a "tiny number" of the 2,638 investors had ever voiced any complaint and fewer still ever asserted any intention to bring a claim;

(2) the few complaints that had been made failed to articulate a legitimate claim or were based on clear factual errors or misunderstandings;

(3) no investor had ever actually pursued any claims against either PCI or PCL despite a handful of threats to do so;

(4) a number of investors represented by reputable law firms had abandoned possible claims they had threatened against DLA indicating to him an acceptance that they had no claims; and

(5) by May 2017 a significant time had passed since the complaints had been made such that they were effectively of historic interest only.

Mr Boulter was not significantly shaken during a robust and vigorous cross-examination on these issues.

34. In his evidence Mr Boulter referred to "several conversations with FFP" where he explained the nature of the former businesses of the Porton Companies and Porton Capital Technology Fund and that there were several thousand investors who had suffered losses and were, unsurprisingly, unhappy about that fact. Mr Boulter says that he specifically said that over the years some investors had expressed their unhappiness and discontent and that as liquidators they may also receive further "grumblings" from unhappy investors.

35. Mr Boulter explained that there is always a risk when funding start-ups. The flipside however is that when start-up companies are successful the investment returns for early investors can be very high. Mr Boulter added that it did not follow from the fact that an investor lost their investment that someone must be liable for compensation. Mr Boulter stated his view that this is the risk investors take when they make high risk investments in start-up companies. Mr Boulter said that he considered most, if not all, of the episodes that are relied upon in the Petitioner's pleading and concluded that there were no contingent liabilities and that the investors were not potential creditors. Mr Boulter added that he firmly believed in May 2017, and continues to believe, that "there was nothing improper in the conduct of the business of either the Porton Companies or Enigma. As such I firmly believed that there were no unrecognised claims that could emerge." Mr Boulter explained that in signing the Declarations of Solvency and the Letters he:

"…carefully considered whether there were any claims or complaints that should be recognised as contingent liabilities, whether there were potential creditors or unrecognised claims and genuinely concluded that there were not. That conclusion was supported by the fact that the relatively limited number of complaints that had previously been made against the Porton Companies had either been resolved or were so baseless or historic (or both) that I believed they were no longer being pursued, and that no actual claim had been commenced against either of the Porton Companies."

36. Mr Boulter adds that if he had not reached that conclusion he would not have signed the Declarations of Solvency or the Letters. Mr Boulter does not accept that he made any fraudulent misrepresentations to the Porton JVLs and says that his approval of the final accounts in his capacity as shareholder was based upon his genuine assessment and understanding of the financial position of the Porton Companies.

37. During his extensive cross-examination Mr Boulter referred to his approach in respect of the Declarations of Solvency and the Letters:

"I believe I approached the matter methodically, diligently, professionally. I believe I made full enquiry, I think I came down to reasonable opinions. I believed those opinions to be fair and true and it was on the basis of that diligent exercise I entered into those agreements. I think I have articulated it, you know, in my evidence, and I believe that to be what I thought then, and what I continue to think today."

38. It was put to Mr Boulter in cross-examination that the documents from 2013 to 2017 suggest claims and his failure to disclose them and the pressure he placed on the liquidators to shut down the Porton Companies was because he did not want a "proper investigation or a court-supervised process taking place." Mr Boulter responded as follows:

"I believe I entered a process that was methodical, diligent. I believed in it honestly. I think I came to reasonable conclusions and opinions. I believed in those opinions. I think they are founded in fact. There were no claims against Porton. These matters were old. They had effectively died. Most of them, there was no merit to any of these claims, and so when I looked at it in the context of contingent liabilities or unasserted claims I didn't see the possibility that these categories of claims could rise to that standard at all, and so I was happy to sign the Appendix 4 representation [the Letters] and on the back of that I was happy to sign the declaration of solvency which was a forward-looking statement, and it is proven over the course of time. Over those twelve months I didn't get any claims from any investors or any other parties so my declaration was proved to be correct. So no, I disagree with you."

39. Mr Boulter consistently maintained during cross-examination that he had not acted fraudulently and that the opinions he expressed and the representations he made in the Declarations of Solvency and the Letters were honestly expressed and made. Mr Boulter's evidence was to the effect that there were no relevant claims or liabilities, contingent, potential, or unrecognised. As it transpires not even the Petitioner, who was well aware of the liquidation proceedings before dissolution, put in a proof of debt. Indeed although the liquidations were properly advertised and public knowledge no proofs of debt were ever lodged by anyone.

40. It is worthy of note that the Porton JVLs engaged in correspondence with the Petitioner from August 2017 culminating in a letter dated 12 October 2017 from the Porton JVLs to the Petitioner indicating in effect that if nothing further was heard from them by 3 November 2017 they intended to "proceed with the conclusion of the liquidation proceedings". Nothing further was heard from the Petitioner in respect of its enquiries prior to the dissolution of PCI and PCL. It is plain to me that the Porton JVLs were, as submitted by Mr Quest, seeking to discharge their duties responsibly and conscientiously and to conduct a genuine liquidation process. They plainly did not think that there were any claims that were capable of preventing the valid dissolutions of PCI and PCL. Like Mr Boulter the Porton JVLs considered that PCI and PCL had no liabilities. Moreover I

have received no satisfactory explanation as to why the Petitioner took no effective action until after the dissolutions of PCI and PCL. The Petitioner lodged the petition on 29 July 2021, three years and nine months after the 3 November 2017 deadline provided by the Porton JVLs and approximately three and a half years after the deemed dissolutions.

Findings in respect of alleged fraudulent breaches of fiduciary duty

41. I am not satisfied that there were any fraudulent breaches of fiduciary duties committed by Mr Boulter as alleged by the Petitioner. There were no claims that were required to be disclosed. Mr Boulter did not act in fraudulent breach of fiduciary duty. He honestly believed that there was nothing that he was duty bound to disclose.

Findings in respect of alleged fraudulent misrepresentations

42. I am not satisfied that there were any fraudulent misrepresentations made by Mr Boulter to the Porton JVLs. I confess I found it somewhat difficult to understand the Petitioner's case in this respect. It concerned firstly, a letter dated 4 July 2017 sent by the Petitioner to Mr Charles Cook at DLA which expressed "concerns" and requested "information and documentation" in respect of "Enigma and Porton". The Petitioner says that Mr Boulter should have forwarded that letter to the Porton JVLs. Mr Boulter says that he cannot recall being shown or told about the letter. The Petitioner has not proved that such letter came to the attention of Mr Boulter. In any event Mr Boulter honestly believed that PCI had no liability to the Petitioner. Secondly the Petitioner appears to seek to place reliance on emails from Mr Boulter to the Porton JVLs asking them to get on with the liquidation. I accept Mr Boulter's evidence in effect that there was nothing sinister in these chasers. I am satisfied that there is nothing in the Petitioner's allegations in respect of fraudulent misrepresentations.

Findings in respect of alleged fraudulent approval of final accounts

43. I am not satisfied that Mr Boulter fraudulently approved the final accounts. I have no reason to doubt Mr Boulter's evidence that he was not involved in the preparation of the liquidator's final reports and accounts which were prepared by the liquidators. There is no evidence to the contrary. In approving the final accounts Mr Boulter was doing so as a shareholder. I accept, as Mr Quest submitted, that Mr Boulter was not making any statements or representations in the final accounts, nor was he deceiving anyone. The Porton JVLs had professionally conducted the liquidation and advertised for creditors but none had come forward. No proofs of debt had been lodged, never mind accepted. Mr Boulter's approval of the final accounts simply confirmed that, as a shareholder, he was satisfied that the final accounts reflected the liquidation as conducted by the professional Porton JVLs which they plainly did. I accept that Mr Boulter honestly believed that PCI and PCL did not have any relevant liabilities and that he honestly believed that the final accounts were correct.

Observations and findings on the allegations and the evidence

44. Mr Samek, perhaps subtly hinting that I should not allow Mr Boulter to pull the wool over my eyes, made the obvious point that in fraud cases it is rare to discover the fraudster holding the "smoking gun." Mr Samek submitted that reliance could be placed on the circumstantial evidence and sought to obtain support from the following words of Rix LJ in *JSC BTA Bank v Ablyazov* [2012] EWCA Civ 1411 at paragraph 52 namely: "It is, however, the essence of a successful case of circumstantial evidence that the whole is stronger than individual parts. It becomes a net from which there is no escape."

45. I take into account all the pieces of evidence presented to the court in this case. I have to say that each piece of evidence whether taken individually or collectively does not establish, on a balance of probabilities, a case of fraud against Mr Boulter.

46. I have considered the specific allegations of fraud in this case and on all the evidence before me have found them, on a balance of probabilities, not to be proved. I should stress that

this case is not about what the Petitioner describes as the "Enigma Investment Scheme." Mr Allen, one of the Joint Liquidators of the Petitioner, was at pains to make this clear when he stated at paragraph 8 of his third affidavit:

> "For the avoidance of doubt, this affidavit does not seek to present evidence with a view to proving the existence of fraud in relation to the Enigma Investment Scheme. I understand that this is a separate issue which is the subject of the proceedings in England. This affidavit (and indeed the Petition) is concerned only with the narrow issue of whether Mr Boulter's actions in relation to the liquidations and dissolutions of the Porton Companies amount to a fraud in those liquidations."

47. On that "narrow issue", for the reasons contained in this judgment, I have decided against the Petitioner. I have found that the evidence does not, on a balance of probabilities, prove that Mr Boulter committed a fraud in respect of the liquidations and dissolutions of the Porton Companies as alleged by the Petitioner.

48. I should add that Mr Boulter is one of the defendants in the English proceedings which, as I understand the position, are being vigorously defended. If there has been any wrongdoing in respect of the so-called "Enigma Investment Scheme" Mr Boulter will be brought to justice by the English court. If there has been no wrongdoing then those proceedings will be dismissed. This court sitting in the Cayman Islands must confine itself to the evidence filed in these proceedings and determine the allegations of fraud on the basis of the pleadings, the evidence and submissions advanced in this jurisdiction.

Two other issues

49. There are two other issues I should touch upon in this judgment. Firstly the "causation and injury" issue and secondly the "acquiescence" issue both raised by Mr Boulter in his skeleton argument dated 25 February 2022, but not in his pleading.

The "causation and injury" issue

50. Firstly the "causation and injury" issue. James LJ in *Pinto* at pages 283 to 284 stated:

> "The only case in which it is desirable that what has been done should be undone is where there has been a fraud by which someone is injured."

51. Mr Quest submitted that the Petitioner did not seek to assert or prove that PCI or PCL was actually insolvent or that they were actually liable, either to the various investor complainants or to the Petitioner itself. The Petitioner argues that as a result of Mr Boulter's alleged fraud the liquidations proceeded without court supervision, which would have been necessary absent a declaration of solvency. Mr Quest submitted that it had not been explained how court supervision would have made any difference or how its absence prejudiced the investors or the Petitioner. The Porton JVLs advertised the liquidations but no investor submitted a proof of debt nor did the Petitioner (despite corresponding directly with the Porton JVLs). Mr Quest further submitted that it was entirely proper for the Porton JVLs to complete the winding up. Mr Quest stressed that in any case the Petitioner, which was well aware of the liquidations, could itself (if it considered itself to be a creditor of either PCI or PCL) have made an application under section 131 of the Companies Act for the relevant liquidation to continue under supervision or for the dissolution to be deferred pursuant to section 151(3) of the Companies Act.

52. Mr Quest submits that on the basis that it is not claiming to be a creditor of PCI or PCL the Petitioner has given no proper or sufficient explanation either as to how it was injured by the dissolutions or as to why it has a sufficient interest in the restoration of the companies (which have no assets). Mr Quest further submits that in its evidence, it says no more than it "has an interest in investigating those responsible for the Enigma Investment Scheme". Mr Quest submits that the Petitioner's true motive appears to be to harvest privileged material from PCI and PCL to deploy against Mr Boulter and DLA in the English

proceedings and that such is not a proper basis for invoking the exceptional and narrow jurisdiction to set aside dissolutions on the basis of fraud.

53. Mr Samek in response submitted, in effect, that there is a wide jurisdiction to set aside a dissolution outwith statute for fraud and proof of injury is not a pre-requisite. Mr Samek relied on some Scottish authorities including *Spring Salmon Seafood Ltd* [2010] CSOH 117 and submitted that all the Petitioner had to show was that its claim was not "merely shadowy." Mr Samek also referred to *Whitbread (Hotels) Ltd* 2002 SLT 178 where it was held that it was inappropriate, on the facts and circumstances of that case, to enter into a detailed examination of the validity of a claim drafted by responsible English counsel in support of an application to restore a company to the register.

54. I have considered the pleadings and the evidence to ascertain what claim the Petitioner says it has against the Porton Companies, noting that it did not lodge a proof of debt at the relevant time notwithstanding the fact that it was in communication with the Porton JVLs. At paragraph 26 of the petition it is stated that "the Petitioner may have claims against the Porton Companies for, inter alia, dishonest assistance, knowing receipt and unlawful means conspiracy." At paragraph 27 of the petition it is stated that investors "may have potential causes of action against the Porton Companies for, inter alia, breach of contract, misrepresentation and breach of trust. The Porton Companies have potential causes of action against Mr Boulter for, inter alia, breach of fiduciary duty together with potential claims against third parties including, but not limited to, DLA."

55. Mr Allen in his first affidavit at paragraph 9 refers to the Petitioner's requests that orders be made restoring the Porton Companies to the register and for joint official liquidators to be appointed "in order to fully investigate the affairs of the Porton Companies." At paragraph 32 Mr Allen says that the Porton Companies "may also be liable for knowing receipt, dishonest assistance and/or other causes of action." Mr Allen at paragraph 51 says that the restoration of the Porton Companies and the continuation of the liquidations as official liquidations "will enable official liquidators to undertake a proper investigation into the affairs of the Porton Companies, including the conduct of its business and outstanding liabilities. This will ensure that creditors' rights are properly protected." At paragraph 56

Mr Allen says that "Enigma may have claims against the Porton Companies as a creditor …".

56. Mr Samek submitted that the Petitioner had a potential claim against the Porton Companies and that his clients are "in effect, the representatives of the former Porton investors, because Mr Allen is the representative of the Enigma estate which includes all the Porton investors because of the in specie distribution of shares immediately prior to the liquidation of the Porton companies, so he is not on some frolic of his own, it isn't therefore just Enigma's losses." Mr Samek submitted that the "potentiality of claims" was "enough.": "We do think we've got a claim and we are going to be asking the English court to resolve that."

57. Mr Quest makes powerful points in respect of the lack of standing of and injury to the Petitioner in this case, but for the purposes of this judgment I am content to assume that the Petitioner has sufficient interest in these proceedings to enable the Petitioner to seek the relief the Petitioner is seeking. I do not decide this case on lack of standing or lack of causation or lack of injury. I decide this case on the Petitioner's failure to prove fraud.

The "acquiescence" issue

58. Mr Quest also had powerful points in respect of the "acquiescence" issue. James LJ in his seminal judgment in *Pinto* (which I remind myself was not a fraud case) at page 284 stated:

> "I am of opinion that the Petitioner is estopped from disputing the validity of the dissolution…But when a person having knowledge of what is being done assents by his trustees to the transfer of the property of the company to another company, being aware that the former company was in course of winding up, and takes no step during the whole of that winding-up, it is utterly out of the question that he should be at liberty to come after the lapse of years and upset all that has been done."

59. James LJ was not alone in his observations on this "acquiescence" issue. Cotton LJ at page 285 stated:

> "Moreover, the Petitioner has substantially been aware of all that has been done; he knew that the property was to be transferred to the other company, and that a final meeting was called to consider the liquidator's account. After having thus lain by, he cannot now come to have the proceedings ripped up."

60. Thesiger LJ took a similar view to those clearly and concisely expressed views of James LJ and Cotton LJ on this "acquiescence" issue plainly stating at pages 285 to 286:

> "I am of opinion that there has been such a complete assent by the creditor to the voluntary winding- up as to preclude him from attempting to impeach it … I come clearly to the conclusion that Mr Key assented to the winding-up, and it is out of the question that he should be allowed to come after a lapse of four years to impeach proceedings to which he assented at the time."

61. The following facts can be gleaned from the law report of *Pinto:*

(1) a resolution that the company be wound up by voluntary liquidation was passed on 22 January 1873 and confirmed on 12 February 1873 (see page 276);

(2) a meeting was called for 6 January 1874 for the purpose of having the final account of the liquidators laid before it and a return of this meeting was duly made on 12 January 1874. Mr Quest says that the deemed dissolution would have taken effect three months thereafter on or about 12 April 1874 (page 279);

(3) the petition for the winding up of the company was presented in December 1876 (page 279); and

(4) evidence was given that the petitioner was "fully aware of the proceedings under the winding-up, and assented to them" (page 279).

62. Mr Quest asks the court to note that in the case presently before the court:

(1) the Petitioner was fully aware of the voluntary winding-up proceedings for both PCI and PCL and indeed engaged in direct correspondence with the Porton JVLs in relation to them;

(2) on 31 August 2017, the Petitioner intimated the *possibility* of a claim against PCI to the Porton JVLs, but took no steps whatsoever actually to advance such a claim. The letter asked the Porton JVLs "not to distribute these funds until we have concluded our investigation, as this may result in a claim against Porton capital (sic) Inc.";

(3) on 12 October 2017 the Porton JVLs gave the Petitioner a specific deadline (3 November 2017) by which to raise any further queries failing which they would "proceed with the conclusion of the liquidation proceedings.";

(4) in doing so, the Porton JVLs in fact delayed the final general meeting of PCI in order to give the Petitioner additional time to raise any further queries or make a claim, thereby extending the liquidation process for the Petitioner's benefit;

(5) the Petitioner may be taken to have made a deliberate decision not to take any further action, whether by the specified deadline (3 November 2017) or at any other time prior to the dissolution of PCI (28 February 2018) or PCL (13 March 2018). That decision was made with the full knowledge that in the absence of any action, the Porton JVLs would "proceed with the conclusion of the liquidation proceedings."; and

(6) the petition was not presented until 29 July 2021, that is, three years and nine months after the 3 November 2017 deadline (and approximately three and a half years after the deemed dissolutions themselves).

63. Mr Quest submits that if the Petitioner had some claim in mind, whether actual or contingent, the decision by the Petitioner to take no action whatsoever is completely inexplicable. Even if the Petitioner was not yet in a position to formulate a fully

particularised claim (and even now it has struggled to do so and, in these proceedings, does not allege that the so-called "Enigma Investment Scheme" involved any wrongdoing), there were a number of other options available. The Petitioner could have requested a further extension of the PCI liquidation from the Porton JVLs or if necessary and appropriate made an application under section 131 of the Companies Act for the liquidation to continue under supervision or under section 151(3) to defer the date of dissolution. Mr Quest says that instead the Petitioner made a deliberate decision to do none of these things. Mr Quest adds that it is striking that no evidence whatsoever has been adduced by the Petitioner to explain its conduct in this regard. Mr Quest submits that having made a deliberate decision to do nothing, despite having been given a specified window in which to do so and knowing that the consequence of that decision would be the conclusion of PCI's liquidation, it is not now open to the Petitioner to belatedly dispute the validity of the dissolutions. Mr Quest makes the point that the relevant awareness is not acquiescence in the alleged fraud but acquiescence in the winding up and the subsequent dissolution.

64. Mr Samek retorts by pointing out that this "acquiescence" issue has not been pleaded and thus the Petitioner has been deprived of an opportunity to advance evidence in respect of it. Moreover, Mr Samek submits that it is a particularly unattractive point to take in the context of a fraud claim. Mr Samek prays in aid *Takhar* and submits that if fraud is proved it would be against public policy to say that the Petitioner is defeated by "acquiescence".

65. Despite all the powerful arguments presented by Mr Quest on the "acquiescence" issue I do not think it would be fair or appropriate to dismiss the petition on the basis of "acquiescence" as such was not pleaded. It may be that if it had been pleaded the Petitioner would have adduced evidence and further duly informed legal arguments to deal with it. I leave open the issue as to whether "acquiescence" can be relied upon in fraud cases or whether there are policy considerations against such. I do not decide this case on the basis of "acquiescence". I dismiss this case on the basis that fraud has not been proved. If it had been proved I would have needed to hear further argument as to whether such defence was available in a case where fraud had been found against the party seeking to rely on "acquiescence".

Conclusion

66. For the reasons stated in this judgment I have concluded that fraud has not been proved in this case and the petition must therefore be dismissed.

67. Costs would normally follow the event and I would be minded to make an order that the Petitioner pay Mr Boulter's costs (to be taxed on the standard basis in default of agreement) of its unsuccessful petition subject to consideration of any concise (no more than 5 pages) submissions to the contrary to be filed within 21 days with any concise (no more than 5 pages) submissions in reply to be filed within 14 days thereafter.

David Doyle

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT