IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 44

Court of Appeal / Civil Appeal No 43 of 2024 and Summonses Nos 24 and 25 of 2024

Between

Nature One Dairy (Australia) Pte Ltd

… *Applicant*

And

Bicheno Investments Pty Ltd

… *Respondent*

In the matter of Court of Appeal / Civil Appeal No 43 of 2024

Nature One Dairy (Australia) Pte Ltd

… *Appellant*

And

Bicheno Investments Pty Ltd

… *Respondent*

GROUNDS OF DECISION

[Insolvency Law — Administration of insolvent estates — Judicial management — Interim judicial management]
[Civil Procedure — Appeals — Leave]

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v
Bicheno Investments Pty Ltd

[2024] SGCA 44

Court of Appeal — Civil Appeal No 43 of 2024 and Summonses Nos 24 and 25 of 2024
Sundaresh Menon CJ; Kannan Ramesh JAD
19 August 2024

25 October 2024

Kannan Ramesh JAD (delivering the grounds of decision of the court):

1 CA/CA 43/2024 ("CA 43") was the appeal of Nature One Dairy (Australia) Pte Ltd ("NOD") against the decision of the Judicial Commissioner below (the "Judge") in HC/SUM 1559/2024 ("SUM 1559"). The respondent, Bicheno Investments Pty Ltd ("Bicheno"), applied in SUM 1559 for interim judicial managers to be appointed over NOD, pending the determination of Bicheno's application in HC/OA 547/2024 ("OA 547") for NOD to be placed under judicial management. The Judge allowed the application and appointed interim judicial managers (the "IJM order") on 11 June 2024.

2 CA 43 was filed on 12 June 2024. On 25 June 2024, NOD filed CA/SUM 24/2024 ("SUM 24") for permission to appeal the IJM order. Two days later, on 27 June 2024, NOD filed CA/SUM 25/2024 ("SUM 25") for permission to adduce further evidence in CA 43. Bicheno resisted both

applications. It was appropriate to address SUM 24 first, as CA 43 and SUM 25 would necessarily fall away if permission to appeal was required and not granted. Accordingly, on 1 August 2024, we invited further submissions on whether permission to appeal was required to appeal the IJM order.

3 Having reviewed the submissions, we held that permission to appeal was required. However, we were not persuaded that permission ought to be granted and dismissed SUM 24. Consequently, it was unnecessary to address CA 43 and SUM 25. We provided brief reasons for our decision then and provide the full grounds of our decision now.

Background

The parties

4 NOD was a company incorporated in Singapore. It carried on the business of manufacturing dairy products. NOD was the parent company of a group in the dairy products industry (the "Group"). In the Group, only one subsidiary was profitable – Nature One Dairy Pte Ltd ("NODPL"). NODPL was in the milk powder business.

5 Bicheno was a creditor of NOD, holding 80 unsecured convertible notes issued under a Converting Note Subscription Agreement dated 12 February 2020. Bicheno has since redeemed the notes, or the notes have matured. As a result, NOD was liable to pay Bicheno approximately A$5.52m as at February 2021. The debt was the subject of legal proceedings in the Supreme Court of Victoria (the "Australian Proceedings").

Circumstances leading up to the commencement of insolvency proceedings

6 In response to NOD's plan to sell the business of NODPL to a company seeking to list on the Australian Stock Exchange (the "ListCo") through an asset-for-share swap arrangement (the "Potential Divestment"), Bicheno commenced OA 547 and SUM 1559 on 7 June 2024. Upon completion of the Potential Divestment, shares in the ListCo would be distributed to NOD's shareholders *in specie*.

7 The first intimation of the Potential Divestment was announced through a letter from NOD's Chairman Mr Hussain Rifai ("Mr Rifai") enclosed in NOD's Annual Report for Financial Year ("FY") 2023. On 29 May 2024, a notice of Annual General Meeting ("AGM") was issued by NOD, where the Potential Divestment was proposed in a draft resolution ("Resolution No 5"), accompanied by an explanatory statement (the "Explanatory Statement"). Amongst other things, the Explanatory Statement stated that NOD's Board "[wa]s ready to proceed with the [Potential Divestment] upon the requisite Resolution being passed".

8 On 3 June 2024, four of NOD's shareholders objected to the Potential Divestment and Resolution No 5, and requested that Resolution No 5 be withdrawn from the agenda for the AGM. Mr Rifai replied on 4 June 2024, refusing to accede to the request. Accordingly, Bicheno commenced OA 547 to place NOD under judicial management. To prevent the Potential Divestment from being completed before OA 547 was disposed of, Bicheno also applied *ex parte* on the same day *vide* SUM 1559 for NOD to be placed under interim judicial management.

NOD's financial position

9 Apart from the facts surrounding the Potential Divestment, the financial position of NOD was also relevant to SUM 1559. The following facts were salient. First, from NOD's Annual Financial Statement ("AFS") for FY 2023, two points were pertinent: (a) NOD's total current liabilities of S$10.647m exceeded its total current assets of S$1.156m by S$9.491m; and (b) NOD only had cash in bank of S$3,912, which was significantly lower than the S$1.5m it had in FY 2022.

10 Secondly, from the AFS for FYs 2021 to 2023, it was evident that the Group had incurred losses in each of those years and its consolidated balance sheet position had worsened year-on-year.

11 Finally, NOD had not paid a debt of at least A$861,000 owed to Sanston Securities Australia Pty Ltd ("Sanston"). Sanston was also a shareholder of NOD holding 2.5% of its shares. We noted that the debt owed to Sanston was also recognised by NOD in the AFS for FY 2022.

12 The AFS for FY 2023 were NOD's most recent financial statements. Before the Judge, NOD adduced and relied on NOD's management accounts dated 31 March 2024 (the "Management Accounts"). The Management Accounts painted a somewhat different picture of NOD's financial position from the AFS for FY 2023, presenting NOD as cash flow solvent. Notably, the Management Accounts departed from the AFS for FY 2023 in the following ways:

(a) Bicheno's claim of A$5,385,000 was reclassified as a contingent and non-current liability;

(b) NOD's counterclaim against Bicheno was reclassified as a contingent and non-current asset;

(c) loans owed by NOD's subsidiaries were reclassified as current assets on the basis that the subsidiaries were able to repay them following demands for payment; and

(d) debts totalling S$798,320 owed to related parties were reclassified from current liabilities to non-current liabilities as the relevant related party had allegedly agreed to revise the terms of repayment from "repayable on demand" to "repayable after 12 months from demand".

The decision below

13 In allowing SUM 1559, the Judge found that (a) there was a *prima facie* case that NOD was insolvent and that the objectives of judicial management set out in s 89(1) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") would be furthered; and (b) there was urgency for the appointment of interim judicial managers.

14 The Judge was satisfied that NOD was *prima facie* insolvent for the following reasons:

(a) The Judge noted that two sets of auditors raised material uncertainties with respect to the Group as a going concern. He accepted the evidence of NOD's creditors that debts were owed by NOD.

(b) The Judge rejected the Management Accounts as it "raised more questions than answers". He did not accept the reclassification of debts

and receivables in the Management Accounts as those entries had been examined by the auditors when preparing the AFS for FY 2023.

(c) The Judge found that NOD was *prima facie* insolvent even if NOD's case was taken at its highest because the Australian Proceedings would, according to NOD's Group Financial Controller, only reduce the claim therein to A$4m. Therefore, taking NOD's current assets of S$3,649,017 less its current liabilities of S$1,343,665 and the debt of A$4m, NOD would still be cashflow insolvent.

15 The Judge accepted that there was a *prima facie* case that the objectives of judicial management would be met for the following reasons:

(a) There would be a more advantageous realisation of the company's assets. The Judge noted that NOD's current management appeared to disregard the views and interests of its creditors.

(b) A judicial manager would have a real prospect of ensuring NOD's survival as a going concern as the management of the company had clearly lost the confidence of its substantial creditors.

16 The Judge rejected NOD's submission that there was no urgency because the Potential Divestment would only be consummated upon the listing of the ListCo, noting that NOD's claim that the Potential Divestment was in its infancy was evidence from the Bar. The Judge further noted that paragraphs 3 and 4 of the Explanatory Statement stated that the shares would be distributed before the ListCo was listed, and upon listing, the shareholders would have "the liquid market of the ListCo shares distributed to them". Based on the terms of

the Potential Divestment, the Judge reasoned that there was urgency to safeguard NOD's only profitable asset as it was in jeopardy.

The parties' cases on appeal

17 The parties were in agreement that the IJM order was an interlocutory order and therefore permission to appeal was required to appeal the order. Where they differed was whether permission should be granted.

18 NOD submitted that permission to appeal should be granted because the Judge made the following *prima facie* errors:

> (a) Concluding that there was a *prima facie* case that NOD was insolvent on the basis of the AFS for FY 2023, when that was not evidence of its true financial state when OA 547 was filed on 7 June 2024. NOD contended that the Judge should have instead relied on the more current Management Accounts;
>
> (b) In assessing NOD's solvency, placing weight on debts that were either the subject of litigation in the Australian Proceedings (in the case of Bicheno) or not demanded (in the case of Sanston);
>
> (c) Concluding that there was sufficient urgency for the IJM order to be granted; and
>
> (d) Concluding that there was a *prima facie* case that the statutory purposes of judicial management would be fulfilled when there was no restructuring plan in place.

19 NOD further submitted that these *prima facie* errors raised the following questions of importance and/or of general principle to be decided for the first time, namely:

(a) For the purposes of an application for judicial management, could the court decide on the solvency of a company without any evidence of its current financial position?

(b) Could the court determine the urgency of an application for interim judicial management without evidence of the timeframe of the action sought to be stopped?

(c) Could the court decide whether an interim judicial management would achieve the objectives of judicial management if there was no restructuring plan before the court?

20 Bicheno submitted that there was neither a *prima facie* case of error nor any questions of general principle to be decided for the first time or of importance. Bicheno submitted that NOD's contention was in essence that the Judge had reached the wrong conclusion on the evidence. This did not meet the threshold for permission to appeal to be granted. Specifically, Bicheno submitted that there was no *prima facie* case of error because:

(a) The Judge was entitled to conclude on the basis of the AFS for FY 2023 that NOD owed significant sums to Bicheno and Sanston. As regards Sanston, it was irrelevant that a formal demand had not been made as the debt was long due.

(b) The Judge was justified in concluding that there was urgency to make the IJM order.

(c) There was no requirement that a restructuring plan had to be put forward before it could be said that there was a real prospect that the objectives of judicial management would be achieved.

21 Bicheno further submitted that the first two of the questions framed by NOD (at [19]) were irrelevant and that the first and third were neither questions of general principle to be decided for the first time nor questions of importance.

Issues to be determined

22 As foreshadowed above, CA 43 and SUM 25 were contingent on permission to appeal in SUM 24 being granted. SUM 24 raised two issues:

(a) Was permission to appeal required to appeal the IJM order?

(b) If so, should permission to appeal be granted?

Issue 1: Whether permission to appeal was required

23 Whether permission to appeal was required to appeal the IJM order turned on whether it was "an order at the hearing of any interlocutory application", for the purpose of paragraph 3(*l*) of the Fifth Schedule to the Supreme Court of Judicature Act 1969 (2020 Rev Ed) (the "SCJA"). If so, permission to appeal would be required, pursuant to s 29A(1)(*c*) of the SCJA.

24 It is well established that an "order" in paragraph 3(*l*) means "an interlocutory order": *Zhu Su v Three Arrows Capital Ltd* [2024] 1 SLR 579 ("*Three Arrows*") at [12]. As noted above at [17], the parties agreed that an order appointing interim judicial managers was an interlocutory order, and therefore, permission to appeal was required.

25 We agreed with the parties' position. In *Three Arrows* at [12], we affirmed the test for an interlocutory order as set out in *Bozson v Altrincham Urban District Council* [1903] 1 KB 547, namely:

> [d]oes the judgment or order, as made, finally dispose of the rights of the parties? If it does, then … it ought to be treated as a final order; but if it does not, it is then … an interlocutory order.

Based on this test, the key question was whether an order appointing interim judicial managers under s 92 of the IRDA finally disposed of the rights of the parties.

26 In our judgment, it did not. In arriving at this conclusion, we had regard to the instructive observations of the Court of Appeal in *Telecom Credit Inc v Midas United Group Ltd* [2019] 1 SLR 131 (affirmed in *Three Arrows* at [27]):

> … an application for leave to apply for judicial review, and … an application for pre-action interrogatories, are examples of applications that are clearly not interlocutory. Such *applications are entirely self-contained*, in that there is no pending proceeding in which the application may be said to have been made. They will also not lead to any trial on their merits regardless of which way the court decides the application. The hearing of the application is itself the only main hearing, and once the application is disposed of, there is 'nothing more to proceed on', in the words of the court in [*OpenNet Pte Ltd v Infocommunications Development Authority of Singapore* [2013] 2 SLR 880] at [21].
>
> [emphasis added]

27 An application for interim judicial management is not a self-contained application. It is filed in an application for judicial management and involves the same parties as the primary cause, *ie*, the company and its directors, and the creditors. The appointment of interim judicial managers is in order to protect the assets and the business of the company pending the disposal of the

application for judicial management: *Hin Leong Trading (Pte) Ltd (in liquidation) v Rajah & Tann Singapore LLP and another appeal* [2022] 2 SLR 253 ("*Hin Leong*") at [18]. That the application for interim judicial management is not a self-contained application is clear from s 92(1) of the IRDA, which situates the application "between the making of an application for a judicial management order and the making of the judicial management order or the determination of the application". Accordingly, the determination of the application for interim judicial management does not dispose of the substantive rights of the parties in the *underlying cause* – the application for judicial management – which remains to be determined when that application is adjudicated upon.

28 An application for interim judicial management is unlike an application under s 244 of the IRDA which was considered in *Three Arrows*. The distinguishing feature is that an application under s 244 involves a separate and self-standing question between the applicant and the party against whom the application is brought, as to whether the latter is compelled to provide the information or documents sought by the former. The underlying insolvency proceedings, which the application under s 244 relates to, involve other parties and serves the different purpose of the realisation and distribution of assets.

29 For these reasons, we agreed with the parties that the IJM order was an interlocutory order within the meaning of paragraph 3(*l*) of the Fifth Schedule to the SCJA. Consequently, permission to appeal was required to appeal the order.

Issue 2: Whether permission to appeal should be granted

30 We turn to whether permission to appeal should be granted. It is trite that permission to appeal may only be granted on three grounds (*Lin Jianwei v Tung Yu-Lien Margaret and another* [2021] 2 SLR 683 at [85]), namely:

(a) a *prima facie* case of error;

(b) a question of general principle decided for the first time; or

(c) a question of importance upon which further argument and a decision of a higher tribunal would be to the public advantage.

31 We were not persuaded that any of these grounds had been made out. We begin with the first ground, *viz*, whether there was any *prima facie* case of error. For the reasons to follow, we did not agree with NOD that there was any *prima facie* case of error in the Judge's decision.

32 First, we were of the view that the Judge did not err in finding that there was a *prima facie* case of insolvency. It was material that NOD did not dispute that the AFS for FY 2023 showed that it was insolvent. Its only complaint was that the Judge erred because the AFS for FY 2023 did not represent NOD's financial position when OA 547 was filed on 7 June 2024. NOD emphasised that the Management Accounts were more relevant as they were more proximate in time to the filing of OA 547 than the AFS for FY 2023. The Management Accounts showed that NOD was in fact solvent at the material time.

33 In our judgment, the Judge did not err in (a) taking into account the AFS for FY 2023 in reaching the conclusion on NOD's *prima facie* insolvency, and (b) not accepting the Management Accounts. As noted above (at [10]), the AFS

for FYs 2021 and 2022 showed mounting losses. Those losses were consistent with the financial position of NOD in the AFS for FY 2023. We agreed with Bicheno that the question was whether there was a credible explanation for a turnaround in NOD's fortunes in FY 2024 as reflected in the Management Accounts, in the light of its bleak financial position reflected in the AFS for FYs 2021 to 2023.

34 We agreed with the Judge that the Management Accounts raised more questions than answers. The Management Accounts recharacterized the current liabilities in the AFS for FY 2023 as non-current liabilities. Before the Judge, NOD explained that the recharacterization was necessary because the auditors had simply adopted what they were told by NOD's directors. In other words, the nub of NOD's submission was that the auditors did not undertake an audit as they were statutorily obliged to do because they relied on representations from the directors which were in fact inaccurate. The same explanation was offered in SUM 24. In our judgment, the Judge was entitled to regard this explanation as less than credible and conclude that the Management Accounts were no more than a convenient recharacterization of the current liabilities in the AFS for FY 2023.

35 We were unpersuaded by NOD's recharacterization of its related party debts of S$798,320 from current liabilities to non-current liabilities on the basis of an alleged agreement to vary the terms of those loans from "repayable on demand" to "repayable after 12 months from demand". As the Judge rightly noted, no evidence was tendered of this alleged agreement, including the identity of the related parties and the nature of the debts. We also did not accept NOD's reclassification of the loans owed by its subsidiaries as current assets on the basis that NOD had demanded payment of the loans and the subsidiaries

were in a position to satisfy the demand. We make two points. First, this was nothing more than a bare assertion. Second, as noted above (at [10]), there were serious doubts as to the solvency of the Group based on the AFS for FYs 2021 to 2023. In the absence of cogent evidence to the contrary, there was no reason to believe that the subsidiaries had the capacity to pay, thereby warranting the reclassification.

36 More generally, we observed that NOD's written submissions made no effort to challenge the reasons given by the Judge for rejecting the Management Accounts. Rather, as noted above (at [32]) the crux of its case in SUM 24 was that the Judge had erroneously relied on the more dated AFS for FY 2023 rather than the allegedly more current Management Accounts, which for the reasons given, we rejected.

37 Second, we were of the view that the Judge did not err in taking into account the debts owed to Bicheno and Sanston. On the Bicheno debt, we noted that NOD's Group Financial Controller Ms Ho Nga Yee had conceded at paragraph 8(i) of her affidavit dated 11 June 2024 that at least A$4m was due and owing. Therefore, on NOD's own case, at least A$4m should have been recognised as a current liability. Notably, this debt was not recognised in the Management Accounts. On the Sanston debt, it was irrelevant that no formal demand had been made. The true inquiry was whether there was a liability that was due and not whether a demand had been made for payment: *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") at [65].

38 Third, we were of the view that the Judge did not err in treating the circumstances as sufficiently urgent to warrant the appointment of interim

judicial managers. The case for urgency was clear. NOD was seeking to sell the business of its only profitable subsidiary, NODPL, by the end of August which would be about the time OA 547 was scheduled to be heard. The Potential Divestment would therefore have undermined OA 547. Further, the Potential Divestment should be situated in the context of the Judge's finding that NOD was *prima facie* insolvent and its directors were acting without any regard for the interest of its creditors. In our judgment, it was clear that ensuring NOD's only profitable asset was preserved pending the hearing of OA 547 was a relevant consideration: *Hin Leong* at [18].

39 Finally, we were of the view that the Judge did not err in concluding that there was a *prima facie* case that the objectives of judicial management stated in s 89(1) of the IRDA were satisfied. NOD's submission was that the Judge erred as there was no restructuring plan before him. It relied on *Re Logistics Construction Pte Ltd* [2024] SGHC 78 ("*Re Logistics*"), where a restructuring plan had been drawn up by the company. In our view, *Re Logistics* did not stand for the proposition that a restructuring plan was a necessary pre-condition for an interim judicial management order to be made. An application for judicial management does not need to be supported by a restructuring plan. There is no requirement to this effect in the statutes or in the jurisprudence. It is therefore difficult to see why an application for interim judicial management requires one. Indeed, the IRDA specifically provides that it is for the judicial manager to submit a statement of proposals for achieving the statutory purposes, 90 days after appointment: s 107 of the IRDA. There was therefore no basis for NOD's submission that a restructuring plan had to be in place before interim judicial managers could be appointed. The court simply needs to be satisfied *inter alia* that there is a reasonable prospect that at least one of the three objectives stated in s 89(1) of the IRDA would be met. A restructuring plan might assist in this

regard, but that is a different matter from whether such a plan is necessary for the order to be made.

40 For the reasons above, there was no *prima facie* case of error in the decision of the Judge.

41 We were also of the view that the second and third grounds were equally devoid of merit. First, as noted above (at [19]), on NOD's own case, these questions were framed on the basis that there was a *prima facie* case of error. Given that we had concluded otherwise, the questions did not arise. Secondly, and in any case, we were of the view that these questions were no more than attempts by NOD to mount *factual* challenges under the guise of questions of law. Finally, in our judgment, these questions did not raise any issue which could not be sufficiently addressed by the present jurisprudence, which included (a) the test for insolvency as clarified in *Sun Electric*, and (b) the principles governing judicial management as discussed in various cases including *Hin Leong, Re KS Energy Ltd and another matter* [2020] 5 SLR 1435 and *Re X Diamond Capital Pte Ltd (Metech International Ltd, non-party)* [2024] 3 SLR 1228. Accordingly, we rejected NOD's second and third grounds for permission to appeal.

Conclusion

42 For the reasons above, we dismissed SUM 24. Accordingly, there was no jurisdiction to consider CA 43 and SUM 25, and both the appeal and the application were dismissed.

43 We conclude by pointing out that we had, in a letter dated 1 August 2024, raised with the parties our observation on the utility of proceeding with

CA 43, given that OA 547 would be heard shortly on 26 August 2024. The parties were invited to state their position and offer an explanation if they wished to proceed. Bicheno understood the point in our observation. On the other hand, NOD insisted on proceeding with CA 43 and the related applications. Its reasons for insisting missed the point entirely. It is therefore appropriate that we make some observations.

44 There is much to be said in favour of the view that directors and/or shareholders directing a company's conduct in insolvency and/or restructuring proceedings ought to act with prudence and sensitivity to the company's financial circumstances in making decisions in the cause. While the law does not fetter the directors and/or shareholders in this regard, that does not mean that costs consequences will not vest on them if their decisions in the litigation result in unnecessary and unwarranted costs being incurred by the company. There is good reason for this. As a result of such decisions, if costs are ordered against the company or the company incurs costs and expenses, it would be the unsecured creditors who would in fact bear them given the company's financial situation. It seems incorrect for the creditors to bear that burden in such circumstances.

45 The obligation of the directors and/or shareholders in such circumstances may be analogised with the duty of directors to take into consideration the interests of creditors where the company is financially stricken, as there is a common thread. In this regard, the observations of the Court of Appeal in *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 ("*OP3*") at [72], in the context of the director's duty to consider the interests of creditors in certain circumstances (the "Creditor Duty"), are apposite:

> 72 This brings us to the third preliminary point, namely the rationale that underlies the Creditor Duty. This lies in the shift in who may be said to be the main economic stakeholder of the company as the company approaches insolvency (see *Sequana* at [86], *per* Lord Reed) and the asymmetry in corporate governance. To take each point in turn, whereas shareholders are the primary bearers of the risk of loss arising from the manner in which directors exercise their powers when the company is solvent (see [70] above), creditors displace them from this position when the company is insolvent because an insolvent company effectively trades and conducts its business with its creditors' money (see *Progen* ([2] *supra*) at [52]). And even as creditors bear the risks of continued corporate trading in such a situation, they generally have no control over the conduct of the company's business (see *Sequana* at [263], *per* Lady Arden). There is consequently a need to constrain directors from externalising the risks of continued trading onto creditors, bearing in mind that shareholders usually have nothing to lose and everything to gain, and creditors, contrastingly, have everything to lose and nothing to gain by the continued trading of a company which is on the cusp of insolvency (see *Progen* at [52]; *Sequana* at [57], *per* Lord Reed, and at [238], *per* Lord Hodge). In essence, the law responds to the misalignment of incentives between those running the company and those bearing the consequences of actions undertaken by a financially distressed company by enjoining directors of such firms to take corporate decisions with the interests of creditors in mind (see Aurelio Gurrea-Martinez, "Towards an optimal model of directors' duties in the zone of insolvency: an economic and comparative approach" (2021) 21(2) Journal of Corporate Law Studies 365 ("*Towards an optimal model of directors' duties*") at 367–369).

46 As *OP3* states, the company's interest shifts towards its main economic stakeholder, its creditors, as it approaches insolvency, requiring the directors to make decisions with the interests of its creditors in mind. Further, the principle of proscribing the externalisation of the financial risk onto creditors in these circumstances in the context of costs incurred by the company in insolvency proceedings, is a well-entrenched one. For example, in relation to the security for costs of an appeal against a winding up order a similar message of caution was expressed in *Ong Kian Hoy v Liquidator of HSS Engineering Pte Ltd* [2015]

1 SLR 486 ("*Ong Kian Hoy*") at [28]. Judith Prakash J (as she then was) observed that:

> In *In Re Wilson and Sons Ltd* [1972] 1 WLR 791 ("*Wilson*"), the company appealed against the winding up order made against it and the issue arose as to who should be the party to provide security for the costs of the appeal. The English Court of Appeal held that the costs of the appeal ought to be borne directly by those promoting the appeal and not the company itself. The court noted that in the earlier case of *In Re Consolidated South Rand Mines Deep Ltd* [1909] WN 606, the view had been stated that a company in winding up had a right to appeal but should only be allowed to do so upon the terms of finding security from a source outside the company's assets, namely, from the directors or shareholders who were at the back of the appeal. The rationale was that if the appeal failed, the company should have their costs from the persons who really promoted the appeal. This approach was followed in *Wilson* where the court held that security for the costs of the appeal had to be secured from those concerned with promoting the appeal. This would mean that the company would not have to use its assets to pay the legal costs for the appeal if it failed. In a later Hong Kong case, *In the matter of S Y Engineering Company Limited*, Civil Appeal No 1986 of 2001, the court observed that it would not be just that any costs occasioned by an unsuccessful appeal from a winding up order should be thrown upon the assets of the company to the prejudice of the creditors.

The imposition of security for costs of an appeal against a winding up order on directors or shareholders, or those promoting the appeal as a means of forestalling any prejudice to creditors is part of English jurisprudence: see *In re Photographic Artists' Co-operative Supply Association* (1883) 23 Ch D 370; *In Re Consolidated South Rand Mines Deep Ltd* [1909] WN 606 (as cited in *Ong Kian Hoy*); and more recently affirmed in *Cooke v Dunbar Assets plc* [2016] EWHC 1888 (Ch) at [52] to [58].

47 The same considerations undergird the historical practice of the English courts to make a "*Bathampton*" order, arising from the eponymous case of *Re Bathampton Properties Ltd* [1976] 3 All ER 200 ("*Re Bathampton*"). The

"*Bathampton*" order was an order to the effect that the company's costs of unsuccessfully opposing a winding up petition would be paid out of its assets only after all creditors were paid in full. In *Re Bathampton,* Brightman J (as he then was) observed at 204 that:

> The company now asks for its costs of unsuccessfully opposing the petition to be taxed and paid out of the assets of the company under r 195 of the Companies (Winding-up) Rules 1949, subject only to the claims of the mortgagees and the costs of preserving, realising and getting in the assets. Under r 195, and subject to any order of the court, the taxed costs of the petition are a first charge on the net assets. If there is a surplus of assets in the liquidation, after all costs, expenses and debts have been paid, such an order will *ex hypothesi* not prejudice the creditors. If, however, there is not a surplus—and no one at this stage can confidently predict a surplus—the result of the order will be to reduce the assets available for creditors. Prima facie there would seem to be a great injustice in permitting the beneficial owner of all the shares in a company to oppose a winding-up petition in order to seek to secure a benefit for himself as shareholder and then, having failed in his opposition, to charge the costs of such unsuccessful opposition to the creditors of the company. In the present case, counsel for the company also appeared for Mr Harrison as opposing contributory and creditor.

And further at 205-6 that:

> In my opinion, the court ought to look critically at costs incurred by an insolvent company in unsuccessfully opposing a winding-up petition on the ground that the debt is disputed, when the advantage and perhaps the purpose of delaying liquidation is a possible surplus for the beneficial owner of the company's capital. I do not charge Mr Harrison with lack of good faith but why, I ask myself, should the beneficial owner of the company's capital be entitled to finance such litigation at the expense of the creditors? In the instant case Mr Harrison had little or nothing to lose and everything to gain by causing the company to dispute the debt. If he failed in that litigation, which he has promoted, no hardship is caused if the solicitors' bill falls to be paid by him personally rather than by the general body of creditors. I do not intend to make any inroad into the general practice of allowing a company its costs of appearing on and consenting to a winding-up petition. All that I am seeking to do in the present case is to exercise my discretion in such a

> way as to produce a result which is just and fair as between Mr Harrison and his alter ego the company on the one hand, and the general body of creditors on the other hand.

48 The *Bathampton* order has since been overtaken by the discretion afforded to the English courts to make adverse costs orders against non-parties to the proceedings (including a director) who improperly caused the company and the petitioner to incur costs in connection with the winding up petition: see *Re Brackland Magazines Ltd and others* [1994] 1 BCLC 190 applying *Aiden Shipping Co Ltd v Interbulk Ltd, The Vimeira* [1986] AC 965 (HL). It should be noted that a similar power exists under O 21 r 5 of the Rules of Court 2021.

49 In our view, the Creditor Duty, the approach to security for costs of an appeal against a winding up order, the *Bathampton* order, and the court's scrutiny of any unnecessary costs incurred as a result of litigation decisions made by those behind a company that is the subject of insolvency and/or restructuring proceedings share the same underlying principle – what is the best interests of the company in the circumstances. This drives the decision on costs where costs are sought to be visited on the company in the same way as the decision on whether directors have discharged their duties. The philosophical underpinning is common *viz*, the recognition of the shift in the main economic stakeholder of the company when it is under financial stress—where the directors and shareholders have little to lose and everything to gain *vice versa* for the creditors, which underscores the importance of acting with prudence in taking litigation decisions.

50 For the reasons above, in the absence of a credible explanation, we considered that the costs incurred as a result of NOD's insistence on proceeding with CA 43 and the related applications could have been avoided, and judicial

resources not wasted. As we had observed in our letter dated 1 August 2024, the evidence which NOD sought to adduce by SUM 25 and the arguments in CA 43 could be respectively adduced and made before the Judge at the hearing of OA 547, which was to be heard just a few weeks later. Absent compelling reasons, it made eminent sense to take that course of action. However, NOD decided otherwise. Having regard to all the circumstances of the case, we considered it appropriate to award costs of $45,000 (inclusive of disbursements) in favour of Bicheno against NOD in relation to CA 43, SUM 24 and SUM 25.

Sundaresh Menon
Chief Justice

Kannan Ramesh JAD
Judge of the Appellate Division

Tan Siew Bin Ronnie, Twang Kern Zern and Simone Bamapriya Chettiar (Central Chambers Law Corporation) for the applicant/appellant;
Ong Tun Wei Danny, Ayana Ki Su Jin, and Lee Jin Loong (Setia Law LLC) for the respondent.