IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 112

Civil Appeal No 23 of 2021

Between

AnAn Group (Singapore) Pte Ltd

… *Appellant*

And

VTB Bank (Public Joint Stock Company)

… *Respondent*

In the matter of Companies' Winding Up No 183 of 2018 (Summons No 3902 of 2020)

Between

VTB Bank (Public Joint Stock Company)

… *Plaintiff*

And

AnAn Group (Singapore) Pte Ltd

… *Defendant*

JUDGMENT

[Arbitration] — [Arbitrability and public policy]
[Companies] — [Winding up] — [Liquidators' remuneration]
[Civil Procedure] — [Inherent powers]
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v
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Andrew Phang Boon Leong JCA, Steven Chong JCA and Quentin Loh JAD
14 October 2021

29 November 2021

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 Typically, a liquidator's remuneration and expenses are payable from the liquidated company's assets. In some exceptional circumstances, however, a winding up order may be reversed and set aside. In such cases, the expenses associated with the liquidation of the company, including the liquidator's fees, might have already been incurred. A few questions could then arise. Who is to bear these fees? Should it be the company, the petitioning creditor, or some other entity? Does the court have the power to order a party *other than* the company to bear these fees, and, if so, what is the juridical basis for the exercise of such a power? The latter question, in particular, is a novel one that has arisen for our determination in the present case.

2 The appellant, AnAn Group (Singapore) Pte Ltd ("AnAn"), was the defendant in HC/CWU 183/2018 ("CWU 183"). The respondent, VTB Bank (Public Joint Stock Company) ("VTB"), is an alleged creditor of AnAn, and it was the plaintiff in CWU 183 (*ie*, the petitioner). VTB sought, via CWU 183, a winding up order against AnAn.

3 VTB succeeded at first instance in CWU 183, and the General Division of the High Court (the "High Court") made an order for AnAn to be wound up. This court reversed the High Court's decision on appeal, in CA/CA 174/2018 ("CA 174"): see *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] 1 SLR 1158 ("*AnAn (CA)*"). We dismissed CWU 183 and held that there was a *prima facie* dispute over the debt that formed the basis of VTB's winding up application. The dispute over the debt was to be resolved via arbitration: *AnAn (CA)* at [113] and [120].

4 Following our decision in *AnAn (CA)*, AnAn filed HC/SUM 3902/2020 ("SUM 3902") in CWU 183. This was its application for VTB to bear AnAn's former liquidators' and the liquidators' solicitors' (the "Liquidators") remuneration and expenses (the "Liquidators' fees"), in the light of our decision to reverse the winding up order. SUM 3902 was heard alongside HC/SUM 3569/2020 ("SUM 3569"), which was the Liquidators' application to be discharged, and to claim their reasonable remuneration and expenses.

5 The judge below (the "Judge") allowed SUM 3569 but dismissed SUM 3902. The Judge rejected AnAn's primary contention that a liquidator's remuneration is a form of "costs" under s 18(2) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) ("SCJA") read with para 13 of the First

Schedule thereto ("Para 13"). The Judge's decision is found in his oral judgment dated 25 February 2021 (the "Judgment").

6 In the present appeal, CA/CA 23/2021 ("CA 23"), AnAn appeals against the Judge's decision. It makes by and large the same arguments as it did below: that the court's power to order costs under the SCJA encompasses the power to make orders in relation to the party *who should bear the Liquidators' fees*. AnAn contends that we ought to exercise this power to make VTB liable for the Liquidators' fees. VTB disagrees with AnAn's interpretation of the SCJA, and also contends, amongst other things, that the issue of liability for the Liquidators' fees should be determined in the arbitration, and not by the court.

7 After hearing counsel's oral submissions on 14 October 2021, we reserved judgment. Having considered the parties' respective positions, we dismiss CA 23.

Background and key events

Factual background

8 On 3 November 2017, the parties entered into a global master repurchase agreement ("GMRA") under which AnAn would sell VTB global depository receipts ("GDRs") of shares in EN+ Group PLC ("EN+"). AnAn would then repurchase the GDRs from VTB at a later date at pre-agreed rates. This arrangement was "in substance a loan from VTB to AnAn": *AnAn (CA)* at [4].

9 The GMRA contained the following arbitration agreement (the "arbitration clause"; see *AnAn (CA)* at [7]):

> Any dispute arising out of or in connection with this Agreement, including any question regarding its subject matter, existence,

> negotiation, validity, termination or enforceability (including any non-contractual dispute or claim) (a 'Dispute'), shall be referred to arbitration and finally settled on the following terms:
>
> > (i) the arbitration shall be conducted in accordance with the Arbitration Rules of the Singapore International Arbitration Centre ('SIAC Rules') which Rules are deemed incorporated into this Clause; […]

10 Between 7 November 2017 and 6 April 2018, several events occurred which culminated in AnAn failing to restore and/or maintain sufficient collateral for the loan arrangement between the parties under the GMRA. This was an alleged breach of AnAn's obligations under the GMRA, otherwise referred to as an event of default: see *AnAn (CA)* at [5]–[9]. Thus, on 12 April 2018, VTB sent a default notice to AnAn, designating 16 April 2018 as the early termination date of the GMRA. This notice alleged two events of default: *AnAn (CA)* at [10].

Procedural History

11 On 23 July 2018, VTB served on AnAn a statutory demand for the sum of US$170m. AnAn did not satisfy the demand within the three-week time limit: *AnAn (CA)* at [12]. On 17 August 2018, VTB filed CWU 183 seeking a winding up order against AnAn. AnAn resisted CWU 183 by disputing the debt owed to VTB: *AnAn (CA)* at [13].

12 VTB succeeded before the High Court, as the court applied the "triable issue" standard of review: see *AnAn (CA)* at [15]; see also the High Court's decision in *VTB Bank (Public Joint Stock Company) v AnAn Group (Singapore) Pte Ltd* [2018] SGHC 250 at [58]. Consequently, the High Court ordered AnAn to be wound up. AnAn appealed *vide* CA 174.

13 On 7 April 2020, a five-judge *coram* sitting in this court reversed the High Court's decision. We applied the *prima facie* standard of review, and found that "it [was] clear that there [was] a *prima facie* dispute in this case that would justify allowing the appeal and restraining the winding up application presented by VTB": *AnAn (CA)* at [101]. We considered it appropriate to *dismiss*, and not *stay*, CWU 183: see *AnAn (CA)* at [113]. AnAn was therefore not wound up.

14 On 8 May 2020, the Liquidators filed CA/SUM 68/2020 to this court, seeking to be paid their remuneration and expenses out of the assets of AnAn, such remuneration and expenses having been incurred in the course of AnAn's aborted liquidation. Then, on 23 June 2020, AnAn filed CA/SUM 74/2020 ("SUM 74"), seeking an order for VTB to bear all the remuneration and expenses incurred by the Liquidators, and/or for VTB to indemnify AnAn if AnAn were held liable for the same. On 23 July 2020, we decided that both summonses ought to be made to the High Court in the first instance and made no order accordingly.

15 On 13 August 2020, the Liquidators filed SUM 3569 to the High Court. Therein, they sought several prayers: for their expenses between 24 August 2018 and 6 April 2020 to be paid out of the assets of AnAn ("Prayer 1"); for AnAn to bear their expenses incurred on and after 7 April 2020, in respect of the handing over of AnAn's affairs to AnAn ("Prayer 2"); for themselves to be discharged from all liability in respect of any act done or default made by them in the administration of AnAn's affairs ("Prayer 3"); and for costs.

16 Subsequently, Prayers 1 and 2 above were amended with the court's leave, pursuant to an application by the Liquidators on 2 November 2020. The amended prayers are captured at [2] of the Judgment, as follows:

> (a) The remuneration properly incurred by the Former Liquidators (the '**Liquidation Remuneration**') for the period from 24 August 2018 to 6 April 2020 (the '**Liquidation Period**') is to be paid out of the assets of the Company, such Liquidation Remuneration to be agreed if not taxed.
>
> (b) The disbursements properly incurred by the Former Liquidators (the '**Liquidation Disbursements**') for the Liquidation Period are to be paid out of the assets of the Company, such Liquidation Disbursements to be agreed if not taxed.
>
> (c) The remuneration properly incurred by the Former Liquidators on and after 7 April 2020 in respect of the handing over of the Company's affairs to the Company (the '**Handover Remuneration**') is to be paid by the Company to the Former Liquidators, such Handover Remuneration to be agreed if not taxed.
>
> (d) The disbursements properly incurred by the Former Liquidators (the '**Handover Disbursements**') on and after 7 April 2020 in respect of the handing over of the Company's affairs to the Company are to be paid out of the assets of the Company, such Handover Disbursements to be agreed if not taxed.
>
> [emphasis in original]

For convenience, we will from here on refer to these amended prayers as "Prayers 1 and 2".

17 On 9 September 2020, AnAn filed SUM 3902, seeking an order that VTB is liable to bear all the expenses and remuneration properly incurred by the Liquidators (inclusive of both Prayers 1 and 2 of SUM 3569), and/or indemnify AnAn for any sums paid by AnAn pursuant to SUM 3569. AnAn cited the following as the grounds of its application in SUM 3902:

> The grounds of the application are:

> 1. Section 268(3)(c) of the Companies Act (Cap. 50);
>
> 2. Section 18(1) of the Supreme Court of Judicature Act (Cap. 322);
>
> 3. Order 92 rule 4 and Order 92 rule 5 of the Rules of Court (Cap. 322) and/or the inherent jurisdiction of the Court; …

18 The two summonses were heard on 19 October 2020, and the Judge also considered the parties' (and the Liquidators') further submissions filed on 2 November 2020. The Judge issued the Judgment on 25 February 2021.

Decision below

19 The Judge granted Prayers 1 and 2 of SUM 3569. The Liquidators were entitled to "be paid both their reasonable remuneration and expenses out of the assets of [AnAn]": Judgment at [7]. This included the "Handover" remuneration and disbursements. That is, for the period beginning from 7 April 2020 onwards, "[t]o the extent that the Former Liquidators were acting in accordance with [their] duties, they must be entitled to their reasonable remuneration and expenses": Judgment at [8] and [9]. The Judge clarified that the quantum of remuneration will be subsequently determined: Judgment at [29]. The Judge also subsequently granted Prayer 3, *ie*, the Liquidators' application to be released pursuant to s 276(4) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"): see Judgment at [23] and HC/ORC 2238/2021.

20 The Judge dismissed SUM 3902. Primarily, the Judge disagreed with AnAn's contention that the court's power to award costs (under s 18(2) of the SCJA read with Para 13) confers the court power to make orders in relation to a liquidator's expenses and remuneration. The Judge noted thus (Judgment at [14]):

> … To my mind, however, the reference to 'costs' in Para 13 of the SCJA refers only to *legal costs* (*ie,* solicitors' fees, charges and disbursements) *incurred in relation to legal proceedings*. It does *not* include liquidators' remuneration or expenses. The Company's reliance is therefore misplaced. In this vein, the Company itself acknowledges in its further submissions (dated 2 November 2020) that the 'costs of liquidation…do not relate to legal costs'. The Company nevertheless insists that a liquidator's remuneration is a 'form of costs' within the meaning of 'costs' in Para 13 of the SCJA. It cites s 328(1)(*a*) of the CA, which refers to the liquidators' remuneration as being part of the 'costs and expenses of the winding up'. However, the legislative context of that provision (which concerns the insolvency regime) is entirely different from the SCJA. It is by no means a useful indication of how the term 'costs' in the latter legislation is to be interpreted.

21 The Judge distinguished the Australian decisions relied on by AnAn, namely *Locker Group Pty Ltd v HEA Australia Pty Ltd* [2015] VSC 752 ("*Locker Group*") and *In the matter of Complete Investing Services Pty Ltd (in liq)* [2018] NSWSC 1003 ("*Complete Investing (Liability)*"). The Judge noted *inter alia* that in *Locker Group*, the Australian statutory provision cited was not *in pari materia* with local legislation (*ie*, the SCJA). Further, in *Complete Investing (Liability)*, the parties did not contest the issue of whether the court's power to order costs extends to "a power to order payment of the liquidators' remuneration and expenses": see Judgment at [16] and [17].

22 The Judge also observed that VTB's conduct did not rise to the level of an abuse of process. While VTB had sought a winding up order on a basis that was ultimately found not to be sufficient, "this does not mean that it had acted in bad faith or for a collateral purpose": Judgment at [19]. For the aforementioned reasons, the Judge declined to order that VTB is directly liable to the Liquidators for their fees. For the same reasons, the Judge declined to award an indemnity in favour of AnAn: see Judgment at [24] and [25].

23 The Judge reasoned, in the alternative, that the issue of *costs* as between AnAn and VTB had been dealt with in CA 174 (see *AnAn (CA)* at [121]). Accordingly, the Judge observed that "even assuming that this court has the power to make the alternative orders sought by [AnAn], [he was] not minded to exercise [his] discretion to grant the said orders": Judgment at [26]. As explained below, this raises the question as to whether the court is now *functus officio* as regards the issue of the Liquidators' fees.

24 Finally, the Judge declined to provide a view on whether the dispute over the Liquidators' fees would fall within the scope of the arbitration clause in the GMRA (Judgment at [27]):

> As an aside, VTB also contends that this dispute over the liability for the Former Liquidators' remuneration and expenses should be referred to arbitration. This is allegedly because the dispute falls within the scope of the arbitration clause in the global master repurchase agreement between the parties. [AnAn] denies this on several grounds, including that the dispute does not fall within the said arbitration clause. It is unnecessary for me to express any view on this given my finding that this court's general power to award costs does not permit the orders sought by [AnAn]. It is for parties to decide if they wish to deal with this issue in arbitration instead.

SUM 77

25 On the eve of the present appeal, that is, on 1 October 2021, VTB filed CA/SUM 77/2021 ("SUM 77"), in which it sought to adduce fresh evidence in the form of several pleadings in XXXX Arbitration No XXX of 2020 (ARBXXX/20/XXX) ("the Arbitration"). This is the ongoing arbitration between the parties, which was commenced in 2020 following our decision in *AnAn (CA)*.

26 While SUM 77 was initially contested, the parties eventually agreed for the summons to be allowed in part. Specifically, AnAn consented to certain paragraphs of the pleadings in the Arbitration to be adduced as fresh evidence in the present appeal. This was captured in VTB's solicitors' letter dated 13 October 2021. Accordingly, at the hearing of the present appeal, we recorded an order in the terms of the parties' agreement in respect of SUM 77. Each party was ordered to bear its own costs of SUM 77.

Parties' cases

27 Herein, we briefly summarise the parties' positions. We will elaborate on the details of their arguments in the course of our analysis of the issues before us.

Appellant's case

28 AnAn's primary case is that the court's power to order costs under the SCJA is sufficiently broad, and that the court can and should, using this power, make orders in relation to the party who should bear the Liquidators' fees. AnAn argues that it is VTB who should bear the Liquidators' fees.

29 First, AnAn contends that the court's power to award costs (under s 18(2) of the SCJA read with Para 13) confers the court with the power to make orders in relation to a liquidator's expenses and remuneration. It relies on the definition of "costs" in O 59 r 1(1) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC"), *ie*, "fees, charges, disbursements, expenses and remuneration". AnAn argues that this definition is "not limited to legal costs".

30 Secondly, AnAn contends that this court ought to exercise this power to order VTB to bear the Liquidators' fees. It argues, primarily, that it need not

prove an abuse of process in order to make VTB liable for the said fees. The burden is on VTB to show special reasons why such "costs" should not follow the event (*ie*, the outcome of CA 174). Alternatively, AnAn argues that an abuse of process is made out, and that VTB ought therefore to be liable for the Liquidators' fees.

31 Thirdly, AnAn argues that the present dispute has not been resolved. That is, the court is not *functus officio* as regards the issue of the Liquidators' fees. This is because the issue of who should bear these fees was not before this court in CA 174.

32 Finally, AnAn argues that it should not be compelled to pursue its claim for costs through the Arbitration, through its claim against VTB for damages for breach of the arbitration clause. The subject matter of the present dispute is not subject to arbitration.

Respondent's case

33 VTB contends that the issue of liability for the Liquidators' fees should be determined in the Arbitration as part of AnAn's claim for damages for breach of the arbitration clause, and not by the court in the present appeal.

34 Further, VTB argues that there is no basis to find it liable for the Liquidators' fees. These should be paid out of AnAn's assets. A petitioner is only made liable to make such payment where misconduct or an abuse of process is shown. AnAn has not proven such misconduct or abuse of process.

35 VTB also contends that AnAn's interpretation of the SCJA and ROC is incorrect. The foreign jurisprudence cited by AnAn is distinguishable. The relief

that AnAn seeks does not fall under the SCJA and the ROC. Instead, it forms a "separate" and "distinct" relief that ought to have been pursued at CA 174. VTB, however, does not identify the juridical basis of the court's power to order such relief.

36 Lastly, VTB argues that in any event, it is too late for AnAn to raise the issue of liability for the Liquidators' fees. As AnAn contends that such expenses form part of the "costs" of CA 174, the issue should have been raised in CA 174. Having failed to do so, the court is now *functus officio*.

Preliminary clarifications

37 We make three important clarifications before engaging with the issues arising in the present appeal. First, the issues raised in SUM 3569 are not before this court. AnAn has limited its appeal to the Judge's dismissal of SUM 3902. There is therefore no dispute that the Liquidators are due to be paid their reasonable remuneration and expenses. The sole question is *who* is to bear the Liquidators' fees.

38 Second, neither side disputes that the questions at hand fall to be considered under the Companies Act, and not under the aegis of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"). That is correct, given the application of the saving and transitional provisions in the IRDA: see ss 526(1)(*f*) and 526(2)(*a*) of the IRDA. The relevant dates, namely the date of VTB's application for the winding up of AnAn and the date of appointment of the Liquidators, fall *before* the date on which the IRDA came into force.

39 Third, we will address in this judgment the parties' arguments on the question whether the dispute should be referred to arbitration. This is notwithstanding the fact that (a) AnAn's Notice of Appeal does not raise the issue; (b) VTB has not filed a Notice of Appeal; and (c) the Judge declined to take a view on the arbitration issue, suggesting that no appeal could have been filed with respect to this specific point: see [24] above. However, under O 57 r 9A(5) of the ROC, a respondent need only *state in its case* that it desires to contend on appeal that the decision below should be varied or affirmed on other grounds not relied on by the court below. This was noted in *L Capital Jones Ltd and another v Maniach Pte Ltd* [2017] 1 SLR 312 at [51] and [65]:

> 51 The 1994 Amendment … introduced O 57 r 9A(5), which only required a respondent to ***state in its case*** that it desired to contend on appeal that the decision below should be varied or affirmed on other grounds not relied on by the court below, and to specify the grounds of its contention. …
>
> …
>
> 65 … ***This would allow successful respondents to mount a case to affirm the judge's ultimate decision by raising other arguments which did not find favour with the court below, without needing to file a cross-appeal***. …
>
> [emphasis added in bold italics]

40 Accordingly, it is clear that VTB need not file a formal Notice of Appeal in respect of the arbitration issue. VTB is entitled to argue that this court should decline jurisdiction, and that the dispute should instead be referred to the Arbitration. This argument seeks to *affirm* the Judge's *ultimate* conclusion in dismissing SUM 3902.

Issues on appeal

41 The overarching question in this appeal is whether VTB should be made to bear the Liquidators' fees. Flowing from this, the six issues on appeal may be distilled as follows:

(a) Whether this court should decline jurisdiction over the dispute in favour of the tribunal in the Arbitration (the "arbitral tribunal").

(b) Whether "costs" under the SCJA includes liquidators' remuneration and expenses.

(c) If not, whether this court nevertheless has the power to determine who should bear the Liquidators' fees, and if so, what the source of this power is.

(d) If the court has the aforementioned power, what then is the threshold for the court's exercise of its powers.

(e) Whether the threshold has been crossed, that is, whether we should exercise our powers in favour of AnAn, and order VTB to bear the Liquidators' fees.

(f) Whether this court is *functus officio* in relation to the issue as to who is to bear the Liquidators' fees.

Whether the dispute should be referred to arbitration

42 VTB argues that AnAn has already submitted to the arbitral tribunal the issue of damages arising from the breach of arbitration clause. The present dispute is one that arose "in connection with or as a consequence of an Event of

Default" under the GMRA. VTB highlights that "[i]t is AnAn's own case that CWU 183 was allegedly commenced in breach of the arbitration agreement". The breach "includ[es] all the costs and expenses it had to incur as a result of CWU 183, not just the liquidators' costs". Thus, having elected to bring its claim via arbitration, AnAn "cannot be allowed to maintain this [a]ppeal at the risk of conflicting judgments". Put another way, VTB's argument is that the dispute over who should bear the Liquidators' fees forms part of the damages claimed by AnAn in the Arbitration. We should accordingly decline jurisdiction in favour of the arbitral tribunal.

43 AnAn raises several arguments in retort. First, it argues that the arbitral tribunal does not have the power to order VTB to bear the costs of the liquidation. That power is wielded by the High Court (under its power to award costs). This "is emphatically not a contractual or other claim arising from a dispute but part and parcel of the ongoing litigation proceedings in Court". Further, AnAn argues that by commencing winding up proceedings against AnAn, VTB has submitted to the High Court's jurisdiction which includes all matters relating to the winding up, "including adjudicating the costs of the aborted liquidation". If VTB genuinely believed this to be a matter that should be referred to arbitration, it ought to have applied to stay the present proceedings in favour of arbitration which it did not.

44 Based on the parties' arguments, an apparent tension between two areas of law arises, not too dissimilar from that which arose in *AnAn (CA)*. On the one hand, we have concerns over the arbitrability of the present dispute, which arose from the *insolvency* proceedings. It is indisputable that this court has jurisdiction and control over its own insolvency processes, and that consequently, as a matter of public policy, certain disputes involving insolvency matters are non-

arbitrable: see *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*"). The issue of the Liquidators' fees would, at first blush, appear to fall within the scope of insolvency proceedings, because it arose from summonses filed in respect of CWU 183.

45 On the other hand, the present dispute also appears to fall within the scope of the broadly-worded arbitration clause in the GMRA. Under our arbitration law, the salient facts suggest that the *prima facie* threshold has been crossed. There appears to be some overlap between the issue before this court, and that before the arbitral tribunal. The overlap arises because the damages sought by AnAn in the Arbitration may potentially include the Liquidators' fees. Consequently, it appears that the dispute over who should bear the Liquidators' fees is, in some way, a dispute arising "in connection with" the GMRA (as *per* the arbitration clause).

46 In our view, the present orders that AnAn seeks in the context of the insolvency proceedings, and AnAn's claim for damages for breach of the arbitration clause, are two *distinct* claims with different legal bases. We elaborate.

Different disputes with distinct legal bases

47 At the outset, we express our doubts over AnAn's characterisation of the present dispute as non-arbitrable. While the issue in relation to the liability for the Liquidators' fees *arose from* the winding up proceedings, this does not mean that the issue is necessarily non-arbitrable. To be precise, we are not concerned with the situation contemplated in *Larsen Oil*. In that decision, we stated thus (at [46]):

> We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat ***disputes arising from the operation of the statutory provisions of the insolvency regime per se as non-arbitrable*** even if the parties expressly included them within the scope of the arbitration agreement. [emphasis added in bold italics]

48 The observations in *Larsen Oil* certainly do not mean that any dispute with a connection to insolvency law, no matter how tangential, would be deemed non-arbitrable. In so far as a head of relief is *not* one that the court is only empowered to make under "statutory provisions of the insolvency regime", such relief would *prima facie* fall outside of the prohibitive rule in *Larsen Oil*. Here, it is important to bear in mind that the court is not being asked to exercise any of its powers in relation to insolvency such as an order for judicial management, winding up or the appointment of a liquidator, *etc*. Such powers are vested in the courts by virtue of insolvency legislation and in that sense, such applications are non-arbitrable because arbitrators do not have the powers to grant such orders. But the present case does not involve any of these. The court's powers to order costs, which AnAn seeks to invoke, are not part of the statutory insolvency regime.

49 More fundamentally, and even assuming that the present dispute over the court's *costs* powers is non-arbitrable, the present dispute is simply quite different from the one before the arbitral tribunal. A close examination of the nature of the present proceedings, and those before the arbitral tribunal, reveals that while both parties are not incorrect in principle, they are in truth speaking at cross-purposes.

50 To the extent that the power to award the Liquidators' fees is, AnAn alleges, a part of the court's power to award "costs" arising from the setting aside order, it would appear that the arbitral tribunal has no such power. In this strict sense, the present dispute would indeed be "non-arbitrable". VTB's case, on the other hand, is that the Liquidators' fees should not be treated as costs and that AnAn's claim in the present appeal should in truth be treated as a claim for damages for breach of the arbitration clause. To the extent that such damages *could potentially* include the Liquidators' fees, VTB's argument would also be correct. But critically, these are distinct disputes founded on entirely different areas of law although they may pertain to the same subject matter.

51 We emphasise that arbitration is by its nature consensual. If both parties agree that a commercial dispute over a head of damage should be referred to arbitration as a claim for breach of an arbitration agreement (as is the case at present), then in the absence of any public policy consideration or lack of powers on the part of the arbitrators to grant the relief sought, it would be incongruous to suggest that such a commercial dispute is non-arbitrable.

52 Both parties have expressly acknowledged that the issue of whether the Liquidators' fees are claimable against VTB as damages for breach of the arbitration clause would fall within the scope of the Arbitration. We note that AnAn's pleadings in the Arbitration do not specify the Liquidators' fees as part of the damages claimed; but AnAn has expressly reserved its right to amend its pleadings to this effect. As such, it is clear that the Liquidators' fees may eventually form the subject matter of a *contractual* claim in the Arbitration. In these circumstances, we see no reason to treat the dispute before the arbitral tribunal as non-arbitrable. There is no public policy consideration militating

against the tribunal's adjudication of what is in essence a contractual dispute between two commercial entities.

53 There can be no dispute that the principles for the award of costs, and the principles surrounding the award of contractual damages, are conceptually different. It also cannot be gainsaid that the arbitral tribunal has no power to make any of the orders sought in SUM 3902 (or in the present appeal); the converse is true – the contractual dispute before the arbitral tribunal is not before the court. AnAn has not, in SUM 3902 or CA 23, premised its case on any breach of the arbitration clause.

54 Consequently, although the dispute over the Liquidators' fees can fall within the scope of the Arbitration (as a claim arising from the breach of the arbitration clause), this does not *oust or displace this court's jurisdiction* to adjudicate on the dispute over whether VTB should be ordered to bear the Liquidators' fees *as costs*.

No risk of inconsistent pronouncements

55 There is no risk of inconsistent pronouncements, contrary to what VTB contends. Of foremost importance is the fact that any pronouncement by this court, pursuant to our powers to order costs or otherwise, will *not* create any *res judicata* in respect of AnAn's *contractual* claim for breach of arbitration agreement. As explained above, these are entirely distinct issues, each bearing a different conceptual base.

56 No cause of action or issue estoppel will arise, because there is neither identity of cause of action, nor identity of subject matter: see the requirements of estoppel in *Cheong Soh Chin and others v Eng Chiet Shoong and others*

[2018] SGHC 130 at [28]. There is no identity of cause of action because as explained, AnAn is seeking at present to invoke the court's statutory powers. It has not alleged any breach of the arbitration clause. There is also no identity of subject matter. While there appears to be an *overlap* in the subject matter, *ie*, the form of the specific sum being sought – namely, both the present dispute and AnAn's claim in the Arbitration involve *the Liquidators' fees* – any relief ordered herein would not be one that arises as a consequence of a contractual breach. The converse is true: any order made by the arbitral tribunal, if it rules in AnAn's favour, will be one for *contractual damages*. The difference in the type of relief that may be awarded reveals that the subject matter of the respective claims is distinct. In other words, any decision by this court will not result in "a declaration or determination of a party's liability and/or his rights or obligations leaving nothing else to be judicially determined" in the Arbitration: *Goh Nellie v Goh Lian Teck and others* [2007] 1 SLR(R) 453 at [28]. The issue of damages for breach of the arbitration clause will remain to be heard by the arbitral tribunal.

57 In practical terms, there is no risk of anomalous outcomes. This becomes clear when considering the various outcomes of the appeal. If we find in favour of AnAn and order VTB to bear the Liquidators' fees, AnAn will likely not be able to recover such fees as part of its claim for damages in the Arbitration since AnAn would not have suffered any loss in respect of the fees. If we find in VTB's favour, and orders AnAn to bear the Liquidators' fees, AnAn will likely pursue VTB for these fees as part of its claim for damages for breach of the arbitration clause. Such a claim will be determined as a contractual claim in the Arbitration.

58 Indeed, counsel for VTB, Ms Shobna Chandran, acknowledged during the hearing of CA 23 that AnAn would *not* be estopped from pursuing, as part of its claim for damages in the Arbitration, the Liquidators' fees, because "there has been no substantive determination on these issues" before this court. She fairly recognised that these issues will be left to be determined by the arbitral tribunal.

59 Based on the foregoing, we see no reason to decline jurisdiction over the present dispute. The contractual dispute before the arbitral tribunal over the same subject matter but on a different legal basis does not *per se* oust our *jurisdiction* over CA 23.

Whether "costs" includes liquidators' remuneration and expenses

The parties' arguments

60 AnAn's argument is that the court has a *statutory power* to award "costs" under s 18(2) SCJA read with Para 13, and that this power encompasses the court's power to order another party to bear a liquidator's expenses and remuneration. AnAn first contends that there is "no express limitation" on what "costs" in the SCJA means, or on whom costs may be awarded against. "Costs" is however defined in O 59 r 1(1) of the ROC to include "fees, charges, disbursements, expenses and remuneration". As the ROC is subsidiary legislation derived from the SCJA, it stands to reason that the word "costs" in both statutes should bear the same meaning. Notwithstanding the non-applicability of the ROC to winding up proceedings (as *per* O 1 r 2(2) of the ROC), AnAn submits that this court is nonetheless entitled to look at the definition of "costs" in the ROC to inform the meaning of the term "costs" in the SCJA. "Costs" in the latter must be at least as broad as "costs" in the former.

61 AnAn then argues that the definition of costs in O 59 of the ROC encompasses liquidators' remuneration and expenses. The wording of "expenses and remuneration" is sufficiently broad. The "underlying principle" is the same: costs should follow the event and it is only fair that the successful party should be compensated. Further, compulsory winding up of a company is a form of court proceedings, and the remuneration of a liquidator appointed pursuant to such a winding up must therefore comprise part of the costs "of and incidental to proceedings" under O 59 r 2(2) ROC. Section 311 of the Companies Act supports this: it refers to a liquidator's remuneration as part of "[a]ll proper costs, charges and expenses of and incidental to the winding up". Likewise, s 328(1)(*a*) of the Companies Act refers to such remuneration as part of "the costs and expenses of the winding up". Based on this, AnAn contends that as "winding up" is a "proceeding" in the Supreme Court, it "follows that the liquidator's remuneration and expenses are part of the costs of or incidental to those proceedings".

62 Building on the above points, the Judge (AnAn contends) was incorrect to hold that Para 13 cannot encompass costs such as liquidators' remuneration since such remuneration is already dealt with by the insolvency regime under the Companies Act (see Judgment at [15]). The Judge's reasoning confuses the supervisory jurisdiction of the court over the liquidator's remuneration (under the Companies Act) and the court's adjudicatory jurisdiction to determine who should ultimately bear the costs of the litigation (which arises from the SCJA).

63 Finally, AnAn relies on foreign and local jurisprudence to buttress its position. In the NSWSC's decision of *In the matter of Complete Investing Services Pty Ltd (in liq) (Costs)* [2018] NSWSC 1059 ("*Complete Investing*"), the court ordered the applicant creditor and the company to equally bear the

costs of the liquidator, following the decision to set aside the winding up order. *Complete Investing* according to AnAn is instructive because the provisions in the NSW legislation are "akin to" the provisions in the SCJA and ROC. Similarly, in *Teelek Realty Pte Ltd and others v Ng Tang Hock* [2021] 2 SLR 719 ("*Teelek*"), this court ordered the second appellant to be personally liable for the liquidator's remuneration and expenses.

64 VTB stops short of asserting that the court has no power to make the orders sought by AnAn. Instead, it addresses AnAn's contentions, and argues that the court's power to order costs under the SCJA/ROC does not encompass the power to make orders in relation to a liquidator's fees. Claims for such fees should be sought "as a separate and independent relief at the hearing of the appeal against the winding-up order". VTB also contends that the decisions cited by AnAn are distinguishable.

Adjudicatory and supervisory jurisdiction

65 We first deal with a specific aspect of AnAn's case that "costs" in Para 13 includes liquidators' remuneration and expenses (see [62] above). AnAn argues that the power to award costs is part of the court's *adjudicatory* jurisdiction in respect of CA 174. This is to be contrasted with the court's *supervisory* jurisdiction over liquidators.

66 As a starting point, it is common ground between AnAn and VTB that the prayers sought herein by AnAn involve an invocation of the court's *adjudicatory* jurisdiction. The distinction between adjudicatory and supervisory jurisdiction was fully explored in this court's decision in *Ho Wing On Christopher and others v ECRC Land Pte Ltd (in liquidation)* [2006] 4 SLR(R) 817 ("*ECRC*").

67 We agree with the parties that in the present appeal, the court is indeed being asked to exercise its *adjudicatory*, not supervisory, jurisdiction. The present dispute involves this court *adjudicating* on the merits of AnAn's claim for VTB to bear the Liquidators' fees or to indemnify AnAn for the same. This is an exercise involving the court's adjudicatory jurisdiction, because the court is being asked to arrive at a "consequential order that follows the principal decision reached by the court with regard to the issues of the case": *ECRC* at [45]. The court's adjudication of the issues will determine the rights of the two parties in SUM 3902.

68 Supervisory jurisdiction is quite clearly not invoked here. The court's supervisory jurisdiction, as clarified in *ECRC*, arises from the Companies Act, and empowers the court to make orders *as against a liquidator*. The prayers sought in SUM 3902 are not against the Liquidators, but against VTB, a *party to the litigation*.

69 However, the mere fact that the court's adjudicatory jurisdiction is being invoked against VTB does not advance AnAn's claim against VTB in respect of the Liquidators' fees. It remains necessary and relevant to draw a distinction between the adjudication of CA 174, and the adjudication *of the present appeal*.

70 AnAn characterises the issue before us as: "where the company has successfully appealed a winding-up order [*ie*, CA 174], whether the Court can exercise its adjudicatory jurisdiction under the SCJA to order that those costs be met by the unsuccessful applicant". The Liquidators' fees are to be regarded as part of the "costs" of CA 174, because they "had been incurred as part of the costs of and incidental to the legal proceedings in which an adjudication has been made in favour of the party that incurred that cost". To that extent, AnAn

contends, the court's *adjudicatory jurisdiction to award costs in CA 174* is being invoked in the present appeal. Such "costs" should follow the event, namely AnAn's success in CA 174.

71 We disagree with AnAn for two key reasons. First, in principle, it would be incorrect to regard the court's adjudication of the present appeal as part and parcel of the adjudication of CA 174. CA 174 and CA 23 are entirely different appeals, each concerned with distinct legal issues. CA 174 concerned whether the winding up order in CWU 183 could be sustained, and upon determination of that issue, who should bear the legal costs of that appeal. CA 23 involves a *posterior and distinct* question of who is to bear the expenses arising out of AnAn's now-aborted liquidation. This question has arisen for determination as a result of AnAn's application in SUM 3902. Secondly and critically, AnAn's argument is contingent on us accepting that a liquidator's remuneration constitutes "costs" under the SCJA. This is the pivotal and decisive issue in this appeal. For the reasons provided below, we do not accept that "costs" includes "liquidators' remuneration".

"Costs" under the SCJA

72 It seems to us that AnAn has advanced its case theory in order to rely on the usual consequential order that costs should follow the event. In our judgment, there is no legal basis to support such an argument.

73 Nothing in the SCJA expressly confers the court with the power to order a party apart from the company to bear a liquidator's remuneration. While the word "costs" in Para 13 may be undefined, it is clear that it does not encompass a liquidator's remuneration. To begin with, there is no mention of winding up proceedings or insolvency in the SCJA, save for the Sixth Schedule (dealing

with appeals to be made to the Court of Appeal). Section 18(2) of the SCJA read with Para 13 merely specify that the court *has the power to award costs*. This is entirely uncontroversial.

74 AnAn argues, in the absence of any express provision to support its interpretation, that there is "no express limitation" on the definition of "costs". While that may be true, this does not aid AnAn. The *absence* of any limitation to the definition of costs does not logically lead to the conclusion that such a power exists.

75 AnAn then points to the definition of "costs" in O 59 of the ROC to inform its interpretation of "costs" in Para 13. It contends that "costs" in the SCJA and "costs" in the ROC "must bear the same meaning", and that such meaning includes a liquidator's expenses and remuneration.

76 We disagree. There is no canon of interpretation that allows subsidiary legislation to inform the meaning of primary legislation. We are not aware of any authority to support such rule of interpretation and none has been cited by AnAn. The SCJA and the ROC are drafted by different entities. The SCJA, being primary legislation, is an act of Parliament, *ie*, the legislature. Its meaning is to be informed by Parliamentary intention. On the other hand, the ROC is subsidiary legislation created under s 80 of the SCJA. The drafters are *not* Parliament, but the Rules Committee: s 80(1) SCJA. Accordingly, and quite obviously, it would be incorrect absent good reason to use the rules drafted by the Rules Committee to inform the meaning of legislation drafted by *the legislature*. There is no legislative material indicating that the ROC is relevant to the interpretation of the SCJA, at least in the context of the present issue on "costs".

77 While there exists a canon of interpretation that an identical expression used in the *same statute* should bear the same meaning (see *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [58(c)(i)]), this rule does not appear to apply *across* primary and subsidiary legislation.

78 Even assuming the ROC could inform the meaning of the SCJA, AnAn has not shown that "costs" in the ROC includes a liquidator's remuneration. In fact, the position is to the contrary as O 1 r 2(2) of the ROC expressly excludes the application of the ROC to winding up proceedings. AnAn itself has recognised this. How, then, can "costs" in the ROC contemplate liquidators' remuneration if the ROC does not apply to winding up proceedings? In other words, if the ROC excludes winding up proceedings, it cannot then be said that any provision therein contemplates the very expenses that are incurred *in the course of such excluded proceedings*.

79 In this regard, AnAn argues that O 1 r 2(2) ROC is "no barrier to the Court taking guidance from O 59", because the courts "habitually have regard to or take guidance from O 59 … even in the context of winding up proceedings". AnAn cites *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") to this effect. We fail to see the relevance of *Sun Electric*. In *Sun Electric*, we examined the court's power to order the *costs of proceedings against a non-party*. While the proceedings concerned an appeal against a winding up order, the reference to O 59 r 2(2) ROC in *Sun Electric* at [47] was for the general principle that costs of and incidental to the proceedings "shall be at the discretion of the court" which includes the power to order *legal costs* against the non-party directors and shareholders in the event the appeal is unsuccessful. This is quite unlike the present appeal where AnAn is relying on the definition

of costs under O 59 r 1 ROC to include fees and expenses which are uniquely incurred in the context of winding up proceedings notwithstanding O 1 r 2(2) ROC which expressly excludes its application to winding up proceedings.

80 AnAn has also put forward a further argument: that liquidators' remuneration comprises part of the costs "of and incidental to proceedings" under O 59 r 2(2) of the ROC (see [61] above). This argument is likewise untenable since O 59 r 2(2) is "[s]ubject to the express provisions … of these Rules", which would include O 1 r 2(2) ROC. AnAn's argument therefore fails to properly account for the exclusion of winding up proceedings in the ROC.

81 Finally, AnAn's reliance on the foreign and local jurisprudence does not support its position (see [63] above). In the NSWSC's decision in *Complete Investing*, the court ordered the applicant creditor and the company to *equally bear* the liquidator's expenses and remuneration. This followed the decision to set aside the winding up order. In ordering the parties to equally bear the liquidator's expenses and remuneration, the NSWSC invoked its power to award costs under s 98(1) of the Civil Procedure Act 2005 (New South Wales) ("the NSW Act"). AnAn argues that *Complete Investing* is instructive because the provisions in the NSW Act are "akin to" the provisions in the SCJA and ROC.

82 However, the NSW Act is not *in pari materia* with the ROC, and it is an unsuitable reference for the position under Singapore law. The relevant provisions of the NSW Act are as follows:

> **3 Definitions**
>
> (1) In this Act:
>
> …

> ***costs***, in relation to proceedings, means costs payable in or in relation to the proceedings, and includes fees, disbursements, expenses and remuneration.
>
> …
>
> …
>
> **4 Application of Parts 3–10**
>
> (1) Subject to this section, Parts 3–9 apply to each court referred to in Schedule 1 in relation to civil proceedings of a kind referred to in that Schedule in respect of that court.
>
> …
>
> (2) The uniform rules may exclude any class of civil proceedings from the operation of all or any of the provisions of Parts 3–9.
>
> …
>
> (5) Subject to any such regulation, this Act does not limit the operation of any other Act with respect to the conduct of civil proceedings.
>
> …
>
> **Part 7 Judgments and orders**
>
> …
>
> **Division 2 Costs in proceedings**
>
> **98 Courts powers as to costs** (cf Act No 52 1970, section 76; SCR Part 52A, rules 5, 6, 7 and 8; Act No 9 1973, section 148B; Act No 11 1970, section 34)
>
> (1) Subject to rules of court and to this or any other Act –
>
> (a) costs are in the discretion of the court, and
>
> (b) the court has full power to determine by whom, to whom and to what extent costs are to be paid, and
>
> (c) the court may order that costs are to be awarded on the ordinary basis or on an indemnity basis.

Critically, s 4 of the NSW Act (on the applicability of the statute) does not exclude winding up proceedings, *unlike O 1 r 2(2) ROC*. Accordingly, the NSWSC is not prohibited from referring to the NSW Act in determining the issue of a liquidator's remuneration.

83 This distinction between s 4 of the NSW Act and O 1 r 2(2) ROC is of utmost importance. There are admittedly some similarities between the language of s 3 of the NSW Act and O 59 r 1(1) ROC (on the definition of "costs"), as well as between the words of s 98 of the NSW Act and those of O 59 r 2(2) ROC (on the court's powers to order costs). However, the exclusionary nature of O 1 r 2(2) ROC *vis-à-vis* winding up proceedings makes all the difference. It simply means that the ROC cannot serve as a reference point for the treatment of "costs" in the course of such proceedings.

84 The other case cited by AnAn, *Teelek*, is readily distinguishable. In that case, we ordered the second appellant to be personally liable for the liquidator's remuneration and expenses in the light of the second appellant's *oppressive conduct*: see *Teelek* at [103]. In making that order, we made no reference to the ROC or the SCJA. *Teelek* clearly does not support AnAn's interpretation of the SCJA, Para 13 and the ROC.

85 Based on the foregoing, we reject AnAn's argument on the source of the court's power. The power to make orders as regards the Liquidators' fees is quite clearly not located in the SCJA or the ROC, under the court's power to order costs. We add that *even if* we accept AnAn's position that "costs" includes a liquidator's remuneration and expenses, we disagree that such "costs" necessarily "follow the event", *ie*, the reversal of the winding up order. AnAn must still prove *fault* on the part of VTB, and in our view, such fault is not present on the facts of this case – we elaborate on these points shortly (see [118] and [125]–[143] below).

86 To conclude, it must be recognised that AnAn's claim is for VTB to *indemnify* it not for "costs", but for the *fees* which are rightly due to be paid to

the Liquidators. The indemnity sought is not for *costs*, because AnAn did not incur these expenses, unlike for example a situation where an expert is appointed by a party for the purposes of the case. In that situation, costs will include disbursements such as the remuneration and fees of the expert. Liquidators however stand in quite different shoes: they are remunerated from the liquidated company's assets, under the supervision of the court: see s 311 of the Companies Act. The remuneration of liquidators consequently cannot be regarded as costs (or for that matter, disbursements) in the manner that an expert's fees can.

The court's power to order a petitioning creditor to bear a liquidator's fees and expenses

87 Our rejection of AnAn's argument that liquidators' remuneration does not fall within the rubric of costs under the SCJA or the ROC does not mean that the court is left without the power to make the order sought by AnAn.

88 In our view, the power resides in the court's inherent powers under O 92 r 4 of the ROC. We raised this point at the hearing of the present appeal, and both counsel accepted that the court does possess the inherent power to order an unsuccessful petitioning creditor to bear the liquidator's expenses and remuneration. Indeed, such a power was exercised in *Teelek*, where the second appellant was ordered to bear the liquidator's remuneration and expenses (see [84] above). However, the source of that power was not explicitly explained in *Teelek.* We therefore take this opportunity to briefly clarify why that power is rightly founded in the court's inherent powers, before turning to the more pertinent question of when this power can be invoked and under what circumstances.

The source of the court's power

The SCJA, the ROC and the Companies Act

89 It must be borne in mind that the SCJA and the ROC are general legislation that deals with the jurisdiction of the various courts, and their general powers to order legal costs in relation to court proceedings. Insolvency and winding up are *specialised* areas of law, and there is legislation dealing specifically with these issues, *ie*, a *lex specialis*. It is likely for this reason that the Judge turned to the insolvency regime under the Companies Act.

90 In this respect, AnAn contends that the Judge erred in considering the issue at hand as falling within the Companies Act. The Judge observed that the issue of liquidators' remuneration is already dealt with by the insolvency regime under the Companies Act: Judgment at [15]. AnAn argues that the Judge's reasoning confuses the court's supervisory jurisdiction under the Companies Act and the court's adjudicatory jurisdiction to determine the party who should ultimately bear the costs of litigation under the SCJA.

91 The Companies Act provisions that appear relevant are ss 268(3), 311 and 328(1)(*a*):

> **General provisions as to liquidators**
>
> **268.** …
>
> (3) A liquidator, other than the Official Receiver, shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined —
>
> (*a*) by agreement between the liquidator and the committee of inspection, if any;
>
> (*b*) failing such agreement, or where there is no committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than 75%

> in value and 50% in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted for the purpose of voting, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator and the amount of remuneration sought by him; or
>
> (*c*) failing a determination in a manner referred to in paragraph (*a*) or (*b*), by the Court.
>
> …
>
> **Costs**
>
> **311.** All proper costs, charges and expenses of and incidental to the winding up including the remuneration of the liquidator shall be payable out of the assets of the company in priority to all other claims.
>
> …
>
> **Priorities**
>
> **328.**—(1) Subject to the provisions of this Act, in a winding up there shall be paid in priority to all other unsecured debts —
>
> (*a*) firstly, the costs and expenses of the winding up including the taxed costs of the applicant for the winding up order payable under section 256, the remuneration of the liquidator and the costs of any audit carried out pursuant to section 317;
>
> …

92 The above provisions essentially provide that upon appointment by the court and performance of their roles, liquidators are entitled to reimbursement for their reasonable remuneration and expenses. Such reimbursement is payable *by default* out of the assets of the wound-up company in priority to the company's other debts, and the quantum of such reimbursement may be fixed by the court absent agreement between parties. That is the extent of the statutory insolvency regime under the Companies Act. But these provisions do not discuss whether *a petitioner* may be made liable to, or may be ordered to indemnify, a liquidator for his/her remuneration and expenses. These are

separate points which the Companies Act was quite clearly not designed to cater for.

Inherent powers

93 Chao Hick Tin JC (as he then was) alluded to the existence of a general power in *Re Pac-Asian Services Pte Ltd* [1987] SLR(R) 717 ("*Re Pac-Asian*"), citing *Re Bridal Centre Co Pty Ltd* (1985) 9 ACLR 481 at 488 ("*Re Bridal Centre*"). Chao JC quoted (at [13]) Kelly J in *Re Bridal Centre*, who stated thus:

> In many cases where the petition is dismissed, it would seem unjust that the remuneration should come out of the assets of the company and in those circumstances one would expect that those who seek the appointment of the provisional liquidator would eventually be responsible for the liquidation.

Chao JC noted the relevance of Kelly J's observations *vis-à-vis* the order in *Re Pac-Asian*. Specifically, he noted that "[t]he Court of Appeal in the present case has ordered an inquiry as to the damages suffered by the company. This must be what Kelly J contemplated when he said, '[t]hose who seek the appointment … would eventually be responsible'". The issue in *Re Pac-Asian* was whether provisional liquidators are entitled to payment out of the company's assets, and Chao JC therefore did not rule on the question of *who was to bear the liquidator's remuneration*, or for that matter whether the court had the power to make a petitioner bear such remuneration. But importantly, he observed the potential relevance of Kelly J's pronouncement, and did not foreclose the possibility of the court possessing such a power.

94 In our judgment, Kelly J's observations in *Re Bridal Centre* must be correct – the court possesses the power to, in certain cases where it would be unjust for the company to bear the brunt of the liquidator's remuneration, order a petitioner to bear such remuneration. This power forms part of the court's

inherent powers; the court is entitled to rely on its inherent powers in such situations, because they involve an area in which no statutory provision applies: *Standard Chartered Bank (Singapore) Ltd v Construction Professional Resources Pte Ltd* [2019] 5 SLR 709 ("*Standard Chartered*") at [10]. Order 1 r 2(2) of the ROC does not preclude reference to O 92 r 4 in the context of winding up proceedings, because the latter expressly states that "nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or prevent an abuse of the process of the Court". Nor is there any statutory exclusion of the power we are concerned with: see *Chan Yun Cheong (trustee of the will of the testator) v Chan Chi Cheong (trustee of the will of the testator)* [2021] 2 SLR 67 ("*Chan Yun Cheong*") at [37].

95 Crucially, the powers we are concerned with are designed "to prevent injustice or prevent an abuse of the process" in order to remedy unfair situations such as those considered by Kelly J in *Re Bridal Centre*. Our courts have, in various decisions, discussed the various diverse situations in which the invocation of its inherent powers to remedy injustice was appropriate: see for example *Siva Kumar s/o Avadiar v Quek Leng Chuang and others* [2021] 1 SLR 451 ("*Siva Kumar*") at [56]–[58]; *Harmonious Coretrades Pte Ltd v United Integrated Services Pte Ltd* [2020] 1 SLR 206 at [40]; *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [36]–[40]. The common thread in these decisions is that the court's inherent powers are only exercised in *exceptional circumstances*, to do justice or to avert injustice: *Chan Yun Cheong* at [37]. The "essential touchstone" is one of *need*: *Siva Kumar* at [57].

96 The power, however, ought to be carefully and narrowly defined, given that it is well-recognised that "[t]he inherent power of the court under O 92 r 4

… is a wide but rarely used power": *Standard Chartered* at [10]. In exercising such powers, the court must "ensure no prejudice to anyone in any way": *Standard Chartered* at [10]. In addition, the power we are presently concerned with, while not statutorily excluded, would appear to interact with the statutory insolvency regimes under the Companies Act and IRDA. There is thus a need to ensure that when the court exercises such power, it will not be contrary to any aspect of these statutory regimes: see also *Chan Yun Cheong* at [38].

Safeguards on the court's exercise of its power

97 In our view, the court's power may be understood as follows: where a company is wound up, and the winding up order is reversed on appeal, the court has the power to order the petitioning creditor(s) to bear a part or the whole of the liquidator's remuneration and expenses. The court will consider all the facts of a given case before determining whether to exercise this power, including but not limited to the conduct of the petitioner and the company (and its officers).

98 This power may be exercised subject to several important caveats. First, the mere fact that a winding up order is reversed will be insufficient to warrant the exercise of the power. We elaborate further under the next issue. In short, a reversed winding up order is a threshold condition that must be met before the court even considers exercising its powers. The company must be able to point to some *fault* on the petitioner's part beyond the reversal of the winding up order to warrant the court's exercise of its powers.

99 Next, and at the risk of stating the obvious, the statutory provisions governing a liquidator's claim for his/her remuneration must still be satisfied. That is, the regime under s 268 of the Companies Act (or s 78 of the IRDA) remains fully applicable. A liquidator is only entitled to reasonable

remuneration. This, often, would form the subject matter of a separate summons filed by the liquidator.

100 Any order made by the court against a petitioner ought to assume the form of an order for the petitioner to *indemnify* the company for the remuneration paid to the liquidator. As a starting point, the liquidator must still be paid from the company's assets pursuant to s 311 of the Companies Act or s 183 of the IRDA, which state that a liquidator's remuneration and expenses "are payable out of the assets of the company". This is a crucial point that must be observed in order not to subvert the statutory insolvency regime.

101 This would safeguard the liquidator's entitlement for his remuneration. It should not be overlooked that while a liquidator is appointed pursuant to an application by a petitioning creditor, the appointment is made by the court (see [92] above) – hence the need to provide security for his remuneration.

102 With the aforementioned safeguards, any litigation over liability for a liquidator's fees can be effectively confined between the petitioner and the company. There will be no encroachment on the court's *supervisory jurisdiction* over liquidators under the Companies Act and IRDA. The manner in which the present proceedings have transpired proves the point. The Liquidators' concerns were addressed in SUM 3569, which does not form part of the present appeal. They have no interest in the present appeal. The dispute now pertains solely to determination of the liability with respect to the Liquidators' fees as *between AnAn and VTB*.

103 Finally, it is open to the court to order a petitioner to indemnify the company *partially*. The discretionary nature of the court's inherent powers

necessarily implies that the court is fully empowered to make nuanced and measured orders in order to achieve justice. Indeed, this form of order is not a novel one. The NSWSC in *Complete Investing* ordered the company and the petitioner to bear *equal* "responsibility" for the winding up. In appropriate cases, a similar approach may be adopted by our courts. The determination of the appropriate ratio will inevitably be fact-sensitive. It will turn on a variety of factors including the company's conduct, the petitioner's conduct and the justice of the case viewed holistically.

The threshold for the court's exercise of its power

104 Based on the foregoing, it is clear that the court does have the power to make the orders sought by AnAn, under its inherent powers. The next key question is whether we should exercise our power to order VTB to indemnify AnAn for the Liquidators' fees. This is preceded by the question of the *threshold* that must be met before the court is satisfied that it should exercise its power. For convenience, we henceforth refer to this as "the power".

105 AnAn contends that there is no requirement of fault, and that "costs" should follow the event. That is, because it succeeded in CA 174, all of the expenses incurred in the course of the winding up should be borne by VTB. VTB contends that the company must show "misconduct or an abuse of process" in order for the petitioning creditor to be found liable.

106 In our view, the inquiry is a fact-sensitive one that is fault-based and concerned with unfair conduct on the part of the petitioner. The heart of the inquiry is whether the petitioner has acted in a manner that would render it unfair for the company to bear the liquidator's remuneration and expenses. This

inquiry arises *regardless* of whether the power is one that arises from the court's inherent powers or its power to award costs.

The relevance of fault

107 There are two fundamental starting points to the present inquiry, the first being the very nature of the court's inherent powers. These powers are indubitably wide and discretionary, and rooted in the notion of fairness; the object of the power in any case is ultimately to "express justice": *Standard Chartered* at [10]. Much will accordingly turn on the facts of a given case, and whether unfairness may be discerned. As alluded to, in cases involving questions over who is to bear a liquidator's remuneration, central to the consideration of fairness and justice would be the conduct of the parties, and whether they have acted in a manner that warrants the court's intervention.

108 This is in line with the second starting point – the default position under s 311 of the Companies Act, which stipulates that the fees and expenses of the liquidator should *ordinarily* be paid out from the assets of the company. A claim for an indemnity against a petitioning creditor for such fees and expenses is therefore a *departure* from the default position. Any departure would, logically, require justification; such justification, in our view, would typically entail the company demonstrating some fault or unfair conduct on the part of the petitioner.

109 In this connection, we examine the decisions cited by the parties. From our review of the cases, it appears that the common denominator is that fault on the part of the petitioner is necessary before the court would exercise its power to order a petitioner to bear the liquidator's remuneration and expenses. It is

insufficient to simply point to the fact that the expenses were incurred as a result of an aborted winding up.

110 To recap, Chao JC in *Re Pac-Asian* cited Kelly J's observations in *Re Bridal Centre* (see [93] above), that "[i]n many cases where the petition is dismissed, it would seem unjust that the remuneration should come out of the assets of the company" (at [13]). While the element of fault was not expressly discussed, Kelly J did mention that the factor militating in favour of making the petitioner bear the expenses is "unjust[ness]". The relationship between fault and unjustness is clear, and we are of the view that the pronouncements in *Re Pac-Asian* and *Re Bridal Centre* some three decades ago were indeed prescient in this regard.

111 *Teelek* presents a much clearer example. The notion of fault was patent in that case. The court considered the second appellant's *oppressive conduct* to be the key factor in ordering her to bear the full extent of the liquidator's remuneration and expenses. The second appellant's oppressive conduct manifested the fault and unfairness that called for the court's intervention.

112 A similar approach has been adopted by the courts in other jurisdictions. In *Locker Group*, the Supreme Court of Victoria ("VSC") found that the petitioning creditor had failed to disclose material information. Locker Group, one of the creditors, applied to be the petitioning creditor in the winding up application in place of the original petitioning creditor. Locker Group stated on affidavit that it had served its papers on the company on 3 June 2014 when the papers only reached the company on 10 June 2014. The company was wound up on 11 June 2014 when no representative appeared on behalf of the company

at the winding up hearing. The company thereafter successfully applied to set aside the winding up order.

113 At the main appeal itself, the company sought an order that the petitioning creditor, Locker Group, should bear the liquidators' costs. The VSC found that had the late service of the winding up petition been properly disclosed to the judge hearing the petition, the winding up order would not have been made. On this basis, the petitioning creditor was ordered to pay the reasonable remuneration and expenses of the liquidators: see *Locker Group* at [60]. The fault of the petitioning creditor was evident, as was the unfairness occasioned by the creditor's less-than-candid conduct.

114 The VSC rendered a similar decision in *Victorian Workcover Authority v Barroaghan Pty Ltd* [2001] VSC 413 ("*Barroaghan*"). The petitioning creditor was found to have abused the winding up process because it failed to disclose significant information, and seriously misrepresented the facts. These led to the initial winding up orders being made. The VSC noted at [18] that "[t]he courts have regarded circumstances of failure to disclose significant information or misrepresentation of the facts as a serious matter constituting an abuse of process". In the light of the abuse and patent fault, the petitioning creditor was ordered to bear the costs of the liquidator.

115 In the same vein, in *Baldwin v Baldwin* (1947) 82 Cal App 2d 851 ("*Baldwin*"), the California Court of Appeal affirmed the lower court's decision to order the appellant, who had sought the appointment of the receiver, to pay the receiver's costs and expenses. This was not a case involving winding up, but receivership. The court's observations are nevertheless pertinent, and they demonstrate that fault of the petitioner is relevant. The court agreed with the

lower court's findings that the appointment of receiver "was made in reliance upon the [appellant's] false allegations" and that the receivership was consequently "unnecessary, improvident, wrongful and inequitable" (at 854).

116 AnAn cites *Complete Investing* to support its position that fault is irrelevant. This is a misreading of *Complete Investing*. First, the court in *Complete Investing* found it relevant that there was "a consensus between Mrs McMillan and Roam that the liquidator's costs and remuneration should be borne equally by Roam and the Company" (at [29]). Secondly, the court observed that "it seems … that Roam and the Company bear relatively equal *responsibility* for the circumstances in which the winding up order was made … and that they should equally bear the costs and remuneration of the liquidator" [emphasis added] (at [30]). It is thus clear that the court considered the parties' fault, or "responsibility" for the winding up, to be relevant for the purpose of determining liability for the liquidator's remuneration.

117 The authorities above demonstrate that fault or unfairness is an essential requirement before the courts would exercise their powers to order a petitioner to bear the liquidators' remuneration. Thus, as mentioned at [98] above, the mere fact that a winding up order is reversed will be insufficient *per se* to warrant the exercise of the power. There must be proper scrutiny into *why* the winding up order was reversed, and whether the petitioner's unfair conduct had led to the winding up order being granted in the first place.

118 The cases discussed put paid to AnAn's contention that fault is irrelevant, and that "costs" should follow the event. Fault on the part of the petitioner remains crucial in the inquiry. This is true *even if* one accepts that a liquidator's remuneration falls within the meaning of "costs"; this much is clear

from the Australian decisions discussed above. In invoking its powers to order costs under the NSW Act, the NSWSC in *Complete Investing* scrutinised the petitioner's "responsibility" for the winding up order. Similarly, in exercising its power to award the "costs or expenses of any person" pursuant to s 29(1)(*a*) of the Civil Procedure Act 2010 (Victoria), the VSC in *Locker Group* placed paramount importance on the petitioner's prejudicial non-disclosure (*Locker Group* at [58]–[60]). Accordingly, even if AnAn overcomes the first hurdle in its case (of having to prove that "costs" includes a liquidator's remuneration), there is yet a second hurdle that it must cross.

119 We add that fundamentally, AnAn's position, if accepted, could lead to unfair and unprincipled outcomes. On the one hand, we have cases where the insolvent company succeeds in resisting the winding up application not because of the doubtfulness of the petitioned debt, but for jurisdictional reasons. The facts of *AnAn (CA)* provide a paradigm example. It bears mention that AnAn succeeded in CA 174 because of the arbitration clause in the GMRA, coupled with our recognition of the *prima facie* threshold. But that did not mean that no debt was owed by AnAn; rather, it simply meant that the disputed debt ought to be contested in the contractual forum, *ie*, arbitration. On the other hand, there may be cases where a winding up petition is *maliciously* brought. This would include cases where the debt in question is doubtful or non-existent, and it would appear that the petitioner had brought the petition for ulterior motives or in abuse of process. Also similar to this category would be cases involving deliberate or dishonest non-disclosure of documents during the presentation of the winding up petition. If AnAn's contention is accepted, such considerations will no longer be material in examining where the justice of the case lies in order to determine the liability for the liquidator's remuneration as between the company and the petitioning creditor.

Whether fault must rise to the level of abuse of process

120 Where an abuse of process is established, the elements of unfairness and fault (on the part of the petitioner) will be patent, and this would justify the court's exercise of the power. This is because abuse of process would involve the invocation of the court's processes for unmeritorious or improper purposes, to the prejudice of a respondent.

121 That said, we hesitate to peg the minimum threshold for the exercise of the power to an abuse of process. The authorities do not appear to set the threshold at such a high level. The decisions in *Re Pac-Asian*, *Teelek*, *Locker Group* and *Baldwin* did not express the threshold to be abuse of process or malicious prosecution. While the VSC in *Locker Group* considered several statutory provisions on abuse of process, the ultimate findings made (see *Locker Group* at [60]) did not include any conclusions on abuse of process. While the VSC in *Barroaghan* did expressly find an abuse of process, this does not necessarily justify the imposition of a minimum threshold of abuse of process. The VSC did not suggest that a finding of abuse of process would be *necessary* before the court would be willing to exercise its powers against a petitioning creditor.

122 For similar reasons, VTB's reliance on *Deputy Commissioner of Taxation v Starpicket Pty Ltd (No 2)* [2013] FCA 699 ("*Starpicket*") is misplaced. By VTB's own admission, the relevant observations in *Starpicket* were *obiter*. More pertinently, the observations made by the Federal Court of Australia ("FCA") do not support VTB's contention (at [70]):

> … While I do not doubt that there may be circumstances in which such an order may be appropriate – *for example* where a winding up application has been brought in circumstances

> which amount to an abuse of process – this is not such a case. … [emphasis added]

As seen, the FCA did not observe that abuse of process *must* be established before the court will order the petitioner to bear the liquidator's remuneration. Rather, the FCA cited abuse of process as one of the *possible* scenarios in which the court may be inclined to do so.

123 In summary, it is important to recognise that in situations falling below the threshold of abuse of process, much will depend on the facts of the case. It is not difficult to imagine that even absent an abuse of process, a petitioner can be meaningfully said, in certain scenarios, to have acted unfairly or to have been at "fault"; this much is clear from the cases discussed above.

Whether VTB has crossed the threshold

124 Based on the threshold we have articulated in the preceding section, VTB should not be made to bear the Liquidators' fees. While VTB's acts resulted in AnAn being wrongly wound up, VTB's conduct was not so egregious or unfair as to warrant our intervention.

No fault or abuse of process on VTB's part

125 The complexion of the proceedings below supports the conclusion that VTB did not act with fault. The picture would be different if VTB had jumped the gun in proceeding with the winding up route when the alleged debt owed by AnAn was not due at the time of the statutory demand, or if the court found that there was no debt due to VTB at all. That could possibly constitute "fault" on VTB's part. But that was not what occurred.

126 Here, it was not seriously disputed that an event of default had occurred in relation to the GMRA (see [10] above). In the face of such default, VTB properly served a statutory demand on AnAn on 23 July 2018, which was left unsatisfied. On 10 August 2018, AnAn's lawyers wrote to VTB's lawyers; they disputed the debt and asked VTB to consider not proceeding with a winding up application, failing which they would apply for an injunction. AnAn then made an urgent application for an injunction on 13 August 2018, *vide* HC/SUM 3677/2018 ("SUM 3677") in HC/OS 975/2018.

127 Andrew Ang SJ heard SUM 3677 on the same day. Pertinently, AnAn did not place paramount importance on the arbitration clause in its injunction application, and instead primarily relied on arguments premised on frustration and *force majeure*. This is reflected in Ang SJ's minute sheet, where he dismissed SUM 3677 on the basis that there was no *bona fide* dispute between the parties, as *per* the test set out in *BDG v BDH* [2016] 5 SLR 977. It was following these events that, on 17 August 2018, VTB filed CWU 183.

128 The rest of the proceedings then unfolded as set out at [11]–[13] above. It is highly relevant that, as we highlighted to counsel, our decision in CA 174 arose from an important point of law which had to be settled, in the light of various conflicting High Court authorities. This is patent on the face of the decision in *AnAn (CA)*. Indeed, we have clarified in *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 (at [34]) that our decision in *AnAn (CA)* had "significantly altered the law in this area in so far as crossclaims or disputed debts which are the subject of arbitration agreements are concerned". Prior to *AnAn (CA)*, "our courts have expressed varying formulations of the standard of proof to be applied". This point is critical, as it shows that VTB's application was not a patently unmeritorious one

from the outset, *ie*, it was not intended to improperly pressurise AnAn in circumstances where VTB ought to have known that its petition was doomed to fail.

129 It is also important to recognise the factual implications of our decision in *AnAn (CA)*. The setting aside of the winding up order was the *consequence* of our recognition of the *prima facie* threshold and its operation *vis-à-vis* the arbitration clause. Our decision has no impact on the *underlying claim* which may ultimately be decided in favour of VTB at the Arbitration, as fairly acknowledged by counsel for AnAn, Mr Lee Eng Beng SC.

130 In short, AnAn only raised the arbitration clause late in the day, and even then, only tangentially. It was not AnAn's paramount argument to resist the winding up. Even so, it had been duly contested by VTB, who prevailed before the High Court. Consequently, it cannot be said that VTB had acted improperly or in a manner that can be considered unfair or prejudicial to AnAn. Nor did VTB engage in any of the objectionable behaviour identified by the courts in decisions such as *Locker Group*, *Barroaghan* or *Baldwin*; there was no prejudicial non-disclosure by VTB, or any behaviour that would shock the conscience of the court.

131 Based on the above, it is also apparent that VTB had not acted in *abuse of process*. There is no evidence that the commencement of CWU 183 was motivated by an improper or collateral purpose or actuated by bad faith: see *Ong Jane Rebecca v Lim Lie Hoa and other appeals and other matters* [2021] 2 SLR 584 at [141] (on improper purposes); *Miya Manik v Public Prosecutor and another matter* [2021] SGCA 90 at [64] (on patently unmeritorious applications). Indeed, as we noted in *Vinmar Overseas (Singapore) Pte Ltd v*

PTT International Trading Pte Ltd [2018] 2 SLR 1271 at [131], "the threshold for abusive conduct is *very high*" [emphasis added]. AnAn has not been able to point to any aspect of VTB's conduct that may satisfy the high threshold that must be met.

132 We add that although we concluded in *AnAn (CA)* (at [114]–[118]) that even on the triable issue threshold, VTB ought not to have succeeded before the High Court, this factor is equivocal at best. At first instance, VTB's application was certainly not hopeless. After all, the High Court was sufficiently compelled, on the triable issue standard, to make an order in VTB's favour; we, in *AnAn (CA)*, went to some lengths to explain why in our view the High Court erred on the facts. Put simply, the mere fact that VTB's arguments turned out to be unmeritorious does not inevitably lead to the conclusion that VTB brought its case abusively: see a similar discussion at [102] of *AnAn (CA)* on why AnAn's conduct of its case did not amount to an abuse of process.

133 AnAn's remaining argument on abuse of process may be given short shrift. It argues that a breach of arbitration agreement would "routinely" justify the award of *indemnity costs* in proceedings. By parity of reasoning, there is "no reason why VTB should not be ordered to meet the actual incurred costs of the winding-up proceedings". We reject AnAn's argument, primarily because we have explained that liquidators' remuneration cannot be considered as *costs*. It is thus irrelevant that the courts have typically ordered *indemnity costs* for breach of arbitration agreements. We add that AnAn has not grounded its claim before us on breach of the arbitration clause. It would therefore be premature and in fact inappropriate for us to hold that the arbitration clause was breached, especially since that very issue is pending before the arbitral tribunal. Finally, even assuming that there had been such a breach, AnAn has quite simply not

explained how a breach of this nature would amount to an abuse of process. As alluded to above, we are not persuaded that VTB had, by acting as it did in the proceedings below, acted abusively.

Commencement of CWU 183 in the face of the arbitration clause

134 When we raised the aforementioned points to parties during the hearing, it became clear that only a sole point of contention remained: whether VTB's commencement of CWU 183 in the face of the arbitration clause, *in and of itself*, sufficed to amount to "fault" warranting the exercise of the power. In our view, this does not evince fault on VTB's part that is sufficient to warrant the court's intervention.

135 We assume, *arguendo*, that VTB's actions amounted to a breach of the arbitration clause. A breach of this sort *per se* is insufficient to establish "fault". It would be wrong in principle to automatically equate a disregard for contractual obligations to fault on the part of the defaulting party. Breach of contractual terms is not a fault-based inquiry – it simply involves scrutiny into the construction of a contractual term, what that term requires in terms of performance, and whether there has been due performance in accordance with the term. The motivations of a breaching party and the unfairness of its conduct are irrelevant. For this reason, our courts have long recognised that "[i]t is trite that contractual liability is strict": *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal* [2007] 4 SLR(R) 413 at [134].

136 In any event, and once again *assuming* there is a breach, even if VTB's breach of the arbitration clause may strictly be considered a form of "fault", the court nonetheless retains the discretion in deciding whether VTB should be ordered to bear the Liquidators' fees *at this stage of proceedings*. That is, it must

be open to us to decide whether, viewing the dispute between the parties in totality, it would be in the interests of fairness to make such an order against VTB. In our view, three points militate against the grant of such an order.

137 First, we emphasise that the nub of AnAn's case on this issue is that VTB proceeded in CWU 183 with unholy haste. AnAn criticises VTB's application to *remove the Liquidators* because they were slow and complacent in their approach to recover AnAn's assets, such application having led to further expenses on the Liquidators' part. We have serious doubts as to whether that would constitute fault or misconduct. It was VTB's prerogative to take steps to expedite the process while the winding up order was still in force. More importantly, that was conduct in relation to the *winding up process* and not in relation to the *commencement* of the winding up.

138 Secondly, AnAn's application in HC/SUM 4413/2018 to stay CWU 183 was rejected by the High Court on 29 October 2018. In such circumstances, VTB cannot be faulted – AnAn's attempt to halt the winding up was rejected by the court, and not by any improper attempt by VTB to, as it were, forcefully see CWU 183 to fruition. The same may be said as regards Ang SJ's dismissal of SUM 3677 (see [127] above). Mr Lee argued, in this light, that VTB could have nevertheless "agreed to a stay if they wanted to preserve the winding-up order but then not visit the company with the consequences of the expenses of liquidation". We are unable to agree. VTB was well within its rights to pursue CWU 183 as it did and having prevailed in the stay and injunction applications, it was fully entitled to proceed with CWU 183.

139 Thirdly, to order VTB to bear the Liquidators' fees at this stage may cause injustice rather than prevent injustice. VTB may well succeed in the

Arbitration. If it does, it would be unfair for VTB to bear the Liquidators' fees since in that situation, the said fees would have to be incurred in any event, and would be borne by AnAn, not VTB.

140 In response, Mr Lee submitted that the Liquidators' actions have resulted in no real benefit to AnAn. However, as pointed out by Ms Chandran, the Liquidators' actions resulted in the recovery of about S$19.9m for AnAn. Ms Chandran cited the 3rd affidavit of Bob Yap (one of AnAn's joint and several liquidators) filed in HC/SUM 173/2019, which lists out the benefits of the Liquidators' work. Such work included the Liquidators' recovery of cash and balances taken over from AnAn, a refund of AnAn's capital investment in a company known as "Silvi", the refund of an unauthorised US$1.5m payment, and the sale of certain fixed assets. AnAn has not, in these proceedings, challenged the accuracy of Bob Yap's averments in his affidavit. Consequently, there is no reason to believe that the work done by the Liquidators thus far would not be useful should VTB eventually prevail in the Arbitration.

141 We reiterate that at present, there are the *different thresholds* which are applicable for the determination of liability for the *same parcel of expenses*. This is because in the present appeal, AnAn bears the burden to establish *fault* on the part of VTB in commencing the winding up. As explained above, a breach of the arbitration clause is not sufficient to constitute fault for the purpose of the court's exercise of its inherent powers. In the Arbitration, AnAn's claim will proceed on an entirely different basis – breach of the arbitration clause *simpliciter*. We have elaborated on this point at [53] above.

142 Accordingly, the fairer order is for the parties to abide by the outcome of the Arbitration. Such a claim would be premised on a breach of the arbitration

clause. To ensure that there will be no residual dispute that may hamstring the Arbitration, both parties have confirmed that AnAn's claim would rightly fall within the scope of the arbitration clause. Also, as mentioned (see [58] above), Ms Chandran confirmed that VTB will not be taking any objection on the basis of our decision creating any estoppel or *res judicata* as regards AnAn's claim against VTB in the Arbitration.

143 For the above reasons, it is inappropriate for this court to exercise our inherent powers to order VTB to be liable to AnAn for the Liquidators' fees at this stage.

Whether the court is *functus officio*

144 VTB contends, in the alternative, that this court is now *functus officio* in relation to the issue of the liability for the Liquidators' fees. As a key pillar of this argument, VTB adopts AnAn's distinction between the court's *adjudicatory* and *supervisory* jurisdiction (see [70] above). VTB argues that "taking AnAn's case at its highest", the appropriate juncture to seek *costs incidental to the winding up proceedings* was before this court in CA 174. That opportunity, however, has passed.

145 VTB's argument is predicated on the assumption that the Liquidators' fees are part of "costs". Our conclusion that the power is part of the court's inherent powers to prevent injustice, and not part of its powers to award "costs", puts paid to this argument. Indeed, the distinct nature of the present dispute *vis-à-vis* that in CA 174, as we observed at [71] above, demonstrates precisely why the court is not *functus officio*.

146 While it is true that in the cases cited by VTB, the issue of who is to bear the liquidators' remuneration was considered during the appeal at which the winding up orders were reversed, the court in those decisions never expressed the view that such relief sought by the company *must* be pursued at that stage. Given that the court is not *functus officio*, there is no legal impediment to prevent the court from examining the liability for the Liquidators' fees post CA 174.

Conclusion and costs

147 We dismiss CA 23 and decline to exercise our inherent powers to make VTB liable for the Liquidators' fees. AnAn is to bear the costs of the appeal, fixed at S$35,000 (all-in). The usual consequential orders for payment out of the security will apply.

Andrew Phang Boon Leong
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Quentin Loh
Judge of the Appellate Division

Lee Eng Beng SC, Chew Xiang and Cheong Tian Ci, Torsten (Rajah & Tann Singapore LLP) for the appellant;

Shobna Chandran, Yong Manling Jasmine and Muhammad Taufiq bin Suraidi (Tan Rajah & Cheah) for the respondent.
