IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2021] SGCA 8

Civil Appeal No 160 of 2020

Between

Superpark Oy

… *Appellant*

And

(1) Super Park Asia Group Pte. Ltd.
(2) Luke Anthony Furler
(3) Hubert Jen Wei Chang

… *Respondents*

In the matter of HC/Originating Summons No 671 of 2020

In the matter of Super Park Asia Group Pte Ltd

And

In the matter of Section 290 of the Companies Act (Cap 40), Paragraphs 5 and 14 of the First Schedule of the Supreme Court of Judicature Act (Cap 322), Section 4(10) of the Civil Law Act (Cap 43) and Order 92 Rule 4 of the Rules of Court (2014 Rev Ed)

Between

Superpark Oy

… *Applicant*

And

(1) Super Park Asia Group Pte. Ltd.
(2) Luke Anthony Furler
(3) Hubert Jen Wei Chang

… *Respondents*

GROUNDS OF DECISION

[Insolvency Law] — [Liquidators] — [Provisional liquidators]
[Insolvency Law] — [Voluntary winding up] — [Commencement]

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Superpark Oy
v
Super Park Asia Group Pte Ltd and others

[2021] SGCA 8

Court of Appeal — Civil Appeal No 160 of 2020
Andrew Phang Boon Leong JCA, Steven Chong JCA, and Quentin Loh JAD
4 December 2020

11 February 2021

Andrew Phang Boon Leong JCA (delivering the grounds of decision of the court):

Introduction

1 This appeal arose out of an order ("the Order") by the Judge below ("the Judge") given on 29 July 2020 permitting the second and third respondents, who had been appointed as provisional liquidators of the first respondent, to continue with their efforts to dispose of the first respondent's assets. The Order also stipulated that the appellant, who had resisted the making of the Order, had until 5 August 2020 to either put the first respondent into judicial management or find other means to restructure or rehabilitate it, failing which the Court would allow the "liquidation process … to continue to its conclusion".

2 While this appeal bears the trappings of an insolvency-linked dispute, it is more appropriately seen as a conflict between the shareholders of the first respondent. The appellant, the majority shareholder of the first respondent,

denied that any creditors' voluntary winding up of the first respondent had commenced and/or continued to the present. The minority shareholder, one Mark Ananda Kumarasinhe ("Kumarasinhe"), was at least partially funding the second and third respondents, who were appointed as the first respondent's provisional liquidators on 17 June 2020. On their part, the second and third respondents argued that a creditors' voluntary winding up had commenced and could not be terminated without a court order specifically stipulating so. The second and third respondents accordingly argued that they should be entitled to continue disposing of the first respondent's assets.

3 At the heart of this dispute is the question of the interaction between ss 290(1)(*b*) and 291(6)(*a*) of the Companies Act (Cap 50, 2006 Rev Ed) (Version in force before 30 July 2020) ("the CA"). The appellant relied on s 290(1)(*b*) of the CA to argue that, absent a special resolution by the first respondent's members, the first respondent could not be voluntarily wound up. As no such special resolution was passed, the first respondent was not in voluntary winding up, and the appointment of the second and third respondents as liquidators was void. By contrast, the second and third respondents argued that under s 291(6)(*a*) of the CA, voluntary winding up had commenced following the lodgement of the statutory declaration providing for their appointment as provisional liquidators, and that the voluntary winding up commenced did *not* require a members' special resolution in order to proceed. Put another way, the second and third respondents took the position that s 291(6)(*a*) of the CA created a *third* way for a voluntary winding up to commence, above and beyond the two ways outlined in s 290(1) of the CA.

4 Having carefully considered the parties' written as well as oral submissions, we were unable to agree with the Judge's Order, and allowed the appeal. We now give the detailed grounds for our decision. As no formal written

grounds of decision were issued by the Judge for reasons we will canvass below (see especially [41] below), it will be useful for us to first set out the factual background before we explain our reasons for allowing the appeal.

Facts

Background to the dispute

5 The appellant, Superpark Oy, is a company incorporated in Finland as a holding company in the SuperPark Group structure. Superpark Oy is wholly-owned by SuperPark Bidco Oy. Johan Wentzel ("Wentzel") is the Chairman of the board of directors of Superpark Oy. The SuperPark Group, which is ultimately owned by several individuals and private equity investors, operates several indoor activity parks worldwide.

6 The appellant is the majority shareholder of the first respondent, Super Park Asia Group Pte Ltd ("SPAG", or the "first respondent"), holding 78.33% of its shares. SPAG was incorporated in Singapore on 15 May 2018 as a private company limited by shares, and is described as being in the business of sports clubs and associations. SPAG was set up as an investment holding company for the operating subsidiaries of the SuperPark Group in Asia, and wholly owns the following subsidiaries:

(a) SuperPark Asia Limited, the Hong Kong subsidiary ("SP HK");

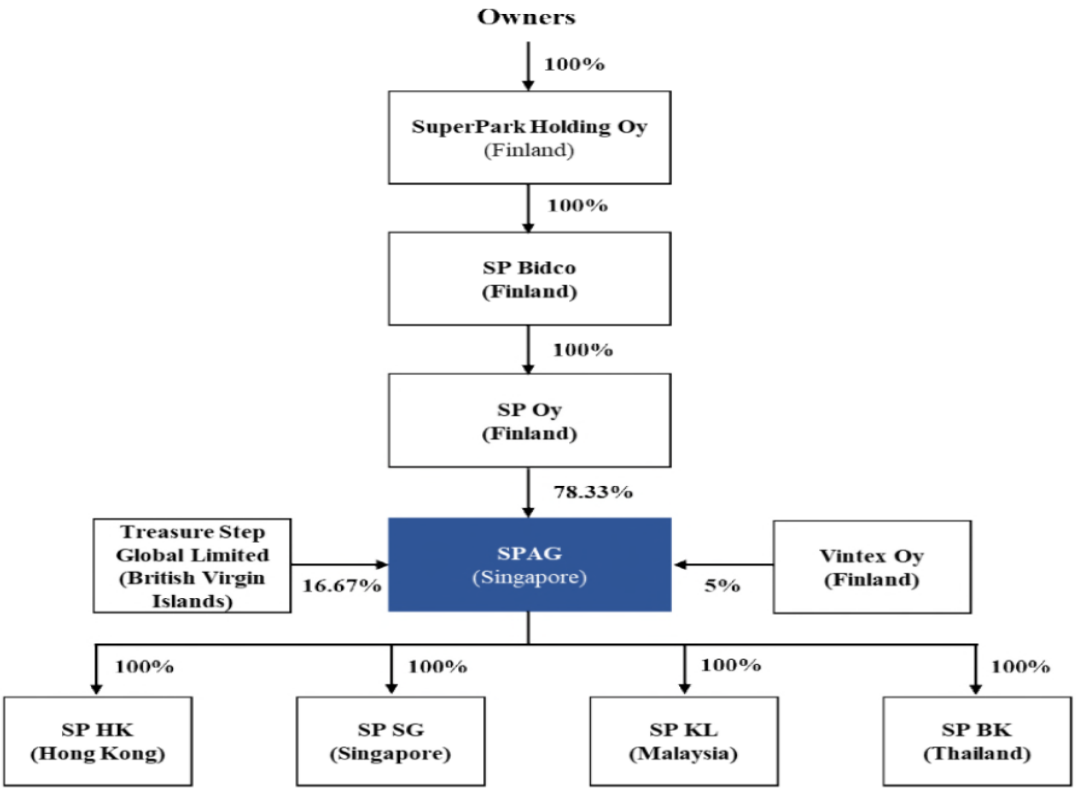
(b) SuperPark ISM Company Limited, the Thailand subsidiary ("SP BKK");

(c) SuperPark KL No 1 Sdn. Bhd., the Malaysia subsidiary ("SP KL"); and

(d) SuperPark Singapore SC Pte. Ltd., the Singapore subsidiary ("SP SG").

There is some uncertainty as to whether SP HK was properly registered as being owned by the appellant or SPAG. This is immaterial to the present appeal, though for ease of reference, we will refer to all the subsidiaries listed above collectively as the "subsidiaries".

7 The relevant corporate structure of the SuperPark Group is represented diagrammatically below:



8 SPAG's other owners are Treasure Step Global Limited ("Treasure"), and Vintex Oy ("Vintex"). Kumarasinhe is a director and shareholder of Treasure.

9 Prior to the appointment of the second and third respondents as provisional liquidators, the directors of SPAG were Juha Tapani Tanskanen ("Juha"), who is the appellant's CEO, Kumarasinhe, and one Goh Ke Ching, the park manager and supervisor of SP SG. Juha was the appellant's representative on the board of directors of SPAG.

10 Kumarasinhe was first introduced to the appellant sometime in 2017. He wished to establish a SuperPark in Hong Kong (*ie*, SP HK), which was to be a licensee of the appellant. However, Kumarasinhe was unable to secure suitable external investors, and it was therefore agreed that the appellant would instead finance SP HK with an equity investment, thus becoming SP HK's majority shareholder. Kumarasinhe was subsequently appointed as CEO of SP HK.

11 In May 2018, following the incorporation of SPAG, Kumarasinhe recommended and procured the establishment of SP BKK, SP KL, and SP SG. He was appointed a director of all three subsidiaries. The appellant provided US$3m in loans between October 2018 and January 2019 for the establishment of SP SG, while SuperPark Bidco Oy provided financing for SP BKK after Kumarasinhe failed to generate sufficient cash flow from existing parks or procure funding to fund the construction of the entire SP BKK park. To date, the appellant and SuperPark Bidco Oy have funded approximately US$9m or more to SPAG and its various subsidiaries.

12 The relationship between the appellant and Kumarasinhe began to break down sometime in or around the latter half of 2019. In November 2019,

Kumarasinhe sent a sharply worded email to Juha expressing frustration about the appellant's slow pace of funding for the SP BKK park. Kumarasinhe described the appellant's apparent decision to not fund the SP BKK park in the absence of SPAG agreeing to new terms for the provision of debt drawdowns as resulting in great demotivation, and having a significant negative impact on cash positions.

13 The relationship continued to deteriorate, with the exchange of even more correspondence, and matters came to a head with a strongly-worded email that Kumarasinhe sent to Juha on 25 January 2020. This email, extracted below, speaks for itself:

> Im [*sic*] not doing this for you. *This is ridiculous*. You guys can make your own dashboard from the forecasts we give you. Like I said to you, *I am not going to be the corporate finance analyst for Finland and will not be engaging in the stupidity of reviewing numbers on a day to day basis*. If you guys want to do this then fine…we prefer to focus on strategy going forward.
>
> […]
>
> *Juha, you may have come up with the concept and some branded colours but ultimately that is where the development ended* but yet we are expected to fork over 6% of our TOP line to [the appellant]…for what? Sorry, this arrangement is not equitable anymore and something needs to be done about it. *This is a massive obstacle to working in a transparent and free way with you guys and* ***something that in 2020 I intend to address … one way or the other***. I have to say, it was *borderline insulting* that you questions [*sic*] aspects of our "concept" […] Its [*sic*] even more ironic when you reflect on the standard of Europe's parks with strange trampolines here and there […] run down parks with random pantones […] *it's a joke* […]
>
> [emphasis added in italics and bold italics, ellipses not in square brackets original]

14 On its end, the appellant, through its officers, expressed frustration with Kumarasinhe for not complying with various audit and disclosure requirements. In particular, it was alleged that Kumarasinhe failed to submit financial

information regarding SPAG and its subsidiaries in a timely fashion despite being on notice that such information was critical for the appellant to negotiate with banks and investors, fulfil reporting obligations under credit facilities on time, and conduct a group-wide audit. Specifically, in relation to Kumarasinhe's refusal to prepare for a group-wide audit conducted by the appellant's auditors, Ernst & Young, Wentzel sent a firmly-worded email dated 27 May 2020 expressing his disappointment at the lack of progress in complying with the requirements for the audit. Wentzel's email clearly indicated that he wanted Kumarasinhe to co-operate with Ernst & Young for the audit, and that the audit was of "very high importance" to the appellant. This does not appear to have been done, and the relationship appears to have deteriorated further.

The board resolution to appoint provisional liquidators for SPAG

15 True to his word in his email of 25 January 2020, Kumarasinhe did in fact take action to "address" the working relationship with the appellant. On 17 June 2020, Kumarasinhe tabled a board resolution at a meeting over Zoom to put SPAG in provisional liquidation. No prior notice concerning such a resolution had been given to Juha or the appellant, and the resolution passed with votes from Kumarasinhe and Goh Ke Ching despite Juha's objections that no notice had been given. Juha's requests for an adjournment were also ignored. The directors' resolution passed on 17 June 2020 was to the effect that, *inter alia*:

> (a) The directors declared that SPAG was unable to continue business by reason of its liabilities;
>
> (b) The second and third respondents, of AJCapital Advisory Pte Ltd, were appointed as joint and several provisional liquidators;

(c) An extraordinary general meeting ("EGM") be convened on 16 July 2020 to propose (i) a special resolution to voluntarily wind-up the company, and (ii) an ordinary resolution to appoint the second and third respondents as joint and several liquidators in such winding up; and

(d) A creditors' meeting be convened on 16 July 2020 to, *inter alia*, confirm the appointment of the second and third respondents as joint and several liquidators of SPAG.

On the same day, the said directors lodged the requisite statutory declaration under s 291 of the CA. Notice was also given of the second and third respondents' appointment as provisional liquidators in various newspapers.

16 Following their appointment as provisional liquidators on 17 June 2020, the second and third respondents proceeded to ascertain the financial situation of the company, concluding that it was balance sheet insolvent, and that it was "very likely" to be cashflow insolvent. In particular, the second and third respondents determined that as of 31 May 2020, SPAG was in a net liabilities position of negative €2,388,781 (book value) and negative €4,512,478 (estimated realisable value). In terms of cashflow, the second and third respondents observed that SPAG only had €5,101 in its bank account, but had allegedly incurred around €100,000 in operating costs each month from January to May 2020.

17 On 22 June 2020, correspondence began to be exchanged between the appellant's solicitors on the one hand, and the second and third respondents on the other. The appellant's solicitors denied that the appellant had any knowledge that SPAG was insolvent, and sought mainly disclosure of information

concerning SPAG's financial state. In subsequent correspondence, the appellant's solicitors informed the second and third respondents that the appellant intended to vote against any resolution to wind up the company, and expressed concern that the second and third respondents would be taking steps to sell SPAG's assets, including the subsidiaries, to third parties. The second and third respondents' solicitors' response was to indicate that (a) the appellant ought to have the relevant information given that Juha was a director of SPAG, (b) in any event, it would provide the information requested on 3 July 2020, and (c) it was entitled to take steps to sell SPAG's assets as it had to act in the interests of SPAG's creditors.

The EGM to terminate the provisional liquidation of SPAG

18 On 2 July 2020, at about 1pm, the appellant gave the second and third respondents notice of an EGM. The EGM was scheduled for 5.15pm that very day, and the following resolutions were tabled:

(a) That Kumarasinhe be removed as a director with immediate effect;

(b) That Goh Ke Ching be removed as a director with immediate effect;

(c) That Wentzel be appointed as a director with immediate effect;

(d) That Lau Dong Neng be appointed as a director with immediate effect; and

(e) That the company not be voluntarily wound up and that the present provisional liquidation be terminated with immediate effect.

Notwithstanding the objections of the second and third respondents on the basis that the EGM had been called in an irregular manner and appeared to subvert the statutory procedures for voluntary winding up, the appellant went ahead with the meeting. All five resolutions outlined above ("the EGM resolutions") were passed.

19 On 6 July 2020, the second and third respondents, who considered the EGM resolutions invalid and not binding on themselves, issued a Notice of a Meeting of Creditors of the Company. In that notice, a list of creditors of SPAG and their potential claims was enclosed, as is extracted below:

S/N	Creditor	Currency	Debt
1.	Grandwork Interior (Thailand) Co Ltd	THB	20,062,165.09
2.	United Graphic Pte Ltd	SGD	Contingent
3.	Astute International	USD	138,183
4.	Superpark Oy (*ie*, the appellant)	USD	888,435
5.	Boost OY	USD	3,570,236
6.	Benn Kirkham	USD	52,377
7.	Lagotronics Projects BV ("Lagotronics")	EUR	922,089
8.	Lagotronics	USD	75,000
9.	SuperPark Asia Limited (*ie*, SP HK)	EUR	745,000
10.	Baker McKenzie	USD	27,424.12
11.	SuperPark Singapore SC Pte Ltd	EUR	719,000
12.	Power Professional Productions	HKD	2,473,680
13.	Siam Priawat ("IconSiam")	THB	Contingent

It bears note that in this list of creditors, the appellant and its affiliate, Boost OY, held an ***approximately 53% majority*** of the total debt (converting the total debt amount to US dollars). The appellant was thus, in effect, the majority creditor.

20 However, on 7 July 2020, one day after the Notice of a Meeting of Creditors had been sent, Kumarasinhe submitted a Statement of Affairs for SPAG. Kumarasinhe's Statement of Affairs outlined that as of 17 June 2020, the estimated deficiency SPAG was facing was negative €4,606,323.95 based on values as recorded in the company's books, and negative €7,456,501.54 if estimated realisable values were used. No explanation was provided for the dramatic decrease in the estimated realisable value figure from the provisional liquidators' prior estimates. In addition, Kumarasinhe's Statement of Affairs reflected the following list of creditors as of 17 June 2020:

S/N	Creditor	Amount (In €)
1.	Benn Kirkham	48,798
2.	Lagotronics	1,107,390
3.	Groundwork Interior (Thailand) Co. Ltd	555,271
4.	Power Professional Productions	288,509
5.	United Graphics	146,266
6.	Baker McKenzie	24,693
7.	Boost OY	3,141,090
8.	SuperPark Asia Limited (*ie*, SP HK)	1,884,817
9.	SP SG	794,681
10.	Superpark Oy (*ie*, the appellant)	453,739
11.	Astute International	119,917
	Total:	8,565,171

Two points bear note at this juncture. First, Kumarasinhe's Statement of Affairs does not contain any attachments or enclosures which bear out these figures. Put simply, there did not appear to be documentary evidence with which to directly verify the debts asserted. Second, under these calculations, the appellant and its affiliate, Boost OY, were *no longer majority creditors*. Instead, they would only hold about 41.9% of the total debt. The second and third respondents explained the discrepancy between the figures in this Statement of Affairs and the figures in the 6 July 2020 Notice on the basis that the figures in the notice were figures which were added to over time as creditors came forward with proofs of debt.

HC/OS 656/2020

21 On 8 July 2020, the second and third respondents commenced HC/OS 656/2020 ("OS 656"), in which they sought a declaration that the EGM resolution of 2 July 2020 purporting to terminate the voluntary winding up of SPAG and remove the second and third respondents was invalid. At the same time, the second and third respondents also filed SUM 2700/2020 ("SUM 2700") seeking, *inter alia*, an injunction restraining the appellant from taking any action inconsistent with SPAG being in provisional liquidation. SUM 2700 was heard on an *ex parte* basis before the Judge on 8 July 2020.

22 After hearing arguments from the parties, the Judge pointed out that SUM 2700 was an *ex parte* application, and that the appellant would have to seek to set aside the injunction made that day if it disagreed with the order. She then granted an order in terms of the injunction, with costs reserved to the substantive hearing of OS 656.

HC/OS 671/2020

23 On 13 July 2020, the appellant commenced HC/OS 671/2020 ("OS 671") for, *inter alia*, a declaration that the provisional liquidation and any voluntary winding up of SPAG would be terminated at an EGM of SPAG dated 16 July 2020, one month after the provisional liquidators were appointed. Simultaneously, the appellant also filed SUM 2791/2020 ("SUM 2791") seeking an order, *inter alia*, restraining the second and third respondents from taking any further steps in the provisional liquidation of the first respondent until 16 July 2020 or further order, whichever is earlier, save for payments made

in the ordinary course of business and correspondence in the name of SPAG as required by law. The Judge's decision in OS 671 and SUM 2791 was the subject of the present appeal.

24 SUM 2791 was heard before the Judge on 14 July 2020. The central point made by the appellant at that hearing concerned its discovery of the steps taken by the second and third respondents to dispose of the assets of the company. Even though the second and third respondents had, by letter dated 2 July 2020, indicated that they were looking for "urgent funding to keep the Subsidiaries alive", they had instead circulated an Invitation to Offer to sell all of the SPAG subsidiaries ("the Invitation to Offer"). Three oddities concerning the Invitation to Offer bore note. First, despite the appellant's already-communicated interest in keeping SPAG running, the Invitation to Offer was ***not*** circulated to the appellant. No compelling explanation was provided for this somewhat remarkable omission. Yet another noteworthy and unusual feature of the Invitation to Offer was its highly accelerated and condensed timeline, as outlined below:

(a) 3 July 2020 – Execution of non-disclosure agreements;

(b) 6 July 2020 – Non-public information released to qualified parties;

(c) 10 July 2020 – Expressions of interest due;

(d) 13 July 2020 – Dataroom opens to shortlisted bidders;

(e) 31 July 2020 – Dataroom closes;

(f) 4 August 2020 – Submissions of binding offers; and

(g) September to October 2020 – Target closing period.

25 The third odd feature of the second and third respondents' Invitation to Offer was that it misleadingly and falsely indicated at the footer of the document that the second and third respondents were "appointed Joint and Several Liquidators of Super Park Asia Group Pte Ltd pursuant to resolutions passed by the board of directors of the Company on 17 June 2020". No such resolutions appointing the second and third respondents as joint and several liquidators had been passed, and the second and third respondents had only been appointed as *provisional* liquidators. While there was in fact a reference in the main body of the text to the second and third respondents being "provisional liquidators", the timeline outlined above from [24(a)] to [24(g)] clearly and unambiguously envisaged the second and third respondents continuing as liquidators even *after* the termination of their term as provisional liquidators on 16 July 2020. This was despite the clear indications from the appellant, which was the majority shareholder in SPAG, that it would not be voting to pass a special resolution to wind up the company.

26 A further unusual circumstance which was raised at the hearing of SUM 2791 on 14 July 2020 was the continued failure by the second and third respondents to identify who was paying their fees and funding their work, particularly given the position they had taken that SPAG had only €5,000 in cash in its accounts. While the Judge speculated during the hearing that it "must be Kumarasinhe" funding the second and third respondents, counsel for the second and third respondents effectively evaded the point and did not address the issue. We address this issue subsequently at [101] below, but note at this juncture that the hearing on 14 July 2020 was adjourned due to lack of time, with the Judge ordering that the second and third respondents were not to take any steps to dispose of SPAG's assets pending further hearing of the summons.

27 The further hearing of the summons was fixed on 17 July 2020, but we first outline what transpired at the EGM and Creditors' Meeting on 16 July 2020, one month after the second and third respondents had been appointed as provisional liquidators. At the EGM, which was attended by all of SPAG's shareholders or their proxies, the third respondent chaired the session. Two resolutions were considered and voted upon. The first was a special resolution to "approve that the Company cannot by reason of its liabilities continue its business and accordingly that [it] be wound up voluntarily". The appellant and Vintex voted against this resolution, with Treasure's proxy, Kumarasinhe, voting for it. The resolution failed. The second resolution was an ordinary resolution to approve the appointment of the second and third respondents to act jointly and severally as liquidators of SPAG for the purpose of winding up. The appellant and Vintex once again voted against this resolution, with Treasure voting for it. This resolution also failed.

28 Shortly after the EGM on 16 July 2020, which concluded at around 4.30pm, the Creditors' Meeting commenced, at around 5.00pm. In attendance were, *inter alia*, the second and third respondents, Kumarasinhe, the second and third respondents' legal counsel, and a number of special proxies and creditors. The voting share of each creditor who submitted a proof of debt, along with its appointed proxy (if any), is as reflected below:

S/N	Creditor	Debt (€)	Debt (%)	Proxy
1.	Grandwork Interior (Thailand) Co. Ltd	571,771.71	5.02%	Mohamed Nawaz Kamil ("NK")
2.	United Graphic Pte Ltd	143,890.60	1.26%	NK
3.	Astute International	122,844.69	1.08%	NK
4.	Superpark Oy	780,422.22	6.85%	Lee Koon Foong Adam Hariz ("Hariz")

5.	Boost OY	3,161,433.90	27.75%	Risto Ojantakanen
6.	Benn Kirkham	46,563.15	0.41%	In Person
7.	Lagotronics	988,764	8.68%	NK
8.	SP HK	2,312,939.15	20.31%	NK
9.	Baker McKenzie	24,379.94	0.21%	Cal Dioluin
10.	Power Professional Production (HK) Ltd	283,731.10	2.49%	NK
11.	IconSiam	1,481,233.32	13.00%	Kumarasinhe
12.	SP SG	1,472,715.90	12.93%	NK

29 Six resolutions were put to the Creditors' Meeting. Of particular note were the following resolutions, which are reproduced together with their status and accumulated votes:

> (a) First, a resolution confirming the appointment of the second and third respondents as joint and several liquidators of the company was put to the meeting. All the creditors save the proxies for the appellant and Boost OY voted for this resolution, and it thus was carried by 65.39% to 34.61% of the votes by percentage of debt held.
>
> (b) Second, a resolution providing that the books, accounts, and records of SPAG and the second and third respondents were to be destroyed ***one*** day after the dissolution of SPAG pursuant to s 320(3) of the Companies Act if no Committee of Inspection was formed was also put to the meeting. The proxies for the appellant and Boost OY once again voted against this resolution, while Grandwork Interior (Thailand) Co. Ltd abstained. The resolution was thus carried with 60.37% voting for, 34.61% against, and 5.02% abstaining.

30 It is thus in this context, where the second and third respondents had failed to win the relevant support of the members of the company, but had received the support of the majority of the creditors of the company, that

SUM 2791 was again heard before the Judge on 17 July 2020. SUM 2791 was heard alongside SUM 2859/2020 ("SUM 2859"), an application by the appellant for the Judge's injunction granted in OS 656 to be set aside. The crux of the second and third respondents' case at the hearing of 17 July 2020 was that once provisional liquidators were appointed, SPAG was in provisional liquidation and could not cease to be so except by an express order of Court. However, when the Judge continued to ask who was funding the provisional liquidators, counsel for the second and third respondents did not directly answer the question, focusing instead on how the fact that liquidators' fees are taxed by the Court meant that the independence of the liquidators was not impugned regardless of who the funders were.

31 The matter was subsequently adjourned for the appellants to submit on their plans for the rehabilitation of SPAG, and for further legal arguments. It was heard again on 20 and 29 July 2020. On 29 July 2020, the Judge made the following order in resolution of both SUM 2791 and SUM 2859 ("the Judge's Order"):

> The 2nd and 3rd Respondents are allowed to continue with their efforts to dispose of the assets of the company and those of the subsidiaries on the understanding that there will be no advertisement. Any sale negotiations will be done by private treaty. The [appellant] has until Wed 5/8/20 to either put the company into judicial management or find other means to restructure or rehabilitate the company. Failing any concrete action by the [appellant], the court will allow the liquidation process of the company to continue to its conclusion.

32 On 23 September 2020, the appellant filed the present appeal (CA 160/2020) against the above order made by the Judge, in so far as the order related to OS 671 and SUM 2791. Leave to appeal had been entered by consent of both parties on 25 August 2020. However, in the interest of outlining matters in a chronological fashion, we will first outline the appellant's application for

judicial management in HC/OS 761/2020 ("OS 761"), which pre-dated the filing of this appeal.

HC/OS 761/2020

33 On 5 August 2020, the appellant commenced OS 761 for SPAG to be placed under judicial management pursuant to s 91 of the Insolvency, Restructuring and Dissolution Act (No 40 of 2018) ("IRDA"). On the same day, the appellant also filed SUM 3235/2020 ("SUM 3235") for SPAG to be placed under interim judicial management ("IJM"). SUM 3235 was heard before Ang Cheng Hock J ("Ang J") on 21 August 2020.

34 At the hearing of SUM 3235, the appellant argued that SPAG should be placed under IJM because, even on the second and third respondents' own figures and averments, it was insolvent. Further, there was at least a *prima facie* case that placing the company under IJM would achieve one or more of the statutorily-prescribed objectives under s 89 of the IRDA, particularly given the appellant's plans to rehabilitate the company through, *inter alia*, an injection of €2,000,000 to €3,000,000. The appellant also argued that failing to place SPAG under IJM would, under the terms of the Judge's Order, allow the second and third respondents to continue disposing of SPAG's assets and subsidiaries.

35 The application for IJM was resisted by Treasure in its capacity as a minority shareholder of SPAG, as well as by Lagotronics in its capacity as a creditor. At the hearing, it was argued by counsel for the second and third respondents that SPAG could not be placed under judicial management because it was already in liquidation. Reliance was placed on s 91(8)(*a*) of the IRDA, which expressly provides that a judicial management order must not be made in relation to a company after that company has gone into liquidation. In

Kumarasinhe's affidavit filed on behalf of Treasure, it was further argued that (a) a good *prima facie* case that a judicial management order would in fact be made was not made out because the appellant's forecasts in relation to the prospects for SPAG's rehabilitation were overly optimistic, and (b) that the liquidators were in the midst of disposing the assets of the company and that this process should not be disrupted. All of these arguments were also adopted by Lagotronics in opposition to the making of an IJM order.

36 At the hearing of the IJM application, counsel for the second and third respondent, appearing as counsel for SPAG, sought an adjournment of the proceedings on the basis that SPAG was in liquidation and ought to apply for and obtain a stay under the IRDA before it could apply for judicial management. Ang J was unpersuaded. He observed that:

> I do not quite agree that the company is in liquidation because it is an undisputed fact that no shareholders' resolution has been passed to wind up the company voluntarily. In my view, Luke Furler and Hubert Chang are no longer the liquidators of the company. The hearing of the IJM application can proceed today.

37 The hearing of SUM 3235 thus proceeded on 21 August 2020, and Ang J granted an order in terms at the end of the hearing, with instructions for the interim judicial managers ("IJMs"), KPMG, to produce an interim report within four weeks. However, due to what the IJMs described in a letter to the Court dated 28 September 2020 as a failure by the second and third respondents to hand over information in a timely fashion despite having agreed to do so, and the second and third respondents having been "selective in terms of the records to be handed over to the IJMs", an extension of time for submission of the interim report was sought. This was granted, and the interim report was eventually provided to the Court on 9 October 2020.

38 In the interim report, the IJMs outlined a restructuring proposal submitted by the appellant and SuperPark Bidco Oy. That restructuring proposal envisaged injecting at least €2m into SPAG and SP BKK of which (a) €1m will, subject to proof of debts, be used to settle liabilities of SP BKK given that certain creditors of SP BKK are alleged to have corporate guarantee claims against SPAG, and (b) €1m will be used to pay the remaining unrelated creditors. Further, a debt conversion of the approximately €4m owed to the appellant and SuperPark Bidco Oy was also proposed, with the appellant and SuperPark Bidco Oy indicating that they were prepared to consider investing a *further* €2.5m to €3m into SPAG thereafter, subject to review of the full financial affairs of SPAG and its subsidiaries.

39 The IJMs concluded in the interim report that the above-outlined proposal was "at present the most viable prospect to achieve one or more of the statutory objectives of judicial management". We note for completeness that the present appeal in CA 160/2020 was filed before the interim report prepared by the IJMs had been made available.

The Arguments Below

40 As alluded to above at [3], the focal point for the arguments below was whether or not the first respondent was, as of the appointment of provisional liquidators on 17 June 2020, in liquidation. In gist, the appellant denied that liquidation had commenced because the requirement in s 290(1)(*b*) of the CA that the company resolve to do so by special resolution had not been complied with. By contrast, the second and third respondents contended that s 291(6)(*a*) of the CA meant that liquidation had commenced following their appointment as provisional liquidators, and that the liquidation, once commenced, could not be terminated or stayed except by an express order of court.

The Decision Below

41 Due to the rapidly-evolving nature of SPAG's financial position, and the parties' desire for a swift resolution of the points of law arising from the Judge's Order, the parties agreed to, *inter alia*:

(a) Dispense with any written grounds of decision, with the notes of evidence from OS 671 and SUM 2791 to stand as the grounds of decision; and

(b) Have the hearing of this appeal expedited and heard as soon as reasonably practicable.

42 The appellant applied in CA/SUM 105/2020 ("SUM 105"), with the consent of the second and third defendants, for the issues raised at [41] above to be reflected in an order of court. The parties agreed to the first respondent being a party to the appeal on the condition that it was merely a nominal respondent. SUM 105 was granted on 9 October 2020.

43 The absence of any written grounds of decision notwithstanding, a number of observations made by the Judge in the course of the hearing below were relevant for the purposes of this appeal:

(a) The Judge declined to make a clear finding on the second and third respondents' status and whether or not they were liquidators. Instead, she adopted what she described as a "practical and pragmatic approach" not to grant an injunction to prevent the disposal of SPAG's assets given the clear insolvency of the company.

(b) Further, the Judge regarded Kumarasinhe's acts with considerable suspicion, noting that it "must" have been him who was, at least initially, covertly covering the second and third respondents' fees. Further, the Judge thought it "sinister" that the second and third respondents were seeking to destroy the books and accounts of the first respondent, including those from their time as provisional liquidators, a mere *one* day after the company's dissolution.

(c) The Judge also expressed disbelief at the appellant's claim that it was wholly in the dark as to the allegedly parlous financial position SPAG was in.

The Judge's decision at (a) above expressly declining to make a finding on whether or not the company is in liquidation may, with respect, be said to have been the genesis of the uncertainty at the heart of this case because it left the status of the second and third respondents and the validity of their appointment as liquidators unclear. This ambiguity was exacerbated by the wording of the Judge's Order, which expressly made reference to the court allowing "the liquidation process of the company to *continue* to its conclusion" (emphasis added). The Order could therefore be construed as suggesting that the liquidation process had *already* commenced.

44 On 7 August 2020, in SUM 3304/2020 ("SUM 3304") pursuant to OS 671, the appellant sought leave to appeal against the Judge's Order. Leave to appeal was entered by consent on 25 August 2020. In particular, the parties agreed for three questions of law relating to the validity of SPAG's purported winding up to be referred to this court (see [45(a)] below).

Issues Before this Court

45 The issues before this Court in this appeal are as follows:

(a) Questions of law referred to this Court:

(i) In the event that a voluntary winding up is commenced pursuant to s 291(6)(*a*) of the CA, when and how can it be terminated ("Question 1")?

(ii) Does s 291(6)(*a*) of the CA mean that a voluntary winding up commences upon the directors passing a resolution to appoint provisional liquidators under s 291(1) of the CA, regardless of whether the members' resolution for voluntary winding up is passed pursuant to s 290 of the CA ("Question 2")?

(iii) Can the creditors of a company voluntarily wind-up a company (assuming the voluntary winding up has not already commenced pursuant to s 291(6)(*a*) of the CA) and/or appoint liquidators in a voluntary winding-up, if the members have not passed any resolutions to that effect pursuant to s 290(b) of the CA ("Question 3")?

(b) Whether to allow the appeal against the Judge's order in OS 671 and SUM 2791 permitting the liquidation process of the first appellant to continue.

46 It was clear that the answer to [45(b)] turned on the conclusion we reached on the questions of law outlined above. Among the three questions of law posed, it was more appropriate to begin the analysis with Question 3, which dealt with the issue of whether or not the creditors of a company even had the *capacity* to voluntarily wind up a company if no special resolutions to that effect had been passed by the members. This was logically *anterior* to Question 2, which dealt with precisely *when* the voluntary winding up could be said to

commence, and Question 1, which addressed the *termination* of any such winding up. If there was no capacity for a company to be voluntarily wound up if no special resolutions to that effect is passed, then Questions 2 and 1 would necessarily be rendered moot on the instant facts.

Issue (a): Questions of Law in this Appeal

Question 3: Can a company be voluntarily wound up by its creditors if no special resolution has been passed?

47 Question 3 asks whether a company can be voluntarily wound up by its creditors if its members have not passed any special resolution to that effect. The appellant argued that a company cannot be voluntarily wound up by its creditors if its members have not passed any special resolution to that effect because that conclusion (a) did not comport with s 290 of the CA, (b) did not comport with a purposive interpretation of s 291(6) of the CA, and (c) would be at odds with s 292 of the CA and the principle that a provisional liquidator is only supposed to maintain the status quo until the members decide whether or not to liquidate the company. By contrast, the second and third respondents sought to answer Question 3 in the affirmative, suggesting that there was a "third way" for voluntary winding up to take place which was *not* included in s 290 of the CA, but which nonetheless exists in line with generally-applicable principles.

48 We answered Question 3 in the negative, for the three reasons outlined below.

49 First, and most directly, a company may not be voluntarily wound up by its creditors if its members have not passed any special resolutions to that effect

because of the plain and unambiguous wording of s 290 of the CA. Section 290 of the CA provides as follows:

> **Circumstances in which company may be wound up voluntarily**
>
> **290.**–(1) A company may be wound up voluntarily –
>
> (*a*) when the period, if any, fixed for the duration of the company by the constitution expires or the event, if any, happens, on the occurrence of which the constitution provides that the company is to be dissolved and the company in general meeting has passed a resolution requiring the company to be wound up voluntarily; or
>
> (*b*) if the company so resolves by special resolution.

50 What is immediately apparent from s 290(1) of the CA is that *only* two circumstances are outlined in which a company may be wound up voluntarily. The second and third respondents' suggestion that there is a *third* or further method by which a company may be wound up voluntarily runs into the obvious difficulty of any such method not being reflected in s 290(1) of the CA to begin with. In this regard, the statutory architecture of s 290(1) of the CA is significant. It is the very first section contained under Division III of Part X of the CA. Part X of the CA addresses winding up, while Division III specifically deals with voluntary winding up. It is apparent from its positioning and its plain wording that s 290(1) of the CA has the effect of establishing the ambit of Division III, and in that regard s 290(1) is clear that, if s 290(1)(*a*) of the CA is not satisfied, the *only* other avenue of carrying out a *voluntary* winding up is through s 290(1)(*b*) and the passing of the relevant special resolution. It is only if a voluntary winding up even arises in the first place that the secondary question of whether it is a members' or creditors' voluntary winding up can arise. To hold otherwise would be to do violence to the plain language of s 290(1).

51 Second, allowing a company to be "voluntarily" wound up by its creditors in the absence of a special resolution passed by its members is at odds with the very notion of voluntariness which underpins the entire distinction between a voluntary and a court-ordered/compulsory winding up. This argument is borne out on two sub-levels.

52 On the first sub-level, *both* s 290(1)(*a*) and (*b*) of the CA are founded on the consent of the company's *members* to the company being wound up. Section 290(1)(*a*) of the CA provides that a company may be voluntarily wound up if the period, if any, fixed for the duration of the company by the constitution expires or the event, if any, happens, on the occurrence of which the constitution provides that the company is to be dissolved, and the company in general meeting passes a resolution requiring that the company be voluntarily wound up. What is immediately apparent here is that the consent and agreement of the members, whether in determining any fixed duration or triggering event for dissolution in the constitution, takes centre stage. This is buttressed by the provision for the company "in general meeting" passing a resolution for winding up in s 290(1)(*b*) of the CA. Consent and voluntariness thus also underpin s 290(1)(*b*) of the CA and the requirement for a special resolution to bring about a voluntary winding up under that section. It is therefore clear that, absent such consent and/or voluntariness, it would be an inexplicable misnomer to describe a winding up which lacked the consent and voluntariness of its members as a "*voluntary*" winding up.

53 In fact, even s 218 of the Straits Settlements Companies Ordinance of 1940 ("the 1940 Ordinance"), which the second and third respondents expressly relied on as illustrating that there used to be a third method to voluntarily wind up a company in the CA's predecessor legislation (see [66]– [68] below), only provided that a company could be thus wound up "*if the company resolves by*

extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up" (emphasis added). This underscores the point already made that, even if one were to go back to the relevant predecessor legislation, the notion of the consent of a company's members was central to a voluntary winding up.

54 On the second sub-level, there are real and substantial distinctions between voluntary and compulsory winding up which would be undermined by allowing a company to be "voluntarily" wound up by its *creditors* in the absence of a resolution by its *members* to that effect. In the English High Court decision of *Re Phoenix Oil and Transport Co Ltd (No. 2)* [1958] Ch 565, Wynn-Parry J observed (at 570) that:

> A study of the relevant sections of the Companies Act, 1948, dealing with winding up shows clearly that *as regards voluntary winding up the legislature has followed (in pursuance of the policy of previous Companies Acts) a different policy from that laid down in the case of compulsory winding up*. The reason is not far to seek. In the case of voluntary winding up, the jurisdiction of the court is not invoked in order to place a company in liquidation. In the case of a creditors' liquidation, the creditors, through their committee of inspection, are in control as against the contributories; while in the case of a members' voluntary winding up it is the members who are in control. In both cases the court is given a certain degree of jurisdiction, but I think it can be accurately, though shortly, said that in both forms of voluntary winding up the court is in the background to be referred to if the necessity should arise. *In the case of a winding up by the court, however, different considerations arise*. In this case the court is conducting an administration, and so, as in the case of an ordinary administration action in the Chancery Division, it retains, under the express provisions of the statute, a much greater degree of control. [emphasis added]

Wynn-Parry J's summary of the policy distinction between voluntary and compulsory liquidations was adopted and described as a "classic statement" by this Court in *Sinfeng Marine Services Pte Ltd v Taylor, Joshua James and another and other appeals* [2020] 2 SLR 1332 ("*Sinfeng Marine*") at [25].

55 In *Sinfeng Marine*, this Court observed at [15] that the legal framework in the CA distinguishing between Division 2 ("Winding up by Court") and Division 3 ("Voluntary winding up") is "important as the modes of winding up reflect the policy distinction between voluntary and compulsory liquidations and with this distinction comes the scope of the statutory powers of the court and the liquidators". At [24], the Court elaborated that:

> Each of the respective modes of winding up reflects the policy distinction between voluntary and compulsory liquidations. … Depending on the mode of winding up, the two provisions demonstrate the degree of control by the court in the conduct and supervision of the winding up. In a compulsory winding up, the liquidator is appointed by the court and is an *officer of the court* (see s 288 of the CA). In addition, the winding up by the court is conducted under the court's direct supervision. On the other hand, a liquidator in a non-compulsory winding up, although under the court's general supervision and control (see ss 313(2)–313(4) of the CA), is appointed by the members or creditors of the company as the case may be, and is an agent of the company in a private arrangement … [emphasis original]

This Court also endorsed Vinodh Coomaraswamy J's view in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 at [139] that the distinction between voluntary and compulsory liquidation also has a bearing on the powers of the liquidators (at [26]). Cumulatively, *Sinfeng Marine* stands for the clear proposition that there exists a substantial and meaningful distinction between the regimes for compulsory and voluntary winding up. Allowing the creditors of a company to do away with the requirement for the members of the company to have passed a special resolution for voluntary winding up would elide that distinction. Given the clear distinction in *effects* between voluntary and compulsory liquidation, it stands to reason that the differing *pre-requisites* for each of those different methods for winding up exist in order to account for and reflect the divergent effects. It would therefore not be appropriate to allow a party which has not satisfied the requirements for a compulsory winding up to, in effect, foist a compulsory winding up on a company by the back door through completely ignoring the requirement of shareholder consent.

56 Further support for the view that a voluntary winding up can only commence by the action of the members of a company is found in the fairly uniform commentary on this point in the relevant practitioners' works. In *Walter Woon on Company Law* (Sweet & Maxwell, 3rd Ed, 2009) at [17.109], for example, the author takes the view that "[a] meeting of the company must be called to pass a resolution for winding up". In a similar vein, the authors of *Loose & Griffiths on Liquidators* (LexisNexis, 9th Ed, 2019) observed at [2.19] that:

> … It should be noted that there is no means by which creditors can *institute* a voluntary winding up. A voluntary winding up is *always* commenced by the members of a company, *whether the company is solvent or insolvent*. Where a creditor wishes to instigate a winding up, the proper recourse is to court, ie a compulsory winding up. [emphasis added]

We note for completeness that the focus of this extract is on the *institution* and/or *commencement* of a voluntary winding up, which can only be done by the members of the company. This does not, however, preclude the existence of what is referred to in the CA as "creditors' voluntary winding up", which arises when a voluntary winding up is commenced under Division 3 of Part X of the CA *but where no declaration has been made and lodged in pursuance of s 293 of the CA*.

57 The authors of McPherson's *Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) ("*McPherson*") make a similar point at [2-021] of that work:

> … It should be observed that there is no means whereby creditors themselves can institute a voluntary winding up. Their rights *come into existence only when the company takes steps to wind up voluntarily by calling a meeting of the company in order to pass a resolution to this effect. Unless the members vote in favour of a winding up,* the only way for creditors to have a winding up is to present a petition to the court for a winding-up order … [emphasis added]

Further emphasis is given to this point at [2-027]:

> … The foregoing account [of a creditors' voluntary winding up] *presupposes that a resolution for voluntary winding up has been passed by the requisite majority of members* at the meeting of the company. If this does not occur, voluntary liquidation cannot continue, and the *only course then open to the creditors is to apply for a winding-up order.* [emphasis added]

58 In summary of the second argument on Question 3, that a company cannot be voluntarily wound up unless a special resolution is passed by the members because to decide otherwise would elide the distinction between voluntary and compulsory winding up, it is clear that the applicable statutes, case authorities, and academic works all gravitate inexorably in the same direction to answer Question 3 in the negative.

59 The third argument for answering Question 3 in the negative is that deciding otherwise would render s 290(1)(*b*) of the CA effectively otiose in the context of creditors' voluntary winding up. If the appointment of provisional liquidators and a determination by the provisional liquidators that the company was insolvent could, without more, cause a company to be in liquidation, with all of the attendant changes in legal status that entails, there would be no real need for the passing of a special resolution by the company's members. A

creditor could have the company placed in liquidation without the oversight by the Court which accompanies a compulsory winding up if the requirement for a special resolution was, in effect, "read out" of the statute.

60 The second and third respondents sought to argue in relation to Question 3 that the fact that the provisional liquidators have determined that the company is in fact insolvent means that the interests of the creditors must be paramount, and that liquidation should therefore proceed. This fundamentally misses the point which we have just made. A determination by the provisional liquidators that the company is insolvent does not place the company in a *voluntary* winding up. The interests of the creditors could still be protected by them relying on the liquidator's determination of insolvency to establish s 254(2)(*c*) of the CA as a basis for arguing that compulsory winding up on the grounds of inability to pay the company's debts under s 254(1)(*e*) of the CA is justified. Put simply, protecting the interests of the creditors is not a warrant to circumvent the statutory framework for compulsory as opposed to voluntary winding up, nor is it *carte blanche* to ignore the clear language of s 290(1)(*b*) and the stipulation therein requiring a special resolution in order for there to be a voluntary winding up.

61 We set out at this point the rest of the second and third respondents' arguments concerning whether a company may be voluntarily wound up even if no special resolution is passed.

62 First, the second and third respondents argued that a liquidator has a duty under s 295(1) of the CA to *immediately* summon a meeting of the creditors and lay before them a statement of the assets and liabilities of the company if he forms the opinion that the company will not be able to pay its debts. It was further argued that once the Creditors' Meeting in s 295(1) of the CA is called,

s 295(2) prescribes that the creditors may appoint a person of their choosing as liquidator, and that this in effect means that the creditors take control over the liquidation process. The second and third respondents thus contended that it would not be appropriate to halt the liquidation process because the proper procedure is provided for in s 295 of the CA.

63 We found this argument unconvincing and illustrative of a somewhat cavalier approach to the relevant statutory framework. Section 295 of the CA falls within Subdivision (2) of Division 3, and is thus expressly prescribed as one of the "Provisions applicable only to members' voluntary winding up". Thus, in order for s 295 of the CA to apply, a members' voluntary winding up will need to be in effect. The requirement under s 290(1)(*b*) of the CA for a special resolution will therefore, assuming s 290(1)(*a*) of the CA does not apply, also have to be met. Even taking the second and third respondents' argument at its highest and looking at s 297 of the CA, which governs the nomination of liquidators in a creditors' voluntary winding up, all s 297 of the CA provides is for the nomination of a liquidator and provisions associated with that nomination. It does not answer the question of whether or not a voluntary winding up can be said to be in existence. Crucially, s 297 of the CA is applicable only to a creditors' voluntary winding up, and therefore *assumes* that a valid creditors' voluntary winding up is in existence for its operation. It does not prescribe *whether* or *when* a creditors' voluntary winding up may be said to exist.

64 The second argument made by the second and third respondents was that the Court should not allow an insolvent company to "walk back" from liquidation. What the second and third respondents appeared to mean by that was that there is no principled basis for requiring a company undergoing a members' voluntary winding up to seek an order of court to stay the winding up

on the one hand, but allowing the members of an insolvent company to scupper a provisional liquidator's work and halt the winding up by declining to pass the relevant special resolution on the other.

65 This reasoning was, with respect, circular. It was not the case that the members of a company could "halt" or "thwart" a creditors' voluntary winding up because a creditors' voluntary winding up simply could not be said to have commenced if the requisite special resolution was not even passed, for the reasons we have already given. In any event, it is unsurprising that there are differences between a members' and creditors' winding up. This is expressly provided for in the structure of the CA through Subdivisions (2) and (3) of Division 3. The alleged inconsistency the second and third respondents sought to rely on in this area was, quite simply, overstated.

66 Third, the second and third respondents pointed to the legislative history of the CA to support their argument that a company can be voluntarily wound up by its creditors even in the absence of a members' special resolution. This argument was made on two separate limbs:

> (a) First, it was argued that the predecessor to s 291(6) of the CA, s 220 of the 1940 Ordinance, stated that "[a] voluntary winding-up *shall be deemed* to commence at the time of the passing of the resolution for voluntary winding up", and that the removal of the word "deemed" from s 255(6) of the Malaysian Companies Act 1965, which preceded s 291(6) of the CA in its present form, must have been intentional on the part of the draftsman. This, it was contended, illustrated that a voluntary winding up *commenced* when the declaration (under what is now s 291(1) of the CA) was lodged with the Registrar, without any deeming necessary.

(b) Second, s 218 of the 1940 Ordinance originally contemplated that there were three ways of commencing a voluntary winding up, as opposed to the two methods listed in s 290 of the CA (see [49] above). The third method, under s 218(1)(*c*) of the 1940 Ordinance, provided for voluntary winding up "if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up". This third limb was removed in the Malaysian Companies Act 1965, at the same time that s 255(6) of the Malaysian Companies Act 1965 (now s 291(6) CA) was introduced. The second and third respondents thus argued that, given the timing of the amendments and the similarity in wording between s 218(1)(*c*) of the 1940 Ordinance and what is now s 291(6)(*a*) of the CA, s 291(6)(*a*) was intended to "replace" s 218 of the 1940 Ordinance as the *third* possible means of commencing a voluntary winding-up.

67 The respondents' arguments based on the legislative history of the relevant provisions in the CA were indefensibly speculative. The fact that s 220 of the 1940 Ordinance included the word "deemed" while s 255(6) of the Malaysian Companies Act 1965 did not was neither here nor there. This was because the entire structure of s 220 of the 1940 Ordinance was altered. This becomes starkly apparent when the two provisions are juxtaposed:

S 220 of the 1940 Ordinance	**S 255(6) of the Malaysian Companies Act 1965**
Commencement of voluntary winding up. 220. A voluntary winding up shall be deemed to commence at the time of the passing of the resolution for voluntary winding up.	**Section 255. Provisional Liquidators** […] **Date of commencement of winding up** (6) A voluntary winding up shall commence– (a) where a provisional liquidator has been appointed before the resolution for voluntary

	winding up was passed, at the time when the declaration referred to in sub-section (1) was lodged with the Registrar; and (b) in any other case, at the time of the passing of the resolution for voluntary winding up.

As is evident from the text of both provisions, the removal of the word "deemed" does not *ipso facto* lead to the conclusion advanced by the second and third respondents that s 255(6) of the Malaysian Companies Act 1965 is no longer a deeming clause. This was because the very structure and phrasing of the provision was changed. The second and third respondents' logic in this regard is not decisive. There exists a whole slew of differences between s 220 of the 1940 Ordinance and s 255(6) of the Malaysian Companies Act 1965 and it would not be appropriate to impute an intention to the draftsman based on *every last one* of those discrepancies. The statutes should instead be read holistically.

68 The second and third respondents' second argument based on the legislative history of s 296(1) of the CA was even more speculative. The entire weight of the argument that s 291(6) of the CA was meant to "replace" s 218(1)(*c*) of the 1940 Ordinance as the "third" method of voluntarily winding up a company rested solely on two premises – the timing of the amendment, and the alleged similarity in wording between s 218(1)(*c*) of the 1940 Ordinance and s 291(6)(*a*) of the CA. Neither premise was at all tenable. The alleged similarity in wording between s 218(1)(*c*) of the 1940 Ordinance and s 291(6)(*a*) of the CA is more apparent than real, as is apparent from this juxtaposition:

<table>
<tr><th>S 218(c) of the 1940 Ordinance</th><th>S 255(6) of the Malaysian Companies Act 1965</th></tr>
<tr><td>Circumstances in which company may be wound up voluntarily.
218.–(1) A company may be wound up voluntarily–
(c) if the company resolves by extraordinary resolution to the effect that it cannot by reason of its liabilities continue its business, and that it is advisable to wind up.</td><td>Section 255. Provisional Liquidators
(1) Where the directors of a company have made a statutory declaration in the prescribed form which has been lodged with the Registrar and with the Official Receiver–
(a) that the company cannot by reason of its liabilities continue its business; and
(b) that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration,
the directors shall forthwith appoint an approved liquidator to be the provisional liquidator.
[…]
Date of commencement of winding up
(6) A voluntary winding up shall commence–
(a) where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in sub-section (1) was lodged with the Registrar; and
(b) in any other case, at the time of the passing of the resolution for voluntary winding up.</td></tr>
</table>

It is clear from the above that any alleged similarity in wording between s 218 of the 1940 Ordinance and s 255 of the Malaysian Companies Act 1965 has been grossly overstated by the second and third respondents. Not only is the similarity restricted *only* to the reference to where a company "cannot by reason of its liabilities continue its business", s 218 of the 1940 Ordinance and s 255(1) of the Malaysian Companies Act 1965 serve fundamentally different purposes. Section 218 of the 1940 Ordinance outlines, in much the same way s 254 of the Malaysian Companies Act 1965 does (as does s 290 of the CA), the circumstances in which a company may be voluntarily wound up. This is clear even from the heading of the provision. By contrast, s 255 of the Malaysian Companies Act 1965 specifically goes towards the role and appointment of provisional liquidators. The two provisions relate to entirely different subject matter, and cannot be unthinkingly compared. Further, s 218(1)(*c*) of the 1940 Ordinance expressly requires a company to "resolv[e] by extraordinary resolution" that it cannot continue its business, a requirement that is strikingly absent from s 255 of the Malaysian Companies Act 1965. In the circumstances, notwithstanding the fact that the legislative changes from the 1940 Ordinance to the Malaysian Companies Act 1965 were made at the same time, it was simply not defensible to suggest that s 255 of the Malaysian Companies Act 1965 provides a "third" method to voluntarily wind up a company. If the intention of the legislature had been, in fact, to replace s 218(1)(*c*) with s 255(6) of the Malaysian Companies Act 1965, we do not see why the s 255(6) mechanism would not have been placed under s 254 of the Act, which *specifically* governed the circumstances under which a company could be voluntarily wound up. The second and third respondents' arguments in this regard were simply a bridge too far and represented, in our view, a desperate clutching at legal straws.

69 Fourth, and most significantly, the second and third respondents argued that since s 291(6)(*a*) of the CA makes clear that voluntary winding up commences at the time of the lodging of the directors' statutory declarations under s 291(1), voluntary winding up *does* in fact commence even in the absence of any special resolution by the members of the company. Section 291(6) of the CA provides that:

> **Commencement of voluntary winding up**
>
> (6) A voluntary winding up shall commence –

> (*a*) where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, at the time when the declaration referred to in subsection (1) was lodged with the Registrar; and
>
> (*b*) in any other case, at the time of the passing of the resolution for voluntary winding up.

On this interpretation of s 291(6) of the CA, a company was said to be expressly envisaged as being placed in voluntary winding up even *prior* to any resolution for voluntary winding up having been passed.

70 In support of this argument on the precise commencement of the voluntary winding up (at [69] above), the second and third respondents cited the following cases:

(a) In *Interocean Holdings Group (BVI) Ltd v Zi-Techasia (Singapore) Pte ltd (in liquidation)* [2014] 2 SLR 485 ("*Interocean*") at [18], Edmund Leow JC observed that "the only way a company being wound up can be put back into its former state is by way of a court order staying the winding-up proceedings and this is so whether the company has been put voluntarily into winding up or is in such a state by way of court order". The second and third respondents therefore argued that since s 291(6) of the CA provides that winding-up commences from the lodging of the directors' statutory declaration under s 291(1) of the CA, the company is in winding up and cannot *cease* to be in winding up without an order of court.

(b) A similar argument was made in reliance on *Eversendai Engineering Pte Ltd v Synergy Construction Pte Ltd (Ministry of Education, Third Party)* [2004] SGHC 129 ("*Eversendai*"). At [18], Vincent Leow AR observed that "… the voluntary winding-up regime differs from the compulsory winding-up regime in that the voluntary winding-up commences once s 291(6)(a) of the CA is complied with and it does not require the resolution to be passed first". It was therefore argued that winding up commenced as at the date of the s 291(1) statutory declaration being lodged, and was not dependent on the passing of the special resolution referred to in s 290(1)(*b*) of the CA.

(c) Finally, reference was also made to the New Zealand High Court decision of *Ross v P J Heeringa Limited* [1970] NZLR 170 ("*Ross*"). In *Ross*, the defendant, a private company with Mr and Mrs Heeringa as the only shareholders, passed an extraordinary resolution that the company by reason of its liabilities be wound up voluntarily, with the plaintiff nominated as liquidator. A meeting of creditors was fixed for 14 February 1969. One day prior, on 13 February 1969, the same shareholders passed a further resolution that the resolution of 6 February be rescinded. The creditors were invited to attend the meeting as originally called, and no nomination for a liquidator was made by the creditors. The plaintiff initiated the action to clarify the status of the company and himself. Haslam J opined (at 173) as follows:

> In my opinion the scope and purpose of the relevant sections of the Act is (*inter alia*) to ensure protection as far as possible to creditors and other interested parties having dealings with the company. Consistency to such provisions can be given only by treating a resolution for voluntary winding-up, properly passed, as an irrevocable step …

71 We were unpersuaded by this argument. We address the entirety of this fourth argument, and the cases which purportedly support it, in our analysis of Question 2 below (see [78] *et seq* below).

Question 2: Does a voluntary winding up commence upon the directors passing a resolution to appoint provisional liquidators regardless of whether the members' resolution for winding up is passed?

72 Question 2 addresses when a voluntary winding up may be said to commence, and how ss 291(6) and 290(1)(*b*) of the CA interface with one another. At its core, it asks whether a voluntary winding up commences upon the appointment of provisional liquidators, even if no members' resolution for winding up is eventually passed. This is a question which is inextricably linked with Question 3 (as analysed above), and whether or not a voluntary winding up can be said to have commenced at all in the absence of a special resolution for winding up. As Question 3 has been answered in the negative, it follows that a voluntary winding up *cannot* be said to commence upon the directors passing a resolution appointing provisional liquidators if the members' special resolution for winding up is not passed. In other words, our answer to Question 3 already addressed Question 2 as framed by the court below. The better way to frame Question 2 is thus to focus on precisely *when* a creditors' voluntary winding up can be said to have commenced, particularly in light of s 291(6)(*a*) of the CA.

73 In short, our view was that, in the situation where a provisional liquidator has been appointed before the resolution for voluntary winding up was passed, a voluntary winding up commences at the time the directors of the company lodge a declaration with the Registrar that the company cannot by reason of its liabilities continue its business, and that meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration ("the Declaration"). This was in line with the plain wording of s 291(6)(*a*) of the CA. What was key, however, was that s 291(6)(*a*) of the CA only operates "where a provisional liquidator has been appointed before the resolution for voluntary winding up ***was*** passed" (emphasis added). This

was as opposed to where a provisional liquidator has been appointed before the resolution for voluntary winding up "*is*" passed. In other words, s 291(6)(*a*) only operates where the resolution for voluntary winding up had *already* been passed. In that sense, it may be best understood as a provision that *retrospectively* dates the commencement of the winding up as the time of the lodgement of the declaration (in situations where this took place prior to the passing of the resolution for winding up). It is thus essential for the operation of s 291(6)(*a*) of the CA that the resolution for winding up *is* in fact passed. Critically, s 291(6)(*a*) is *not*, as the respondents suggested, a provision that contemplates a voluntary winding up occurring even *without* the passing of a member's resolution for winding up.

74 Section 291(6) therefore stipulates that a voluntary winding up may be said to commence at the time the Declaration is lodged only in situations where (a) a provisional liquidator is appointed, and (b) after that appointment, the resolution for voluntary winding up was passed. These two requirements are conjunctive. In any other case, the point at which the voluntary winding up commences was determined by s 291(6)(*b*) as being the time of the passing of the resolution for voluntary winding up.

75 The reasons underpinning our conclusion on Question 2 were fairly straightforward. Apart from giving effect to the use of the term "was" in the text of s 291(6)(*a*) of the CA itself (as outlined at [73] above), deciding that the operation of s 291(6)(*a*) requires the resolution for voluntary winding up to have already been passed reflects the fact that there must be consent by the members before a company may be voluntarily wound up. At [2-024] of *McPherson's Law of Company Liquidation*, the following point is made:

> It is to be noted that if at the company meeting the members called for a vote on whether the company is to be wound up to

> be adjourned, any resolution passed at the creditors' meeting held under s.98 and before the holding of the adjourned company meeting *only has force from the date of the passing of the members' resolution to wind up,* because *until there is a resolution to wind up the creditors' decisions have no effect.* [emphasis added]

What may be gleaned from this extract is twofold. First, it illustrates that the special resolution by members to wind up the company is a *sine qua non* requirement for a voluntary winding up to take effect, and for power to be ceded to the creditors in the context of a voluntary winding up. Second, it disposes, in no uncertain terms, of the argument raised by the second and third respondents that the creditors' interests may *without more* result in the creditors being able to take control of a *voluntary* winding up notwithstanding the absence of any real voluntariness, at least as measured by the absence of the requisite special resolution.

76 We turn now to address the arguments raised by the second and third respondent that militate against our answer to Question 2. In gist, the second and third respondents argued that a voluntary winding up commences from the Declaration being lodged, even if the members' special resolution is ultimately not passed, because such lodgement would still be *before* the resolution for winding up.

77 The first argument raised by the second and third respondents in this regard is that s 291(6)(*a*) of the CA is *not* a "deeming" clause, in that it instead directly prescribes, rather than deems, that a voluntary winding up commences at the point of the Declaration being lodged. This was said to stem from the fact that ss 255(1) and 255(2) of the CA, which govern when a compulsory winding up commences, both adopt the language of a winding up being "deemed" to have commenced either as of the time of the passing of the relevant resolution

(s 255(1) CA), or as at the time of the making of the application for winding up (s 255(2) CA). Unlike s 255 of the CA, the second and third respondents argued, s 291(6) of the CA makes no reference whatsoever to deeming. This would suggest, according to the second and third respondents, that s 291(6)(*a*) of the CA operates directly and without any statutory fiction involved, such that winding up commences as at the lodgement of the Declaration. The second and third respondents relied primarily on two bases as support for this proposition: First, the Malaysian judgment in *Ganda Setia Cemerlang Sdn Bhd & Anor v Maika Holdings Bhd (in liquidation)* [2017] 6 MLJ 661 ("*Ganda*"), and second, the judgment in *Eversendai*.

78 *Ganda* was said to be relevant for present purposes because it interprets sections of the Malaysian Companies Act 1965 (Act 125, 1973 Rev Ed) ("Malaysian Companies Act 1965") which are *in pari materia* with ss 290 and 291(6) of the CA. Specifically, ss 254 and 255(6) of the Malaysian Companies Act 1965 are *in pari materia* with ss 290 and 291(6) of the CA. It was suggested in *Ganda* (at [15]) that:

> Where the company is wound up voluntarily, and that may be by special resolution of the company, or due to the expiration of the duration of the company fixed either in its memorandum or articles of association and a general resolution has been passed to that effect (see s 254) or even on grounds of insolvency and a statutory declaration to that effect has been lodged with the registrar of companies and with the official receiver (see s 255), s 263(2) carries a similar requirement on leave as that found in s 226(3).

The upshot of this extract from *Ganda*, as asserted by the second and third respondents, was that it showed that the Malaysian equivalent of s 291(6)(*a*) of the CA would have the effect of triggering the Malaysian equivalent of s 299 of the CA, thereby requiring leave of Court before proceedings can be continued against a company in a creditors' voluntary winding up. The implication that follows is that the Malaysian equivalent of s 291(6)(*a*) of the CA is a basis for winding up.

79 We took the view that the second and third respondents' reliance on *Ganda* was misplaced. First, the second and third respondents' interpretation of *Ganda* appeared to be an instance of stretching the meaning of a judgment beyond what it could reasonably bear. The second and third respondents understood *Ganda* as showing that the Malaysian equivalent of s 291(6)(*a*) was a *standalone basis* for triggering the commencement of winding up. However, looking at the extract from [15] of *Ganda*, there is in fact no such implication in the judgment. All that the Court in *Ganda* was indicating was that where a company is wound up voluntarily, "s 263(2) carries a similar requirement on leave as that found in s 226(3)". What the Court in *Ganda* appeared to be doing when making reference to winding up voluntarily "by special resolution of the company, or due to the expiration of the duration of the company … [and] insolvency and a statutory declaration to that effect [being] lodged with the registrar" was listing examples of *when* voluntary winding up *might* be taken to commence. This appeared to be a *descriptive* rather than *prescriptive* exercise, in that there was nothing to indicate that the Malaysian Court was definitively setting down occasions where winding up commenced. Further, it may well be the case that the Malaysian Court was simply referring to the *starting point* of possible avenues for voluntary winding up. In that regard, it made sense for that court to refer to situations where a statutory declaration of the company's insolvency was lodged with the registrar, since that would, in a situation where the shareholders went on to pass a special resolution, be the starting point for insolvency commencing under s 255(6)(*a*) of the Malaysian Companies Act 1965. There was nothing to suggest that *Ganda* at [15] should be construed as identifying the lodging of the statutory declaration as being sufficient *in and*

of itself, and without a members' special resolution, to commence a voluntary winding up. That reference should instead be seen as merely identifying the starting point for winding up *in a situation where the members' special resolution was eventually passed*.

80 *Even if Ganda* is interpreted as authority that there existed a third method for a company to be voluntarily wound up, there are compelling reasons for declining to follow that position. First, no reasoning whatsoever was provided for why the court in *Ganda* might have adopted the view that s 255 of the Malaysian Companies Act 1965 provided a basis for a company to be wound up voluntarily. In fairness, though, this particular point does not even appear to have been argued before the Malaysian Court. Second, identifying s 255 of the Malaysian Companies Act 1965 as a basis for a company to be voluntarily wound up would be out of sync with s 254 of the Malaysian Companies Act 1965, which, like s 290 of the CA, only prescribes *two* and *not* three methods for a company to be voluntarily wound up. Again, no reasoning was provided for why a *third* method arose. Third, and in any event, the proposition relied on in *Ganda* at [15] was merely *obiter dicta* (taking the respondents' case at its highest) and was not central to the holding in that case, which centred instead on whether the appellants were entitled to commence proceedings for breach of contract against the respondent after the respondent had *already* been wound up *following the passing of a special resolution by its members*. The issue of whether or not a winding up could commence in the *absence* of a special resolution, or *when* such an alleged "winding up" would commence, did not arise as an issue for the court's determination. Further, *Ganda* has not been followed by any subsequent authority on the position the second and third respondents claim it takes at [15] of the judgment.

81 We thus turned to consider the case of *Eversendai*. In *Eversendai*, a judgment creditor of the subject company had applied to attach sums owed by a third party to the subject company, and the application was heard at a time when the subject company had appointed a provisional liquidator but its shareholders had not yet passed the special resolution for winding-up. However, the winding-up resolution was ultimately never passed. The central issue was whether the voluntary winding up had nonetheless already commenced.

82 Vincent Leow AR observed that the absence of the word "deemed" in s 291(6) of the CA, particularly when compared to s 255 of the CA, meant that there was no statutory fiction for the backdating of the commencement of the voluntary winding up under s 291(6). Apart from this reason, a further three justifications were raised:

> (a) First, it was pointed out that there was no equivalent of s 258 of the CA (for an application to the Court to stay or restrain proceedings after the making of a winding up application but before a winding up order is made) in the voluntary winding up regime. This, it was suggested, was because a voluntary winding up could commence upon the appointment of a provisional liquidator *alone*, without a winding up resolution being passed.
>
> (b) Second, unlike in the case of the presentation of a winding up petition where there was little certainty of a winding up order being made, the chances of the shareholders of a company not passing a winding up resolution after the directors had made a Declaration were slim. Thus, there was no objection to winding up commencing from the lodgement of the Declaration.

(c) Third, it was argued that as a voluntary winding up was initiated by the directors of the company, there was no fear that injury would be unfairly caused to the company if the voluntary winding up commenced without the passing of a winding up resolution. This was contrasted with allowing winding up to commence immediately upon the filing of an application for winding up in a compulsory winding up, which would paralyse the trade of the company and cause great injury to the company and its stakeholders.

83 With respect, we did not find the reasons put forward in support of the *Eversendai* position compelling. Instead, we found the views expressed by Lee Eng Beng in the 2004 Edition of the SAL Annual Review on Insolvency Law (at (2004) 5 SAL Ann Rev 302 from [14.12] to [14.29]), where he criticised certain aspects of the *Eversendai* decision, more persuasive. Lee makes the following points in rebuttal to the position reached in *Eversendai*:

(a) First, it is fallacious to hold the view that the commencement of winding up involves a statutory fiction, even in the s 255 context. The commencement of winding up is not a factual occurrence or physical phenomenon but a legal concept, and does not involve any leap in logic or linguistic interpretation. As Lee notes, there is nothing imaginary about the commencement of winding up being defined as retrospectively taking place at a particular time. More importantly, the conclusions which follow from a voluntary winding up being able to commence even prior to the passing of a winding up resolution are so alarming that they cannot be based solely on the semantics of the word "deemed". If the position in *Eversendai* were adopted, the voluntary winding up in that case would have commenced for up to a period of one month (*per* ss 291(3) and 291(1)(*b*)) before being terminated. However, the legal status of acts done or transactions entered into by the company prior and during this period would still be governed by the relevant winding up provisions in the CA, with dramatic consequences. For instance, floating charges would be liable to be rendered void under s 330, any attachment, sequestration, distress or execution may be void under s 299(1), unregistered charges may be liable to become void under s 131, and even criminal offences may be committed under provisions such as ss 336(1)(*c*) and 9(1) of the CA.

(b) Second, the point that there is no equivalent of s 258 of the CA in the voluntary winding up regime is neither here nor there. An application can be made to the court by a provisional liquidator under ss 291(2) and 310 of the CA to stay any action or proceeding against a company, thereby providing a provisional liquidator with the means to, as was emphasised by the Court in *Eversendai*, preserve the status quo.

(c) Third, the prospects of the shareholders disagreeing with the directors as to whether or not to voluntarily wind up the company are not so slim as to provide a policy justification for the conclusion reached in *Eversendai*. Both in *Eversendai* and in the instant case, the members of the company have declined to follow the position taken by the majority directors. This issue was all the more stark on the instant facts given that the dispute fundamentally appears to be one between shareholders, with Kumarasinhe having himself procured the appointment of the provisional liquidators (see also [2] above).

(d) Fourth, injury to a company results from the very presentation of a winding up petition, regardless of whether the winding up is voluntary or compulsory. Commercial counterparties would likely prefer not to trade with a potentially insolvent company. Thus, the commercial issue of whether paralysis and injury are caused to a company is quite distinct from the legal issue of when a winding up may be said to commence.

84 The second and third respondents' reply to the criticisms raised by Lee, apart from a throwaway line about the age of Lee's article, was fourfold:

85 First, the second and third respondents asserted that *Interocean* "offers a solution" to the difficulty Lee identified because the holding in *Interocean* "would mean that the legal status of the acts in [the] intervening period [between the appointment of provisional liquidators and the staying of any winding up by the Court] would remain intact even if the winding up [was] eventually stayed by the Court". The difficulty Lee identified was that the legal status of acts done and transactions entered into during the intervening period would be subject to the relevant winding-up provisions despite the winding up never being actually "consummated".

86 In our view, this argument by the second and third respondents was not compelling, and in fact missed the point that Lee identifies. The "intervening period" which Lee identified was not that between the appointment of provisional liquidators and the staying of winding up by the Court, but rather the period between the appointment of provisional liquidators, and the members' resolution for winding up *not being passed at all*. By substituting one endpoint for another, the second and third respondents have somewhat unfairly underplayed the gravamen of the difficulty Lee had identified. The difficulty identified was that absurd situations would arise where parties might be subject to the full force of the insolvency regime, including the threat of criminal sanctions for trading, *even in a situation where winding up did not in fact arise* because no special resolution for winding up had been passed. This difficulty

would be magnified in a situation where, if the provisional liquidators were appointed by mistake or in error, the second and third respondents' case that liquidation commenced from the point of the appointment of provisional liquidators would mean that any parties caught during the "intervening period" between the appointment of provisional liquidators and the termination of the alleged liquidation on the basis of mistake or error would *still* be subject to the full force of the insolvency regime. It was thus difficult to see what solution *Interocean* provides when, on the second and third respondents' approach to *Interocean*, a counterparty could be criminally liable for insolvent trading if a trade was executed on one day, but not liable if it was executed on the next, simply based on when the shareholders declined to pass a special resolution.

87 Fundamentally, the problem with the first of the second and third respondents' replies to Lee's article is that those replies beg the question. They assume what they claim to be seeking to prove by asserting that liquidation commences at the point of the declaration being lodged. They do not, however, address *at all* how *Interocean* is of any assistance where a company does *not* in fact become insolvent.

88 The second argument levelled by the second and third respondents to rebut Lee's article was that the position Lee takes is at odds with s 291(6)(*a*) of the CA, which the second and third respondents argue is not a "deeming" provision. This argument centres again on the absence of the word "deemed" in s 291(6)(*a*) of the CA.

89 As previously explained, this argument was a non-starter. In gist, (a) the second and third respondents' fixation with the notion of a "deeming" clause has already been dealt with earlier (see [66] to [68], [77], and [83(a)] above), (b) in any event there is no need for s 291(6)(*a*) of the CA to be construed as a

"deeming" clause in so far as it is read as requiring that the resolution for voluntary winding up *already* be passed, which comports with the description of the passing of the resolution in the *past* tense, and (c) any attempt by the second and third respondents to construe s 291(6)(*a*) of the CA as a *third* basis for a voluntary winding up taking place runs squarely into the difficulty posed by s 290 of the CA, with there being only *two* methods for voluntary winding up enumerated there.

90 As their third rebuttal to Lee's position, the second and third respondents pointed to an assortment of practical and policy-related difficulties:

(a) First, if winding up does not commence until a members' resolution is passed, ss 292 and 299 of the CA would not come into effect until then, allowing the company to potentially continue trading and/or creditors to commence proceedings against it ("Difficulty 1").

(b) Second, directors would have to "deal with the competing wishes of shareholders and creditors" and may thus be left "paralysed" ("Difficulty 2").

(c) Third, if winding up were made subject to shareholder approval, creditors in support of liquidation may be incentivised to file concurrent applications to Court for compulsory winding up ("Difficulty 3").

(d) Fourth, if winding up does not commence until the passing of the members' resolution, uncertainty would arise because any transaction entered into between the lodging of the directors' statutory declaration and the shareholders' resolution risks being rendered void if the shareholders decide not to pass the resolution ("Difficulty 4").

91 In our view, these difficulties were all overstated:

(a) In relation to Difficulty 1, the company would not continue trading unfettered because provisional liquidators would be appointed from the point of the lodging of the directors' statutory declaration (see s 291(1) of the CA). Further, pursuant to s 291(2) of the CA, a provisional liquidator shall have and may exercise *all* the functions and powers of a liquidator in a creditors' winding up subject to such limitations and restrictions as may be prescribed. Further, if there is pressure on the company to access protections under ss 292 and 299 of the CA, that will incentivise shareholders to pass the requisite special resolutions in a timely fashion.

(b) As for Difficulty 2, this was once again a non-starter given that provisional liquidators would be appointed. Directors would thus not be placed in any of the allegedly parlous positions the second and third respondents described.

(c) Difficulty 3 was also overstated given that there is nothing wrong with creditors filing concurrent applications for compulsory winding up. There is extensive jurisprudence on this (see for instance, the Singapore High Court decision of *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 which governs situations involving such concurrent applications). There is also nothing objectionable about creditors using the proper mechanisms they have – through a *compulsory* winding up application – to enforce their legal claims. That is in line with the structure of the CA, and the distinction between voluntary and compulsory winding up (see [49]–[58] above).

(d) Difficulty 4 was more apparent than real because any transaction entered into between a third-party counterparty and the company would be through the provisional liquidators, and the frequency of such transactions would in any event be considerably reduced given the appointment of the said provisional liquidators. If the shareholders' resolution for winding up is passed, the third party's transactions with a liquidator will not prove objectionable, and if the shareholders' resolution is not passed, then there is no difficulty with transactions entered into during the "intervening period" because the company could not be said to have commenced voluntary winding up in the first place.

92 We therefore found the second and third respondents' arguments in relation to *Eversendai* to be unpersuasive. We also noted that the second and third respondents' *own* position on *Eversendai* was, with respect, a remarkable example of approbating and reprobating in the very same breath. At [48] of their written submissions, the second and third respondents tried to justify ignoring and giving no weight to [27] of *Eversendai*, where Vincent Leow AR had concluded that a voluntary winding up terminates immediately once shareholders refuse to pass a resolution to that effect. The basis of the second and third respondents adopting the rest of *Eversendai* but sidelining [27] of that judgment was ostensibly that [27] was *obiter dicta*. However, that did not get around the difficulty that *both* [27] of *Eversendai and* the *ratio* of that case stemmed from the AR's interpretation of s 291(6) of the CA. In fact, the AR's conclusion that termination of the winding up would occur once shareholders refused to pass a resolution to that effect was framed as *stemming from* the determination that s 291(6)(*a*) of the CA is, as the second and third respondents *themselves* argued, not a deeming clause. As the appellant rightly observed in its written submissions, divorcing the holding that (a) voluntary winding up

commences upon appointment of provisional liquidators, from (b) the holding that such a voluntary winding up is inchoate, is not possible. It leads to the absurd conclusion that such a "voluntary winding up" cannot terminate even if the shareholders do not ratify it, and the "voluntary winding up" then takes on a zombified life of its own entirely divorced from the provisional liquidation, which has already terminated. Such a conclusion would render s 291(3) of the CA and the restrictions contained therein on the duration of the provisional liquidators' appointment otiose. The second and third respondents thus appeared to be cherry-picking only the parts of *Eversendai* and the AR's approach to s 291(6)(*a*) of the CA which were advantageous to themselves, with no real principled distinction being proffered as such.

93 Apart from *Ganda* and *Eversendai*, the other cases which the second and third respondent relied on, as outlined above at [70], were also of little assistance. The case of *Interocean*, in particular, did not assist the second and third respondents because it involved a situation where the special resolution for winding up was in fact passed by *the members* (at [6]). Any views expressed as to what would occur in the event that such a special resolution was *not* passed were thus, strictly speaking, merely *obiter dicta*. Further, *Interocean* referred (at [17]) to voluntary winding up *that has already been commenced*. Given the position adopted on Question 2 as to *when* winding up commences, it could not even be said that winding up has commenced on the instant facts, and accordingly, *Interocean* does not offer insight on the specific issue raised in Question 2. It only addresses, instead, what can or cannot be done *after* the commencement of winding up has already occurred.

94 Similar reasoning applies to the New Zealand case of *Ross*. In that case, the members *had* properly passed a special resolution for winding up. Any comments made about *when* winding up should be taken to commence and

whether or not it can be halted thus have to be seen in that light. In *Ross*, the attempted halting of the winding up occurred merely one day before the creditors' meeting, and nearly a full week after the members' special resolution had been passed. This was simply a case of members having changed their minds after passing the special resolution, which contrasts strongly with the instant case where the members *never* changed their minds and, crucially, *never* even had the *chance* to express their intentions regarding a voluntary winding up. *Ross* is thus of highly limited assistance to the present case. In fact, *Ross* might be seen as being of assistance to the appellant given that it deals primarily with the situation where a "resolution" has *already been passed* by the members of the company. In just one page of the four-page-long judgment, at 172, Haslam J referred to a shareholders' resolution no fewer than 11 times, underscoring the centrality of the shareholders' consent to a voluntary winding up. Further, even in the extract which the second and third respondents *themselves* sought to rely on, at 173 of the judgment, the extract provided that "[c]onsistency to such provisions can be given only by treating a *resolution* for voluntary winding-up, *properly passed*, as an irrevocable step" (emphasis added). Again, the voluntary nature of the voluntary winding up, and the consent of the shareholders, is placed front and centre in the analysis, contrary to the second and third respondents' attempts to make shareholder consent irrelevant in a voluntary winding up.

95 One of the central thrusts of the second and third respondents' case has been that the interests of the creditors must be paramount. As already observed at [60] and [75] above, this is not in and of itself determinative. Saying that the interests of the creditors is paramount in an insolvent company does not *ipso facto* determine the manner in which such paramountcy is to be accorded, nor does it dictate that the creditors should be able to *directly* assert control over the

company. The *form* which that paramountcy takes is where the second and third respondents' analysis is deafeningly silent. After all, even where the directors of a nearly-insolvent company owe duties to creditors, such duties cannot be directly vindicated by those creditors in personal actions against the directors in the creditors' capacity as creditors. Clearly, there are limits on the direct exercise of creditor influence on the company, *even where the company is insolvent*. Accordingly, the paramountcy of creditors' interests does *not* give creditors a blank cheque to rewrite the legislation on how a *voluntary* winding up operates.

96 Given the foregoing analysis, we took the view that voluntary winding up *cannot* be said to commence at the time the Declaration is lodged. That would be contrary to the plain wording of s 291(6) of the CA, and would engender a whole host of untenable consequences. Perhaps most fundamentally, however, it would ride roughshod over the entire statutory framework delineating voluntary and compulsory winding up. The second and third respondents' argument that a company *can* be voluntarily wound up even without the requisite special resolution because such winding up commences before the special resolution is passed puts, with respect, the cart before the horse. It assumes the very thing which it purports to establish, that the company *can* be voluntarily wound up without a special resolution by its members in the first place. It flies in the face of the plain language of ss 290 and 291(6)(*a*) of the CA, and is, quite simply, untenable.

Question 1: When and how can a creditors' voluntary winding up be terminated?

97 Given the position reached above, Question 1 was rendered fairly irrelevant. A creditors' voluntary winding up simply did not exist on the facts

because no members' resolution for winding up was ever passed, and accordingly no issue of termination arose. We therefore left the issue of precisely when a voluntary winding up may be said to terminate to a more appropriate juncture where such an issue does arise on the facts.

Conclusion on Issue (a)

98 In sum, we answer Questions 2 and 3 in the manner outlined above. We declined to answer Question 1 because it does not arise anymore given the answers to Questions 2 and 3.

Issue (b): Whether to Allow the Appeals in OS 671 and SUM 2791

99 Applying the answers to Questions 2 and 3 to the facts, a number of conclusions followed:

> (a) First, the company is not and never has been in liquidation. There was no impediment to Ang J's order placing it under IJM, and the IJMs appointed should be entitled to continue their work, pending any further orders of the court.
>
> (b) Second, the second and third respondents should not be allowed to continue to dispose of the assets of the company. Their term as provisional liquidators has come to an end, and they should instead be directed to hand over all relevant information to the IJMs. The second and third respondents should not have held themselves out as liquidators, and should procure the relevant corrections (including on the ACRA database) to reflect that.

100 We also found that SUM 2791 ought to have been granted, and that the second and third respondents ought to have been enjoined from holding

themselves out as any manner of insolvency professional of SPAG after 16 July 2020. Further, we declared that OS 671 has been disposed of in the appellants' favour, since answering the questions of law in the appellant's favour has in effect amounted to a declaration that no voluntary winding up of SPAG existed. The relevant cost orders should follow accordingly.

101 Finally, we make some observations about the state of the dispute among SPAG's shareholders. At the risk of potentially being uncharitable to Kumarasinhe, it appeared to us that what was in fact taking place in this case was a move by Kumarasinhe to procure the liquidation of the first respondent such that its assets were sold at a reduced price to him or entities connected with him. Amidst keeping the appellant relatively poorly informed regarding SPAG's financial situation by, *inter alia*, denying full access to the appellant's auditors, Kumarasinhe appeared to have somehow procured the connivance of one other director of SPAG, Goh Ke Ching, to pass a directors' resolution for the appointment of provisional liquidators. The second and third respondents, in their capacity as provisional liquidators, appeared to be working closely with Kumarasinhe in hastily forcing through the liquidation and disposal of SPAG's assets, potentially to entities connected with Kumarasinhe. The evidence in support of these propositions was sevenfold:

(a) First, the second and third respondents had been remarkably evasive in identifying who was paying their fees as provisional liquidators. Notwithstanding queries to that effect at the hearings on 8 July, 14 July, and 20 July 2020 (see, for example, [26] above), no information was forthcoming confirming that Kumarasinhe was personally funding and had indemnified the second and third respondents until after those hearings, when it was confirmed that Kumarasinhe had provided an indemnity of S$50,000 in the event that

SPAG's assets are unable to cover the second and third respondents' professional fees.

(b) Second, the second and third respondents in their capacity as provisional liquidators had inexplicably elected to sideline the appellant and not even extend any information to it regarding the sale of SPAG's assets despite being entirely aware of the appellant's prior expressions of interest in rehabilitating the company (see [24] above).

(c) Third, the timelines for sale of SPAG's assets were highly accelerated and directed at a speedy sale (see [24] above). Further, the process envisaged the second and third respondents continuing on as liquidators even though there had been no confirmation of their appointments at that point.

(d) Fourth, there appeared to have been a sustained failure, first by Kumarasinhe, and then later by the second and third respondents, to provide information to the appellant regarding the full financial position of the first respondent (see, for example, [17] above). This appeared to be continuing even with the provision of information to the IJMs.

(e) Fifth, the debts allegedly owed by SPAG ballooned rapidly from the Notice of Creditors' Meeting to those reflected in Kumarasinhe's statement of affairs (see above at [20]). This had the effect of denying the appellant (and Boost OY) the status of majority creditor.

(f) Sixth, Kumarasinhe was appointed as a proxy for IconSiam at the Creditors' Meeting held on 16 July 2020 despite being a director of the debtor, SPAG. This appointment coincided with the debt allegedly owed by SPAG to IconSiam inflating rapidly from merely about €65,000 as reflected in Kumarasinhe's instructions to a law firm for advice in April 2020, to over €1.48m barely three months later in July 2020.

(g) Seventh, and unusually, one of the resolutions put forward at the Creditors' Meeting on 16 July 2020 involved the destruction of all of the books, accounts, and records of the first respondent and the second and third respondents ***one*** day after the dissolution of SPAG. This unusual and undue haste was observed to be "very strange" and even "sinister" by the Judge.

102 We are mindful, however, not to overstate the case. There was no direct evidence of Kumarasinhe colluding with the SPAG's creditors of the first respondent, and much of the evidence in that regard in particular is purely circumstantial. Further, the appellant was itself remiss in letting the financial situation of the company deteriorate to what could best be described as a fairly parlous state. In this regard, counsel for the appellant himself acknowledged that the appellant had "taken [its] eye off the ball" in failing to adequately scrutinise the financials of the company.

103 Nonetheless, Kumarasinhe's questionable actions were all the more striking in the context of the Report of the Insolvency Law Review Committee 2013, which noted at [35] the "potential for abuse in instances where a provisional liquidator is appointed by the directors" where the controllers of the company then "effect swift liquidations under their own control, in which they themselves bought assets from the liquidator". The Report of the Insolvency Law Review Committee 2013 provided the basis for much of the IRDA, and while we do note the potential dangers of retrospectively assessing the CA through the lens of the IRDA, there is some suggestion that the instant facts fall within the ambit of what is described at [35] of the report. Consistent with our

analysis above, it was our view that the statutory architecture of the CA and the framework governing voluntary winding up provided a basis for preventing a rogue management from hijacking the procedure for *voluntary* winding up, and that any such attempts on the instant facts, whether by Kumarasinhe and/or the second and third respondents, were precluded by the CA.

104 We add as a final point that we were somewhat perturbed by the actions of the second and third respondents in their capacity as provisional liquidators. We did not see any reasons for the alacrity with which they attempted to dispose of SPAG's assets and destroy the books thereafter, nor were any such reasons placed before us.

Conclusion

105 For the reasons set out above, we allowed the appeal. Having regard to the parties' respective costs schedules, we awarded the appellant costs of $40,000 (all-in). There will be the usual consequential orders.

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

Chan Ming Onn David, Lee Ping (Li Ping), Swah Yeqin Shirin and Lin Ruizi (Shook Lin & Bok LLP) for the appellant;
Ng Ka Luon Eddee, Kang Weisheng Geraint Edward, Seah Yan De Bryan, Thaddaeus Aaron Tan Yong Zhong and Joseph Lim Weisheng (Tan Kok Quan Partnership) for the second and third respondents;
The first respondent unrepresented.
