IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 122

Companies Winding Up No 119 of 2016

In the matter of Section 254 of the Companies Act (Cap. 50)

And

In the matter of Wealthplus Pte Ltd (In Members' Voluntary Liquidation)

Between

Petroships Investment Pte Ltd

… *Plaintiff*

And

Wealthplus Pte Ltd (In Members' Voluntary Liquidation)

… *Defendant*

And

(1) Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd
(2) Megacity Investment Pte Ltd

… *Interveners*

Originating Summons No 594 of 2016

In the matter of Section 302 of the Companies Act (Cap. 50)

And

In the matter of Section 310 of the Companies Act (Cap. 50)

And

In the matter of Wealthplus Pte Ltd (In Members' Voluntary Liquidation)

Between

Petroships Investment Pte Ltd

… *Plaintiff*

And

(1) Sim Guan Seng
(2) Khor Boon Hong
(3) Goh Yeow Kiang Victor
(4) Wealthplus Pte Ltd (In Members' Voluntary Liquidation)

… *Defendants*

And

(1) Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd
(2) Megacity Investment Pte Ltd

… *Interveners*

GROUNDS OF DECISION

[*Res judicata*] — [Issue estoppel] — [Findings of fact]

[Insolvency law] — [Winding up] — [Liquidator] — [Removal of liquidator]

[Companies] — [Winding up] — [Conversion of members' voluntary liquidation to compulsory winding up]

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This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter

[2017] SGHC 122

High Court — Companies Winding Up No 119 of 2016; Originating Summons No 594 of 2016
Vinodh Coomaraswamy J
3 October; 17 November 2016

31 May 2017

Vinodh Coomaraswamy J:

Introduction

1 Petroships Investment Pte Ltd ("Petroships") is a minority shareholder of Wealthplus Pte Ltd ("Wealthplus"). Since 2011, Petroships has maintained that four transactions which Wealthplus entered into between 2003 and 2009 disclose at least a *prima facie* breach of the directors' fiduciary duties and therefore merit further investigation. In 2012, Petroships applied for leave to commence a statutory derivative action against the directors. While that was pending, the majority shareholders of Wealthplus passed a special resolution putting it into members' voluntary liquidation. Petroships opposed the liquidation. Despite Petroships' urging, the current liquidators of Wealthplus have thus far refused to investigate the four transactions.

2 The result is that Petroships now brings two applications under the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") against Wealthplus and its liquidators. Petroships' case on both applications is that the liquidators' refusal to investigate the four transactions either: (i) arises from an actual lack of impartiality on the liquidators' part; or (ii) gives rise to a perception of a lack of impartiality on their part. As a result, Petroships seeks to displace the current liquidators – the nominees of the majority shareholders – and to replace them with Petroships' own nominees.

3 The first of Petroships' two application is brought under s 254 of the Act. By this application, Petroships seeks two principal orders: (i) an order placing Wealthplus in compulsory liquidation, notwithstanding its ongoing voluntary liquidation; and (ii) an order appointing Petroships' nominees as Wealthplus' new liquidators. I shall call this application "the Winding Up Application".

4 Petroships' second application is brought under s 302 of the Act. By this application, Petroships seeks four principal orders: (i) an order removing Wealthplus' current liquidators; (ii) an order appointing Petroships' nominees as Wealthplus' new liquidators; (iii) an order preventing the new liquidators from being removed without the court's leave; and (iv) an order authorising and empowering the new liquidators to investigate the four transactions specifically and Wealthplus' affairs generally. I shall call this application "the Removal Application".

5 Between 2009 and 2015, Petroships brought a series of six successive proceedings arising out of its investment in Wealthplus. I enumerate them at [23] below. All six of those proceedings have failed. One of those six proceedings was Petroships' application, mentioned at [1] above, for leave to

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commence a statutory derivative action against Wealthplus' directors for breach of fiduciary duties in causing Wealthplus to enter into the four transactions. I dismissed that application at first instance: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others* [2015] SGHC 145 ("*Petroships (HC)*"). The Court of Appeal dismissed Petroships' appeal, albeit on a different ground: *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others and another matter* [2016] 2 SLR 1022 ("*Petroships (CA)*").

6 Both at first instance (as an alternative ground for my decision) and on appeal (as the only ground for the Court of Appeal's decision), it was held that once a company goes into liquidation and control over its decision to commence proceedings passes from the ultimate control of its majority shareholders to neutral third parties, *ie*, its liquidators, an application for leave to commence a statutory derivative action under s 216A of the Act loses its underlying purpose. At that point, the proper recourse for an aggrieved member of the company becomes his power under the Act to hold the liquidators to account for the manner in which they conduct the liquidation.

7 It is in this context that Petroships now brings the two applications before me, seeking to hold the liquidators to account for their conduct of the liquidation.

8 I have dismissed both of Petroships' applications. I have done so despite accepting Petroships' submissions on the preliminary point made against it. That preliminary point is that these two applications are either barred by the doctrine of *res judicata* or are an abuse of the process of the court because Petroships has commenced – and failed – in six other proceedings on the same or similar subject matter. Petroships' central complaint on the applications before me is that there is an actual or a perceived lack of impartiality on the

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liquidators' part. For reasons I expand on at [73] to [107] below, I accept that Petroships' pursuit of its central complaint is neither an abuse of the process of the court nor barred by a *res judicata* arising from *Petroships (HC)* or from *Petroships (CA)*. Its complaint was not the subject-matter of any of the previous six proceedings, it was not adjudicated upon in any of those proceedings nor could it have reasonably been raised in any of those proceedings.

9 Nevertheless, I have rejected the remainder of Petroships' submissions on both applications. In view of the substance of Petroships' central complaint and the way it argued its applications, I have in these grounds dealt first and primarily with the Removal Application, followed by the Winding Up Application. My conclusions on them are as follows:

> (a) First, on the Removal Application, I find that Petroships has no subjective or reasonable belief in its central complaint. I accept that the liquidators have erred in their decision to make an investigation of Wealthplus' affairs conditional on the members' unanimous approval. But I find that they erred in good faith. Their error is not evidence of bias and is not sufficient, in all the circumstances, to give rise to a reasonable perception of bias. Removing the liquidators would therefore not serve the real, honest and substantial interest of the liquidation or the purpose for which the liquidators were appointed. Petroships has therefore failed to show cause under s 302 of the Act to enliven my power to remove the liquidators.
>
> (b) Second, on the Winding Up Application, I find that there is no evidence that Wealthplus' liquidation cannot be continued as a voluntary liquidation with due regard to the interests of Petroships or any of its creditors or contributories within the meaning of s 253(2)(*d*)

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of the Act. I therefore have no power to make a winding up order in respect of Wealthplus.

10 Petroships has appealed against my decision. I therefore now set out my reasons in full.

Background

The parties

11 Petroships is a special-purpose vehicle owned and controlled by Mr Alan Chan Hong Joo. It holds 10% of the shares in Wealthplus.

12 The other 90% of the shares in Wealthplus are held ultimately by a company known as Koh Brothers Group Limited ("KBGL"). KBGL is a listed company which specialises in construction, property development and specialist engineering. It was founded by Mr Koh Tiat Meng. KBGL has a number of subsidiaries. I shall refer to KBGL and its subsidiaries collectively as the KBGL group.

13 The Winding Up Application has only one respondent: Wealthplus. The Removal Application has four respondents: each of Wealthplus' three liquidators and Wealthplus.

14 The two interveners in both applications are the majority shareholders of Wealthplus: Megacity Investments Pte Ltd ("Megacity") and Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd ("KBCE"). Both Megacity and KBCE are members of the KBGL group of companies and are therefore under KBGL's ultimate control.

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15 It is the interveners, and not Wealthplus or its liquidators, who have provided the real opposition to Petroships' applications.

Joint venture to exploit land use rights

16 The history of the parties' disputes goes back almost 20 years. In 1998, Alan Chan and Koh Tiat Meng agreed to enter into a joint venture to exploit certain land use rights in China. Wealthplus was incorporated as the special-purpose vehicle for their joint venture. Wealthplus in turn incorporated three special-purpose companies in Singapore, each of which held a single special-purpose company in China.[1] The sole purpose of each Chinese subsidiary was to hold a single set of land use rights in China. Wealthplus is therefore itself the holding company of a small group of companies.

17 From 1998 to 2011, Megacity held 90% of the shares in Wealthplus. In 2011, in order to increase the number of Wealthplus' shareholders from two to three, Megacity transferred 41% of the shares in Wealthplus to KBCE. Wealthplus thus has three shareholders today: Megacity holding 49%, KBCE holding 41% and Petroships holding 10%.

18 The shareholders of Wealthplus have the right to nominate its directors. From 1998 to 2009, Wealthplus had three directors. Alan Chan was Petroships' nominee. Mr Koh Teak Huat (Koh Tiat Meng's brother) and Mr Koh Keng Siang (Koh Tiat Meng's son) were Megacity's nominees. Both of Megacity's nominees also served simultaneously as directors of other KBGL group companies.

19 Soon after Wealthplus was incorporated, Petroships and Megacity

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[1] Goh Yeo Kiang Victor's Affidavit in Companies Winding Up Originating Summons No 119 of 2016 ("CWU 119/2016") dated 5 August 2016 at p 89.

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entered into a formal agreement to govern their joint venture. Their joint venture agreement provided that Wealthplus was to be funded by share capital of $1m and a shareholders' loan of up to $27.7m. The agreement also provided that Wealthplus' two shareholders at that time – Megacity and Petroships – were to contribute to the share capital and the shareholders' loan *pro rata*. Megacity therefore contributed 90% of Wealthplus' share capital (*ie*, $900,000) and 90% of an initial shareholders' loan of $11m (*ie*, $9.9m). Petroships contributed $100,000 to Wealthplus' share capital and $1.1m to the loan. Petroships' loan of $1.1m to Wealthplus is a significant feature of the parties' dispute.

20 Petroships' and Megacity's joint venture to exploit the land use rights in China was ultimately abandoned. In 2007, with Petroships' consent, Wealthplus sold the land use rights. It did so by causing each Singapore subsidiary to sell its Chinese subsidiary to a third party. That sale took with it the land use rights held by the Chinese subsidiaries. As a result, Wealthplus' Singapore subsidiaries collectively received $19.4m in sale proceeds.[2]

21 In 2008, Petroships began agitating to be paid its share of the profits of its investment in Wealthplus, to recover its capital, and to be repaid its $1.1m loan. The board of Wealthplus found itself divided, with disagreements between Alan Chan on one hand and Koh Teak Huat and Koh Keng Siang on the other.

22 These disagreements led Alan Chan to resign as a director of Wealthplus in 2009. Petroships did not nominate a replacement for him. Therefore, the only two directors of Wealthplus from 2009 to the present day have been Koh Teak Huat and Koh Keng Siang.

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2 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 89.

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Brief history of the parties' litigation

23 Alan Chan's resignation as director was a precursor to the six successive proceedings which Petroships commenced between 2009 and 2015 against KBGL or related parties arising out of its investment in Wealthplus. All six of these proceedings were either struck out or dismissed. The following is a summary of these six proceedings:

(a) First, in 2009, Petroships filed suit against Megacity claiming from Megacity (note: not from Wealthplus): (i) the sum of $117,728, said to be its share of the profits of the joint venture in Wealthplus; and (ii) repayment of Petroships' loan of $1.1m to Wealthplus. This suit was struck out under O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).[3]

(b) Second, in 2010, Petroships filed suit against Wealthplus and Megacity claiming: (i) repayment of its loan of $1.1m to Wealthplus; and in the alternative (ii) an order for Wealthplus to be wound up on the just and equitable ground. This suit was struck out when Petroships breached a peremptory discovery order.[4]

(c) Third, in 2010, Petroships filed suit again against Wealthplus and Megacity. Its claim in this second 2010 suit was identical to its claim in the first 2010 suit. This suit was struck out under O 18 r 19 of the Rules of Court.[5]

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3 Interveners' Bundle of Documents dated 29 September 2016 at Tab 2, pp 67 to 68.

4 Interveners' Bundle of Documents dated 29 September 2016 at Tab 3, pp 107 to 108.

5 Interveners' Bundle of Documents dated 29 September 2016 at Tab 4, pp 137 to 138.

(d) Fourth, in 2011, Petroships filed suit against KBGL claiming: (i) that it had a contractual relationship with KBGL; (ii) that KBGL had wrongfully caused Wealthplus to enter into the four transactions against Wealthplus' interest; and (iii) that KBGL had failed to repay to Petroships its loan of $1.1m to Wealthplus, failed to distribute to Petroships its share of Wealthplus' profits, and was liable to account to Petroships for its share of Wealthplus' profits. This action was struck out under O 18 r 19 of the Rules of Court on the basis that Petroships' allegation of a contract directly with KBGL was wholly without basis and therefore frivolous and vexatious.[6]

(e) Fifth, in 2012, Petroships brought its application under s 216A of the Act which I have already mentioned. I dismissed that application on the primary ground that Petroships was not acting in good faith as required by s 216A: *Petroships (HC)* ([5] *supra*) at [170]. The Court of Appeal dismissed Petroships' appeal on the sole ground that no application under s 216A could be brought once a company had gone into liquidation: *Petroships (CA)* ([5] *supra*) at [74].

(f) Sixth, in 2015, Petroships applied under s 284 of the Act[7] to compel the liquidators: (i) to produce copies of all proofs of debt which they had received; and (ii) to inform Petroships on affidavit whether they had adjudicated upon the proofs and, if not, when they intended to do so. The High Court dismissed this application on the basis that Petroships' interests were properly protected by its right to challenge the liquidators' decision if and when the liquidators admitted a particular proof.[8]

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6 Interveners' Bundle of Documents dated 29 September 2016 at Tab 9, pp 606 to 610.

7 OS 143/2015, Certified Transcript of hearing on 22 April 2015, page 2 line 30.

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24 The Removal Application and the Winding up Application are therefore the seventh and eighth proceedings commenced by Petroships arising from its investment in Wealthplus.

25 Petroships' central complaint in both applications, as I have mentioned, is either actual bias or perceived bias on the liquidators' part in favour of the interveners – *ie*, KBCE and Megacity – as the majority shareholders of Wealthplus. That bias, Petroships says, can be seen in the circumstances in which the liquidators were appointed and various aspects of the liquidators' conduct since appointment, including their refusal to investigate the four transactions and the manner in which they have treated a proof of debt filed by Megacity in the liquidation.

26 It is therefore necessary now to turn to a summary of the facts.

[8] OS 143/2015, Certified Transcript of hearing on 22 April 2015, p 6 lines 10 to 13.

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Prelude to Wealthplus' liquidation

Petroships identifies the four transactions

27 As I have mentioned, Petroships' suit against KBGL in 2011 (see [23(d)] above) and its s 216A application in 2012 (see [23(e) above] above) centred on four transactions which, Petroships says, the directors of Wealthplus caused the company to enter into contrary to the interests of the company as a whole. These four transactions are likewise at the factual heart of Petroships' complaint against the liquidators in the two applications now before me. So it is appropriate to begin by describing these four transactions.

(a) First, between 2003 and 2009, Wealthplus transferred a total sum of $14.95m to various companies within the KBGL group for purposes which appear unrelated to Wealthplus' project in China.

(b) Second, in 2008, Wealthplus wrote off a debt of $135,005 and described it only as "bad debts".

(c) Third, in 2009, Wealthplus made a $651,658 provision in its accounts for impairment of non-trade-related debts.

(d) Fourth, in 2008 and 2009, Wealthplus paid $559,631 in directors' fees to Koh Teak Huat.

28 At Wealthplus' annual general meeting in November 2011, Wealthplus' directors – by then only Koh Teak Huat and Koh Keng Siang – explained the four transactions in the following terms:[9]

(a) Wealthplus transferred the funds to KBGL group companies as reimbursement for the cost of acquiring the land use rights as provided in the joint venture agreement between Petroships and Megacity.

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(b) The sum of $135,005 which Wealthplus wrote off in 2008 principally constituted debts due from each of Wealthplus' Chinese subsidiaries to its holding company in Singapore. The Chinese subsidiaries had been disposed of in 2007 and so the debts could no longer be recovered.

(c) The $651,658 provision for impairment which Wealthplus had made included:

(i) an outstanding balance of $537,253 due from the three Chinese subsidiaries which had been disposed of in 2007, the recovery of which was doubtful; and

(ii) a prepayment of $112,335 in respect of an amount incurred by a director relating to the disposal of land in China.

(d) Wealthplus paid director's fees to Koh Teak Huat in 2008 and 2009 as he was the only director who took an active role in managing Wealthplus' business. The fees were paid for his contributions in disposing of the land use rights in China. Both Alan Chan and Koh Keng Siang had been paid no directors' fees.

29 At this meeting, the directors of Wealthplus also proposed to put the company and its subsidiaries into members' voluntary liquidation.[10] The directors informed the shareholders that an extraordinary general meeting would be convened in due course to pass the necessary resolutions to do so.

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9 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1025 at para 4.2.

10 Intervener's Bundle of Documents dated 29 September 2016 at Tab 18, p 217.

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Petroships seeks explanations for the transactions

30 Three days after this meeting, also in November 2011, Petroships commenced its suit against KBGL (see [23(d)] above). That suit, as I have mentioned, was struck out in May 2012.

31 A few weeks after that, in June 2012, Petroships served formal notice on Wealthplus' directors under s 216A(3)(*a*) of the Act that it intended to apply for leave to commence a statutory derivative action against the Megacity-nominated directors for breach of fiduciary duties unless they could adequately explain the four transactions.[11] Wealthplus' directors responded by convening an extraordinary general meeting to be held in August 2012 to resolve to put Wealthplus into voluntary liquidation.[12] Wealthplus' directors having refused to respond as required by the s 216A notice, Petroships filed its application under s 216A of the Act in August 2012.

32 A week later, Wealthplus held its extraordinary general meeting. Petroships' proxy opposed the winding up resolution on the ground that Wealthplus should not be wound up until its directors had adequately explained the four transactions, with supporting documentation. The directors took the position that Petroships was at liberty to take up the four transactions with Wealthplus' liquidators after the liquidation had commenced. The special resolution was passed. Yin Kum Choy and R S Ramasamy of Adept Public Accounting Corporation were appointed Wealthplus' liquidators.

[11] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1029 to 1030.

[12] Intervener's Bundle of Documents dated 29 September 2016 at Tab 11.

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Wealthplus in members' voluntary liquidation

Petroships pursues the four transactions with the liquidators

33 In October 2012, Petroships wrote to the then liquidators seeking their views on Wealthplus' directors' explanations of the four transactions.[13] In the same letter, Petroships expressed doubt about the independence and impartiality of the liquidators.[14]

34 In November 2012, the liquidators replied.[15] They stated that there was no basis for Petroships to question their impartiality and independence. They also said that it was premature for the liquidators to take a view on any party's position on the four transactions before the facts had been investigated. To address Petroships' allegations of bias, the liquidators proposed to carry out an investigation on condition that (a) Wealthplus' shareholders consented to the investigation; and (b) the shareholders indemnified the liquidators for the cost of the investigation in proportion to their shareholding. If these conditions were not met, the liquidators indicated that they would seek directions from the court under the Act.

35 Wealthplus' members could not agree on the liquidators' proposals. The majority took the position that since Petroships alone insisted on an investigation, Petroships alone should bear the cost.[16] Petroships insisted that an investigation was necessary in the interests of the company and pointed out that Wealthplus itself had sufficient funds available for the cost of the investigation.[17] In view of the deadlock, the liquidators applied in January 2013

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13 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1048 to 1050.

14 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1050 at para 12.

15 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1051 to 1052.

16 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1059.

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to the High Court for directions "that the Liquidators take steps to review, enquire into and/or investigate into the affairs of the Company, in particular, in respect of the matters raised by Petroships"[18], with the cost of the investigation to be borne by all three shareholders of Wealthplus.

36 While the liquidators' application was pending, in June 2013, the interveners requisitioned an extraordinary general meeting to be held in August 2013 to consider a resolution to remove the liquidators. They indicated that they considered the removal to be in Wealthplus' best interests. The reasons given, amongst others, were that the liquidators had now indicated that they would need five to six years to carry out the liquidation and that its cost would be somewhere between $300,000 and $400,000.[19] Both the time frame and the estimated costs were a substantial increase from the liquidators' pre-appointment indications.

37 Accepting the inevitable, the liquidators tendered their resignations before the meeting. The interveners nominated in their place the current liquidators: Mr Victor Goh, Mr Sim Guan Seng and Mr Khor Boon Hong.

38 The extraordinary general meeting went ahead. Victor Goh was in attendance on behalf of himself and the other two incoming liquidators. Petroships tendered a list of questions for the incoming liquidators to answer. The directors told Petroships to take their questions up with the incoming liquidators after their appointment and outside the meeting.[20] Resolutions were put forward to accept the outgoing liquidators' resignations and to appoint the

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17 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1059.

18 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 399.

19 Koh Keng Siang's Affidavit in CWU 119/2016 dated 16 September 2016 at p 442.

20 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1071 at para 2.

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incoming liquidators in their place.[21] The majority voted in favour of both resolutions. Petroships voted against both resolutions. The resolutions were duly carried.

Petroships pursues the four transactions with the liquidators

39 The day after the incoming liquidators were appointed, Petroships wrote to them asking for answers within two working days to the questions tendered at the meeting.[22] On the designated day, before the liquidators' response could be received, Petroships wrote to them again, enclosing a number of additional documents for them to review. The letter concluded by asking the liquidators to consider and address its concerns about the conduct of Wealthplus' directors and Wealthplus' financial affairs.[23]

40 The liquidators replied the next day.[24] They told Petroships that they had just been appointed and were still in the process of taking over the affairs of the company from the outgoing liquidators. They assured Petroships that they would update members in due course.

41 Petroships did not accept this response. It wrote back on the same day, suggesting that the circumstances in which the former liquidators had been removed, and the current liquidators' inability to respond to Petroships' questions even provisionally, gave Petroships grounds to doubt whether the majority would allow the liquidators to carry out their duties independently and impartially.[25] Petroships' letter concluded by putting the liquidators on notice

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21 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1071 at para 3.

22 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1077 at para 3.

23 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1078.

24 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1079.

25 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1080 at para 7

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that if they failed or refused to answer the list of questions within three working days, Petroships would be compelled to draw the inference that the liquidators were unable to confirm their independence and impartiality.

42 In October 2013, Petroships wrote to the liquidators pointing out that more than a month had elapsed since it had posed its questions without any response from the liquidators.[26] Petroships also made the point that Wealthplus had failed to pay its debts in full within twelve months of going into members' voluntary liquidation – contrary to the indication in the obligatory declaration of solvency which Wealthplus' directors had signed in July 2012 – and that the Act therefore required that a meeting of its creditors be summoned.

43 The liquidators' substantive response made three broad points.[27] First, they rejected Petroships' allegations of partiality as being without basis. The liquidators' position was that they were professionals appointed under the law who were carrying out their duties with care and integrity. Second, they pointed out that they had been inundated with accusatory letters from Petroships impugning their integrity from the moment of their appointment. They had chosen not to reply immediately because it appeared that Petroships' resentment towards the majority was being misdirected at the liquidators. Third, they informed Petroships that it would be a waste of resources to convene a creditors' meeting. Wealthplus was indeed solvent, expected to receive the proceeds of sale from China within three weeks and had already committed itself to repaying the shareholders' loans in full, including Petroships' loan of $1.1m.

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and p 1081 at paras 8 and 10.

26 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1084 to 1085.

27 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1086 to 1087.

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44 Petroships responded the next day, again accusing the liquidators of "not acting independently and impartially in their conduct of the winding up".[28]

45 In the meantime, the liquidators had taken the decision not to adopt the former liquidators' application for directions to investigate the four transactions (see [35] above).[29] That application was therefore formally withdrawn when it came up for hearing.

46 In November 2013, the liquidators informed Petroships that its proof of debt had been accepted. They enclosed a cheque for $1.1m in full and final satisfaction of Wealthplus' debt to Petroships.[30]

47 Petroships wrote to the liquidators in response in December 2013 stating that its loan to Wealthplus had been repayable on demand and had remained unpaid since Petroships' demand in 2008.[31] Petroships reserved its right to seek damages from Wealthplus for losses suffered as a result of its failure to repay the loan upon demand.

48 In July 2014, the interveners wrote to Petroships to expand on the directors' explanations at the 2011 annual general meeting (see [28] above) of the write-off of $135,005 and the impairment of $537,253.[32] The interveners provided a breakdown of the relevant sums and annexed in support of their explanation Wealthplus' 2007 financial statements, financial reports from

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[28] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1089 at para 2.

[29] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1082 at para 3.

[30] Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at pp 54 to 55.

[31] Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 56.

[32] Koh Keng Siang's Affidavit in CWU 119/2016 dated 16 September 2016 at pp 221 to 224.

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Wealthplus' Chinese subsidiaries and the sale and purchase agreements under which its Chinese subsidiaries had been sold. Petroships did not reply to this letter.

Petroships lacked good faith in bringing the s 216A application

49 Later in July 2014, I dismissed Petroships' s 216A application. I should, at this juncture, summarise the findings of fact upon which I did so: see *Petroships (HC)* ([5] *supra*). I found that:

(a) Petroships had an illegitimate collateral purpose in bringing the s 216A application. Its true and dominant purpose in doing so was to recover its $1.1m shareholder's loan to Wealthplus and its share of the profits from its investment in Wealthplus: *Petroships (HC)* at [101]. But for this purpose, Petroships would not have brought the application at all: *Petroships (HC)* at [146] to [147].

(b) Petroships was seeking leave to bring a statutory derivative action because that action was the only remaining avenue by which it could proceed against KBGL or its group to achieve its objective in the four unsuccessful actions which Petroships had by then brought (see [23(a)] to [23(d)] above): *Petroships (HC)* at [105]. Petroships' delay between discovering the four transactions and applying under s 216A of the Act was unreasonable and indicated that it lacked good faith in making the application: *Petroships (HC)* at [115] to [116].

(c) Alan Chan displayed a lack of honesty when he was cross-examined on his affidavits in the s 216A application: *Petroships (HC)* at [117]. His denial of any personal knowledge of Petroships' four failed actions against Megacity, Wealthplus and KBGL (in various

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combinations) between 2009 and 2011 was not credible: *Petroships (HC)* at [118] to [126].

(d) Petroships had no honest belief that the proposed derivative action was based on a good cause of action with a realistic prospect of success in view of: (i) the history of Petroships' failed actions; (ii) Alan Chan's evidence of Petroships' purpose in those actions; and (iii) Alan Chan's dishonesty: *Petroships (HC)* at [145].

50 I discuss separately (at [96] to [98] below) whether these findings have survived the decision of the Court of Appeal in *Petroships (CA)* and remain capable of establishing an issue estoppel binding Petroships in the two applications before me.

Annual general meeting of 20 November 2014

51 The next significant event after I dismissed the s 216A application in July 2014 was Wealthplus' annual general meeting in November 2014.[33] That meeting was chaired by Mr Victor Goh and attended by proxies for each of the three shareholders. In addition, Mr Chandra Mohan – counsel for the interveners in Petroships' s 216A application and on the two applications now before me – attended the meeting as their solicitor and as an "observer".

52 That meeting spawned three issues which are relevant for present purposes.

33 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 63.

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(i) Investigation into Wealthplus' accounts

53 First, Petroships' proxy, Ms Lau Lee Hua, said that the liquidators had a duty to investigate Wealthplus' accounts, especially because there were discrepancies between Wealthplus' 2010 financial statements, the liquidators' report, and Wealthplus' directors' declaration of solvency. The discrepancies suggested that the proceeds of sale of the land use rights had simply disappeared.[34]

54 Mr Mohan informed the meeting that the interveners had agreed to an investigation provided that Petroships funded it, which Petroships refused to do.[35] Ms Lau pointed out that the discrepancies were substantial, and so the liquidators, as neutral and independent parties, should take the initiative to investigate them.[36]

55 Victor Goh did not appear inclined to investigate. He said that the liquidators were answerable to all the members of Wealthplus because Wealthplus was in members' voluntary liquidation. He also said that Petroships' questions had been dealt with in my decision on the s 216A application at first instance and formed the subject of Petroships' then pending appeal against my decision to the Court of Appeal. His opinion was that, if there was to be any investigation, it was necessary for all the members to agree to it because of the costs involved.[37]

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34 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at pp 63 to 64 at para 4.4.

35 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 64 at para 4.9.

36 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 65 at para 4.10.

37 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at pp 64 to 65.

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56 In January 2015, Petroships wrote to the liquidators to object to the manner in which they had conducted the annual general meeting.[38] Petroships expressed surprise that Mr Mohan was permitted to attend the meeting as an observer because it had not been informed that members' solicitors could attend. Petroships also made the point that Mr Mohan had dominated the discussions at the meeting, and that Victor Goh – the designated chairman of the meeting – "appeared to have allowed" Mr Mohan to do so.

(ii) Petroships learns that Megacity had lodged a proof of debt

57 Second, Petroships learned for the first time at this meeting that Megacity had submitted a proof of debt to the liquidators. The value of the proof was and remains just under $9.5m.[39]

58 After the meeting, in December 2014, Petroships wrote three successive letters to the liquidators about Megacity's proof of debt. In the first letter, Petroships asked the liquidators for a copy of the proof of debt and when they intended to adjudicate upon it.[40] In the second letter, sent a week later, Petroships noted that the liquidators had not responded and pointed out that "this [was] not the first time [the liquidators] have refused to answer [Petroships'] queries without providing any reason".[41] Petroships asked for a response by a specified date in December 2014 failing which it would be compelled to seek a court order to require the liquidators to furnish the documents and information sought.[42]

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38 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1159.

39 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 66 at para 5.4.

40 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 176.

41 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 178 at para 3.

42 Goh Yeo Kiang Victor's Affidavit in CWU 119/20016 dated 5 August 2016 at p 178 at para 4.

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59 Not having heard from the liquidators, Petroships then sent the third letter. In it, Petroships extended the deadline for the liquidators' response to January 2015.[43] Petroships said that if the liquidators failed to comply, it would apply to court. Petroships also attributed the liquidators' failure to reply to their lack of diligence and independence.[44]

60 The liquidators replied to Petroships in January 2015.[45] They stated that they would update all members on the progress of Wealthplus' liquidation collectively at general meetings, and reiterated their view that investigations should only be undertaken with the shareholders' unanimous agreement.

61 In February 2015, Petroships filed its application under s 284 of the Act (see [23(f)] above). The true target of the application was Megacity's proof of debt and any supporting documentation. That application was dismissed in April 2015 as, in effect, being premature.

(iii) Remuneration of the outgoing liquidators

62 The third issue raised at this meeting was the former liquidators' claim for a little over $138,000 in fees for themselves and their solicitors.[46] Although there was a consensus that the former liquidators were entitled to be paid, there was no consensus on the quantum. Koh Keng Siang thought the amount excessive and noted that the former liquidators had not sought approval from members before engaging solicitors to apply for directions from the court (see

43 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 179.

44 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 179 at para 3.

45 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 180.

46 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 66 at para 6.1; Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1258.

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[35] above).[47] Victor Goh decided to circulate the claim for fees to the members for their review.

63 In January 2015, Petroships wrote to the liquidators on this issue.[48] It addressed the costs incurred by the former liquidators in their application for directions (see [35] above). Petroships took the position that the former liquidators had "acted responsibly and properly" in filing that application and in incurring these costs. Petroships claimed that as the application had been aborted due to the interveners' decision to replace the former liquidators, the majority should bear the costs incurred by the former liquidators in bringing the application.[49]

64 The members could not agree on the former liquidators' remuneration. So in February 2015, the former liquidators applied for their fees to be taxed by the court. The liquidators then convened an extraordinary general meeting for members to discuss and respond to the taxation application.[50]

65 The liquidators later wrote to Petroships stating that they had received an offer from the former liquidators to reduce the fees payable from a little over $138,000 to a little under $73,000.[51] Wealthplus then held an extraordinary general meeting in late March 2015, where the members accepted the offer by a majority vote.[52] The liquidators thereafter paid the former liquidators the

[47] Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 66 at para 6.2.

[48] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1267 to 1268.

[49] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1267 at paras 2(c) to 3.

[50] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1271 to 1273.

[51] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1289.

[52] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1290.

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reduced sum.

Events after the appeal in the application under s 216A of the Act

66 In November 2015, Petroships' s 216A application came to an end when the Court of Appeal dismissed Petroships' appeal against my dismissal of it. Given that one of Petroships' complaints was that the liquidators were beholden to the majority and under its effective control, the Court of Appeal expressly left open the possibility of Petroships having recourse in future to "remedies afforded by the liquidation regime": *Petroships (CA)* ([5] *supra*) at [73]. Importantly, the Court of Appeal did not decide then – because it did not have to in order to dispose of the appeal – whether Petroships' complaints about the liquidators were well-founded: *Petroships (CA)* at [75].

67 Five days after the appeal was dismissed, Petroships wrote to the liquidators again.[53] It stated that the Court of Appeal did not, in dismissing the appeal, make any findings on Petroships' claims in relation to Wealthplus' affairs. But it also said that the Court of Appeal's observation about the possibility of recourse against the liquidators implied that the liquidators had hitherto been acting in an unprofessional manner.[54] Petroships repeated its request for the liquidators to answer its queries on three "most pressing" issues.

68 The liquidators asked Petroships the next day for time to prepare a substantive reply.[55] That came in a letter dated 31 December 2015.[56] In January

[53] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1114 to 1116.

[54] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1114 at paras 3 to 5 and p 1116 at para 10.

[55] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1117.

[56] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1119 to 1122.

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2016, Petroships informed the liquidators that it was dissatisfied with their reply.[57]

69 In May 2016, the liquidators wrote to Petroships, stating that they wished to interview Alan Chan to address certain queries relating to Megacity's proof of debt.[58] Petroships rejected the liquidators' request in June 2016.[59]

70 A week later, Petroships filed these two applications.

Questions to be determined

71 Petroships' two applications raise three principal questions:

(a) Are these applications an abuse of the process of the court?

(b) Has Petroships shown cause for the liquidators to be removed within the meaning of s 302 of the Act?

(c) Has Petroships shown that the voluntary winding up of Wealthplus cannot be continued with due regard to the interests of the creditors and members within the meaning of s 253(2)(*d*) of the Act?

72 I address these questions in turn.

57 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1123 to 1125.

58 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1126.

59 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1127.

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Is Petroships abusing the process of the court?

Applicable principles

73 The interveners have in these proceedings – as they did in Petroships' s 216A application – accused Petroships of abusing the process of the court: see *Petroships (HC)* ([5] *supra*) at [84] to [92]. To establish the abuse of process, the interveners rely on what they have characterised as Petroships' vexatious conduct and on the doctrine of issue estoppel. The vexatious conduct is said to lie in the eight successive proceedings – if these two applications are added to the previous six – which Petroships has brought in the seven years between 2009 and 2016. The issue estoppel is said to arise from my findings of fact in *Petroships (HC)*. Petroships' submissions therefore invoke two legal doctrines: abuse of process and *res judicata*. I discuss these two doctrines before turning to a consideration of Petroships' submissions.

74 The doctrines of abuse of process and *res judicata* rest on common underlying considerations of justice and public policy. While every plaintiff has a right to his day in court, that right is not absolute. It must be balanced against the defendant's interests and also against the consideration that judicial resources are finite and must therefore not only be conserved but must also be allocated equitably between all those who have or may have a claim on them, actual and potential as well as present and future.

75 Although the two doctrines rest on common considerations and overlap in their operation, they are conceptually distinct: *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd)* [2014] AC 160 ("*Virgin Atlantic*") at [25].

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76 The doctrine of *res judicata* is a substantive doctrine of law. It comprises a number of different but related principles: *Virgin Atlantic* at [17] cited in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd (nTan Corporate Advisory Pte Ltd and others, other parties) and another appeal* [2015] 5 SLR 1104 ("*TT International*") at [98]. Its objective is to prevent the specific type of abuse that arises from successive proceedings brought on the same or similar subject-matter and involving the same parties or their privies. *Res judicata* recognises, therefore, that a plaintiff's entitlement to his day in court does not allow him to vex the same defendant or his privies twice over the same or a similar dispute. The doctrine of *res judicata* achieves this purpose by a set of constituent principles and exceptions to those principles. These principles and exceptions are framed as rules and applied with a degree of rigidity. The doctrine affords only limited scope for judicial flexibility, and even then, only if certain specific conditions are satisfied.

77 Two of the constituent principles of the doctrine of *res judicata* are cause of action estoppel and issue estoppel. Cause of action estoppel holds that when a court of competent jurisdiction has determined that a particular cause of action does or does not exist, that outcome may not be challenged by either party or their privies in subsequent proceedings: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal and other matters* [2017] SGCA 21 ("*Turf Club Auto Emporium*") at [83]. The bar on such a challenge is absolute unless fraud or collusion taints the decision: *TT International* at [139]. Issue estoppel, on the other hand, is of "wider application" and operates even when the causes of action in the successive proceedings are not identical. Issue estoppel operates as long as some issue of fact or law is common to the successive proceedings, was necessary for the

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decisions in those proceedings, and is binding on the parties: *Turf Club Auto Emporium* at [84].

78 To these two constituent principles a gloss was applied by Wigram V-C in *Henderson v Henderson* (1843) 3 Hare 100. Under the rule in *Henderson v Henderson*, the doctrine of *res judicata* extends to bar the re-litigation of an issue which could and should, with reasonable diligence and in all the circumstances, have been raised for determination in previous proceedings but which was not raised there and therefore not decided there. This rule is sometimes known as the extended doctrine of *res judicata*: see *TT International* at [101].

79 An exception with an element of flexibility was then added by the decision of the House of Lords in *Arnold and others v National Westminster Bank plc* [1991] 2 AC 93 ("*Arnold*"). The interplay between the rule, the extension and the exception in English law is best captured by Lord Sumption in *Virgin Atlantic* (at [22]) as follows:

> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised.

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80 I pause here simply to note that Singapore law takes a narrower view of the *Arnold* exception than English law: *TT International* at [190]. But as the exception does not apply in the present case, I need say no more about it.

81 Unlike the substantive doctrine of *res judicata*, abuse of process is a procedural doctrine which is an aspect of the court's inherent jurisdiction to control its own processes. The objective of the doctrine, broadly speaking, is to prevent the court's process from being used for an improper or collateral purpose, *ie*, otherwise than to secure a judicial determination of the parties' rights and obligations or to resolve a genuine dispute. Ascertaining whether particular proceedings are an abuse of process rests not on the application of rules and exceptions but on broad and flexible principles, and therefore depends very much on the facts of each case. Abuse of process accordingly involves a much wider inquiry than *res judicata*.

82 The touchstone for abuse of process is vexation. V K Rajah J (as he then was) explained in *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582 ("*Chee Siok Chin*") (at [33]) that "[p]roceedings are vexatious when they are shown to be *without foundation* and/or where they *cannot possibly succeed* and/or where an action is brought only for annoyance or to gain some fanciful advantage" [emphasis in original]. Thus, bringing "multiple or successive proceedings which cause or are likely to cause improper vexation or oppression" is capable in itself of being an abuse of process: *NCC International AB v Alliance Concrete Singapore Pte Ltd* [2008] 2 SLR(R) 565 ("*NCC International*") at [71(d)]. That is so even if none of the constituent principles of the doctrine of *res judicata* is engaged.

83 Thus, when a court finds that the doctrine of *res judicata* operates to bar litigation, that inevitably leads to the conclusion that that litigation is an abuse

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of process. But not every finding of an abuse of process leads to the conclusion that the doctrine of *res judicata* is engaged.

84 Where a court finds – for whatever reason – that proceedings are an abuse of the process of the court, the court has a well-established procedural power to terminate those proceedings without adjudicating upon their merits. This power derives generally from the court's inherent jurisdiction and specifically from O 18 r 19(1)(*d*) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed), at least where, as here, the originating process in question is an originating summons. But the court also has a concurrent inherent jurisdiction to terminate proceedings for abuse of process which does not depend on the nature of the particular originating process used: *Chee Siok Chin* at [35]. In all cases, the court exercises that jurisdiction to protect the integrity of the administration of justice and to enhance the efficient allocation of judicial resources: Sir Jack I H Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 CLP 23 at 40 to 41.

85 Although there have been attempts to decant the rule in *Henderson v Henderson* from the substantive doctrine of *res judicata* into the procedural doctrine of abuse of process (see for instance the speech of Lord Bingham of Cornhill in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at [31]), the consensus now appears to be that the rule operates on the substantive plane and is therefore in truth an aspect of the doctrine of *res judicata*, albeit one which is quite clearly concerned with, and therefore overlapping with, abuse of process. As the Court of Appeal said in *TT International* at [102]:

> … As mentioned earlier, this "extended" doctrine has come also to be known by the name "abuse of process"; and at first glance, that might be confusing because *res judicata* and abuse of process are "juridically very different", the former being a "rule of substantive law" and the latter, "a concept which informs the exercise of the court's procedural powers", as Lord Sumption notes in *Virgin Atlantic* (at [25]). However, as Lord Sumption

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> proceeds to explain, *res judicata* and abuse of process are "overlapping" concepts "with the common underlying purpose of limiting abusive and duplicative litigation", such that there is no difficulty in conceiving of the "extended" forms of cause of action and issue estoppel as being "concerned with abuse of process" while simultaneously being "part of the law of *res judicata*".

86 In this case, the interveners submit that an issue estoppel has arisen and binds Petroships as a result of the factual findings I made in *Petroships (HC)* in the course of dismissing the application under s 216A of the Act. The interveners make this submission even though the Court of Appeal in *Petroships (CA)* held that the findings which I made at first instance were unnecessary for disposing of the application before me. This is an unusual submission and ought to be evaluated with an appreciation of the basic principles underlying issue estoppel.

87 In *Lee Tat Development Pte Ltd v Management Corporation Strata Title Plan No 302* [2005] 3 SLR(R) 157 ("*Lee Tat Development*"), the Court of Appeal held at [14] to [15] that the following four conditions must be satisfied for an issue estoppel to arise: (a) there must be a final and conclusive judgment on the merits of the issue in question; (b) that judgment must be by a court of competent jurisdiction; (c) there must be identity between the parties to the two proceedings; and (d) there must be an identity of subject-matter in the two proceedings.

88 Sundaresh Menon JC (as the Chief Justice then was) examined the nuances of each of these four conditions in *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 ("*Goh Nellie*"). Two aspects of Menon JC's analysis are relevant to the applications before me. First, as regards condition (a), Menon JC observed that finality for the purposes of *res judicata* refers to "a declaration or determination of a party's liability and/or his rights

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or obligations leaving nothing else to be judicially determined": *Goh Nellie* at [28]. The concept of finality for this purpose is not to be confused with the procedural distinction between "final" and "interlocutory": *McIlkenny v Chief Constable of the West Midlands and another* [1980] QB 283 at 321F, cited with approval in *Goh Nellie* at [28]. Neither is it to be equated with "the vexed issue of finality for the purposes of an appeal": *Goh Nellie* at [28].

89 Second, Menon JC held that condition (d) encapsulates three distinct sub-requirements: *Goh Nellie* at [34] to [44]. First, the issues must be identical in the sense that the prior decision must traverse the same ground as the subsequent proceedings, and the facts and circumstances giving rise to the earlier decision must not have changed or must be incapable of change. Second, the previous determination must have been fundamental and not merely collateral to the previous decision so that the decision could not stand without that determination. The court should approach this inquiry from the perspective of common sense. The task is to balance the public interest in securing finality in litigation against the private interest in not foreclosing a litigant from arguing an issue which, in substance, was not the central issue decided by a previous court. It will be seen below that this is an important point. Third, the issue in question must be shown in fact to have been raised and argued. If it was not, no estoppel will generally arise unless it was not argued as a result of a concession by the party now resisting the estoppel or unless the rule in *Henderson v Henderson* applies. These finer points on condition (d) in *Lee Tat Development* are further explicated in paras 8.19 to 8.25 of K R Handley, *Spencer Bower and Handley: Res Judicata* (LexisNexis, 4th Ed, 2009) ("*Spencer*"). Menon JC relied extensively on an earlier version of *Spencer* in *Goh Nellie*. I gratefully adopt his analysis.

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90 It is against this conceptual backdrop that the narrow question of law pertaining to issue estoppel that arises in this case should be considered. The question is whether an issue estoppel may arise from findings of fact made by a lower court in determining a case when an appellate court later agrees with the determination, but holds that the lower court should have arrived at the determination by a different route, and where that different route would not have required it to make those findings of fact. The interveners submit that the answer is "Yes" on the narrow ground that the alternative analysis adopted by the appellate court has left the lower court's findings of fact intact.[60] Neither party cited any authority on this specific point to me. *Spencer* also does not address it directly.

91 In my view, the interveners' submission is mistaken for three reasons. First, when both the lower court's and appellate court's decisions are taken together, the appellate court's decision has rendered the lower court's findings of fact entirely irrelevant to the determination of the case. The result is that it can no longer be said that the ultimate determination on the merits "cannot stand without" those findings of fact: *Blair v Curran* (1939) 62 CLR 464 at 510, cited with approval in *Goh Nellie* at [35]. So condition (d) in *Lee Tat Development* is not satisfied.

92 Second, the interveners' approach would yield an unfair result for the litigant against whom the finding of fact has been made. The matter can be tested this way. If the lower court had understood the law correctly and, as a consequence, refrained from making the findings of fact which it erroneously thought were necessary to arrive at its determination, no issue estoppel could conceivably arise on those issues of fact simply because there would have been

[60] Interveners' Written Submissions dated 29 September 2016 at para 41; Certified Transcript of hearing on 3 October 2016 at p 188 line 29.

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no findings at all on those issues. The same result should obtain in a case where a lower court misunderstands the law and as a result makes findings of fact which the appellate court holds are unnecessary for the determination. There is no reason for issue estoppel to operate differently in these two situations.

93 Third, an appellate decision which affirms the determination of a lower court but for completely different reasons, in my view, supplants the lower court's decision in all but the outcome. Thus, it supplants the entire path of reasoning which the lower court adopted to arrive at that outcome. If the appellate court's reasoning is entirely different from the lower court's, the fact that the outcome remains unchanged upon appeal is mere happenstance. That happenstance is of no legal consequence in considering the remaining legal effect of the lower court's decision. The critical phenomenon is the legal reasoning, not the ultimate outcome. The true principle in my judgment is that all parts of a lower court's decision – including any findings of fact made to support it – which an appellate court has found were either wrong or unnecessary for a proper determination of the parties' dispute cease to have any continuing legal effect. Those parts cannot therefore constitute or contribute to a *res judicata* between the parties. Those parts suffer the same fate as if they had been reversed. *Spencer* ([89] *supra*) describes that fate at para 2.33 as follows:

> When an appellate court reverses the judgment below, the former decision, until then conclusive, is avoided *ab initio* and replaced by the appellate decision, which becomes the *res judicata* between the parties. Even if the appeal fails, the decision of the appellate court becomes the source of any estoppels. …

The corollary, however, must be that those parts of a lower court's decision – including any findings of fact made to support it – which are *consistent* with the appellate court's reasoning, and which are not characterised by the appellate

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court as being wrong or unnecessary to resolve the dispute, survive the appellate decision. Those parts remain entirely capable of constituting or contributing to a *res judicata*.

94 Therefore, nothing I have said is intended to cast doubt on the general proposition that an issue estoppel will arise even if there is an appeal, so long as the specific finding in question at first instance is left intact: *Lim Teck Cheng v Wyno Marine Pte Ltd (in liquidation)* [1999] 3 SLR(R) 543 at [18], cited with approval in *Halsbury's Laws of Singapore* vol 10 (LexisNexis, 2016 Reissue) at para 120.183 n 7. I accept *Spencer*'s point that even if the appeal fails, the decision of the appellate court becomes the source of any estoppels. This must be so even in a case where the decision at first instance is substantively affirmed, only because the appellate court either implicitly or explicitly adopts the legal or factual findings of the lower court. Where factual findings are concerned, it would be artificial to suggest that the appellate court somehow makes those findings again and that those new findings are the basis for an issue estoppel. Rather, the assumption is that the lower court's findings are dispositive of the merits – and are therefore final and conclusive – until varied by a higher tribunal: *Gustave Nouvion v Freeman and another* (1889) 15 App Cas 1 at 11. It follows that if there is no such variation, then the lower court's findings are not prevented by the mere existence of an appellate decision from continuing to be final and conclusive. They continue to satisfy condition (a) of *Lee Tat Development* and are therefore capable of giving rise to an issue estoppel.

95 I turn to consider the interveners' submissions in view of these principles.

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Analysis

Issue estoppel

96 The interveners submit firstly that an issue estoppel operates against Petroships to prevent it from denying my findings of fact in *Petroships (HC)*.[61] In particular, the interveners submit that Petroships cannot deny that: (a) its s 216A application was motivated by an illegitimate collateral purpose, *ie*, to vindicate its own rights rather than Wealthplus'; (b) Alan Chan was a director of Wealthplus when the bulk of the four transactions took place and he knew about the alleged wrongs committed against Wealthplus; and (c) Petroships' purported belief that it had a good cause of action in the application under s 216A of the Act was not an honest belief.[62]

97 In my view, no issue estoppel of the kind asserted by the interveners arises from *Petroships (HC)*. In *Petroships (CA)*, the Court of Appeal dismissed Petroships' s 216A application on the basis that that section cannot apply to a company in liquidation. The Court of Appeal therefore held that it was "unnecessary to deal with the substantive arguments on whether the pre-requisites in ss 216A(3)(*b*)–216A(3)(*c*) were met": *Petroships (CA)* at [75]. Although the Court of Appeal upheld the outcome in *Petroships (HC)*, it did so on an alternative analysis of the case which did not rely, whether expressly or impliedly, on the findings of fact which I made on my primary ground for arriving at that result.

98 That being the case, those findings of fact can no longer be treated as having any legal effect between the parties. It is the Court of Appeal's analysis which was, by definition, dispositive of that application. As my findings of fact

61 Interveners' Written Submissions dated 29 September 2016 at para 42.

62 Interveners' Written Submissions dated 29 September 2016 at para 42.

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are no longer final and conclusive in the sense that they determined the merits of *Petroships (HC)*, requirement (a) of *Lee Tat Development* is not satisfied. There can therefore be no issue estoppel arising from them.

99 For completeness, I note that my alternative analysis in *Petroships (HC)* – to the effect that Petroships' proper recourse lay against the liquidators since Wealthplus was already in liquidation – was consistent with the Court of Appeal's preferred, and sole, basis for deciding the case. But as none of the findings of fact which I made were necessary to support that alternative analysis, there is no scope for the argument that an issue estoppel arises from those findings because my alternative analysis survived *Petroships (CA)*. If however those findings had been necessary to support my alternative analysis, and if the Court of Appeal did not regard them as wrong or unnecessary to resolve the dispute, then I would have held that the Court of Appeal's implicit acceptance of them was capable of establishing an issue estoppel. But that is not the case here.

100 Having said that, I have no doubt that it is open to me to arrive afresh at the findings of fact which I have set out at [49] above for the purposes of the two applications now before me. I say this for two reasons. First, the primary material on which I made those findings in *Petroships (HC)* has been placed before me again, together with new material. I must therefore be entitled to make fresh findings for the purposes of these two applications on the totality of the evidence now before me. And in those circumstances, it must be open to me to arrive at the same findings as I did in *Petroships (HC)* if those findings happen to be what I consider now to be the correct findings. Second, the Court of Appeal in *Petroships (CA)*, even if it did consider my findings of fact unnecessary for the disposal of the application under s 216A of the Act, did not reverse them. The interveners are not therefore barred from inviting me to make

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those same findings of fact again. That is what they do. I have for these reasons set out the key findings that are relevant to the present case at [49] above, and make them again on the totality of the evidence before me on these two applications.

101 In this regard, I note that Alan Chan disclaims personal knowledge of the four transactions on the basis that the day-to-day management of Wealthplus lay in the hands of the Megacity directors during the time that he was a director of Wealthplus. I reject this claim. Alan Chan was a director of Wealthplus from July 1998 to September 2009. He approved the financial statements of Wealthplus up until the financial year ending on 31 December 2007, whereas the four transactions include alleged fund transfers from Wealthplus to other companies since 2003.[63] I therefore find that he must have had personal knowledge of the four transactions. This is the same finding I arrived at in *Petroships (HC)* at [129]. That is perhaps not surprising given that the finding is based on the same material and Petroships has put nothing new on this point before me.

Abuse of process

102 The interveners' next submission is that Petroships is attempting to re-litigate the propriety of the four transactions – an issue which was the subject-matter of its s 216A application – under the guise of an application to remove and replace the liquidators of Wealthplus.[64] The interveners submit that this constitutes an abuse of the court's process in the form of bringing multiple or successive proceedings which cause or are likely to cause improper vexation or oppression: *NCC International* ([82] *supra*) at [71(d)].[65] They rely on *Lai Swee*

63 Interveners' Written Submissions dated 29 September 2016 at paras 37 to 38.

64 Interveners' Written Submissions dated 29 September 2016 at para 36; Interveners' Reply Submissions dated 7 November 2016 at para 32.

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Lin Linda v Attorney-General [2006] 2 SLR(R) 565 ("*Linda Lai*"), where the Court of Appeal said (at [63]) that the court "will not allow the same issue to be raised in separate proceedings arising out of identical facts and dependent on the same evidence, even if such proceedings are between different parties as to do so would constitute an abuse of process of the court".[66] The interveners say that Petroships, like the plaintiff in *Chia Kok Kee v Tan Wah and others* [2012] 2 SLR 352 ("*Chia Kok Kee*"), is (at [35]) "simply repackaging [its] claim in various forms and putting them before the court time and again, in the hope that [it] would eventually succeed in one".[67] They rely on the court's conclusion in that case (at [35]) that "[r]e-litigating [the plaintiff's] claim repeatedly despite the judicial determinations of its lack of merit was a clear abuse of process of court".

103 In my judgment, there are three reasons why Petroships' present applications are not an abuse of process. In short, Petroships, unlike the plaintiff in *Linda Lai*, is not asking the court to assess evidence which it has already assessed in order to determine the merits of a complaint which it has already determined.

104 First, Petroships' present applications and its s 216A application do not turn on the same issue. The issue in the present applications is whether Petroships is correct that the liquidators have shown or can be reasonably perceived as having shown undue deference to the wishes of the interveners, as the majority shareholders. By contrast, the issues in Petroships' s 216A application were whether: (i) Petroships was acting in good faith in bringing that application; and (ii) it appeared to be *prima facie* in the interests of

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65 Interveners' Written Submissions dated 29 September 2016 at paras 29 and 32.

66 Interveners' Written Submissions dated 29 September 2016 at para 30.

67 Interveners' Written Submissions dated 29 September 2016 at paras 31 to 32.

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Wealthplus that Petroships be granted leave to pursue an action in the name of Wealthplus in relation to the four transactions. Although Petroships did raise the liquidators' conduct as an issue in its s 216A application, its argument there was merely that the liquidators' refusal to investigate the four transactions up to that time was an additional reason for granting it leave to commence a statutory derivative action. The issues before me now and on Petroships' s 216A application are different. I therefore do not agree with the interveners that Petroships has simply "repackaged" a failed claim as the plaintiff did in *Chia Kok Kee*.

105 Second, the two applications before me now and Petroships' s 216A application are not based on "identical facts and dependent on the same evidence": *Linda Lai* at [63]. Insofar as Petroships relied on the liquidators' conduct in the s 216A application, it: (i) relied only on the liquidators' failure to investigate the four transactions; and (ii) of necessity, relied only on the liquidators' conduct up to the date of the hearings before me and, on appeal, before the Court of Appeal. I rejected the allegations then because I found that Petroships had put before me absolutely no grounds to impugn the liquidators' impartiality: *Petroships (HC)* at [161]. Petroships' case now, some two years later, is based on grounds which arose both before and after I heard the s 216A application, all of which it says suggest that the liquidators lack impartiality or can reasonably be perceived as lacking impartiality and ought to be removed. The liquidators' refusal to investigate the four transactions, although the principal ground, is only one of the grounds Petroships relies on now as warranting the court's intervention. Petroships also relies on aspects of the liquidators' conduct which are entirely unrelated to the four transactions. These include the liquidators' alleged failure promptly to adjudicate Megacity's proof of debt. None of these issues was, or could have been, raised in the s 216A

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application or any earlier proceedings.

106 Third, in Petroships' s 216A application, neither I nor the Court of Appeal decided the merits of either: (i) Petroships' complaints about the four transactions; or (ii) Petroships' complaints against the liquidators for having until then failed to investigate those complaints. This is clear from the fact that we both referred to the possibility of Petroships bringing a future application to challenge or remove the liquidators, should they decide not to investigate the four transactions, as a more appropriate remedy than granting Petroships leave under s 216A of the Act: *Petroships (HC)* at [162]; *Petroships (CA)* at [73]. Given the additional fact that Petroships now relies on events which occurred after the Court of Appeal dismissed Petroships' appeal in its s 216A application, what Petroships is doing now is not re-litigating its claim despite a judicial determination of its lack of merit: *Chia Kok Kee* at [35]. There has been no such determination of its central complaint in the present applications.

107 For these reasons, I reject the interveners' submission that Petroships' applications here constitute an abuse of the court's process. I therefore turn to consider the substance of Petroships' claims.

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Does Petroships satisfy s 302 of the Act?

Showing cause

Summary of principles

108 Section 302 of the Act is found in the fourth subdivision of the third division of Part X of the Act and therefore applies to every voluntary winding up, whether members' or creditors'. The section is a model of simplicity and reads as follows:

> **Removal of liquidator**
>
> **302.** The Court may, on cause shown, remove a liquidator and appoint another liquidator.

109 The principles developed by the case law on s 302, insofar as they are relevant to the facts of the present case, can be summarised in the following propositions:

(a) To enliven the court's power to remove a liquidator, an applicant must show cause under s 302.

(b) To show cause under s 302, the applicant must establish that the removal of the liquidator is in the real, substantial and honest interest of the liquidation and will advance the purposes for which the liquidator was appointed.

(c) To establish this, the applicant may attempt to show that the liquidator lacks impartiality, *ie*, that he is biased in favour of any one or more of the members or creditors of the company. To succeed on this ground, the applicant may show either that the liquidator is guilty of actual bias or that he has so conducted himself as to give rise to a perception of bias.

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(d) The court will give significant weight to an applicant's perception of bias if the applicant can demonstrate: (i) a subjective belief that the liquidator is biased; (ii) that that belief is reasonable, and (iii) that as a result, the applicant has lost confidence in the ability of the liquidator to carry out the liquidation without fear or favour.

(e) If the applicant seeks to present a decision by the liquidator as evidence of the liquidator's bias, the burden lies on the applicant to show that the liquidator took that decision without a rational basis.

(f) In a members' voluntary liquidation, the court will usually give little weight, if any at all, to a liquidator's claim that he refused to investigate the company's affairs simply because there was no funding for the investigation.

(g) While the liquidator's lack of impartiality, actual or perceived, is often determinative of the interest of the liquidation, the court takes into account all aspects of the liquidation in arriving at a decision, including the practical consequences of exercising the power under s 302 to remove the liquidator.

110 I turn now to a consideration of the authorities which have led me to distil these principles. I begin with the history of s 302.

111 The term "cause shown" in this context first appeared in s 141 of the Companies Act 1862 (25 & 26 Vict c 89) (UK) ("the 1862 Act"): Harry Rajak, *Company Liquidations* (Sweet & Maxwell, 2nd Ed, 2006) at para 8–007. Section 141 provides that "the court may … on due cause shewn, remove any liquidator, and appoint another liquidator to act in the matter of a voluntary winding up". The Companies Act 1948 (c 38) (UK) ("the 1948 Act")

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modernised the language of that section but otherwise preserved its import. Thus, s 304(2) of the 1948 Act reads: "The court may, on cause shown, remove a liquidator and appoint another liquidator." This language was adopted in s 266 of the Companies Act 1961 (Vic) in Australia ("the 1961 Act"). The 1961 Act served as the model for the Companies Act 1965 (No 79 of 1965) (M'sia). And the Malaysian Act was in turn the model for the Companies Act 1967 (No 42 of 1967), the very first edition of the current Companies Act, which I refer to here as "the Act".

112 Today, s 302 of the Act is a replicate of s 266 of the 1961 Act and s 304(2) of the 1948 Act. The 1961 Act has been superseded by federal legislation in the form of the Corporations Act 2001 (Cth). But s 503 of that Act preserved the wording of s 266 of the 1961 Act, although s 503 has since 2016 been repealed by the Insolvency Reform Act 2016 (Cth). In England, s 108(2) of the Insolvency Act 1986 (c 45) (UK) ("the Insolvency Act") uses wording that is nearly identical to s 304(2) of the 1948 Act and s 302 of the Act: "The court may, on cause shown, remove a liquidator and appoint another." There is no material difference in the substance of these three provisions. Accordingly, as will be apparent below, English and Australian authorities in this area of the law are of particularly persuasive value.

113 The common law principles that have developed to assist the court in assessing whether cause has been shown for a liquidator to be removed have traditionally been guided by the need to balance two competing aims. The first is to ensure that the liquidator carries out his duties competently and impartially, so that the liquidation achieves the purposes for which it was commenced. The second is to discourage unmeritorious applications for the liquidator's removal by disgruntled creditors or members. Neuberger J (as Lord Neuberger then was) described this balancing exercise in *AMP Enterprises Ltd v Hoffman and*

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another [2003] 1 BCLC 319 ("*AMP Enterprises*") at [23] and [27] in the following terms:

> In an application such as this, the court may have to carry out a difficult balancing exercise. On the one hand the court expects any liquidator, whether in a compulsory winding up or a voluntary winding up, to be efficient and vigorous and unbiased in his conduct of the liquidation, and it should have no hesitation in removing a liquidator if satisfied that he has failed to live up to those standards at least unless it can be reasonably confident that he will live up to those requirements in the future.
>
> …
>
> On the other hand, if a liquidator has been generally effective and honest, the court must think carefully before deciding to remove him and replace him. It should not be seen to be easy to remove a liquidator merely because it can be shown that in one, or possibly more than one, respect his conduct has fallen short of ideal. Otherwise, it would encourage applications under s 108(2) by creditors who have not had their preferred liquidator appointed, or who are for some other reason disgruntled. Once a liquidation has been conducted for a time, no doubt there can almost always be criticism of the conduct, in the sense that one can identify things that could have been done better, or things that could have been done earlier. It is all too easy for an insolvency practitioner, who has not been involved in a particular liquidation, to say, with the benefit of the wisdom of hindsight, how he could have done better. It would plainly be undesirable to encourage an application to remove a liquidator on such grounds …

114 It will be seen from the cases that the best way for the court to approach this balancing exercise is to focus on whether removal of the liquidator advances the interest of the liquidation and the purpose for which the liquidator was appointed. This is the approach also taken on an application under s 268 of the Act, which is the equivalent of s 302 in the compulsory winding up regime: *Hong Investment Pte Ltd v Tai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375 ("*Hong Investment*") at [5].

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Interest of the liquidation

115 The origins of the meaning now ascribed to "cause shown" in s 302 may be traced to two decisions of the English Court of Appeal in the late 19th century. The first is *In re Sir John Moore Gold Mining Company* (1879) 12 Ch D 325 ("*In re Sir John Moore*"). In that case, the court removed a liquidator who had refused to take action against miscreant directors because they were his friends. He also refused to investigate complaints which related to payments which he himself had received while he was the company secretary and before he took up appointment as the company's liquidator.

116 The judgments in *In re Sir John Moore* make two important points. First, Thesiger LJ observed (at 332) that the language in s 141 of the 1862 Act, by requiring cause to be shown, means that the removal of a liquidator is not a matter in the unfettered discretion of the court. Rather, a liquidator has the right to demand that the applicant establish a valid reason – or cause – for his removal before the court's discretion is enlivened. This is equally true in relation to s 302 of the Act and equally true today. The applicant bears the burden of showing cause for removing the liquidator. Only if that cause is shown is the court's discretion to remove the liquidator enlivened. Even then, it is open to the court in its discretion not to act on the cause shown and not to remove the liquidator. The court's power under s 302 is conceptually distinct from its discretion. It is the former which is the subject of the main analysis here.

117 Second and more importantly, Jessel MR defined the term "due cause" within the meaning of s 141 in terms of personal unfitness (at 331):

> … I should say that, as a general rule, they [*ie*, the words "on due cause shewn"] point to some unfitness of the person—it may be from personal character, or from his connection with other parties, or from circumstances in which he is mixed up—some unfitness in a wide sense of the term. …

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118 Jessel MR's apparent focus on the personal unfitness of the liquidator was felt by the court in *In re Adam Eyton Ltd, Ex parte Charlesworth* (1887) 36 Ch D 299 ("*In re Adam Eyton*") to be too narrow. In that case, no charges of personal misconduct were made against the liquidator. The Court of Appeal nevertheless removed him so that the liquidation could be conducted fairly, without any reasonable possibility of imputations being made against him. Cotton LJ opined that Jessel MR in *In re Sir John Moore* must not have intended to give an exhaustive definition of the meaning of "due cause". Cotton LJ thus considered the court's central consideration in applying this power to be an expanded notion of the "interest of the liquidation" (at 303 to 304):

> … Now, in my opinion, it is not necessary, in order to justify the Court under this section in removing the liquidator, that there should be anything against the individual. In my opinion, although of course unfitness discovered in a particular person would be a ground for removing him, yet the power of removal is not confined to that, and I do not think that the late Master of the Rolls in the case of *In re Sir John Moore …*, which has been cited, intended to give an exhaustive definition … He does not intend to exhaust all the grounds, but, in my opinion, and I believe the rest of the Court agree with me, if the Court is satisfied on the evidence before them that it is against the interest of the liquidation, by which I mean all those who are interested in the company being liquidated, that a particular person should be made liquidator, then the Court has power to remove the present liquidator, and of course to appoint some other person in his place.

119 Bowen LJ's approach was consistent with Cotton LJ's. I say that for two reasons. First, Bowen LJ stressed that the court's decision to remove the liquidator was in no way a reflection upon the liquidator, whose "character is clear" (at 305). Second, and more importantly, he said that "due cause is to be measured by reference to the real, substantial, honest interest of the liquidation and to the purpose for which the liquidator is appointed" (at 306). This expression would prove to be an enduring one in its adoption in later cases and textbooks: see *eg*, *Law and Practice of Corporate Insolvency* (Andrew Chan

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Chee Yin gen ed) (LexisNexis, 2014) at p 424 at para 3303; Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) ("*McPherson*"), p 486 at para 8–084.

120 The earliest reported decision in Singapore on the removal of liquidators appears to be *Chua Boon Chin v McCormack John Maxwell and others* [1979–1980] SLR(R) 121 ("*Chua Boon Chin*"). That case cited both *In re Sir John Moore* and *In re Adam Eyton* with approval. *Chua Boon Chin* concerned a company in members' voluntary liquidation. The court removed the liquidators because one of them was concurrently a director of the company. The court held that the liquidators had failed to rebut a *prima facie* case of misfeasance on the part of the directors which the applicant (a member) had established. It was therefore to the "general advantage of those interested in the assets of the company" for the liquidators to be removed (at [32]). While D C D'Cotta J expressed (at [22]) that he was "content to be guided by the principles laid down in *Re Adam Eyton*", he treated Jessel MR's test in *In re Sir John Moore* as an alternative way of showing cause for the purpose of removing a liquidator (at [25]):

> It follows that a liquidator can be removed if the cause shown points to some unfitness of person in the test as laid down by Jessel MR in *Sir John Moore Gold Mining Co, Re* … and also where the court exercises its discretion if satisfied on the evidence before it that it is against the interest of the liquidation that a particular person should be appointed liquidator.

121 By so holding, D'Cotta J anticipated the reasoning of Millett J (as he then was) in the leading modern English case on s 108(2) of the Insolvency Act, *Re Keypak Homecare Ltd* [1987] BCLC 409 ("*Re Keypak*"). In that case, counsel for the defendant liquidators argued that the approach in *In re Adam Eyton*, which focused on the interest of the liquidation, ought to be confined to its own facts. The defendants submitted that in the absence of personal

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misconduct or unfitness on the part of the liquidator, only very special circumstances would justify his removal. Millett J first observed (at 415*h*) that the rule in *In re Sir John Moore* concerning personal unfitness was technically *obiter* because the court had based its decision not on the liquidator's unfit character but on unfitness in the wide sense, arising from the "circumstances in which he [*ie*, the liquidator] [was] mixed up" as he was a friend of the directors of the company in liquidation: see [115] above. Millett J then rejected the defendants' submission on the basis of the breadth of the wording of s 108(2), which he held made it inappropriate for the court to define precisely the kind of cause which is required to be shown (at 416*e*):

> There were special circumstances in [*In re Adam Eyton*], but I do not read the general principle laid down by the Court of Appeal as being limited to cases in which special circumstances can be shown. On the contrary, the words of the statute are very wide and it would be dangerous and wrong for a court to seek to limit or define the kind of cause which is required. Circumstances vary widely, and it may be appropriate to remove a liquidator even though nothing can be said against him, either personally or in his conduct of the particular liquidation.

122 *Re Keypak* concerned a company in creditors' voluntary liquidation. It was heavily insolvent, and there was evidence of possible wrongful and fraudulent trading leading up to the liquidation. The liquidator did nothing but sell what remaining stock the company owned to a phoenix company at a forced sale value. He made no examination of sale and purchase ledgers and conducted no investigation to ascertain whether stock was missing. He also did not take evidence or interview any employees of the company who might have been able to tell him what had been going on in the weeks before the liquidation commenced. But there was no evidence of misconduct or wrongdoing on his part, or of any friendship with the company's directors. Millett J nevertheless held that the liquidator should be removed as he had "adopted a relaxed and

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complacent attitude" to the possibility of wrongdoing by the directors (at 416*g*). Millett J was "not impressed by his performance in the conduct of this liquidation" (at 416*f*). In these circumstances, the liquidator was removed despite the absence of unfitness because allowing him to stay would have been detrimental to the interest of the liquidation.

123 The primacy of the interest of the liquidation has since *Chua Boon Chin* been the mainstay of our courts' approach to ss 268 and 302 of the Act. In *Procam (Pte) Ltd v Nangle and another* [1990] 1 SLR(R) 605 ("*Procam*"), the liquidators of a company in compulsory liquidation made the mistake of engaging a firm of solicitors to assist them in the winding up when the same firm was acting for the petitioning creditor and also for another of the company's creditors. The court, without reference to the cases I have discussed, held that it would not be in the interest of the liquidation to remove the liquidators. This was because the liquidators had erred in good faith and the liquidation was in an advanced stage. L P Thean J said at [27]:

> The liquidators have erred … should I make an order for their removal? I think not. Firstly, the errors were made in good faith, and they have not seriously prejudiced the liquidation of the company. Secondly, it is not in the interest of liquidation to make such an order. The present status of the liquidation of the company is that most of the matters in the liquidation have been completed …

124 Later Singapore cases expressly adopted the approach embodied in *In re Adam Eyton* and *Re Keypak*: see *Yap Jeffery Henry and another v Ho Mun-Tuke Don* [2006] 3 SLR(R) 427 ("*Yap Jeffery Henry*") (s 302 application by creditors of company in creditors' voluntary liquidation) at [20] to [22]; *Hong Investment* ([114] *supra*) (s 268 application by creditor of an company in compulsory liquidation) at [5] to [6]. Judith Prakash J (as she then was) in *Yap Jeffery Henry* (at [22]) echoed Millett J's view in *Re Keypak* that the circumstances in which

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cause may be shown vary widely. Therefore, unfitness of the liquidator is but one of many circumstances through which cause may be shown, even if it is the most commonly alleged: *In re Adam Eyton* at 306. As Neuberger J said of s 108(2) of the Insolvency Act in *AMP Enterprises* ([113] *supra*) at [21], "in general it is inappropriate to lay down what facts will and what facts will not constitute sufficient grounds".

125 The broad effect of these authorities is that the principal guide of the court's assessment of whether cause has been shown under s 302 of the Act is the real, honest and substantial interest of the liquidation: *In re Adam Eyton* at 306. In addition, it is in my view equally important to assess whether cause has been shown within the meaning of s 302 by reference to the purpose for which the liquidator is appointed, as Bowen LJ said in *In re Adam Eyton*. That purpose is necessarily co-extensive with the purpose of the liquidation itself, for to carry out the liquidation is the very purpose for which the liquidator is appointed. This aspect of the test has not received significant attention in the cases, but is in my judgment critical to setting the standard by which the court is to assess the actions of the liquidator which have been impugned. I therefore turn now to consider more specifically the interest and purpose of a solvent liquidation, which the present applications are concerned with.

Interest and purpose of a solvent liquidation

126 The interest and purpose of a solvent liquidation, *ie*, a members' voluntary liquidation, is distinct from the interest and purpose of an insolvent liquidation, *ie*, a creditors' voluntary liquidation or a compulsory liquidation. This distinction suggests that the *In re Adam Eyton* test applies differently for the removal of liquidators in each of these two types of liquidation. To my knowledge, the impact of this difference or differences on the court's

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assessment of whether cause has been shown under s 302 has not been analysed as an independent issue in the textbooks. This is perhaps because the need to consider the nature of the liquidation is already implicit in the general requirement to consider all relevant circumstances. That is a requirement which receives further support in this context from Millet J's point in *Re Keypak* that the circumstances in which cause may be shown vary widely. It is however useful and important for the present case to articulate what those differences are.

127 In my judgment, there are two main differences between how the court assesses whether cause has been shown for the purpose of removing a liquidator in a solvent and an insolvent liquidation. Each difference corresponds to one of the two limbs in the test for showing cause which Bowen LJ articulated in *In re Adam Eyton* at 306, *ie*, the interest of the liquidation and the purpose for which the liquidator is appointed. The differences may be described as follows.

128 First, to determine the interest of a solvent liquidation, a court will ordinarily take into account the views of the members and not the views of the creditors. The opposite is true for a court assessing the interest of an insolvent liquidation. There, a court will ordinarily take into account the views of the creditors and not the views of the members.

129 Second, a court in deciding whether cause has been shown under s 302 of the Act must assess the allegations against the liquidator in the light of the purpose of the liquidation, which is co-extensive with the purpose for which he was appointed. As the purpose of a solvent liquidation is not entirely the same as the purpose of an insolvent liquidation, the nature of the court's assessment in each context is also not entirely the same.

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130 I find support for these propositions in the following discussion of the purposes of solvent and insolvent liquidations in *McPherson* at para 1–005:

> … With a solvent company there is no one aim for the winding up. The aim of winding up is often to allow the shareholders who decide that the company has completed the purposes for which it was established to have the assets distributed to them after paying out the creditors. The shareholders then can determine to make new investments if they wish with the funds received from the liquidation.
>
> The purposes of the liquidation of insolvent companies are often seen as: first, providing a procedure that allows for an equitable and fair distribution of the assets of the debtor company amongst its creditors. This means that one or more creditors are not discriminated against and one or some creditors do not profit at the expense of other creditors …; second, in providing for the winding up of a company which is hopelessly insolvent, liquidation serves the community at large as it is not good for society that companies who are insolvent are able to continue to trade; third, liquidation is designed to allow for an investigation of the company's affairs by an independent and appropriately qualified person, with particular emphasis on the circumstances which precipitated the winding up. Such an investigation may reveal improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action. Further, the investigation may disclose the fact that there were unfair dispositions of property, which has reduced the ability of the company to pay its creditors.

131 Turning first to the concept of the interest of the liquidation, I start by observing that Cotton LJ in *In re Adam Eyton* said that by "interest of the liquidation" he meant "those who are interested in the company being liquidated" (at 304). Thus, to determine in concrete terms what the interest of the liquidation is in any case, it is in my view necessary to ask who is primarily interested in the results of the liquidation. The answer to this question goes a long way towards explaining the differences set out in the passage from *McPherson* quoted above.

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132 A solvent company is liquidated primarily in the members' interest. The creditors have no real interest in the liquidation because it is obligatory to commence and conduct a solvent liquidation on the basis that the creditors will be paid in full and within one year: s 293(1) of the Act. The law protects the creditors by requiring the directors essentially to affirm that basis on penalty of perjury as a condition precedent to commencing the liquidation.

133 As it is the members who are primarily interested in the results of a solvent liquidation, the longstanding policy of the Act is to allow them to continue to manage what in substance are their own affairs: *In re Wear Engine Works Company* (1875) 10 Ch App 188 at 191. Therefore, the principle of majority rule continues to operate as between the members when a solvent company goes into voluntary, solvent, liquidation. The court therefore gives predominant weight to the wishes of the members in ascertaining the real, honest and substantial interest of the liquidation.

134 On the other hand, an insolvent company is liquidated primarily in the creditors' interest. *McPherson* puts it this way at para 3–104:

> … Where the company is insolvent the foremost consideration naturally is the interest of the creditors, as they are the primary stakeholders in the company when the company is insolvent, and these prevail over the interests of other persons likely to be affected by the winding up, such as the company and shareholders. …

135 The members of an insolvent company are, *ex hypothesi*, out of the money in any distribution. The members are therefore excluded from control of the liquidation, even in a residual or ultimate sense. That control is vested, in declining order of immediacy, in the liquidators, the creditors and the court. The members having no control over the liquidation, the principle of majority rule between the members therefore ceases to have any meaning. Accordingly, in an

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insolvent liquidation, the court gives predominant weight to the creditors' interest in ascertaining the real, honest and substantial interest of the liquidation.

136 I turn next to the concept of the purpose of the liquidation, with a focus on the duty to investigate the company's affairs. It is true that both a solvent liquidation and an insolvent liquidation have certain purposes in common. And one of those common purposes is an examination of the company's pre-liquidation transactions: see Paul L Davies and Sarah Worthington, *Gower's Principles of Modern Company Law* (Sweet & Maxwell, 10th Ed, 2016) at para 33–2. This purpose is fulfilled by a liquidator discharging his duty to investigate the company's affairs.

137 But as the passage from *McPherson* at [130] above shows, the content of a liquidator's duty to investigate the company's affairs is different as between a solvent and an insolvent liquidation. A liquidator of a solvent company has only a limited duty to investigate. The court, in assessing his conduct when deciding an application to remove him under s 302 of the Act, must bear in mind the limits of that duty.

138 Having said that, it is not the case that the liquidator of a solvent company has no duty whatsoever to investigate its affairs. Any such investigation has two objectives: (a) to maximise the return to those interested in the liquidation by increasing the company's assets or reducing its debts; and (b) to uphold standards of commercial morality by identifying "improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action": *McPherson* at para 1–005. Both objectives transcend the divide between solvent and insolvent liquidation. A member of a solvent company and a creditor of an insolvent company each have just as much interest in maximising the distribution he is to

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receive in the liquidation. And a failure by the management of a company, whether solvent or insolvent, to live up to the standards of commercial morality is a matter which goes beyond the members' and the creditors' private interests and is a matter of public interest: *In re Pantmaenog Timber Co Ltd* [2004] 1 AC 158 at [52].

139 That is why, in a compulsory liquidation, the liquidator is endowed with broad powers of investigation automatically. These include the power to apply for a public examination of any person involved or connected with any impropriety in relation to the company's affairs: s 286(1) of the Act. A liquidator in a compulsory liquidation may therefore be reasonably expected to exercise that power if in his professional view he considers it necessary. By contrast, a liquidator in a voluntary liquidation, whether it is a solvent or an insolvent liquidation, has no such power. Hence, the most he can be expected to do is to consider applying to court to be endowed with such a power to investigate if in his professional view he considers that such an application is necessary.

140 The impact of these points on the duty of a liquidator in a members' voluntary liquidation to investigate the company's affairs ought not to be missed. As the company is solvent, the principle of majority rule continues to apply. The majority's views on whether to conduct an investigation either to increase the surplus returnable to members or to identify pre-liquidation impropriety or wrongdoing will ordinarily carry great weight, particularly as it is the majority of the members who will be bearing the majority of the expense, both of the liquidation and of the investigation. But by resolving to place the company in liquidation, albeit a solvent liquidation, the members have voted to take the company's affairs out of the hands of their directors and to place them in the hands of a liquidator. He has a statutory duty to discharge in carrying out

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the liquidation, and does so under the supervision of the court, not of the majority. The majority's view on the necessity of an investigation may be the starting point for the liquidator, but cannot be the ending point. The decision is ultimately one for the liquidator to take in his professional judgment, bearing in mind his statutory duties. He cannot abdicate this responsibility by leaving it to the members to resolve *inter se*. It will be seen below at [205] to [217] that the liquidators in the present case may not have fully appreciated this important point.

141 There are therefore other considerations besides the wishes of the majority members that should guide the liquidator – and by extension the court – in a solvent liquidation. I will mention two which are relevant to this case.

142 First, there is a consideration which relates specifically to a minority shareholder's position. *Petroships (CA)* has made clear that any member of a company who attempts to challenge the majority by seeking leave under s 216A to bring a statutory derivative action will have that application automatically rejected if the company is in liquidation at the time of the hearing. This is so even if the s 216A application has merits and even if the majority initiated the voluntary liquidation in order to frustrate the s 216A procedure. That is a possible inference that one could draw on the facts of the present case. Once a company is in liquidation, the shareholder's proper and only recourse is now through the remedies afforded by the liquidation regime. In a members' voluntary liquidation, those remedies include s 302 (removal of liquidator), s 315 (appeal against decision of liquidator), s 341 (application for court to examine conduct of liquidator) and the court's common law power to order the liquidators to allow a member to sue in the name of the company: *Petroships (HC)* at [162] and *Petroships (CA)* at [22]. Thus, where a member properly raises complaints about the pre-liquidation transactions of a company

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on any such application, the court must deal more closely with the merits of those complaints in considering whether to remove and replace the liquidator. That is because the minority now no longer has the alternative of seeking to have those complaints adjudicated through a statutory derivative action.

143 Second, the interest of the liquidation of a company includes, but goes beyond, a consideration simply of how a liquidator has discharged his duties. As I explain at [174] below, it requires the court to examine also practical considerations such as the costs – in terms both of money and time – that will be occasioned by the liquidator's removal and the stage of the liquidation at which the application is made.

144 It also follows that the foregoing analysis does not affect the proper interpretation of the authorities examined below concerning the removal of a liquidator for a lack of impartiality. Many of those authorities were decided in the context of an insolvent liquidation. The content of the duty of a liquidator to act impartially in carrying out the liquidation is not dependent on whether the liquidation is a solvent or an insolvent one. Indeed, the duty of a liquidator to be impartial provides one of the key standards by which the discharge of all his other duties is to be measured. On this note, therefore, I turn to address the principles and cases on the removal of a liquidator on the basis of his lack of impartiality.

Impartiality of the liquidator

145 Impartiality is the quality of being free from prejudice or bias. It is to be distinguished from a closely allied concept – independence – which is the quality of not being dependent on others for the formation of opinions or guidance of conduct: see "impartiality, *n*." and "independence, *n*.", *Oxford*

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English Dictionary Online (Oxford University Press, 2017), <www.oed.com> (accessed 31 May 2017). Thus, while a person who lacks impartiality may lack independence in the sense that he is predisposed to act according to and thus dependent upon opinions that confirm his bias, a person may lack independence for a variety of reasons (such as being weak-willed or impressionable) which may not amount to a lack of impartiality.

146 In the present case, it is a lack of impartiality, not independence, which Petroships alleges warrants the removal and replacement of the liquidators. A lack of impartiality is a type of personal unfitness recognised by the case law to constitute "cause" for removing a liquidator. In this regard, it is appropriate first to summarise what precisely Petroships must show to succeed, before explaining the basis for these requirements.

147 Petroships must show that removal of the liquidators would serve the real, substantial and honest interest of the liquidation and the purpose for which the liquidators were appointed. Petroships may attempt to do so by showing that the liquidators lack impartiality in the sense that they are biased in favour of any one or more of the members or creditors of Wealthplus. In this regard, Petroships may show that the liquidators are either guilty of actual bias or have so conducted themselves as to give rise to a reasonable perception of bias. The court will give significant weight to perceived bias on the part of the liquidators if Petroships can demonstrate a subjective belief that the liquidator is biased and that the belief is reasonable, and that as a result, Petroships has lost confidence in the ability of the liquidator to carry out the liquidation without fear or favour. It will be seen that these requirements are both sound in principle and supported by authority, which I now turn to analyse.

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148 When a company is put in liquidation, control of the company is removed from the self-interested majority and vested in a disinterested liquidator. The liquidator has an obligation to discharge his duties and to exercise his powers competently and impartially, without fear or favour. At the core of the liquidator's duties is the duty to get in, realise and distribute the company's assets. In a members' voluntary liquidation, the commencement of liquidation has certain consequences under the Act. First, under s 300, the liquidator is obliged to apply the property of the company *pari passu* in satisfaction of its liabilities, with the surplus (the company being solvent) being distributed to shareholders in accordance with their shareholding. Second, under s 294(2), all of the directors' powers cease except insofar as the liquidator approves. The liquidator is therefore accountable for his decisions as liquidator only to the court and not to the members and even less so to the directors. As *McPherson* ([119] *supra*) puts it at para 9–054, "the liquidator must use his or her own discretion in the management of the affairs and property of the company, in incurring expenses, and in distributing the assets". See also *Petroships (HC)* at [155] to [157] where I made observations similar to what I have set out here.

149 The impartiality of the liquidator is the cardinal prerequisite for the proper fulfilment of the liquidator's duties. In the words of Cotton LJ, "[l]iquidators ought not to consider themselves partizans either on one side or the other": *In re Adam Eyton* ([118] *supra*) at 304. If a liquidator is biased in favour of a certain faction of the shareholders or beholden to certain directors or in the pocket of a certain creditor, then there is a real risk that he will be biased in his dealings with proofs of debt or in the exercise of his discretion to commence proceedings. He may also fail to realise assets and their proper value,

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either for personal gain or because of bias in favour of the buyer of those assets.

150 A liquidator also should not conduct himself so as to give rise to a perception of bias, even if he is not in fact biased. As V K Rajah JC (as he then was) said in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset*") at [70], a liquidator, whether in voluntary or compulsory liquidation, "must be seen to be properly wearing the mantle of objective neutrality untarnished by any special interests…". There are at least two reasons for this, one instrumental and the other conceptual.

151 Instrumentally, conduct on the part of a liquidator which leads to a perception of bias engenders distrust in the liquidator amongst the stakeholders in the liquidation. That distrust is inimical to the interest of the liquidation because it may cause the liquidation to be side-tracked into value-destroying satellite litigation by those stakeholders challenging the liquidator's every act or omission or seeking to remove or replace him.

152 Conceptually, a liquidator performs more than a merely administrative role in overseeing the liquidation. He also performs a quasi-judicial role, for example, in adjudicating proofs of debt: *Re Chevron Furnishers Pty Ltd (rec and mgr apptd) (in liq)* (1993) 12 ACSR 565 at 569. And that quasi-judicial role has an institutional character: in a compulsory liquidation he is an officer of the court (s 288 of the Act), and in both compulsory and voluntary liquidation he is subject to the court's supervision (ss 313(2) and 315 of the Act). Therefore, he ought not only to be actually free of bias; he ought to be perceived to be free of bias: see in the judicial context *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256 at 259.

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153 This distinction between actual and perceived bias was drawn in broader terms by Jessel MR in *In re Sir John Moore* ([115] *supra*), as I have alluded to at [121] above. His Lordship distinguished between (a) cause shown by virtue of the unfitness of the liquidator and (b) cause shown by virtue of the circumstances the liquidator is mixed up with. This distinction, in my view, illustrates two different ways in which an applicant may attempt to show cause within the meaning of s 302 of the Act on the basis of a liquidator's lack of impartiality. First, an applicant may attempt to show cause by producing evidence of actual bias on the part of the liquidator. *In re Sir John Moore* would be the classic example of this type of case. Second, an applicant may attempt to show cause by producing evidence of conduct by the liquidator which is capable of being perceived as evidence of bias. *In re Adam Eyton* would be a classic example of this type of case. In fact, many cases in which a liquidator has been removed by the court for reasons other than actual partiality may be rationalised under this second ground.

154 Next, the cases also show that an applicant relying on a perception of bias must show that his perception is reasonable. Little weight, if at all, will be given to a mere suspicion or a baseless perception of bias. Even though such a suspicion or perception may result in satellite litigation which may jeopardise the interest of the liquidation (see [150] above), an applicant cannot be allowed to pull himself up by his own bootstraps by commencing satellite litigation and then relying on that litigation as evidence of the merit of his otherwise unmeritorious application. That would no doubt be contrary to the interest of the liquidation.

155 Even where an applicant holds an unreasonable but sincere belief that the liquidator is biased, that belief, once corrected by the court in dismissing his application, can no longer justifiably affect his confidence in the liquidator. The

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removal of the liquidator in those circumstances would therefore not serve the interest of the liquidation. Where however there are reasonable grounds for a belief that the liquidator is biased, either owing to his prior association with the company or any other circumstance (*Advance Housing Pty Ltd (in liq) v Newcastle Classic Developments Pty Ltd* (1994) 14 ACSR 230 at 234), the applicant may experience a reasonable loss of confidence in the liquidator which cannot be cured except by the liquidator's removal, even if the liquidator is shown in fact to have conducted the liquidation impartially thus far.

156 The requirement for a reasonable loss of confidence was explained in *Re Edennote Ltd* [1996] 2 BCLC 389, a case involving a company in compulsory liquidation. To obtain funds to carry out the liquidation, the liquidator sold the sole shareholder of the company the company's right of action against a debtor. At first instance, the judge removed the liquidator on the basis that the liquidator had failed to negotiate a better price for the sale. The Court of Appeal reversed the judge's decision. It held (at 399*b*) that while the liquidator made a "serious mistake", he was nevertheless honest. He did not exercise his power of sale in wilful disregard of the creditors' interests. Accordingly, it was held (at 398*h*) that "no adequate grounds for a reasonable loss of confidence [had] been shown". On the criterion of reasonableness, Nourse LJ, with whom Millett LJ agreed, said (at 398*e*–*f*):

> [The judge below] said that the decision in *Re Keypak Homecare Ltd* was founded on and usefully illustrated the general principle that a liquidator must act in the interests of the general body of creditors and should not continue in office if in the circumstances the creditors no longer had confidence in his ability to realise the assets of the company to their best advantage and to pursue claims with due diligence (see [1995] 2 BCLC 248 at 268). Again, I respectfully agree. But there is an important qualification, which is indeed accepted by [counsel for the applicants]. The creditors' loss of confidence must be reasonable. Moreover, the court does not lightly remove its own officer and will, amongst other considerations, pay a due regard

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> to the impact of a removal on his professional standing and reputation.

157 This passage suggests that the requirement of reasonableness exists also to ensure "fair play" (*In re Adam Eyton* at 306) or fairness to the liquidator in terms of his professional standing and reputation. I consider this to be a factor properly to be taken into account under s 302 at the discretionary stage, only after cause has been shown: see [116] above. This is because conceptually, the interest of the liquidator has nothing to do with the interest of the liquidation or the purpose for which he was appointed. In any event, this serves only to demonstrate the importance of establishing a reasonable loss of confidence in the liquidator's impartiality – or of his other competencies as the case may be – in a s 302 application.

158 More broadly, the requirement of reasonableness is a function of the rule that an applicant must show, if he has the more general perception that the interest of liquidation is being jeopardised, that such a perception is a reasonable one. This is clear from the following passage in *Chua Boon Chin* (at [24]):

> Long Innes J in *George A Bond & Co Ltd, Re* (1932) 32 SR (NSW) 301 had this to say:
>
> > In my view neither suspicion alone, nor even a *prima facie* case which might be rebutted, would either justify or require removal unless there were reason for apprehension that the interests of the liquidation would be imperilled by the continuance in office of the suspect, or unless it were shown that such removal would be for the advantage of those interested in the assets of the company.

159 It might be thought that there is an analogy with the rule against apparent bias under the principles of natural justice. I do not pursue this analogy and I do not use the word "apparent" here for two reasons.

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160 First, for the purposes of ss 268 and 302, it is usually necessary to show that an applicant must subjectively perceive the bias which he alleges to be reasonable. This is because it is his loss of confidence in the liquidator that puts the liquidation at risk. I say "usually" because the overarching test – indeed the only decisive test – for the purposes of s 302 is whether removal is in the interest of the liquidation and for the purpose for which the liquidator was appointed. In contrast, "apparent bias" is in the first place a legal test *stricto sensu* under the principles of natural justice.

161 Second, the test for apparent bias is hypothetical in nature with regard to the perspective from which it is considered. No subjective perception of bias needs to be proved. The question is simply whether a reasonable member of the public could harbour a reasonable suspicion of bias: *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR(R) 85 at [76]. However, on an application to remove a liquidator, if an applicant is unable to show that he holds a subjective belief that the liquidator is biased, there is no room for the argument that he has lost confidence in the liquidator's ability to carry out the liquidation with competence and impartiality. Therefore, whether the applicant genuinely believes that the liquidator is biased is a relevant and weighty consideration.

162 Nevertheless, I reiterate that since the overarching test under s 302 is whether removal of the liquidator is in the interest of the liquidation and for the purposes for which he was appointed, the absence or existence of a subjective belief in bias is not dispositive of an application under s 302. There is still the principle that a liquidator by virtue of his quasi-judicial role should be seen to be without bias: see [150] above.

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Bias demonstrated by failure to investigate

163 The usual requirement of a subjective and reasonable belief of bias has been consistently applied in cases concerning an alleged failure or refusal to investigate the affairs of a company in liquidation. That is the basis on which Petroships brings the two applications before me. The cases examined below will show, in particular, that where a liquidator's failure to investigate the company's affairs is presented as evidence of bias on his part, it is necessary for the court to examine whether he has a rational basis for refusing to investigate. Where it is clear that the liquidator has chosen not to investigate because the circumstances in his judgment do not warrant an investigation, his decision not to investigate can hardly be regarded as evidence of bias. By contrast, if his decision not to investigate is shown to be arbitrary or without basis, or if it was made to further his personal interest or protect the interests of one faction of the members or creditors in preference to those of another, such a decision may indicate a lack of competence or a lack of impartiality on his part, depending on the facts of the case.

164 In *Citrix Systems Inc v Telesystems Learning Pty Ltd (in liq)* (1998) 28 ACSR 529, the applicant was a creditor of a company in creditors' voluntary liquidation. The applicant asked the liquidator to investigate a debt of $56,000 owed to the company. The applicant alleged that the debt had been overstated and was worth only $9,000. The liquidator initially took the unqualified view that the amount was correct. But when the application was brought, he changed his position, stating in his affidavit without explanation that he now thought the matter required further investigation. The court also noted that the liquidator had been involved in the affairs of the company prior to his appointment as its administrator. On these grounds, the court held that the applicant had a subjective belief on reasonable grounds that the liquidator was biased, and

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removed the liquidator from office. Moore J examined the relevant Australian authorities and summarised their effect as follows (at 537):

> What emerges from these authorities is that a liquidator will only be removed in circumstances where, for present purposes, he has not given the appearance of being independent. A creditor who believes this to be the position must establish that its belief is reasonably based.

165 In *City & Suburban Pty Ltd and others v Smith (as liquidator of Conpac (Aust) Pty Ltd (in liq)) and another* (1998) 28 ACSR 328, the applicants were trade creditors of a company in creditors' voluntary liquidation. There was evidence to suggest that the directors had used the company's funds to earn a secret profit. As this appeared to involve breaches of fiduciary duty, the court held that no satisfactory explanation had been given by the liquidator for his failure to conduct a proper investigation into the matter. The court also took into account the liquidator's failure to investigate alleged insolvent trading by the directors and his lax policy on payment of post-administration entertainment expenses and staff salaries. Without deciding whether the liquidator actually favoured the directors' interests, the court concluded that the creditors' loss of confidence in him was justifiable (at 338):

> In all the circumstances I am satisfied that the liquidator's conduct has led to a justifiable loss of confidence in him on the part of the committee of inspection and, no doubt, many of the creditors represented by the committee. That is a matter which, amongst other matters, can be relevant to determining whether it is appropriate for the liquidator to continue as liquidator of the company … I agree with the liquidator's contention that loss of support of the creditors is not, of itself, a sufficient reason to remove a liquidator: see *Network Exchange* [(1994) 13 ACSR 544] at 550 per Hayne J. However, a *justifiable* loss of confidence in the liquidator by the committee of inspection is clearly of greater significance and relevance.
>
> [emphasis in original]

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166 In *Independent Cement and Lime Pty Ltd v Brick and Block Co Ltd (in liq) (recs and mgrs apptd) and others* [2010] FCA 352 ("*Independent Cement*"), a company was in creditors' voluntary liquidation. An unsecured creditor of the company applied to have the liquidators removed on the basis of what they had done as administrators when the company was in administration and later when the company proposed a deed of company arrangement. The court's impression was that the liquidators had been too willing to support the deed of company arrangement without having first explored the potential claims available if the company were wound up. In their first creditors' report, they stated that "the purpose of our appointment is to assist the Directors in restructuring the affairs of the company". The court briefly entertained the possibility (at [50]) that "this suggest[ed] a deference to directors which justifie[d] a loss of confidence in the ability of the liquidators to pursue claims against the directors". But the court expressed no firm view on this. The court then considered the possible solution of appointing special-purpose liquidators to investigate those claims, since the current liquidators were, by virtue of the length of their appointment and their previous role as administrators, so familiar with the company and its affairs that it could be said to be contrary to the interest of the liquidation to remove them from office entirely. But the court felt in the end that it was more efficient to appoint new liquidators since a substantial part of their work would involve investigating the potential claims, which should be done with independence. The court therefore decided, in the interest of the liquidation, to remove the liquidators. As the plaintiff's lack of confidence in the liquidators was reasonable, the court also gave weight to the plaintiff's willingness to fund its nominee liquidators to investigate those potential claims (at [52]):

> The plaintiff has previously indicated that it is willing to fund its nominee liquidators up to $50,000 to investigate such claims. Ordinarily, I would be reluctant to give much weight to such an offer, lest it be seen as permitting a creditor to purchase its preferred liquidator. In this case, however, the

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> plaintiff has been forced into a position of funding a liquidator's investigation because of the lack of confidence it has in the present liquidators, a lack of confidence which, in the circumstances, is not unreasonable.

167 Finally, in *Re ACN 151 726 224 Pty Ltd (in liq) (previously Ridley Capital Holdings Pty Ltd)* [2016] NSWSC 1801 ("*Re ACN 151*") a major judgment creditor of a company in creditors' voluntary liquidation asked the liquidators to undertake a public examination of one of the company's directors and indicated that it was prepared to fund the exercise. The liquidators refused to investigate unless the creditor could produce some evidence of possible fraudulent conduct. The liquidators thereby also refused the creditor's request that the liquidators retain the creditor's solicitors for the purposes of conducting the examination, a request presented ostensibly for the purpose of facilitating an efficient investigation. The court held that the liquidators could not be faulted for declining to retain the creditor's solicitors in order to avoid a possible conflict of interest. The court then held that the liquidators' independence could not be impugned on the basis of their refusal to investigate. Having now seen the documents and indicated their willingness to investigate provided funds were forthcoming and provided they were permitted to retain independent legal representation, there was no reason why the liquidation could not now properly proceed.

168 Black J's reasoning in *Re ACN 151* (at [69] to [70]) demonstrates the important point that where a liquidator's failure to investigate the company's affairs is presented as evidence of bias on his part, it is necessary for the court to examine whether he has a rational basis for refusing to investigate:

> It seems to me that [the plaintiff's] submission that the liquidators, in fact, lacked interest in conducting an examination, or that there is perceived lack of independence based upon it, does not have sufficient regard to the facts that the liquidators had requested, but not at any relevant time been

> provided by [the plaintiff] with, the full range of relevant documents. That submission also did not have sufficient regard to the fact that [the plaintiff] had sought to require the liquidators to conduct that examination using [the plaintiff's] solicitors to do so, and I consider that the liquidators could properly consider they should not proceed on that basis. That submission is also undermined by the fact that the liquidators, now having had access to those documents, have indicated that they consider an examination would be warranted, provided that they are funded for it and permitted to retain independent legal representation. There is no reason to accept Mr Copeland's evidence as to that matter.
>
> It seems to me that these matters raised no real question as to the liquidators' independence or the adequacy of the performance of their role in an unfunded liquidation. It is, of course, commonplace that a liquidator appointed by a company's directors in a voluntary liquidation, and initially partly funded by them or the company, may ultimately conduct examinations of those directors or bring proceedings against them. There is no reason to think that the liquidators would not take that course if a proper basis to do so emerges and they are funded to do so.

169 On this particular point, however, I accept the liquidators' submission that regard must be had to the general principle that the court should be reluctant to interfere with a liquidator's exercise of professional judgment in making decisions in the course of performing his duties.[68] I agree with the view expressed in *McPherson* ([119] *supra*) at para 8–027, an earlier version of which was cited to me by the liquidators,[69] that the court will not intervene unless a liquidator has not exercised his discretion in good faith or has acted in a way in which no reasonable liquidator would have acted. This applies to both compulsory and voluntary liquidation because in both cases, the liquidator is under the ultimate supervision of the court: see ss 313(2) and 315 of the Act.

170 It follows that the burden lies on an applicant to demonstrate a subjective

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68 Interveners' Supplementary Skeletal Submissions dated 7 November 2016 at paras 5 to 6.

69 Interveners' Supplementary Skeletal Submissions dated 7 November 2016 at para 6.

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belief that a liquidator has taken a decision not to investigate a certain issue without a rational basis, if the applicant seeks to present such a decision as evidence of perceived bias on the part of the liquidator. This proposition is supported by the court's general deference to the liquidator's professional decisions, and also by the general rule, articulated by Thesiger LJ in *In re Sir John Moore* ([115] *supra*) at 332, that it is the applicant who bears the burden of showing cause to satisfy the court that the liquidator should be removed.

171 To assess what constitutes a "rational basis", Petroships submits that the court should adopt the rational creditor's perspective. It relies on *Re STX Pan Ocean (Hong Kong) Co Ltd (in liquidation)* [2014] HKCU 2256 ("*Re STX Pan Ocean*") at [83] to submit that all it needs to show is "sufficient *prima facie* evidence raising issues which rational creditors could think need investigation" and "in which the outcome may be financially favourable for them".[70] This is the test applied by the Hong Kong courts to decide whether a voluntary winding up should be converted into a compulsory winding up so that the liquidator will be conferred powers to carry out necessary investigations into the company's affairs as he sees fit: *Re Goldcone Properties Ltd (in creditors' voluntary liquidation)* [1999] 4 HKC 602 at 618G to 619B, cited in *Re STX Pan Ocean* at [51]. I do not consider this difference in context to be fatal to the applicability of the test to the removal of liquidators. But I also do not believe it was ever intended to operate as a test, even in its original context.

172 The phraseology of that test was originally employed by Hoffmann J (as he then was) in *Re William Thorpe & Son Ltd* [1989] 5 BCC 156 ("*Re William Thorpe*"). That case, like *Re STX Pan Ocean*, concerned a creditors' application for a members' voluntary winding up to be converted into a compulsory

70 Plaintiff's Written Submissions dated 29 September 2016 at para 56.

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winding up. This was to enable an investigation into the circumstances in which the directors swore the declaration of solvency, on which the applicant's evidence had cast suspicion, and the conduct of the liquidator who presided over what appeared to have been a significant loss of the company's assets. A majority of creditors in number and value were in favour of the application. Hoffmann J, who allowed the application, said (at 159C):

> I am certainly not in this case in a position to say that the petitioning creditors are being perverse or masochistic. The matters which they say require investigation are on the evidence questions which rational creditors could think need investigation and in which the outcome may be financially favourable for them as well. On the other hand, Mr Machin's submissions for the opposing creditors may well be right. In three years' time his clients may have the empty satisfaction of being able to say, "I told you so". But that, in my judgment, is not a sufficient reason for overriding the views of the majority.

173 It can be seen that Hoffmann J's words were purely descriptive of the questions that the creditors in *Re William Thorpe* had raised. They were not prescriptive. In fact, the factor to which he gave the most weight in his decision and to which any prescriptive value could be ascribed, if at all, was the majority's view in favour of converting the voluntary liquidation into a compulsory liquidation. Further, to the extent that Petroships relies on perceived bias, it will not be relieved of the need to demonstrate a subjective belief of bias by adverting to the perspective of the rational creditor. Finally, a failure to investigate a question which rational creditors could think needs investigation does not necessarily indicate bias as much as it may also suggest incompetence or negligence on the part of the liquidator. It is with these caveats in mind that I accept the rational creditor's perspective as one of many possible approaches for ascertaining whether a liquidator's refusal to investigate is evidence of bias, whether actual or perceived. I nevertheless prefer to consider whether from the perspective of the liquidator he had a rational basis for refusing to investigate.

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This is the approach taken by Black J in *Re ACN 151*, and I respectfully adopt it.

174 Finally, I will add that the court must take into account all aspects of the liquidation, including its practical dimensions. These include but are not limited to the following:

(a) the costs, delay and disruption associated with the removal and replacement of the current liquidator (*AMP Enterprises* at [27]);

(b) the stage of the liquidation (*Procam* at [27]);

(c) the familiarity of the current liquidator with the company (*Independent Cement* at [51]); and

(d) the impact of removal on the liquidator's professional standing and reputation (*Re Edennote Ltd* at 398*f*; see [157] above).

175 Thus, while proof of actual or perceived bias is a very strong reason for saying that cause has been shown under s 302 of the Act, it is not a determinative reason, although it may be persuasive in the vast majority of cases. The court must not lose sight of the interest of the liquidation and the purpose for which the liquidators were appointed, which remain the overarching focus.

176 With all of these principles in mind, particularly the main propositions of law set out at [109] above, I turn to analyse the facts and the parties' submissions.

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Analysis

177 Petroships' case is that the liquidators are biased in favour of the interveners. Petroships submits that this bias is both actual and perceived. It relies on six principal grounds. They are:

(a) the circumstances of the liquidators' appointment;

(b) the liquidators' refusal to investigate the four transactions and alleged discrepancies in Wealthplus' accounts;

(c) the liquidators' reluctance to address Petroships' queries;

(d) the liquidators' conduct in relation to Megacity's proof of debt;

(e) the liquidators' approval of the former liquidators' remuneration without documentation; and

(f) the liquidators' deference to the interveners at Wealthplus' annual general meeting in 2014.

178 I will examine each of these allegations in turn.

Circumstances of the liquidators' appointment

179 Petroships submits that two aspects of the circumstances of the liquidators' appointment indicate their bias towards the interveners.

180 The first aspect is that the liquidators failed to confirm whether they were independent and impartial when asked to do so by Petroships shortly after their appointment. In so doing, say Petroships, they demonstrated that they were partial to the interveners.[71] I reject this submission. On the very day the

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liquidators were appointed, Petroships wrote to them for substantive answers to a laundry list of questions concerning Wealthplus' affairs. They also imposed unilaterally an unreasonable deadline of two working days for a full reply. When the liquidators replied a day after the deadline to say that they had just taken over the liquidation and needed time to prepare an update for the shareholders, Petroships' immediate response – on the same day – was to accuse them of a lack of independence and impartiality. Petroships said to them:[72]

> The circumstances leading to your appointment as Liquidators of the Company has given our client grounds to be concerned about whether you will be allowed to carry out your duties as Liquidators of the Company free of interference or undue influence.
>
> Our client is disappointed that you have not been forthcoming in confirming your independence and impartiality by providing answers to the EGM Questions.
>
> …
>
> If you refuse to answer the questions, our client can only infer that you are unable to confirm your independence and impartiality in the administration of the liquidation of the Company.

181 This was followed by successive letters levelling similar accusations: see [42] to [47] above. Yet, during this period, the liquidators adjudicated and admitted Petroships' proof of debt for $1.1m and paid it in full.

182 In these circumstances, I fail to see how the liquidators' choice not to reply to this accusatory letter is evidence of their partiality towards the interveners. If anything, this exchange of correspondence is evidence that it was Petroships who was prejudiced against the liquidators from the outset.

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71 Plaintiff's Reply Submissions dated 7 November 2016 at para 50.

72 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1080 at para 7 and p 1081 at paras 8 and 10.

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183 Petroships behaved in a similarly hostile manner towards the former liquidators, doubting their independence even before they had commenced their duties and without reason. In its very first letter to the former liquidators, Petroships said:[73]

> Finally, we are instructed that your clients' appointment as liquidators of the Company have [*sic*] been proposed and approved by [Koh Teak Huat and Koh Keng Siang] and this gives our client reason to question their impartiality and independence.

184 I therefore accept the interveners' submission, and accordingly find, that Petroships was predisposed to adopt an antagonistic stance towards both the former and the current liquidators from the day of their appointment.[74]

185 The second aspect of the liquidators' appointment on which Petroships relies as demonstrating their partiality towards the interveners is the liquidators' decision to withdraw their predecessors' application for directions within weeks of their appointment.[75] Petroships argues that since the liquidators claimed that they needed time to review the relevant information and documents, they could not have arrived, within those weeks, at a rational basis to decide that the application was unnecessary. Thus, say Petroships, the liquidators must have withdrawn the application out of bias.

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73 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1050 at para 12.

74 Interveners' Written Submissions dated 29 September 2016 at para 54.

75 Plaintiff's Reply Submissions dated 7 November 2016 at para 50.

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186 I do not accept this submission. The former liquidators applied to court for directions only because there was a disagreement between the shareholders as to whether an investigation was necessary, not because they had formed an independent, positive view that there were *prima facie* grounds warranting an investigation into the four transactions. Thus, in his supporting affidavit for the application, one of the former liquidators said:[76]

> At the outset, I wish to state that in making the application for directions herein, we are seeking directions from the Court for the requisite powers for us to carry out investigations in order for us to properly discharge our duties as liquidators of the Company. We have not conducted any detailed reviews and/or investigations into the complaints made by Petroships in [Petroships' s 216A application], and have thus not reached any conclusion on the merits of the complaints.
>
> This application is necessitated by the fact that one set of shareholders (i.e., Petroships) has made a request for the liquidators to conduct the investigations while the other set of shareholders (i.e., KBCE and Megacity) have vehemently opposed any such investigations.
>
> [emphasis in original]

187 There is therefore no basis to say that the current liquidators withdrew the application for directions out of partiality towards the interveners because it was contrary to a positive finding by the former liquidators that there were grounds which warranted investigation.

Refusal to investigate the four transactions and Wealthplus' accounts

188 The principal issue on the liquidators' refusal to investigate the four transactions and the discrepancies in Wealthplus' accounts is whether the liquidators had a rational basis for deciding not to do so. The liquidators have presented a number of reasons for not investigating the four transactions. I will consider them in conjunction with Petroships' submissions on why they are

[76] Koh Keng Siang's Affidavit in CWU 119/2016 dated 16 September 2016 at p 447.

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inadequate. I state at the outset that my review of the reasons given by the liquidators is not and should not be read as an attempt to substitute my judgment for theirs.

Ongoing litigation in Petroships' s 216A application

189 First, the liquidators explain that they did not see a need to cause Wealthplus to incur costs for investigating the four transactions when those very transactions were the subject-matter of litigation in Petroships' s 216A application between Petroships, Wealthplus and the interveners.[77] This litigation was ongoing from August 2012 to December 2015. I accept this explanation. I find that the liquidators' decision to await the outcome of that application was in all the circumstances reasonable. If they had commenced an investigation while that application was pending, the costs incurred over those three years in that investigation would been entirely wasted if the outcome of the application had been either to find that there was no *prima facie* case for Wealthplus to pursue against the Megacity-appointed directors over the four transactions or that Petroships should be granted leave to pursue in Wealthplus' name the Megacity-appointed directors over the four transactions.

190 Next, the liquidators make the further argument that certain facts which were established in my decision in *Petroships (HC)* ([5] *supra*) are the implicit answer to Petroships' request for the liquidators to investigate. They rely in particular on my finding that Petroships did not commence the s 216A application in good faith and on the undisputed fact that Alan Chan was a director when Wealthplus entered into the four transactions.[78]

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77 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at para 55.

78 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at paras 56 to 57.

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191 I reject this submission insofar as it suggests that my determinations in *Petroships (HC)* resolved the merits of whether there was a need to investigate the four transactions. I address this point further at [212] below. I am, however, prepared on the evidence before me to arrive again at the findings which I have summarised at [49] above. In short, I find again that Petroships lacked good faith in bringing the s 216A application. An important reason for my finding that Petroships lacked good faith is that Alan Chan had personal knowledge of Wealthplus' involvement in the four transactions, yet Petroships did not include Alan Chan as a potential defendant. These findings about the s 216A application, in turn, suggest that Petroships now has no genuine belief that the discrepancies it identifies relating to the four transactions call for an investigation by the liquidators.[79] If they were truly dubious transactions, it remains curious that Petroships did not raise them before Alan Chan resigned as a director in September 2009.

192 In my judgment, therefore, Petroships has no genuine belief that the liquidators' refusal to investigate the four transactions is evidence of the liquidators' partiality towards the interveners.

Interveners' explanations tally

193 Next, the liquidators say that the interveners' explanations "tallied up" with Wealthplus' documents, in particular, Wealthplus' annual reports for 2008, 2009 and 2010 respectively.[80] Against this, Petroships argues that the liquidators' submissions in the present case constitute the first time they have proffered these explanations.[81] To Petroships, this suggests that the liquidators

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79 Plaintiff's Reply Submissions dated 7 November 2016 at paras 67 to 74.

80 Liquidators' Skeletal Submissions dated 29 September 2016 at paras 60 to 63; Liquidators' Supplementary Skeletal Submissions dated 7 November 2016 at para 10.

81 Plaintiff's Written Submissions dated 7 November 2016 at para 65.

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have exercised no independent consideration of Petroships' concerns over the four transactions and Wealthplus' accounts and are merely parroting explanations which have been fed to them by the interveners.

194 I accept that the liquidators could have communicated these explanations to Petroships earlier. I would have accorded these explanations more weight if they had, for example, accompanied the liquidators' letter dated 31 December 2015 in which they set out their responses to some of Petroships' other queries. There is, however, no evidence upon which to infer, as Petroships invites me to, that the liquidators have exercised no independent consideration in arriving at these explanations. The liquidators have set out before me why in their professional opinion these transactions are accounted for in Wealthplus' annual reports and why Wealthplus' financial statements do not raise concerns.[82] I have examined their opinion against the annual reports and I cannot say that there is no rational basis for the opinion. To illustrate the point, I will examine two significant issues that Petroships say warrant an investigation.

195 First, Petroships submits that there are unresolved discrepancies relating to the first of the four transactions, namely, the alleged transfers of various sums totalling $14.95m from Wealthplus to various group companies.[83] In Petroships' view, these appear to be unsecured interest-free loans that Wealthplus granted to its related companies with no benefit to Wealthplus at all.[84]

196 In my view, Petroships has not discharged the burden of showing that the liquidators had no rational basis for taking the view that this discrepancy does not call for an investigation. It will be recalled that Petroships asked about

82 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at para 59.

83 Plaintiff's Reply Submissions dated 7 November 2016 at paras 68 to 72.

84 Plaintiff's Written Submissions dated 29 September 2016 at para 54(a).

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the $14.95m before Wealthplus was put in liquidation. At Wealthplus' 2011 annual general meeting, a director explained that the transfers were intended to reimburse KBGL group companies for the acquisition costs of land in China pursuant to the terms of the joint venture agreement: see [28(a)] above.

197 It turns out that the director was mistaken. At the hearing of Petroships' s 216A application, Koh Keng Siang clarified that the "transfers" totalling $14.95m were in fact receivables, that is, monies owing to Wealthplus, and were therefore assets of Wealthplus.[85] These monies were proceeds of the sale of land in China after the joint venture fell through. But they were still being held in the Chinese accounts of Wealthplus' subsidiary companies because there was uncertainty over whether the Chinese tax authorities would permit the funds to be transferred to Singapore. These monies were therefore regarded as Wealthplus' receivables. This state of affairs was reflected accurately in, amongst other documents, Wealthplus' 2009 annual report.[86] I accept this explanation. Indeed, I came close to accepting this explanation in *Petroships (HC)* at [131] to [132], in the course of considering Alan Chan's *bona fides* in making these allegations:

> The first claim Petroships wishes to pursue in the derivative action is a claim to recover the transfers between 2003 and 2009 to group companies of sums totalling $14.95m. This amount is the total reflected in Wealthplus' 2009 accounts as receivables due to Wealthplus from KBGL, KBCE, Megacity, other related companies and third parties as at 31 December 2009. I leave aside for the moment the fact that these "transfers" are in fact receivables (*ie* debts due to Wealthplus and therefore assets of Wealthplus) rather than outright transfers of money from Wealthplus without any obligation to repay them. I leave aside also that there is absolutely no evidence that these assets are irrecoverable and that there is, on the contrary, evidence that they have been in large part recovered.

85 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 249.

86 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 977.

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> The sum of $14.95m is the figure reflected in Wealthplus' accounts as at 31 December 2009, and therefore must arise from events before 31 December 2009. Further, Petroships' own computation of these "transfers" shows that their total value at the end of 2008, Alan Chan's last full year as a director, stood at $18.65m, or $3.7m *more* than their value at the end of 2009. An analysis of the figures for 2009 shows that the absolute outflow of funds in that year was only about $474,000. Even if it is assumed that all of that outflow took place *after* Alan Chan resigned as a director in September 2009, that still means that 96.8% of the $14.95m that Petroships seeks leave to recover for Wealthplus was transferred while Alan Chan was a director of Wealthplus.
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> [emphasis in original]

198 Petroships has not presented the liquidators with any new complaint about the alleged transfers totalling $14.95m. Petroships' complaints today about the inconsistency between the explanation offered by the directors at the annual general meeting in 2011 and the explanation adopted by the interveners and the liquidators after the s 216A application is now water under the bridge. I cannot say that there is no rational basis for the liquidators to have given those complaints scant regard.

199 Indeed, I do not consider that Petroships genuinely believes that there is any substance at all to their complaint that the four transactions were entered into against Wealthplus' interest. First, as the quotation at [197] above illustrates, Alan Chan was a director of Wealthplus when these transfers allegedly happened. But he did not take issue with them during his tenure. Second, I note that in June 2012, when the interveners asked Petroships to provide a breakdown of the various sums that Wealthplus had allegedly transferred out, Petroships refused to do so.[87] Alan Chan did not deny this when he was cross-examined in the s 216A application. In the circumstances, I do not see how I can infer that the liquidators' refusal to investigate the alleged

87 Certified Transcript of hearing on 3 October 2016, p 142 at lines 8 to 9; Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016, p 1031 at para 4.

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transfers is evidence of bias or could reasonably be perceived by Petroships as such.

200 The second issue concerns alleged discrepancies in Wealthplus' 2012 accounts which Petroships says require investigation. Petroships submits that the explanations for these discrepancies which the liquidators have set out in Victor Goh's affidavit are not based on their personal knowledge of Wealthplus' accounts[88] and is nothing more than the liquidators simply putting forward the interveners' explanation. The liquidators have, so the argument goes, demonstrated partiality towards the interveners by accepting their explanations at face value in deciding not to investigate these discrepancies.

201 The liquidators argue that the only issue here is "a matter of putting across that point".[89] In other words, had the affidavit been drafted better, it would have been clear that the liquidators had indeed applied their mind to the discrepancies and did indeed offer the explanations as their own. The liquidators also say that the explanations were based on the work that they had done since their appointment.[90] The suggestion seems to be that if one considers the substantial amount of work they have done in recovering Wealthplus' assets – and I accept that they have done substantial work – it is unlikely that their explanations of the discrepancies in Wealthplus' accounts could be interpreted as the mere repetition of another's.

202 I appreciate the force of Petroships' argument to the extent that I do not see in Victor Goh's affidavit any express mention of agreement or disagreement with the interveners' explanation for the alleged discrepancies in Wealthplus'

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88 Plaintiff's Reply Submissions dated 7 November 2016 at para 76.

89 Certified Transcript of hearing on 3 October 2016, p 126 at line 25.

90 Certified Transcript of hearing on 3 October 2016, p 126 at line 26.

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accounts. The best defence against a charge of bias in such circumstances is an explanation that identifies and assesses the differing views on the company's accounts, and sets out the reasons for preferring one view to the other. The liquidators' explanations in the present case were not of this standard.

203 But equally, this is not a case in which the liquidators have given no reasons or sketchy reasons. Having considered their evidence, and their reasons for the shortcomings in expressing their views on this point, I am satisfied that the liquidators have put independent thought into assessing the interveners' explanations of these discrepancies, and I believe the liquidators' evidence that they accepted these explanations on the basis of work done. This is clear from the following extract on Victor Goh's evidence, in which he refers to the liquidators' ongoing work on Megacity's proof of debt as part of his answer to the alleged discrepancies identified by Petroships between Wealthplus' August 2012 accounts and its declaration of solvency in 2013:[91]

> As for the alleged differences between the [declaration of solvency] and the August 2012 Management Accounts in respect of what was due or owing to the Company, it would appear that both positions are not necessarily incorrect as (i) as stated above, there is a debt due from MIPL to the Company of S$8.2 million; and (ii) as I will explain below, there is also the balance sum of S$9,472,282.00 being "reimbursement cost" still due under the Joint Venture Agreement. The Liquidators are still looking into this issue. If accepted, then this essentially gives rise to a net debt of S$1 million plus owing from the Company. As such, Chan's comparison of the two documents is not a like-for-like comparison.

204 Accordingly, I cannot find that the liquidators had no rational basis for deciding not to investigate Petroships' complaints with regard to the four transactions and Wealthplus' accounts.

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91 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at para 51.

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Shareholders' dispute

205 I turn now to the third principal reason offered by the liquidators for why they did not investigate the four transactions. It is a fact that Petroships as the minority shareholder is in favour of an investigation into the four transactions and the discrepancies in Wealthplus' accounts while the interveners as majority shareholders are not. The liquidators characterise this as a dispute between shareholders.[92] They say therefore that they are unwilling to expend the funds of the company just to resolve this shareholders' dispute, and will investigate only if Petroships, as the party agitating for the investigation, is willing bear the costs of the investigation.[93] To justify their refusal to investigate unless Petroships is willing to fund the investigation, the liquidators rely on *Yap Jeffery Henry* ([124] *supra*) at [30]. In that case, Prakash J held that the liquidator had no obligation to commence legal action against the directors unless he was indemnified for such costs.[94] Petroships was unwilling to fund an investigation previously. Its current position is that it is prepared to pay in full the costs of the investigation if no problems are eventually unearthed.[95]

206 Petroships submits that by taking the position that the issues it has raised are simply a shareholders' dispute, the liquidators have abdicated their duty to exercise their independent judgment as to whether to investigate Wealthplus' affairs and as to what steps to take in order to recover or realise its assets for the benefit of the shareholders.[96] The evidence which best supports Petroships'

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92 Liquidators' Written Submissions dated 29 September 2016 at para 68.

93 Liquidators' Written Submissions dated 29 September 2016 at paras 69 to 72; Certified Transcript of hearing on 3 October 2016, p 119 lines 17 to 20.

94 Liquidators' Written Submissions dated 29 September 2016 at para 71; Certified Transcript of hearing on 3 October 2017, p 129 lines 6 to 12.

95 Certified Transcript of hearing on 3 October 2016, p 24 lines 24 to 29.

96 Plaintiff's Reply Submissions dated 7 November 2016 at para 44.

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submission here is paragraphs 4.11 and 4.14 of the minutes of Wealthplus' annual general meeting in 2014, which read:[97]

> [Victor Goh] clarified that these issues have been brought up in Court and dismissed. If there are any investigations, all the shareholders should agree to it as there will be costs involved.
>
> …
>
> [Victor Goh] further affirmed that investigations will be carried out should the Court ordered [*sic*] it. If otherwise, the investigations should be approved and funded by the shareholders. [Mr Mohan] further interjected that it was also agreed in Court that the investigation should be funded by the party requesting for such investigation.

207 For two broad reasons, I accept Petroships' submission that the liquidators were wrong in principle to view Petroships' complaints as a shareholders' dispute, and somehow therefore a private matter for Petroships.

208 First, as I have mentioned (at [148] above), a liquidator bears sole responsibility for the discharge of his duties. He is for this purpose accountable ultimately only to the court. While a liquidator may well find himself caught in the middle of a dispute between shareholders, that is an inevitable incident of the office that he occupies. The hard decisions presented by that inevitable incident cannot be avoided either by adopting the path of least resistance or by adopting a middle path. The liquidators in this case have before them a set of complaints which a minority shareholder says warrant investigation and which the majority shareholders say do not. The liquidators have, in effect, agreed to investigate the complaints if all members agree. The liquidators have described this approach[98] as "appeasing" an embittered member out of an abundance of caution. But that is not the correct approach. The liquidator's task is to make the

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97 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at p 65.

98 Certified Transcript of hearing on 17 November 2016, p 44 lines 2 to 3.

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hard decisions which go with his office regardless of whom it pleases or displeases.

209 Accordingly, it was wrong in principle for the liquidators to have made their decision to investigate contingent on the members' agreement *inter se*. This is most apparent from Victor Goh's opinion, recorded at paragraph 4.11 of the minutes of the annual general meeting in 2014, that if there was to be an investigation, the shareholders should agree to it unanimously, as there would be costs involved. I should add parenthetically that it was equally wrong in principle for the former liquidators to take no position on the need to investigate and instead to seek to leave that decision entirely to the court on an application for directions.

210 This brings me to my second reason, which is that the liquidators' concern about incurring costs is not a compelling reason for leaving the decision to investigate to the members. Where a solvent company is involved, the lack of funding is generally not a good reason for declining to investigate a matter which has been found to warrant investigation (*cf* s 323(1) in a compulsory liquidation). The liquidator of a solvent company has direct access to funding for an investigation in the form of the liquidation surplus. If he forms a view that an investigation is warranted, it is within his power – and it might even be said that it is his duty – to use that surplus to fund it. That is so whether or not the members consent unanimously. Having formed an independent view that an investigation is warranted in his professional judgment, he cannot then be heard to say that he will not investigate unless all members agree that he can apply the liquidation surplus for that purpose. That approach would suggest that he in fact sees no real need to investigate. By the same token, if he has formed the independent view that no investigation is warranted in his professional

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judgment, it would equally be an abdication of his duty to investigate simply because some section of the members agrees to fund it separately.

211 In the present case, Wealthplus is a solvent company. The liquidators therefore have funds at their disposal and under their control to support any investigation which, in the exercise of their independent professional judgment, they consider to be warranted. So they had no good reason to make their decision to investigate contingent on the unanimous agreement of the members. Moreover, their reliance on *Yap Jeffery Henry* is misplaced because in that case, the company had no assets to support the legal action that the complainant creditors had demanded that the liquidator commence: see *Yap Jeffery Henry* at [29].

212 Judging from paragraphs 4.11 and 4.14 of the minutes of the 2014 annual general meeting, the liquidators seem to have laboured under two misconceptions. First, they seem to have misunderstood my decision in *Petroships (HC)* as resolving Petroships' complaints about the four transactions and Wealthplus' accounts. That is not what I did or purported to do. Nowhere in *Petroships (HC)* did I decide there were no merits whatsoever in the statutory derivative action which Petroships was then seeking leave to bring. Second, the liquidators seem to have been under the impression that the decision to investigate is something that all members must agree on. As I have explained, this is not the position in law.

213 Like the court in *Independent Cement* ([166] *supra*), I accept that paragraph 4.11 could justify a finding that the liquidators have been guilty of a deference to the majority which justifies a loss of Petroships' confidence in the liquidators' ability to discharge their duties with impartiality. It could also justify a finding that the liquidators, by deferring to the majority, have

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deliberately abdicated their duty to exercise their own professional judgment in making decisions on investigating the company's affairs and recovering its assets.

214 But I do not make either finding. Instead, I find that the liquidators were genuinely concerned about the significant costs that would be incurred in conducting an investigation. I note that their predecessors estimated that an investigation would cost about $300,000 to $400,000 and take five to six years to complete.[99] I accept that as a realistic estimate, if not an underestimate. I find further that the liquidators erred in good faith by allowing the significance of these costs to overshadow their duty to come to an independent decision in their professional judgment whether to investigate, regardless of members' views.

215 In my analysis of the liquidators' decision not to investigate, I bear in mind the purpose of the liquidation: see [136] above. As this is a solvent liquidation, the liquidators' duty to investigate the affairs of Wealthplus is limited: see [137] above. Their refusal to investigate cannot therefore be criticised as a breach of a positive statutory duty actively to investigate the affairs of Wealthplus with a view to identifying wrongdoing or impropriety. The liquidators do, however, have a duty independently to exercise their professional judgment on whether there is a need to investigate a matter if and when such matter is brought to their attention. For the reasons I have given, I find that they have fallen short of that duty in this one respect. But as I have said, I do not find that this is evidence of bias.

216 Moreover, the liquidators now accept that paragraph 4.11 does not set out the correct position in law as far as their duties are concerned.[100] Having had

[99] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 469 at para 22 to p 470 at para 23.

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their understanding corrected, the liquidators should not now be prevented from continuing to have carriage of the liquidation: see *Re ACN 151* ([167] *supra*) at [69]. In the words of Neuberger J in *AMP Enterprises* ([113] *supra*) at [23], I am "reasonably confident" that the liquidators will now "live up to" the requisite standards. I also do not disregard the fact that the liquidators did examine and were satisfied with Wealthplus' financial affairs. What they should have had the courage to do was to tell Petroships that, on the basis of this assessment, they saw no need to investigate, regardless of the views of the members. But their uninformed desire to appease the shareholders with a cost-effective solution got the better of them and led them to take a middle path, contrary to principle, that they would investigate if all members agreed.

217 In my judgment, the liquidators, like the liquidator in *Re Edennote Ltd* ([156] *supra*), made a "serious mistake", but an honest one. In so erring, they did not wilfully disregard Petroships' interests, and therefore no adequate grounds for a reasonable loss of confidence have been shown. On a proper view of the facts, paragraphs 4.11 and 4.14 of the minutes of the 2014 annual general meeting and the attitude they represent indicate neither that the liquidators were biased nor that Petroships has a reasonable basis for perceiving them to be so.

Reluctance to address Petroships' queries

218 Petroships submits that the liquidators failed to provide their substantive views on Petroships' queries on various issues relating to Wealthplus' affairs.[101] This, says Petroships, is evidence of the liquidators' bias in favour of the interveners.

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[100] Certified Transcript of hearing on 17 November 2016, p 64 lines 22 to 29.

[101] Plaintiff's Written Submissions dated 29 September 2016 at paras 59 to 60.

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219 I reject this submission. The evidence before me shows that the liquidators did give Petroships substantive answers to its queries. After Petroships' s 216A application was finally disposed of by the Court of Appeal, Petroships sought answers from the liquidators on three "pressing" issues (see [67] above). The first concerned the discrepancies in Wealthplus' accounts as at 30 June 2012 prepared by the former liquidators. The second concerned the recovery of receivables. Petroships asked the liquidators to confirm Koh Keng Siang's testimony in the s 216A application that Wealthplus' receivables in the sum of $14.95m had been collected. Petroships also asked why the sum of $8.26m which was due to Wealthplus from Megacity had not been collected. The third issue was the progress of the liquidators' adjudication of Megacity's proof of debt.

220 The liquidators gave substantive answers to these issues through a letter dated 31 December 2015, the contents of which may be summarised as follows:

(a) As regards Wealthplus' accounts, the liquidators were not relying on the balance sheet and statement of assets and liabilities drawn up by the former liquidators to reflect Wealthplus' financial situation as at 30 June 2012. Instead, the liquidators were relying on Wealthplus' books and records, and the final set of unaudited accounts as at 22 August 2012.[102]

(b) As regards the recovery of receivables, the liquidators did not participate in the s 216A application, so they declined to comment on Koh Keng Siang's testimony on the recovery of the sum of $14.95m. As regards the $8.26m, the majority shareholders had communicated their intention to set this sum off against Megacity's proof of debt. This

102 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1120 at para 10.

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position has been neither accepted nor rejected by the liquidators, who were still in the process of adjudicating Megacity's proof of debt.[103]

(c) As regards Megacity's proof of debt, the liquidators suggested that this would take some time because, as Petroships itself had acknowledged, the debt "goes back" in time further than the liquidators had expected.[104] The liquidators also stated that they had queries for Petroships and "will be calling upon your client as well as the other directors shortly, to assist in clearing up some of these queries".[105]

(d) Finally, the liquidators referred to the previous and other queries that Petroships might still have and noted that many of these had been addressed or dismissed by the High Court in the s 216A application. The liquidators nevertheless expressed their willingness to address further queries by stating:[106]

> If your clients still wish for our clients to address any residual queries arising from the liquidation process, please specify these and our client will address them accordingly, if appropriate.

221 While this letter did not address every query that Petroships had ever raised to the liquidators, it did address substantively what Petroships itself considered to be the three most pressing issues. It even invited "residual queries" from Petroships. There is therefore no merit in Petroships' assertion that the liquidators have provided no response to its queries. I agree with the

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103 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1120 to 1121 at para 10.

104 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1121 at para 10.

105 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1121 at para 10.

106 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1121 at para 12.

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interveners that Petroships' assertion that no explanation has been provided is without basis.[107]

222 I appreciate that Petroships' broader complaint is that from the time of the liquidators' appointment in August 2013 to the letter of 31 December 2015, the liquidators were terse in their replies to Petroships' queries on the four transactions, Wealthplus' accounts and Megacity's proof of debt, among other issues. On the other hand, the liquidators' position is that, because they were appointed after Petroships commenced its s 216A application, they preferred to wait until that application was finally disposed of before investigating the four transactions.[108]

223 I note that in principle, the liquidators' obligation to discharge their statutory duties did not strictly depend on the rights of Petroships as a minority shareholder, which was the issue before the court in the s 216A application. But since the four transactions were regarded by all parties as an essential component of the facts supporting that application (at least until the s 216A application was finally disposed of with the Court of Appeal's decision on 30 November 2015), I do not think it was unreasonable for the liquidators to have waited for the s 216A application to be determined before responding to Petroships' queries substantively in December 2015. Petroships itself accepted during oral arguments that it may have been reasonable for the liquidators to wait.[109] I therefore do not construe the liquidators' choice not to respond substantively to Petroships' queries as evidence of their partiality towards the interveners.

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107 Certified Transcript of hearing on 3 October 2016, p 146 lines 27 to 29.

108 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at para 71.

109 Certified Transcript of hearing on 3 October 2016, p 42 lines 3 to 21.

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Conduct in relation to Megacity's proof of debt

224 Petroships' first submission on this point is that Megacity's proof of debt is without basis.[110] Petroships takes issue with many aspects of the proof of debt,[111] including its quantum, the basis of Megacity's right to set the debt off against a sum of $8.26m which Megacity owes Wealthplus, and whether the debt is time-barred. Petroships then submits that the liquidators' alleged failure to consider these issues is evidence of bias.[112]

225 I reject this submission. Apart from the issue of whether the debt is time-barred, Petroships has failed to produce any evidence that the liquidators have failed to consider the issues Petroships has raised relating to Megacity's proof of debt. I agree with Petroships' observation[113] that the liquidators appear not to have considered whether the debt was time-barred until I brought that issue to the interveners' attention during the course of oral submissions.[114] But the liquidators have not yet adjudicated the proof of debt. There has simply been no irreversible failure on the liquidators' part to consider that issue or any other relevant issue. Petroships' criticisms of the liquidators on the basis of alleged deficiencies in Megacity's proof of debt or their handling of it are therefore premature. I find no indication that the liquidators will be biased against Petroships in considering the issues associated with Megacity's proof of debt.

226 Further, there is no need for the liquidators to address the issues raised by Petroships to its satisfaction at this stage. As the interveners rightly point out,

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110 Plaintiff's Reply Submissions dated 7 November 2016 at para 96.

111 Plaintiff's Reply Submissions dated 7 November 2016 at paras 86 to 98.

112 Plaintiff's Outline of Submissions in Response dated 16 November 2016 at para 12.

113 Plaintiff's Reply Submissions dated 7 November 2016 at paras 85 to 86.

114 Certified Transcript of hearing on 3 October 2016, p 156 at lines 4 to 8, p 157 at lines 1 to 6.

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the law already provides a remedy for complaints of this nature: once the liquidators have adjudicated the proof of debt, Petroships will be at liberty to file an appeal against that decision under r 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Rev Ed) ("the Rules").[115] This was also the point made by the High Court when it dismissed Petroships' application to, among other things, compel the liquidators to disclose Megacity's proof of debt: see [23(f)] above. Importantly, r 92 of the Rules obliges the liquidator to examine the proof, to call for evidence to support it if he requires, and to state his reasons if he rejects it. The liquidators in the present case should be allowed to perform this duty without interference. If the liquidators admit the proof, Petroships will have the opportunity to challenge their decision at that time. But now is not the proper time. *A fortiori*, it is improper for Petroships to attack the liquidators' impartiality on the basis of their approach to the merits of Megacity's proof of debt when they have simply not yet made a decision on it.

227 Moreover, the liquidators on the final day of oral arguments agreed, as a gesture of good faith, to extend a copy of Megacity's proof of debt and the supporting documents to Petroships.[116] In my view, they could have done so earlier to forestall Petroships' allegations of bias. But the liquidators say that they wished to adopt a consistent position on not furnishing to any creditors copies of any proofs of debt or their supporting documentation after the High Court rejected Petroships' application (see [23(f)] above) on the basis that the liquidators were entitled to adopt that position.[117] In any event, Petroships now has the lead time to examine the proof for itself and to invoke the remedy in r 93 if and when appropriate.

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115 Certified Transcript of hearing on 17 November 2016, p 57 lines 9 to 25.

116 Certified Transcript of hearing on 17 November 2016, p 68 line 15 to p 69 line 16.

117 Certified Transcript of hearing on 3 October 2016, p 102 lines 15 to 17.

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228 As there is no evidence that the liquidators are biased in their consideration of the issues relating to Megacity's proof of debt, the only issue left is the time they have taken to do so. In this regard, Petroships submits that the liquidators have failed promptly to adjudicate Megacity's proof of debt. Connected to the previous submission in this regard is Petroships' assertion that the liquidators failed to examine basic legal questions regarding the validity of the debt before launching into a two-year exercise to trace the amounts owing to Megacity.[118] This conduct is again alleged to be evidence of bias.

229 I reject these submissions. In my view, the liquidators have adequately explained the reason for the time needed to adjudicate Megacity's proof of debt. Soon after the appeal in Petroships' s 216A application was dismissed, they wrote to Petroships stating that the debt was old and even indicated that they would require Petroships' assistance properly to carry out the adjudication.

230 Further, Petroships has contributed to the delay by withholding its assistance to the liquidators in considering Megacity's proof of debt. When the liquidators invited Alan Chan for an interview in May 2016 to assist them in adjudicating it, he declined. Petroships claims that he declined because he allegedly felt unable to prepare adequately for the interview without a copy of the proof of debt, and did not want to turn up to be "grilled" by the liquidators.[119] I am not persuaded by this claim. First, Alan Chan was a director of Wealthplus when this debt to Megacity was allegedly incurred, in 2007. So he cannot have been completely in the dark about it. Second, Petroships' reply letter did not simply decline the interview on the specific basis that Alan Chan was unable adequately to prepare himself. It conveyed an unequivocal rejection of any possibility of cooperation with the liquidators. In that letter, Petroships stated

118 Plaintiff's Reply Submissions dated 7 November 2016 at paras 86, 91 and 95.

119 Certified Transcript of hearing on 3 October 2016, p 63 lines 18 to 31.

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that the liquidators had "demonstrated that they are unsuitable if not unfit to continue as liquidators of [Wealthplus]", and that Petroships would be seeking to appoint new liquidators shortly.[120] So contrary to what Petroships now submits, it certainly did not "politely" decline the request and decide to file its application to compel production of the proof only "after that".[121] Having contributed to the delay in the liquidators' adjudication of Megacity's proof of debt, Petroships surely cannot now say that the liquidators have failed to adjudicate the proof of debt promptly.

231 For these reasons, I hold that the liquidators' conduct in relation to Megacity's proof of debt is no evidence of bias, gives rise to no subjective belief in bias and gives no reasonable basis for a perception of bias.

Approval of former liquidators' remuneration

232 Petroships' first submission is that the liquidators' failure to provide it with all the documents it demanded in relation to the former liquidators deprived it of the material necessary to comment meaningfully on the former liquidators' claim for remuneration.[122] This, says Petroships, is evidence of bias and lack of diligence.

233 I do not accept this submission. I note that Petroships was provided with all the documents which the former liquidators submitted in support of their application to have their fees taxed.[123] In other words, Petroships was given the documents which the former liquidators themselves considered sufficient for

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120 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1127 at paras 7 to 8.

121 Certified Transcript of hearing on 3 October 2016, p 64 lines 1 to 2.

122 Plaintiff's Written Submissions dated 3 October 2016 at paras 90 to 94.

123 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1278.

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the court to decide fairly the fees which Wealthplus should pay them. I therefore fail to see how Petroships can complain that they have been deprived of the material necessary to opine on the former liquidators' remuneration.

234 In fact, I find that Petroships' demand for further documents was unreasonable, and that the liquidators dealt with this demand reasonably. Petroships demanded from the liquidators (a) all documents provided to the former liquidators in relation to their appointment, (b) all instructions that had been given to them, and (c) an account of the actions taken by the liquidators to resolve the matter with the former liquidators.[124] In reply, the liquidators stated that documents in categories (a) and (b) were part of the former liquidators' files to which the liquidators were not privy.[125] As regards (c), the liquidators explained that they had conducted without prejudice discussions with the former liquidators on the issue of their remuneration but were unable to come to an agreement. This response was entirely reasonable.

235 Next, Petroships submits that the liquidators demonstrated bias by simply adopting the majority vote to accept the former liquidators' offer without exercising independent judgment on the matter:[126] see [65] above. The liquidators submit that they were entitled to put the matter to the members for a vote. They rely on *Yeomans v Walker & anor* (1986) 10 ACLR 753 ("*Yeomans*"). It is not disputed that *Yeomans* stands for the proposition that a liquidator is entitled to take into account the wishes of a majority of shareholders, but he is not bound to follow their wishes: *Yeomans* at 758. This proposition is entirely in line with the general principle that a liquidator must

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124 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1279.

125 Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at p 1281.

126 Plaintiff's Written Submissions dated 3 October 2016 at para 92.

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exercise his own independent judgment in making decisions concerning the liquidation of the company.

236 In my view, there is no evidence that the liquidators did not exercise their own judgment. As there is no clear evidence (like paragraphs 4.11 and 4.14 of the minutes of the 2014 annual general meeting) that the liquidators would act on this issue only with the members' approval, I decline to draw the inference that that was their approach. I accept the liquidators' submission that they were entitled to call a meeting to ascertain the members' wishes, and that they did no more than take those wishes into account in arriving at their own decision on the former liquidators' remuneration.[127] Their conduct in doing so is no evidence of bias, actual or perceived.

Deference to the interveners at the annual general meeting in 2014

237 Petroships submits that the liquidators displayed a lack of impartiality at the annual general meeting in 2014. They did so, according to Petroships, because Victor Goh, who chaired the meeting, allegedly failed to answer the questions put to him by Petroships' proxy (Ms Lau), and allowed the interveners' solicitor (Mr Mohan) to dominate the meeting.[128] The liquidators deny this and submit simply that all members are entitled to speak at an annual general meeting.[129]

238 I reject Petroships' submission. I have examined the transcript of the 2014 annual general meeting. My impression is that Victor Goh did genuinely

[127] Interveners' Supplementary Skeletal Submissions dated 7 November 2016 at para 53(a).

[128] Plaintiff's Written Submissions dated 3 October 2016 at para 84.

[129] Interveners' Supplementary Skeletal Submissions dated 7 November 2016 at para 53(c).

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attempt to answer Ms Lau's questions. Significantly, he did so even though Mr Mohan interrupted Ms Lau multiple times during the meeting either to clarify the factual basis of her questions or to argue (rightly or wrongly) that her questions had already been ventilated and addressed in previous court proceedings. This is clear from the following exchange:[130]

LAU:	The amount stated for $24,991.18. Please explain the basis for the value provided by the liquidators in the interim report stating all documents and information reviewed by them in arriving at this value.
GOH:	In the report, we find there is a breakdown of the amount received from the various company that we received from the previous liquidator.
CHANDRA MOHAN:	Mr Chairman, I really think that, you know, we cannot come here to waste time. People come here there's a supporting document, they repeat what is there, do they know what they are even asking? It is there at the back.
GOH:	It's the breakdown in value.
CHANDRA MOHAN:	What is the basis of this question?
…	
CHANDRA MOHAN:	… What is the question? I don't understand. You've parroting what is written in the letter with supporting documents. What is the question?
LAU:	The amount taken over from the previous liquidators appear to contain receipts of money from company subsidiaries even though the SOA does not indicate any such monies being owed to the company.
GOH:	You see SOA is the declaration of solvency, yes. Okay, I think we have to make it very clear. That's why we actually included assets and liabilities at the

[130] Alan Chan's 1st Affidavit in CWU 119/2016 dated 13 June 2016 at pp 1224 to 1227.

	commencement of winding up which is 21st August 2012, alright. For us now what we are doing is more of recovering process which we are trying to recover the assets of the company, alright. The amount that we have received is actually from the previous liquidator from the closure of the various bank accounts. So if you want to talk about -- okay, it doesn't tie to the declaration of solvency which I believe is not a finance -- not a final set of management accounts, the declaration of solvency is as of that day. It's not even a final set of financial statements.
…	
LAU:	Right, there is no way we can accept that position because that differs very much from this.
CHANDRA MOHAN:	So Mr Chairman, I think we just move on. If she doesn't want to accept, (inaudible) So take note.
KOH:	Just take note.
GOH:	You do not accept.
KOH:	Just talk [*sic*] note.
GOH:	This is something that was prepared by WealthPlus certified by the directors and submitted to Inland Revenue.
CHANDRA MOHAN:	She doesn't want to accept it so we --
KOH:	We just take note and move on.
CHANDRA MOHAN:	We just take note but she doesn't want to accept it we can't help it.
GOH:	This is not prepared by us, you know.

239 It is clear from this example that Victor Goh was hardly partial to the interveners. First, he gave a considered response to Ms Lau's question. The merits of his response are not for me to judge. Second, even when he was urged to move on, he chose to continue his attempt to explain his answer to Ms Lau. I

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therefore reject Petroships' characterisation of Victor Goh at this meeting as a mere pawn or mouthpiece of the interveners. Third, in any meeting, some parties will be more vocal than others. But their sheer outspokenness cannot, without more evidence, be equated to the chair's endorsement of what they are saying. There is no such evidence here. In my view, therefore, Victor Goh's conduct at Wealthplus' annual general meeting in 2014 is no evidence of bias on the part of the liquidators. As far as there is any concern about his view that investigations should commence only with the members' unanimous approval, I have dealt with that concern at [209] to [217] above.

Concluding considerations

240 I make four further observations before concluding the analysis.

241 First, Wealthplus' liquidation is already at its tail end. The only outstanding matter is the adjudication of Megacity's proof of debt. Apart from this, the liquidators have, amongst other things:[131]

(a) finalised Wealthplus' pre-liquidation tax position with IRAS;

(b) secured the remittance of funds from the Chinese accounts of Wealthplus' subsidiaries to Wealthplus' Singapore account in six tranches from November 2013 to October 2014;

(c) reconciled these remittances with the accounts of Wealthplus' subsidiaries, and assessed the interest earned and the income tax payable to IRAS thereon;

131 Goh Yeo Kiang Victor's Affidavit in CWU 119/2016 dated 5 August 2016 at paras 18 to 24; Liquidators' Written Submissions dated 29 September 2016 at para 46.

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(d) defended with success Wealthplus or themselves in the various proceedings instituted by Petroships in connection with Wealthplus' affairs; and

(e) adjudicated, admitted and discharged the proof of debt lodged by Petroships for $1.1m.

242 Applying *Procam* ([123] *supra*), therefore, I take into consideration the fact that the liquidation of Wealthplus is almost complete. The liquidators have by now developed a significant degree of familiarity with Wealthplus' affairs. The appointment of new liquidators would incur further time and expense for them to apprise themselves of the status of the liquidation, and would be disruptive to that process also. Petroships has shown me no compelling reason why I should allow this.

243 Second, the interveners have given an undertaking to the court not to remove the liquidators without the leave of the court.[132] Thus the liquidators now have some form of security of tenure in that they cannot be removed simply by a majority vote. That is what happened, in effect, to the former liquidators. I say in effect because they were not actually removed, choosing instead to resign when they realised that their removal was inevitable. The current liquidators can now be removed only with a court order. This should give Petroships sufficient assurance that the liquidators are free to act independently without fear of being removed.

244 Third, I accept that there has been a degree of unnecessary tension in the relationship between the liquidators and Petroships. That tension in my view originates from the unnecessarily hostile position taken by Petroships from the

[132] Certified Transcript of hearing on 17 November 2016, p 62 lines 12 to 15.

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very outset of the liquidators' appointment. It appears to me that Petroships' true target, even after the s 216A application was finally determined by the Court of Appeal, remains the interveners rather than the truth of the matter or the liquidators themselves. That is the overarching reason for my finding that Petroships has no subjective belief in the allegations of bias now made against the liquidators. As a result, it is clear to me, Petroships sees the liquidation of Wealthplus as nothing more than an extension of its opportunity to resolve its many disputes with the interveners in a wholly hostile and adversarial manner. It does not see the liquidation as an opportunity for it to cease fire and to allow the liquidators to do their duty in order to resolve those disputes inquisitorially.

245 To the extent that the liquidators responded to the tension created by Petroships in kind, I am confident that will not continue. And to be clear, I do not think that that reciprocated tension is, in itself, a reasonable basis for the apprehension by Petroships of bias on the liquidators' part.

Summary of analysis

246 I now summarise the effect of the foregoing analysis.

247 First, Petroships does not have a subjective belief that the liquidators are biased. Petroships was prejudiced against the liquidators from the outset.

248 Second, there is no basis for an objective observer to conclude that the liquidators are biased. None of the six principal allegations raised by Petroships (see [177] above), in the final analysis, constitutes a reasonable ground to doubt the impartiality of the liquidators. Although they were unnecessarily defensive in their correspondence with Petroships, that defensiveness was excusable in the light of Petroships' unwarranted hostility towards them from the outset: see

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[182] above.

249 Third, the liquidators are not in fact biased. They did make a serious error of judgment in placing a misguided emphasis on members' unanimity in relation to an investigation of the four transactions. But that is simply an error of judgment regarding which they have now been put right and which has no enduring consequences for the liquidation.

250 There are therefore no grounds for a justifiable loss of confidence in the liquidators' ability to conduct the liquidation competently and independently. Further, the liquidators have undertaken to provide Petroships with a copy of Megacity's proof of debt, and the interveners have undertaken not to remove the liquidators without the leave of the court.

251 Finally, the liquidation is in an advanced stage. Appointing new liquidators would unjustifiably incur additional time and costs, and would be disruptive to the liquidation process.

252 In my judgment, all these factors establish that removing the liquidators would fail to serve – and may well undermine – the real, honest and substantial interest of Wealthplus' liquidation and the purpose for which the liquidators were appointed. I therefore have no hesitation in dismissing Petroships' application under s 302 to remove the liquidators.

Does Petroships satisfy s 253(2)(*d*) of the Act?

253 As in the Removal Application, Petroships' case in the Winding Up Application is based on allegations of bias on the part of the liquidators. As I have found Petroships' case to be without subjective belief and without reasonable basis, the Winding Up Application must necessarily fail. But since

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the parties disagree on the legal threshold to be met for an application under s 253(2)(*d*) of the Act to be successful and have made submissions on that, I will address the point briefly.

254 Section 253(1) of the Act gives standing to any creditor or contributory of a company, amongst other persons, to apply for the company to be wound up by an order of the court. Where the company that is sought to be wound up is in voluntary liquidation, whether solvent or insolvent, the court cannot make the order unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories. This is the effect of s 253(2)(*d*), which reads:

> [T]he Court shall not, where a company is being wound up voluntarily, make a winding up order unless it is satisfied that the voluntary winding up cannot be continued with due regard to the interests of the creditors or contributories.

255 The specific issue raised in this case is whether a contributory must meet a higher standard of proof to secure an order under this provision than a creditor. The interveners submit that he does, while Petroships submits that the standard of proof is the same for both. In my judgment, while there is strictly speaking no free-standing rule emanating from s 253(2)(*d*) on standard of proof, a contributory will in all the possible scenarios contemplated by that provision have to put forward a very strong case to succeed, while a creditor's position in each of those scenarios is not as consistently difficult. I will elaborate.

256 It is clear from a plain reading of s 253(2)(*d*) that the provision contains no rule on standard of proof. The only test prescribed by the text of that provision is whether the continuation of the voluntary winding up would fail to have due regard to the interests of the creditors or contributories. It is possible, however, to consider how that test would be met by a contributory and a creditor

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in each of the possible winding up scenarios contemplated by s 253(2)(*d*), and under that analysis, draw distinctions between the position of a contributory and a creditor for the purposes of s 253(2)(*d*).

257 Section 253(2)(*d*) contemplates two scenarios in which a winding up order may be granted. The first is the compulsory winding up of a solvent company in members' voluntary liquidation. The second is the compulsory winding up of an insolvent company in creditors' voluntary liquidation. I will refer to these as the "first scenario" and "second scenario" respectively. A third possible scenario is the compulsory winding up of a company in members' voluntary liquidation which is actually insolvent. But this can only arise if the liquidator of the company breaches his duty under s 295 of the Act to convert a members' voluntary liquidation into a creditors' voluntary liquidation if the company turns out to be insolvent. As the Act must have been drafted with the expectation that every liquidator will comply with this duty, this third possible scenario must be taken to be either excluded from the scope of s 253(2)(*d*) or at least not to be the primary concern of that provision. I will therefore not deal with it. In any event, it does not arise in the present case.

258 In both the first and second scenarios, it is inherently more difficult for a contributory to satisfy the test in s 253(2)(*d*), *ie*, by showing that the voluntary liquidation cannot be continued with due regard to the rights of the contributories, than for a creditor.

259 In the first scenario, the contributories who formed the majority sufficient to resolve to put the company in members' voluntary liquidation have taken a view that the assets of the company are sufficient to meet its liabilities. Because the company is solvent, the shareholders' bargain is still intact. What has come to an end is the commercial venture, not the members' bargain in the

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memorandum and articles of association underlying that venture. So the principle of majority rule still applies, even in the liquidation. That is all the more so when: (a) the directors, controlled by the majority, have taken the view that the company is solvent on penalty of a criminal offence with a reversed burden of proof: ss 293(4) and 293(5) of the Act; and (ii) the self-interested majority's control over assessing the company's assets and liabilities has been displaced by an impartial liquidator's. So the starting point must be that the minority, as an insider, and against a background of solvency, continues to be bound by majority rule notwithstanding the liquidation.

260 In the second scenario, majority rule no longer applies because the company is insolvent. The contributories' capital has been entirely wiped out. The shareholders' bargain has come to an end. Even if the liquidator is given the additional powers of investigation available in a compulsory liquidation, a contributory – being out of the money – will not see his position improved. So again, a contributory will find it hard to show that the creditors' voluntary winding up will fail to have due regard to his interests as a contributory. Further, even if the contributory could show a reasonable probability that the liquidators' exercise of these additional powers might turn an insolvent company solvent and put the contributories back in the money, the contributory would again find himself (the company now being solvent) bound by majority rule.

261 On the other hand, a creditor always has an interest in the insolvent company's estate and is always an outsider. He always has a basis to demand an investigation of the company's affairs augmented by the express powers available to a liquidator in a compulsory liquidation which are unavailable to a liquidator in a voluntary liquidation. In the second scenario in particular, the court will, in view of the insolvent state of the company, give primacy to the creditors' wishes over those of the contributories: *McPherson* ([119] *supra*) at

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para 3–104, quoted above at [134]. The competition of interests in that scenario is usually a competition between the interests of the creditors themselves: see *Re H J Tomkins & Son Ltd* [1990] BCLC 76 where Hoffmann J (as he then was) was persuaded by the applicant creditors, who were a minority in number but majority in value, to order the compulsory winding up of a company in creditors' voluntary liquidation, although he acknowledged that there was little between the two views maintained before him.

262 I return now to the first scenario, since that is the scenario that arises in the present case. I will focus only on that scenario in the remainder of my discussion in this section. In the first scenario, a creditor will have a difficult task because he is by definition to be paid in full. He may therefore find it hard to show that continuation of the voluntary winding up will fail to have due regard to his interests. But a contributory in that situation also has a difficult task, because he remains bound to abide by majority rule. As stated in Edward Bailey and Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis, 4th Ed, 2014) ("*Bailey & Groves*") at para 14.118, in the context of a discussion on a contributory's recourse and opposition to a winding up petition:

> The compulsory regime is not suited to the resolution of shareholder conflicts and the court is generally unwilling to wind up a solvent company unless the grounds earlier discussed are firmly established. The contributory's petition follows a course different to that of a creditor's because it is in the nature of an internal dispute amongst the shareholders.

263 This passage illustrates the important principle that while a company remains solvent, majority rule continues to apply, and the court will give significant weight to how the members wish to order their own affairs. That is why in the first scenario, a court will generally be unwilling to make a winding up order on the application of a contributory. Correspondingly, a contributory

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will have to prove a very strong case in order to succeed in a s 253(2)(*d*) application. In this connection, the passage above from *Bailey & Groves* alludes to certain "grounds earlier discussed" at para 14.117. Those grounds, in my judgment, describe correctly (though not exhaustively) the type of "very strong case" which a contributory has to prove to obtain a winding up order notwithstanding an ongoing members' voluntary liquidation:

> … However, if there are suspicious circumstances which require investigation or the majority opposing the petition may have been guilty of a fraud on the minority shareholders the court will readily grant an order. Provided that a contributory is qualified to present a winding-up petition, it may be presented notwithstanding the company is already in voluntary liquidation.

264 To persuade me of a different view, Petroships relies on *Re Internet Investment Corporation Ltd* [2010] 1 BCLC 458 ("*Re Internet*"),[133] a decision of the English High Court. I do not think that case assists Petroships. In *Re Internet*, a minority shareholder filed a winding up petition after inquiries that he made led him to suspect that the majority shareholder and sole director had misappropriated his investment. The latter then quickly put the company in members' voluntary liquidation before the petition could be heard. It later emerged at the hearing of the petition that the majority shareholder had indeed misappropriated the investment. Briggs J set out the applicable principles as follows (at [26] to [27]):

> Section 116 of the Insolvency Act 1986 provides that the voluntary winding up of a company does not bar the right of any creditor or contributory to have it wound up by the court; but in the case of an application by a contributory the court must be satisfied that the rights of the contributories will be prejudiced by a voluntary winding up.
>
> It is well established that, in considering whether the court should order a compulsory winding up in preference to a voluntary winding up, a reasonable requirement that the

133 Certified Transcript of hearing on 3 October 2016, p 68 lines 22 to 26.

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> company's affairs should be scrutinised by the process which follows a compulsory order may weigh strongly in favour of a compulsory liquidation. The decisions to that effect are identified in footnote 4 to para 15.110 of *Palmer's Company Law*, and are mainly concerned with petitions by creditors rather than contributories. Nonetheless I see no reason why the principle is not equally applicable to a contributories' petition subject to the requirement that the contributory demonstrate to the court's satisfaction that the contributories' rights would be prejudiced by a voluntary winding up.

265 Briggs J's view in this passage is that a contributory must show that there are circumstances which warrant the type of investigation conducted under the compulsory regime. That regime confers upon the liquidator powers (*ie*, s 286(1) of the Act) that enable him directly to investigate potential wrongdoing and impropriety in relation to the company's affairs: see [137] to [139] above. Clearly, Briggs J sees no reason why this principle ought not to apply to both creditors and contributories seeking to convert a voluntary winding up into a compulsory winding up, since both must justify why the company should be brought under the compulsory regime, and one way to do that is by explaining why the type of investigation which takes place under that regime is necessary.

266 Importantly, Briggs J says nothing about whether the difficulty of that justification is affected by the type of voluntary liquidation or the petitioner's status as contributory or creditor. Therefore, Petroships is mistaken to rely on the equivalence drawn in *Re Internet* between a contributory and a creditor to argue for a general equivalence between the requisite strength of a contributory's case and that of a creditor under s 253(2)(*d*) of the Act. Accordingly, I do not read Briggs J's judgment to be saying anything inconsistent with the passage from *Bailey & Groves* concerning the need for a contributory to establish "suspicious circumstances" or adduce evidence of a possible fraud by the majority in order to have the court wind up a company in

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voluntary liquidation. If anything, the finding which led to the result in *Re Internet* only confirms this high standard of proof: Briggs J granted the winding up order on the basis that the company's affairs "crie[d] out for thorough investigation" (at [28]), and that this would be adequately done only under the compulsory regime.

267 There are other cases cited by the interveners which illustrate how the principle of majority rule requires a contributory to present a strong case if he seeks to wind up a company in members' voluntary liquidation.[134] I will discuss two of these. The first is *Re Oro Fino Mines Ltd* [1900] BCJ No 58, a decision by the Full Court of the British Columbia Supreme Court. In that case, the shareholder of a company in members' voluntary liquidation petitioned for a winding up order. He was unable to show evidence to support his claim that he would be prejudiced by the continuation of the voluntary liquidation. The court thus dismissed his petition. In doing so, it emphasised its reluctance to interfere with the members' control of a solvent company's affairs, and also referred to a contrasting case in which the winding up order was granted only because the company's affairs called for the most rigid scrutiny (at [8]):

> What evidence is there to satisfy us that the petitioner in the case at bar will suffer in consequence of the voluntary winding up? Suggestions have been made during the course of the argument, but exception was taken to such suggestions as not being supported by evidence, and the evidence is not forthcoming. I find myself unable to point to a single circumstance which would justify my brushing aside the voluntary winding up. I have examined all the cases cited by respondent's counsel, but they are clearly distinguishable, e.g., in the case of the *Anglo-Austrian Company* [(1891) 35 Sol Jo 469], supra, Mr. Justice Stirling said: "Every one of these transactions called for the most rigid scrutiny and the most rigid investigation." Assuming that a majority, in value, of the creditors came before the learned Judge below and consented

[134] Interveners' Written Submissions dated 29 September 2016 at paras 78 to 81; Interveners' Reply Submissions dated 7 November 2016 at para 16.

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> to the compulsory order, that should not override the wishes of the shareholders in the regulation of the affairs of the Company, and all the cases go to show that the Court is not desirous of interfering with such control.

268 The second is *In re National Company for the Distribution of Electricity by Secondary Generators, Limited* [1902] 2 Ch 34. In that case, the English Court of Appeal was faced with an argument that a contributory's right to petition for a company in members' voluntary liquidation to be wound up was available only if there was evidence that the winding up resolution was a sham or was passed under some kind of fraud. The basis of this argument, of course, was majority rule: unless the majority's wishes are shown to be vitiated, the court will not interfere with a voluntary liquidation. The court correctly recognised that this was too narrow to be the only permissible ground upon which a contributory in the petitioner's position could succeed. The point is that majority rule is not an absolute principle in a members' voluntary liquidation, and neither should I be taken to suggest that it is.

269 The court nevertheless went on to hold that the contributory must show that the voluntary liquidation is existing under such circumstances as are likely to prejudice the shareholders of the company. For the reasons I have given, this will be difficult. And the court was agreed on this difficulty and expressed it in different ways. Vaughan Williams LJ said (at 40) that the court is unlikely to be satisfied of the existence of prejudice "without very ample proof". Stirling LJ, who concurred with Vaughan Williams LJ, said (at 45) that the court "ought to be very careful in how it exercises that jurisdiction, and ought not to make an order for compulsory winding-up unless it is satisfied that some benefit will thereby result to the shareholders". On the basis of these authorities, I therefore agree with the interveners that a contributory must show a very strong case to succeed under s 253(2)(*d*).

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270 Having considered the authorities and applicable principles, I now turn to the facts. I have considered and rejected Petroships' primary arguments for why it says there is a need for Wealthplus' affairs to be subjected to investigation under the compulsory regime. There is therefore no compelling reason for me to disregard or give less weight to the wishes of the interveners as majority shareholders to keep Wealthplus in voluntary liquidation. Next, as I have concluded, Petroships' allegations that the liquidators are biased are neither subjectively believed nor objectively true. I note that the liquidators and interveners have also given undertakings which offer some comfort to this court and Petroships of their commitment to act fairly towards Petroships. In my judgment, therefore, there is no basis for saying that the voluntary winding up of Wealthplus cannot be continued with due regard to the interests of Petroships as a contributory.

271 I therefore dismiss the Winding Up Application.

Conclusion

272 In view of the issues that have been raised in this case, I close with three observations about ss 302 and 253(2)(*d*) of the Act.

273 First, these two provisions are similar in terms of the breadth of the condition to be satisfied before the power of the court is enlivened. First, under s 302, the only decisive rule, as I have explained (at [125] and [160] above), is that the removal of the liquidator must be in the interest of the liquidation. Similarly, the only decisive requirement under s 253(2)(*d*) is that the voluntary winding up order cannot be continued with due regard to the interests of the creditors or contributories. Second, the broad wording of s 302 means that the court should not attempt to define a list of causes that would suffice for the

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removal of a liquidator: *Re Keypak* ([121] *supra*) at 416*e*. Similarly, the broad terms in which s 253(2)(*d*) is cast are designed to allow the court to discern what will best serve those with a genuine vested interest in the company: *Korea Asset* ([150] *supra*) at [39].

274 These similarities exist no doubt because ss 302 and 253(2)(*d*) are both powerful judicial correctives to problems which affect the central aims of the liquidation process. Consequently, the power to apply these correctives is only enlivened when after the court is satisfied, on a multi-factorial analysis, that the conditions in ss 302 and 253(2)(*d*) have been satisfied. So even though I have attempted to articulate some of the applicable principles behind those conditions, none of them should be relied upon to short circuit the inquiry as to whether the interest of the liquidation would be served or whether continuation of the voluntary regime is likely to prejudice the interests of the creditors or the contributories.

275 Second, the principles governing the condition in each of the two provisions share a common theme, namely, the significance of the distinction between solvent and insolvent companies. One thing that the cases together show is the difference in the law's attitude towards the dissolution of each of the two types of companies. One may not immediately appreciate that difference from the plain words of ss 302 and 253(2)(*d*). But close attention to the scheme of the Act, especially with regard to the powers of liquidators in different types of liquidation, and to the principle of upholding the shareholders' private bargain until it collapses under insolvency, reveals that that difference is one which cannot be ignored by any court seeking to determine whether cause has been shown under s 302 or whether the voluntary regime cannot be continued with due regard to the interests of the contributories or creditors under s 253(2)(*d*).

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276 Third, where the central complaint of the applicant is the unfitness of the liquidator, it is preferable to have the liquidator removed under s 302 and another appointed, rather than to resort to the more drastic remedy of having the company wound up by the court: see *McPherson* ([119] *supra*) at para 3–121, citing *Re Star & Garter Ltd* (1873) 42 LJ Ch 374, where a petition asking for a winding up order instead of removal of the liquidator was said to be "demurrable". Given the nature of Petroships' complaints in this case, I consider that it has rightly focused its efforts on s 302, even though it has ultimately failed.

277 For all the above reasons, I have dismissed the present applications. I have ordered Petroships to pay to the interveners and the liquidators the costs of and incidental to each application, such costs fixed at $15,000 and $10,000 respectively, including disbursements.

Vinodh Coomaraswamy
Judge

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