IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2024] SGCA 57

Court of Appeal / Civil Appeal No 42 of 2023

Between

DGJ

… *Appellant*

And

Ocean Tankers (Pte) Ltd (in liquidation)

… *Respondent*

In the matter of Originating Summons No 452 of 2020 (Summons No 3297 of 2021)

Between

Re Ocean Tankers (Pte) Ltd (in liquidation)

… *Applicant*

And

DGJ

… *Non-party*

Version No 1: 02 Dec 2024 (12:00 hrs)

Court of Appeal / Civil Appeal No 43 of 2023

Between

Ocean Tankers (Pte) Ltd (in liquidation)

… *Appellant*

And

DGJ

… *Respondent*

In the matter of Originating Summons No 452 of 2020 (Summons No 2989 of 2021)

Between

Re Ocean Tankers (Pte) Ltd (in liquidation)

… *Applicant*

And

DGJ

… *Non-party*

JUDGMENT

[Choses in Action — Assignment]
[Debt and Recovery — Right of set-off — Legal set-off]

[Insolvency Law — Insolvency set-off]

DGJ
v
Ocean Tankers (Pte) Ltd (in liquidation) and another appeal

[2024] SGCA 57

Court of Appeal — Civil Appeals Nos 42 and 43 of 2023
Sundaresh Menon CJ, Steven Chong JCA, Kannan Ramesh JAD, Andrew Phang Boon Leong SJ, Judith Prakash SJ
5 August 2024

2 December 2024 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The central question in these appeals is whether a debtor of a company should be allowed to subvert the *pari passu* distribution regime, the key feature of an insolvent liquidation, by procuring the assignment of claims to itself in the advent of the company's compulsory liquidation with the aim of then asserting an insolvency set-off. Matters are also complicated in this case by the unique circumstance that the attempted rescue and eventual winding up of the company engaged two distinct regimes: the first being judicial management under the Companies Act (Cap 50, 2006 Rev Ed) ("CA"), and the second being compulsory liquidation under the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). Various arguments were advanced by the

parties, inviting a broad reconsideration of the laws of assignment and insolvency.

2 These appeals form part of the growing number of cases related to the collapse of Hin Leong Trading ("HLT"), which feature various proceedings involving HLT's group of companies and its trading partners amidst a scramble of interested parties seeking to improve their own positions. In the present case, a debtor of one of the HLT companies has attempted to put itself in a better position by procuring the assignment of claims against the company while it was under judicial management, with a view to asserting a set-off of the assigned claims against the debts it owed the company. The company's liquidators seek the court's declaration that the attempted set-off is ineffective. We agree with the liquidators and elaborate on our reasons in this judgment.

Background facts

The parties

3 Ocean Tankers (Pte) Ltd ("OTPL") is a Singapore-incorporated company, the principal activities of which included ship chartering, provision of ship management services, and the manufacture and storage of petroleum lubricating oil.

4 The appellant in CA/CA 42/2023 ("CA 42") and the respondent in CA/CA 43/2023 ("CA 43"), which we refer to as the "Debtor", is a Hong Kong-based company. The Debtor is a wholly-owned subsidiary of another company, which also has a Singapore-based subsidiary which we refer to as the "Assignor". In short, the Debtor and the Assignor have a common parent company.

The Charterparties

5 Between 24 March and 1 April 2020, the Debtor entered into three charterparties (collectively, the "Charterparties") with OTPL for the charter of the three vessels.

6 The timing of the Charterparties appear to coincide with OTPL's financial troubles. On 6 May 2020, OTPL applied to be placed under judicial management. It was placed under *interim* judicial management on 12 May 2020, and this was made absolute on 7 August 2020.

7 On 16 October 2020, in HC/SUM 4537/2020 ("SUM 4537"), two shareholders/creditors applied unsuccessfully to discharge the judicial management order and instead liquidate OTPL.

The Arbitration

8 On 24 September 2020, the Debtor commenced arbitration proceedings against OTPL for alleged breaches of various duties, including of confidentiality, that were contained in the Charterparties (the "Arbitration"). OTPL counterclaimed in the Arbitration for freight, demurrage, and other sums owed by the Debtor under the Charterparties (the "Counterclaims").

9 In turn, the Debtor acquired, by way of two deeds of assignment (collectively, the "Assignments"), two sets of claims from the Assignor (the "Assigned Claims"). These involved two vessels referred to as "Vessel A" and "Vessel B" which were not among those covered by the Charterparties. Notice of these assignments, which were made on 20 May 2021, was served on OTPL on 21 May 2021. The Debtor thereafter took the position that the Counterclaims

ought to be set off against the Assigned Claims, which it now advances in the present appeals.

Assignment of the Vessel A Claims and the Default Judgment Debt

10 It is apposite to set out the terms of the Assignments and what was sought to be assigned, for this potentially affects the validity of the Assignments. The first assignment (the "First Assignment") related to the Assignor's claims against OTPL for breach of contract, deceit, negligence, and/or breach of bailment which arose from the alleged non-delivery of 342,660 barrels of ultra-low sulphur diesel cargo, which were to have been carried on board a vessel ("Vessel A") by way of a contract contained in or evidenced by three tanker bills of lading. We will refer to these as the "Vessel A Claims".

11 The Assignor had obtained a judgment in default of defence (the "Default Judgment") in respect of the Vessel A Claims on 17 March 2021 in the High Court of Malaya in Kuala Lumpur. Under the Default Judgment, OTPL was to pay the Assignor:

(a) the sum of US$12,478,306.56 being the value of 342,660 barrels of ultra-low sulphur diesel;

(b) interest at the rate of 5% per *annum* on the sum of US$12,478,306.56 from 4 June 2020 until the date of full settlement; and

(c) costs (including costs of the application for the Default Judgment).

12 The first deed of assignment for the Vessel A Claims was made on 20 May 2021 and sets out at cl 2:

> **2 ASSIGNMENT**
>
> The Assignor unconditionally and absolutely assigns to the [Debtor] all of the Assignor's rights, title, interest and benefits in and to:
>
> (a) the [Default] Judgment, including the right to execute on the [Default] Judgment;
>
> (b) the [Default Judgment] Sum; and
>
> (c) to the extent applicable, the [Vessel A] Claim[s],
>
> (collectively, the "Assigned Rights") with effect from the Effective Date.

Assignment of the Vessel B Claims

13 The Assignor's second assignment (the "Second Assignment") to the Debtor was of the Assignor's claims against OTPL involving another vessel, which we refer to as "Vessel B". The Assignor had on 27 February 2020 entered into a contract to sell 2,100,000 barrels of gasoil to HLT (the "Original Sale Contract"). On 8 April 2020, the Assignor entered into a second sale contract (the "Second Sale Contract") with HLT for the Assignor to purchase 458,000 barrels of gasoil 10 ppm sulphur (the "Cargo") from HLT on an in-tank basis on board Vessel B.

14 On 9 April 2020, the Assignor entered into a storage agreement with OTPL (the "Storage Agreement"), under which OTPL became the demise charterer of Vessel B. Under the Storage Agreement, OTPL agreed to allocate oil storage tanks to the Assignor on board Vessel B for a certain period. The Storage Agreement contained a non-assignment clause ("NAC"), which provided:

> TRANSFER OR ASSIGNMENT OF AGREEMENT
>
> Unless otherwise provided hereunder, the rights and obligations of [the Assignor] and [OTPL] under the Agreement shall not be assigned or novated without the prior written

> consent of the other Party, whose consent shall not be unreasonably withheld.

On the same day, OTPL issued an in-tank transfer certificate (the "Document") which evidenced the existence of the Cargo on board Vessel B and the transfer of the Cargo to the Assignor on 9 April 2020.

15 However, it is the Debtor's position that there were false statements in the Document relating to the amount of petroleum products transferred onto or out of Vessel B and/or the fact of such transfer having taken place. This gave rise to two categories of claims, which will collectively be termed the "Vessel B Claims":

(a) The first category relates to the Assignor's cause of action against OTPL in connection with or arising from the Storage Agreement (the "Vessel B Storage Agreement Claim"). In the Arbitration, the Debtor pleaded that the Vessel B Storage Agreement Claim arose from OTPL acting in breach of an implied obligation under the Storage Agreement to not misstate the amount of petroleum products transferred onto or out of Vessel B and/or, the fact of such transfer having taken place.

(b) The second category relates to the Assignor's causes of action against OTPL in connection with or arising from the Document ("the Vessel B Document Claim"). In the Arbitration, the Debtor pleaded that in issuing the Document, OTPL had misrepresented HLT's transfer of the Cargo to the Assignor on Vessel B, that OTPL had conspired with HLT to misrepresent the transfer of the Cargo, and that OTPL had induced HLT to breach the Second Sale Contract.

16 On 20 May 2021, notwithstanding the NAC (at [14] above), a deed of assignment was executed in respect of the Vessel B Claims, which sets out at cl 2:

> **2 ASSIGNMENT**
>
> The Assignor unconditionally and absolutely assigns to the [Debtor] all of the Assignor's rights, title, interest and benefits in and to:
>
> (a) the Cargo;
>
> (b) the Storage Agreement;
>
> (c) the [Document]; and
>
> (d) any and all causes of action that the Assignor has or may have against OTPL in connection with or arising from the Cargo, the Storage Agreement and the [Document], whether set out in any existing legal action or otherwise,
>
> (collectively, the "Assigned Rights") with effect from the Effective Date.

The Debtor's and Assignor's proof of debts and the applications by the JMs below

17 On 11 June 2021, the Debtor and the Assignor filed revised proofs of debt with the then-judicial managers ("JMs") of OTPL, each including the Assigned Claims. The proofs of debt stated that the Debtor was the legal assignee of the Assigned Claims, and its claim was not to be double counted with the Assignor's claim; the Assignor would only maintain its claim in the event that its assignments to the Debtor were ineffective or if the Debtor's proof of debt for the Assigned Claims was not admitted by the JMs.

18 Subsequently, on 12 July 2021, the JMs applied in HC/CWU 117/2021 ("CWU 117") for OTPL to be wound up under the IRDA. They additionally filed two applications in the General Division of the High Court, from which these appeals arise.

19 The first was HC/SUM 3297/2021 ("SUM 3297") filed on 12 July 2021, under which the JMs sought a declaration that the Assignments were void and/or unenforceable against OTPL, and as against the JMs/liquidators in the event that OTPL was wound up.

20 The second was HC/SUM 2989/2021 ("SUM 2989"), filed on 25 June 2021, in which the JMs sought directions on two questions of law:

(a) Whether a debtor of a company placed in judicial management under Part VIIIA of the CA, who acquires a claim against the company by way of assignment after the date on which an order is made to appoint judicial managers to the company (referring to the Assigned Claims), can assert legal or independent set-off against the company for the value of the Assigned Claims ("Question 1"); and

(b) Whether legal or independent set-off, or insolvency set-off, can be asserted by the debtor for the value of the Assigned Claims in the event the company is discharged from judicial management and wound up under the IRDA ("Question 2").

21 On 16 August 2021, after the filing of the applications but before they were heard, OTPL was ordered to be wound up and the JMs were appointed as its liquidators. For consistency, we will refer to the JMs as the "Liquidators" from this point onward.

Proceedings below

SUM 3297

22 In SUM 3297, the Liquidators contended that the Vessel B Claims were invalidly assigned in breach of the NAC, and more generally that the Assigned Claims were not assignable because these were bare rights of action.

23 On the scope of the NAC, the Debtor contended that the Vessel B Claims comprised, among other things, distinct causes of action arising from the Storage Agreement. While there were contractual causes of action arising from the Storage Agreement, the causes of action in misrepresentation arising from the Document were tortious in nature and would fall outside the scope of the NAC, which – on the Debtor's position – only applied to assignment of *contractual* rights and claims. Conversely, the Liquidators argued that the NAC covered the assignment of both contractual and tortious claims, relying on the interpretive approach adopted in *Burleigh House (PTC) Ltd v Irwin Mitchell LLP* [2011] EWHC 834 ("*Burleigh House*"). The Liquidators also argued that, in any event, the Vessel B Document Claim was inextricably connected to the Storage Agreement and so fell within the scope of the NAC.

24 Distinguishing *Burleigh House*, the Judge in the General Division of the High Court ("the Judge") found that the NAC only barred the assignment of contractual claims, and not tortious claims, having regard to the text and heading of the NAC and the other clauses in the Storage Agreement (see *Re Ocean Tankers (Pte) Ltd (In Liquidation)* [2023] SGHC 330 ("Judgment") at [36]). Accordingly, the Judge found that the assignment of the Vessel B Document Claim was not barred by the NAC. Conversely, the Judge found that the Vessel B Storage Agreement Claim, being contractual, fell within the scope of the NAC. The Judge also dismissed, as irrelevant, the Liquidators' argument that

the Vessel B Document Claim was inextricably connected to the Storage Agreement (see Judgment at [37]).

25 As to the effect of the NAC, the Debtor submitted that even if any of the Assignments fell within the scope of the NAC, they would not be rendered void altogether but could and would take effect as equitable assignments or as a declaration of trust. The Judge rejected this and held, affirming the position of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 ("*Linden Gardens*"), that an assignment in breach of a non-assignment clause is void both at law and in equity. There was also no basis for treating the assignment of the Vessel B Document Claim as a declaration of trust (see Judgment at [47]–[48]).

26 In respect of the Vessel B Claims, the Judge therefore found:

(a) The assignment of the Vessel B Storage Agreement Claim contravened the NAC and so was void and/or ineffective as against OTPL and the Liquidators. In any event, it was a bare right to litigate and therefore void and/or ineffective as against OTPL and the Liquidators on this ground as well (see Judgment at [81(b)]).

(b) While the assignment of the Vessel B Document Claim did not breach the NAC in the Storage Agreement, it was a champertous assignment of a bare right to litigate and therefore void and/or ineffective as against OTPL and the Liquidators (see Judgment at [81(c)]).

27 In respect of the Vessel A Claims (which the Judge deemed as having merged into the Default Judgment), the Liquidators contended that the assignment of rights pursuant to the Default Judgment should not be regarded

as the assignment of a property right or a debt, but the assignment of a personal statutory right to assert insolvency set-off in respect of any mutual debts with OTPL. This argument was rejected by the Judge, who found it to be a valid assignment of a judgment debt (see Judgment at [54]–[58]).

SUM 2989

Question 1

28 In respect of SUM 2989, the Judge found it unnecessary to decide Question 1 since it was entirely premised on OTPL being in judicial management (see [20(a)] above). Since OTPL had gone into liquidation by the time SUM 2989 was heard (see [21] above), Question 1 had become moot.

Question 2

29 On Question 2, the Judge held that insolvency set-off could be asserted in respect of the Vessel A Claims. We outline the main elements of the Judge's reasoning.

(1) The relevant time for determining mutuality

30 The Judge first ascertained the relevant time for determining mutuality. The Liquidators took the position that mutuality ought to be assessed at the date of the making of the judicial management application or the date of the judicial management order against OTPL. Conversely, the Debtor took the position that the relevant time should be the date of the commencement of the winding up of OTPL.

31 The Judge agreed with the Debtor because the reference to "judicial management" in s 219 of the IRDA only included judicial management under

the IRDA, and not judicial management under the CA. The CA was the applicable statute at the material time. That left the date of the commencement of the winding up of OTPL under the IRDA as the only relevant time for determining mutuality. This meant that the element of mutuality was to be considered as at 12 July 2021, that being the date of the winding-up application (see Judgment at [111]–[126]).

(2) Whether there was mutuality at the relevant time

32 The Judge then considered whether there was mutuality between the Vessel A Claims and the Counterclaims pleaded by OTPL in the Arbitration, immediately prior to the commencement of the winding up of OPTL.

33 The Liquidators submitted that there was no mutuality because upon the making of the judicial management order against OTPL, its assets (including the freight claims) were held on a statutory trust for the benefit of its general pool of unsecured creditors; OTPL thus ceased to be the beneficial owner of those assets. The Judge rejected this argument, noting a lack of support in case law and the differing purposes of the judicial management and liquidation regimes (see Judgment at [127]–[139]).

(3) Whether any of the exceptions in s 219(3) of the IRDA applied

34 The next issue was thus whether any of the exceptions under s 219(3) of the IRDA barred insolvency set-off from operating.

35 On s 219(3)(*a*) of the IRDA, which excluded debts not provable in judicial management or winding up from the operation of insolvency set-off, the Liquidators submitted that the Vessel A Claims were not provable under s 219(3)(*a*) because s 218(2) (which provides that where an insolvent company

is being wound up, a debt to which a company is subject at the commencement of the winding up is provable) should be read with s 217 (which provides that where a company is wound up while in judicial management, the commencement of the winding up is deemed to be the time of the commencement of the judicial management). This would mean that provable debts would be limited to debts which OTPL was subject to at the commencement of judicial management. The Vessel A Claims, which were assigned *after* OTPL entered judicial management, would not be provable.

36 The Judge rejected this argument, having already found that "judicial management" under s 219(2) of the IRDA referred only to judicial management under the IRDA, and that this should similarly apply to s 217. The judicial management in this case took place under the CA. The relevant time for assessing provable debts was therefore the commencement of winding up under the IRDA, by which time the Vessel A Claim had been assigned (see Judgment at [140]–[142]).

37 Second, on s 219(3)(*b*) which excluded claims arising by reason of an obligation incurred when the creditor had notice that an interim judicial manager was appointed, or that an application for a judicial management order or winding-up order was pending, the Liquidators advanced several arguments:

(a) there should be a freestanding rule that an assignee should be disentitled from asserting insolvency set-off against a company in respect of claims assigned after it has notice of that company's imminent insolvency, and the making of a judicial management order should suffice to constitute such notice;

(b) this also follows from the application of s 219 of the IRDA; and

(c) the Assignor, and therefore the Debtor, was aware of the (unsuccessful) application in SUM 4537 on 16 October 2020 for OTPL to be wound up, which pre-dated the Assignments (see [7] above).

38 The Judge rejected these arguments. In respect of the first and second arguments above (at [37(a)]—[37(b)]), the Judge reiterated that that the judicial management application filed by OTPL was governed by the CA, which provided that only notice of a *winding-up application* would have excluded a claim from insolvency set-off. Given that the IRDA came into operation only after OTPL was placed under judicial management, it would not be fair on the Debtor to retrospectively apply the new notice requirements in s 219(3)(*b*) of the IRDA (see Judgment at [143]). In respect of third argument (at [37(c)] above), the Judge found that s 219(3)(*b*) required notice of *the* application for winding up of OTPL; this was CWU 117 rather than SUM 4537, and the former was only filed on 12 July 2021. Further, SUM 4537 had been dismissed by the time of the Assignments, so there was no pending winding-up application at the material time (see Judgment at [144]–[145]).

39 The Judge therefore found that insolvency set-off could be asserted in respect of the Vessel A Claims. It followed that there was nothing left on which any potential legal set-off could bite. Accordingly, the Judge thought it unnecessary to consider or answer Question 2 insofar as it related to legal set-off (see Judgment at [146]).

Cases on appeal

40 Both parties appealed against the Judge's decision, with the Debtor contesting in CA 42 aspects of the Judge's decision in SUM 3297 and OTPL appealing in CA 43 against parts of the Judge's decision in SUM 2989. In

practical terms, the Debtor takes the position that it should be entitled to assert insolvency set-off in respect of all the Assigned Claims, whereas the Liquidators contend that none of the Assigned Claims should be the subject of an insolvency set-off. The parties largely repeat their positions below, and we set out their main arguments as follows.

The Liquidators' arguments

41 The Liquidators contend that all the Assignments were invalid because they concerned purported assignments of bare rights of action which were void by reason of the public policy against maintenance and champerty. They argue that the exceptions to this do not apply because the Assigned Claims are not incidental or ancillary to a property right or interest and the Debtor does not have a genuine commercial interest in enforcing the Assigned Claims. The Liquidators also repeat their position in relation to the Vessel B Claims that the purported assignments of those claims were ineffective and those assignments were prohibited by the NAC which covered both contractual and tortious claims (see [23] above).

42 The Liquidators further submit that insolvency set-off cannot apply as there is no mutuality between the Assigned Claims and OTPL's Counterclaims. The Liquidators repeat their contention that a statutory trust arose when the judicial management order was made in relation to OTPL on 7 August 2020, and this divested OTPL of beneficial ownership of the Counterclaims in the Arbitration. Accordingly, by the time the Assignments occurred on 20 May 2021, there could not have been mutuality between the Assigned Claims and the Counterclaims. Underlying this submission is the premise that the words "judicial management" in s 219 of the IRDA include judicial management under the CA, and that mutuality should therefore be assessed as at the commencement

of judicial management. Additionally, the Liquidators contend that the Vessel B Document Claim is not a mutual credit, mutual debt or mutual dealing as the claim has not been adjudicated and has therefore not been liquidated.

43 Finally, the Liquidators submit that there is a freestanding common law public policy that would render void and unenforceable a transaction that seeks to circumvent the insolvency regime. In their submission, the Debtor's attempt to exercise insolvency set-off is contrary to this policy because it would allow the Debtor to unfairly improve its position in relation to other creditors of the company. More generally, they contend that such a practice is to be discouraged as it would encourage trafficking in claims for the purpose of circumventing the scheme of *pari passu* distribution.

The Debtor's arguments

44 The Debtor on the other hand submits, applying the contextual approach to the interpretation of non-assignment clause, that the NAC does not proscribe the assignment of non-contractual claims, but only does so in relation to contractual rights or obligations.

45 The Debtor further argues that even if the NAC was breached by the assignment, this would not, in and of itself, render the assignment ineffective as between the obligor and assignee. Instead, the court should retain "remedial flexibility" to award damages, being the default remedy for contractual breaches. The Debtor says that this approach is supported by the wording of the NAC which provides that rights and obligations "shall not be assigned or novated" without the consent of OTPL "*whose consent shall not be unreasonably withheld*" [emphasis added]. This suggests that the NAC is not an absolute bar to an assignment.

46 Moreover, the Debtor submits that the Assignments were not champertous as they do not affect the administration of justice. Since the Debtor and Assignor are related, there is no difference in the ultimate control over the prosecution of the claim before or after assignment. The Assigned Claims were also quantified before they were assigned, and the Debtor has a legitimate interest in the outcome of the litigation as the Debtor and the Assignor were part of the same corporate group with a common interest. In the Debtor's submission, a commercially realistic view would be to accept that the Debtor can rely on its interest in assisting the corporate group to optimise its assets for its global trading business. The Debtor also argues that the assignment of the Vessel B Claims was incidental to a transfer of property, namely the rights in and to the Storage Agreement.

47 On the issue of whether insolvency set-off applies to the Assigned Claims, the Debtor submits that the term "judicial management" as found in s 218 and s 219(2) of the IRDA should not be interpreted to include a judicial management under the CA. Therefore, the date at which mutuality is assessed should be the date of the commencement of OTPL's liquidation. The Debtor also takes the position that no statutory trust arises over a company's assets when a judicial management order is made and that in any event mutuality is not affected by the statutory trust. Lastly, the Debtor submits that there is no common law principle that insolvency set-off cannot be raised in respect of claims that are assigned after the assignee has notice of a company's insolvency or inability to pay its debts and that the court should not recognise a new public policy to that effect.

Independent Counsel's opinions

48 As these appeals raised some intricate points of law, we appointed Professors Tham Chee Ho ("Prof Tham") and Wee Meng Seng ("Prof Wee") to provide their views on some of the issues. At this juncture, it suffices for us to set out their arguments in brief, as we will revisit them in our analysis.

Prof Tham's submissions

49 Prof Tham submits, in relation to the interpretative principles governing non-assignment clauses, that there is no special approach to be adopted and that the proper interpretation is dependent on the wording of the clause, objectively understood, in light of the relevant context. He nevertheless argues that, as with the concern underlying the generous approach to interpreting arbitration clauses laid down in *Fiona Trust & Holding Corp v Privalov* [2007] Bus LR 1719 ("*Fiona Trust*"), the concern underlying the interpretation of non-assignment clauses is to avoid multiplicity of proceedings. Following from this, it was suggested that the approach taken in *Burleigh House*, which interpreted a non-assignment clause in a manner analogous to that taken in *Fiona Trust*, should not be ruled out as decisively as the Judge did.

50 As regards the effect of a breach of a non-assignment clause, Prof Tham submits that *Linden Gardens* does not stand for the proposition that an assignment in breach of such a clause would be void. He argues that the better view would be that the obligor would be free of any liability, in equity or at law, in respect of the said assignment. However, the assignment may be valid as between assignor and assignee *inter se*.

51 Finally, unlike the Judge (see [27] above), Prof Tham does not take a firm view on whether a *foreign* judgment, default or otherwise, triggers the

doctrine of merger. In this regard, he notes that there are foreign authorities answering this question in the negative and it is not clear that the Default Judgment Debt merged with the Vessel A Claims.

Prof Wee's submissions

52 The main thrust of Prof Wee's submission is that the notion of a statutory trust should be abolished altogether, following the approach of the majority of the High Court of Australia in *Commissioner of Taxation v Linter Textiles Australia Ltd (in liq)* (2005) 215 ALR 1 ("*Linter Textiles*"). To this end, he argues that no *lacuna* would be left in the law by the abolition of the statutory trust in liquidation, and there is no need for this concept as the effects of winding up are sufficiently set out by statute. Relatedly, he adds that the statutory trust has little, if any, practical impact and that in any event it is too blunt a tool to serve the aims of modified universalism in the context of insolvency law.

53 As his secondary and alternative argument, he submits that if a statutory trust does arise in liquidation, there is no reason why it should not also arise in judicial management. In this regard, he argues that that the feature of the distribution of dividends that is present in a liquidation is not a necessary condition for the statutory trust to arise. Nevertheless, he takes the view that even if a statutory trust arises in the judicial management of a company, it does not negate mutuality for the purposes of insolvency set-off.

54 Prof Wee further submits that no exception to insolvency set-off would apply if any of the Assignments are valid, either under the grounds listed in s 219(3) of the IRDA or at common law. He notes, however, that allowing a debtor to set off a debt it owes to a company that is in insolvent liquidation, against a claim that the debtor acquires from a creditor of the company, is

objectionable when the debtor has notice of the company's inability to pay its debts because it would be an abuse of the insolvency set-off regime.

55 Lastly, Prof Wee agrees with the Judge that the operation of s 219(2) of the IRDA does not extend to a judicial management under the CA and accepted at the hearing that it was clear that the relevant date for determining mutuality for the purpose of an insolvency set-off is the date of commencement of winding up of OTPL.

Issues on appeal

56 By the time these appeals were heard, it was clear that two broad questions arose for our consideration. The first is whether the Assignments should be ineffective as against OTPL, and if so, on what ground. Second, if the assignments of any of the Assigned Claims are valid as against OTPL, the inquiry would then proceed to whether insolvency set-off operates in relation to the claims which have been successfully assigned.

57 Before turning to the analysis proper, we make some observations on these two questions and their interrelationship. On the first question:

> (a) The overarching inquiry is whether the Assignments should be rendered void, unenforceable and/or ineffective against OTPL on the grounds of public policy. While the individual claims forming the Assigned Claims differ in their nature and subject, it is undisputed that the Assignments were for the common purpose of allowing the Debtor to exercise an insolvency set-off in respect of those claims and thereby circumvent the regime of *pari passu* distribution in OTPL's liquidation. If the Assignments were contrary to public policy, and if this rendered

all the Assignments void, unenforceable and/or ineffective against OTPL, this conclusion would be dispositive of the appeals.

(b) Further and in the alternative, it may also be relevant as a matter of public policy to consider whether the Assigned Claims are bare rights of action, which would engage the public policy against champerty and maintenance and, in that event, whether any of the established exceptions apply to validate the Assignments.

(c) Finally, the scope of the NAC, and specifically, whether it proscribes the assignment of tortious claims, and what its effect is, may be considered.

58 The second question, which is whether insolvency set-off avails, is only engaged if any of the Assigned Claims are effective against OTPL. If there are none, there is simply no provable debt owing by OPTL to the Debtor that can be the subject of an insolvency set-off vis-à-vis the Debtor. Conversely, if any of the Assignments are valid and effective as against OTPL, it would be germane to consider whether insolvency set-off applies to those claim(s). In answering this question, the following sub-issues would arise for determination:

(a) What the relevant date is for determining mutuality for insolvency set-off under s 219 of the IRDA where a company had been under judicial management under the CA immediately prior to liquidation under the IRDA.

(b) Whether a statutory trust arises over the assets of a company in judicial management under the CA such that mutuality between the Assigned Claims and the Counterclaims would be defeated.

(c) Whether any exception to insolvency set-off applies under s 219(3) of the IRDA or at common law.

Our decision

Whether the Assignments are ineffective against OTPL because they contravene public policy

59 In our judgment, the Assignments are ineffective against OTPL and there is no room at all for insolvency set-off to operate. As mentioned above at [57(a)], this finding is dispositive of the present appeals.

All assignments are liable to be struck down on public policy grounds

60 The law relating to assignments is undoubtedly driven by considerations of policy, which historically found expression in the rules against champerty and maintenance. Maintenance has been understood in terms of assistance or encouragement being given *to* a party to a litigation *by* a person who has neither an interest in the litigation nor any motive recognised in the law as justifying such interference. Champerty is a type of maintenance, and consists of maintaining a civil action in consideration of a promise of a share in the proceeds if successful (see *POA Recovery Pte Ltd v Yau Kwok Seng and others and another appeal* [2022] 1 SLR 1165 ("*POA Recovery*") at [86]–[87] and *Lim Lie Hoa v Ong Jane Rebecca* [1997] 1 SLR(R) 775 at [23]).

61 As Danckwerts J observed in *Martell and others v Consett Iron Co Ltd* [1955] Ch 363 ("*Martell*"), the *locus classicus* in the law of maintenance and champerty, the law in this area originated in response to abuses which arose in the context of English medieval society (at 375). This, however, did not prevent the law from evolving in line with modern ideas of propriety (at 384). In *Giles v Thompson* [1994] 1 AC 142 ("*Giles*"), it was observed by the House of Lords

that the law in this area had not stood still but had accommodated itself to changing times (at 164). Indeed, the doctrines are said to be not immutable but rather "evolving concepts" which reflect the times (Marcus Smith & Nico Leslie, *The Law of Assignment*, Oxford University Press, 3rd Ed, 2018 ("*Smith & Leslie*") at para 23.07).

62 It has also been suggested that the law of maintenance and champerty is best kept in "forward motion" by looking to its origins as a principle of public policy designed to protect the purity of justice and the interest of vulnerable litigants (see *POA Recovery* at [88], citing *Giles* at 164). Notably in this regard, Lord Mustill opined in *Giles* that instead of taking an unduly granular view of the transaction sought to be impugned, the nub of the question is whether there is wanton and officious intermeddling with the disputes of others where the meddler has no interest whatsoever, and where the assistance he renders to one or the other party is "without justification or excuse" (at 164). Subsequently, in *Simpson v Norfolk & Norwich University Hospital NHS Trust* [2012] 2 WLR 873, Moore-Bick LJ observed that the court would consider whether the assignee "does not have a sufficient interest in the subject matter of the claim to justify taking an assignment" (at [22]). These statements encapsulate the modern approach of looking to the purpose and effect of the purported assignment.

63 The test as it stood for some time in Singapore was expressed in the decision of the High Court in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Re Vanguard*") (at [43]–[44]). The starting point was that an assignment of a bare cause of action (or the fruits of such actions) would be struck down unless:

(a) it is incidental to a transfer of property; or

(b) the assignee has a legitimate interest (or genuine commercial interest) in the outcome of the litigation; or

(c) there is no realistic possibility that the administration of justice may suffer as a result of the assignment. In this regard, the following should be considered:

(i) whether the assignment conflicts with existing public policy that is directed to protecting the purity of justice or the due administration of justice, and the interests of vulnerable litigants; and

(ii) the policy in favour of ensuring access to justice.

64 Under the framework set out in *Re Vanguard*, the first question is whether an assignment is of a bare cause of action, in contrast to a claim for a debt or a claim based on property rights. It is only if this is answered in the affirmative that the question of whether the assignment may conflict with the due administration of justice would then arise. However, this is potentially underinclusive because it neglects to consider public policy where what is sought to be assigned is *not* a bare cause of action, despite the myriad situations in which the administration of justice may be compromised or other public policy factors engaged. It also has the potential to encourage artificiality in the way claims are characterised. As one commentator has observed, the different treatment between bare causes of action, and those involving a claim for a debt or claims based on property rights, can result in litigants "window dressing" what are bare causes of action as claims to property rights (see Rachael Mulheron, *The Modern Doctrines of Champerty and Maintenance* (Oxford University Press, 2023) ("*Modern Doctrines*") at p 179).

65 There are recent strands of English law appearing to respond to this concern. The first step there remains similar to our law and involves the characterisation of what is sought to be assigned (see *Ndole Assets Ltd v Designer M&E Services UK Ltd* [2017] EWHC 1148 (TCC) at [62]). From the judgment of Lord Roskill in the seminal decision of the House of Lords in *Trendtex Trading Corporation v Credit Suisse* [1981] 3 WLR 766 ("*Trendtex*"), a distinction is to be drawn between bare causes of action, which essentially entail the assertion of personal rights, and causes of action that are of a property right or interest or that are ancillary to a property right or interest (at 778–779). An assignment is presumptively valid in the latter context. On the other hand, if the assignment is of a bare cause of action, it is presumptively invalid and champertous unless the assignee can show a genuine commercial interest in the subject matter of the litigation, or if the assignment is of a property right or interest and the cause of action is ancillary to that right or interest (see *Trendtex* at 779).

66 However, recent English decisions have placed greater weight on the importance of public policy and have suggested that public policy considerations may operate to strike down an assignment even where the assignment is *not* of a bare cause of action. In *Casehub Limited and Wolf Cola Limited* [2017] EWHC 1169, Stuart Isaacs QC considered that the assignment in question was not of a bare cause of action, but nevertheless went on to consider separately whether there were any public policy grounds which would invalidate the assignment (at [25] and [28]). Similarly, in *Farrar and another v Miller* [2022] EWCA Civ 295 ("*Farrar*"), the Court of Appeal understood *Trendtex* to mean that although an assignee might have a genuine commercial interest in the assignment of a bare cause of action, the assignment may

nonetheless be held to be void if it was champertous (at [22]; citing *Trendtex* at 779, *per* Lord Roskill).

67 This raises the question of whether there are broader concerns of public policy that underlie the consideration of the validity of assignments. We note that, in arriving at the legal framework set out at [63] above, the High Court in *Re Vanguard* referred to *Giles* and to *Regina (Factortame Ltd) v Secretary of State for Transport, Local Government and the Regions (No 8)* [2003] QB 381 ("*Factortame*"). The court observed that in both *Giles* and *Factortame*, the approach taken in the consideration of public policy was purposive in nature and as a result, it was not decisive whether the assignment was entered into for a genuine commercial interest; nor was the existence of a genuine commercial interest always necessary (at [41]). It was further noted that public policy would even include the need to ensure access to justice, referring to *Factortame*, as well as to *Fostif Pty Ltd v Campbells Cash & Carry Pty Ltd* [2005] NSWCA 83 and *Siegfried Adalbert Unruh v Hans-Joerg Seeberger* [2007] 2 HKLRD 414 (see *Re Vanguard* at [42]).

68 In our view, the High Court in *Re Vanguard* was correct to recognise that there are broader public policy concerns underlying the law of assignment which go beyond the search for a genuine commercial interest. In *Giles*, Lord Mustill said (at 164):

> … I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its ***origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants***. For this purpose the issue should not be broken down into steps. Rather, all the aspects of the transaction should be taken together for the purpose of considering the ***single question*** whether, in the terms expressed by Fletcher Moulton L.J. in the passage already quoted from in *British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd.* [1908] 1 K.B. 1006, 1014, there is wanton and officious intermeddling with

> the disputes of others where the meddler has no interest whatever, and where the assistance he renders to one or the other party is without justification or excuse.
>
> … The question must be looked at first in terms of the harmfulness of this intervention. … Is there ***any realistic possibility that the administration of justice may suffer***, in the way in which it undoubtedly suffered centuries ago? …
>
> [emphasis added in bold italics]

69 A closer reading of that passage illustrates that the overarching principle underlying the law of assignment, distilled to a single question, is whether upholding the assignment would run contrary to public policy, which inevitably includes concerns about the due administration of justice. This was echoed by the Court of Appeal in *Factortame* (at [44]):

> … [*Giles*] abundantly supports the proposition that, in any individual case, it is necessary to look at the agreement under attack in order ***to see whether it tends to conflict with existing public policy that is directed to protecting the due administration of justice with particular regard to the interests of the defendant***. [emphasis added in bold italics]

70 It follows from these passages that concerns of public policy *cannot* be confined to situations involving the assignment of a bare cause of action. The rule in *Re Vanguard* arose from the public policy against champerty and maintenance, which in turn was concerned with the policy of preserving and protecting the due administration of justice. But once this is understood, it would be illogical to suggest that the rule and the underlying concern is limited or confined to the policy against champerty and maintenance. Indeed, there is nothing in principle that insulates the law of assignment from the need to conform to wider considerations of public policy, especially those concerning the need to secure the proper administration of justice.

The new framework for challenging an assignment on grounds of public policy

71 It follows that any assignment is potentially liable to be struck down if it contravenes public policy, just as other contractual arrangements may be struck down for illegality (see, for example, *Ochroid Trading Ltd and another v Chua Siok Lui (trading as VIE Import & Export) and another* [2018] 1 SLR 363). While this would give expression to other forms of public policy, it does not abolish the rules pertaining to champerty and maintenance.

72 Therefore, in so far as assignments of bare causes of action are concerned, the test in *Re Vanguard* (see [63] above) would continue to apply with the burden of proof unchanged, albeit with modifications to the structure of the test that we outline below. A party who seeks to assert that the assignment of a bare cause of action is valid has the burden of proving that the assignment does not contravene the policy against maintenance by showing that he comes within any of the exceptions set out in *Re Vanguard*. It is important to note that these are exceptions because they do not undermine the policy against maintenance. By establishing that the assignee comes within the exceptions in *Re Vanguard*, the assignee would in effect be showing that the policy concerns underlying the prohibition against champerty and maintenance are not engaged.

73 However, a party may seek to impugn a purported assignment on other grounds, by first showing that there is a policy that applies, and that is likely to be contravened by the purported assignment. The analysis here follows the framework set out by the High Court in *UKM v Attorney-General* [2019] 3 SLR 874 ("*UKM*"). In short, it will be necessary in this context for such a party to satisfy the court that there is a relevant public policy consideration, that it is sufficiently clear and defined, and that it operates to circumscribe the assignment (see *UKM* at [110]).

74 To this end, it will be necessary to consider the *effect and purpose* of the assignment. If a purported assignment was executed with the aim of allowing a party to assert a right under a statutory regime, this forms part of the relevant context and will need to be considered in that light. The imperative in this context is to look at the substance of the transaction and not merely to its form (see Lee Pey Woan, "Form, substance and recharacterisation" in *Form and Substance in the Law of Obligations* (Andrew Robertson & James Goudkamp, eds) (Bloomsbury Publishing, 2019) at pp 71–93).

75 Where a liquidation forms the backdrop to a dispute, the courts will typically have regard to the public policy that inheres in the insolvency regime even when dealing with questions which may be primarily concerned with matters of private law. In *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680, the House of Lords had to determine whether a debenture created a fixed charge or a floating charge. Lord Scott approached this question with reference to the legislative aim of according priority to some classes of creditors over others, and opined that the definition of a floating charge should "keep in mind the mischief that these statutory reforms were intended to meet" (at [98] and [111]). In a similar vein, Lord Walker was cognisant that the distinction between a fixed and floating charge reflected the policy aim of "ensuring that preferential creditors obtain[ed] the measure of protection which Parliament intended them to have" (at [141]).

76 The decision of the House of Lords in *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 ("*British Eagle*") supports this view. The plaintiff and defendant companies were members of the International Air Transport Association ("IATA") and were part of a clearing house arrangement, which was a mechanism for the monthly settlement of debits and credits arising from services provided. Under the

regulations to which the parties were subject, they could not claim the amounts due directly from one another but could only claim from IATA the balances due to them under the arrangement. On the voluntary winding up of the plaintiff company, the liquidator claimed a sum representing the difference between the value of services rendered by the plaintiffs to the defendants and by the defendants to the plaintiffs under the clearing house arrangement. The key issue was whether the clearing house arrangement should prevail even if that would lead to a result that was inconsistent with the *pari passu* regime that applied in the context of insolvency. The respondents sought to rely on the clearing house arrangement and argued that this should be permitted because the dominant purpose of the arrangement was not to evade the operation of the insolvency legislation. This was rejected by the majority of the House of Lords who held that the arrangement was invalid to the extent it contravened the public policy underlying *pari passu* distribution under the liquidation regime, and that this was not affected by the fact that the parties might have had good business reasons for entering into the arrangement. It was therefore held to be irrelevant that it was not the dominant purpose of the arrangement to evade the operation of the insolvency legislation (at 780–781).

77 *British Eagle* was followed by our High Court in *Joo Yee Construction Pte Ltd (in liquidation) v Diethelm Industries Pte Ltd and others* [1990] 1 SLR(R) 171 ("*Joo Yee*"). The question there was whether in the event a petition for the winding up of the main contractor was presented, a contractual term that obliged the Government to pay sums it owed the main contractor directly to the subcontractors instead, to cover what they were owed by the main contractor, was binding on the liquidator of the main contractor, or whether the onset of liquidation rendered that contractual obligation inoperative. L P Thean J observed that the case turned on the "*effect* of such a clause on the liquidation

of the [main contractor]" [emphasis added] (at [6]) and articulated the controlling principle in these terms (at [18]):

> Upon liquidation of an insolvent company (whether voluntary or compulsory), subject to the rights of preferential creditors and also secured creditors, if any, its property must be applied in settlement of its liabilities *pari passu*, and any contract made by the company which provides for a distribution of any of its property for the benefit of one or more of its unsecured creditors which runs counter to or seeks to vary this rule, *ie* ***any "contracting out", is contrary to public policy, and the law as regards distribution of the insolvent's property under the insolvency legislation must prevail***. Accordingly, the liquidator of an insolvent company is entitled to disregard – indeed it is obligatory on him to disregard – such a contract. [emphasis added]

78 The court held that the contractual obligation in that case had the effect of distributing to the main contractor's unsecured creditors sums of money which would otherwise have been paid to the main contractor, and which would in the latter event have formed part of the general assets of the main contractor available for distribution among all its creditors *pari passu*. The operation of such a contractual provision was held to infringe the policy underlying the law of insolvency providing for distribution of the insolvent's property *pari passu* among its creditors. Accordingly, it was held that it did not bind the liquidator (at [21]).

The public policy against improper circumventions of the pari passu *distribution regime*

79 The public policy reflected in *British Eagle* and *Joo Yee* – that private arrangements which contravene or otherwise undermine the rule of *pari passu* distribution in liquidation will not be given effect – is fundamental to insolvency law. Finding its genesis in the 16th century, the *pari passu* rule was first established in the Statute of Bankrupts 1542 (c 4) (UK) by King Henry VIII (see *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed)

(Sweet & Maxwell, 5th Ed, 2018) ("*Goode*") at para 7-03). This, together with the anti-deprivation rule which prevents a reduction in the net asset value of the company to the detriment of its creditors at the point of winding up, are part of the general rule that a company and its creditors cannot contract out of insolvency legislation (see also *Belmont Park Investments Pty Ltd and others v BNY Corporate Trustee Services Ltd and another (Revenue and Customs Comrs and another intervening)* [2012] 1 AC 383 ("*Belmont Park*") at [1], *per* Lord Collins of Mapesbury). So well-entrenched is the policy of safeguarding the *pari passu* distribution regime that it has been said that there is "no basis for any fundamental challenge" to it (see *Belmont Park* at [148], *per* Lord Mance).

80 The policy of *pari passu* distribution is fundamental to the process of liquidation, with the proof of debt process that gives effect to this being the "exclusive procedure whereby a person claiming to be a creditor of the company and wishing to recover his debt in whole or in part must … submit his claim in writing to the liquidator" (see *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis Singapore, 2023) ("*Woon's Corporations Law*") at para 6353, cited in *Kyen Resources Pte Ltd (in compulsory liquidation) and others v Feima International (Hongkong) Ltd (in liquidation) and another matter* [2024] 1 SLR 266 ("*Kyen Resources*") at [32]). At the onset of liquidation, the means by which creditors are to recover their debts changes from "a grab race in which the swiftest creditors gain satisfaction at the expense of the not-so-swift", to a process of collective enforcement (see *Kyen Resources* at [32], citing *Woon's Corporations Law* at para 6353 and Andrew R Keay, *McPherson and Keay, the Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 13-002).

81 Two features of this policy of *pari passu* distribution are salient. First, it does not prescribe a time at which the arrangement *must* have been entered into or triggered. It is "enough that the *effect* of the relevant contractual or other

provision is to apply an asset belonging to the debtor at or following the commencement of the insolvency procedure in a non-pari passu way" [emphasis added] (see *Revenue and Customs Commissioners v Football League Ltd and another* [2013] 1 BCLC 285 at [65] citing *Belmont Park* at [14]). The second feature, as alluded to above at [76], is that it does not matter that the parties might have had good business reasons and did not direct their minds to the question of how the arrangement might be affected by or might affect insolvency proceedings (see *British Eagle* at 780). To this, we observe that if the policy of *pari passu* distribution would operate to strike down even arrangements that were not *intended* to put one or more of the parties in a preferential position in relation to other creditors in a liquidation, it must all the more apply to arrangements entered into with the deliberate aim of doing so.

Abuses of insolvency set-off

82 An exception to the *pari passu* rule is the insolvency set-off mechanism, on which the Debtor seeks to rely. In *Kyen Resources* (at [35]), the nature and effect of an insolvency set-off was illustrated as follows:

> … suppose an unsecured creditor lodges a proof of debt for the sum of $1,000 and the company has a cross-claim against the creditor for the sum of $500 that satisfies the requirements for an insolvency set-off. The cross-claim for $500 must be set off against the creditor's proof of debt for $1,000. In this way, ***the creditor gets satisfaction of its claim to the full extent of the set-off, thereby illustrating the exception to the* pari passu *rule.*** This contrasts with how, ordinarily, the unsecured creditor is only entitled to a *pro rata* distribution of dividend based on the claim that has been admitted. ***As the insolvency set-off is an exception to the* pari passu *rule, its ambit is narrowly circumscribed by statute***. [emphasis added]

83 The availability of an insolvency set-off is a concession to the notion that where parties have been dealing with one another in reliance on their ability to secure payment by withholding what is due to them, it would be "unjust, on

the advent of liquidation, to deprive the solvent party of his security by compelling him to pay what he owes in full and be left to prove for his own claim" (see *Goode* at para 9-01; and Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis, 5th Ed, 2017) at para 26.44). It is not meant to encourage parties to engage in the trafficking of debts to avail themselves of the exception and thereby rank in priority to other unsecured creditors. Therefore, it is unsurprising that the ambit of this exception is narrowly circumscribed (see *Kyen Resources* at [35]).

84 Yet, the narrow scope of the insolvency set-off has not entirely prevented trafficking in debts as litigants attempt to bring themselves within the exception to the rule prior to the onset of insolvency proceedings. *Hawkins v Whitten* (1829) 10 B&C 217 was an early example of this. The question in that case was whether the defendant was entitled to set-off, in the bankruptcy of one Wellingborough Bank, notes owing by the bank against his own debt to the bank. While details of the reported decision were brief, it was noted that the defendant had "industriously obtained" those notes after the bankers had stopped payments to the creditors but before a formal act of bankruptcy. Bayley J held that the relevant statute provided for the "[n]otice of an act of bankruptcy alone [being] the criterion or dividing point". Therefore, although the defendant took the debt for the "very purpose of making them the subject of his set-off", there was nothing in the statute that prohibited him from asserting a set-off (at 223). This led to an unsatisfactory outcome in that even though the defendant had acquired the debt at a time when the bank was in a perilous financial situation and had done so in order to gain priority over other creditors, he was allowed to steal a march on the other creditors. In effect, the court held that he could not be prevented from taking advantage of a *lacuna* which existed because the statute did not expressly prohibit the act in question.

85 The potential that this gave rise to abuse in respect of the insolvency set-off mechanism, and the prejudice that such abuse would cause other creditors, was recognised by the authors of Lightman & Moss, *The Law of Administrators and Receivers of Companies* (2017, 5th Ed, Sweet & Maxwell) ("*Lightman & Moss*"), who explained this as follows (at para 22-029):

> A owes B a debt of 100. A becomes insolvent and B realises that it is likely to receive a dividend of about 10 so that B's claim is only worth 10 to it. A third company, C, owes A a debt of 50. In the liquidation of A, C would have to pay this debt in full. If, however, C were to purchase B's debt, C would be able to set off the full amount of what it owes to A and will not have to pay this in A's liquidation. If C pays more than 10 for B's debt (but less than 50), both C and B will have benefitted. ***The other unsecured creditors of A will, however, have been prejudiced as A will not receive an asset (i.e. the right to be repaid 50 by C).*** [emphasis added]

86 Prof Wee agrees that insolvency set-off is objectionable when a debtor acquires a claim from a creditor of the company in circumstances where the debtor is aware of the company's inability to pay its debts, for two reasons. The first, as noted by *Lightman & Moss*, is that the debtors' debt to the company would be discharged by the full-face value of the debt it purchases from the creditor, causing the company's assets to be diminished to a greater degree than it would otherwise be but for the assignment. This unfairly prejudices the other unsecured creditors. The other reason is that in so far as the creditor assigns its debt to a debtor (who intends to apply it by way of an insolvency set-off) at a price which is more than what the creditor would otherwise receive in dividends from the company, it would have circumvented the *pari passu* rule and received more than it would otherwise have done so. This unfairly benefits the creditor.

The Assignments are ineffective against the Liquidators for subverting the policy of pari passu distribution

87 It follows that the outcome of these appeals would not only affect the Debtor and OTPL, but the general class of unsecured creditors at large. It would, in our judgment, be not only appropriate but necessary that we take into account the interests of those unsecured creditors as a whole because they are the very class of persons in whose favour the *pari passu* regime is meant to operate. This is nothing new or unusual: see *Joo Yee, British Eagle*, as well as *Ong Boon Chuan v Tong Guan Food Products Pte Ltd (in compulsory liquidation) and another* [2022] SGHC 181 (at [23]). These decisions also demonstrate that the policy in favour of *pari passu* distribution is one which is not merely *a* consideration in such cases, but a dominant and operative concern that is part of the very fabric of the liquidation process – a point alluded to in *Kyen Resources* (at [32]–[35]).

88 Counsel for the Debtor, Mr Lok Vi Ming *SC* ("Mr Lok"), did not deny that the Assignments were carried out with the aim of gaining a tactical advantage over other unsecured creditors. While Mr Lok referred to this as an "optimisation" of their liabilities, in our judgment, it was nothing more than an abuse of the insolvency set-off process in an effort to steal a march on the other unsecured creditors. As we observed at the hearing, the Assignments were executed in anticipation of OTPL's liquidation, and it was never suggested by the Debtor that they were, at the time of the Assignments, under the impression that OTPL was going to survive. Quite plainly, the Assignments were for the purpose of asserting an insolvency set-off when OTPL went into liquidation. This is a quintessential example of impermissible debt trafficking of the sort we have referred to earlier (at [84] above).

89 Accordingly, we find that the Assignments are void and unenforceable for subverting the regime of *pari passu* distribution in liquidation. It would be entirely contrary to the patent interest in ensuring the orderly distribution of assets among the body of unsecured creditors (see [80] above), to permit a given creditor and debtor to traffic in debts in order to secure priority for their debts and so deprive the insolvent company of the full value of its assets that should be available for distribution. What constitutes debt trafficking is ultimately a question of fact and we do not set out to define this exhaustively, but it is without doubt that the present case is a clear example.

90 Mr Joseph Lee ("Mr Lee"), co-counsel for the Debtor, submitted that not giving effect to the Assignments in the present case would have wider ramifications on the market for distressed debts. However, we think that this is overstated. Our decision in these appeals would not prevent the trading of debts in the typical situation where a creditor sells its debt to another, preferring to take a fraction of its nominal value at once instead of waiting for the liquidation process to conclude and for the ultimate distribution to be effected. Such a transaction would be between two parties, the assignor and assignee, and would in no way affect the position of the insolvent company. The right acquired by the assignee is the same right to prove in the insolvency that the assignee had. Hence, there is no question of subverting the *pari passu* regime or any other policy concern. And a party that purchases the distressed debt in such circumstances does not do so for the purpose of asserting an insolvency set-off, but to obtain what it hopes and anticipates will be a better return when the assets of the company are liquidated and its proceeds distributed to the general body of unsecured creditors on a *pari passu* basis.

91 For this reason, we do not think this in any way raises any countervailing policy reason which might militate against holding the Assignments to be void

and unenforceable. And this is sufficient for us to dispose of the appeals in favour of the Liquidators.

Whether the Vessel A Claims have merged into the Default Judgment

92 That said, however, as full arguments were raised in respect of a number of issues, we think it helpful to outline our views on *some* of the remaining issues in this case, beginning with the doctrine of merger.

93 Under Singapore law, when a judgment has been given on a cause of action, the doctrine of merger operates to merge the cause of action with the judgment of the court such that the cause of action ceases to have an independent existence (see the decision of this court in *Michael Vaz Lorrain v Singapore Rifle Association* [2020] 2 SLR 808 at [14]–[15]). Before the Judge, it was common ground that the Vessel A Claims standing on their own constituted bare rights of action that were not assignable as such; *but also* that those rights in any case had merged with the Default Judgment and this was where the parties joined issue below.

94 On appeal, the Liquidators contended for the first time that the Vessel A Claims had not merged with the Default Judgment because the latter had been invalidly obtained in the Malaysian High Court without the consent of the JMs or the leave of the Singapore Courts, with such consent or leave being an essential requirement for the pursuit of these claims given the protection of the judicial management moratorium that was afforded to OTPL pursuant to s 227D(4)(*c*) of the CA. We note that not only did the Liquidators fail to highlight this new point in their Appellant's Case, this argument fell outside the scope of both SUM 3297 and SUM 2989. Furthermore, the validity of the Default Judgment as a provable debt in insolvency set-off under s 219(2) of the

IRDA is a matter for the *Liquidators* to determine as a matter of the ordinary course of winding up proceedings *vide* r 17(1) of the Insolvency, Restructuring and Dissolution (Court-Ordered Winding Up) Regulations 2020. There was no evidence of any such determination before us, nor of any application to vary such a determination under r 132(1) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020. Be that as it may, we express the preliminary view that it is unlikely that s 227D(4)(*c*) of the CA applies to commencement of *foreign* proceedings against a company in judicial management. This is a corollary of the general principle that a statutory moratorium on the commencement or continuation of legal proceedings and process triggered by a winding-up order does not have extraterritorial effect (see *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815 at [90]), which also extends to the moratorium provisions regarding judicial management (see *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125 at [17]).

95 Prof Tham (with whom the Liquidators were aligned) submitted that no merger of the Vessel A Claims with the Default Judgment would have occurred because the doctrine of merger does not extend to judgments emanating from a foreign court: *J. M. Lyon & Co v Meyer & Goldenberg* [1893] 1 SSLR 19; *Malaysia Credit Finance Bhd v Chen Huat Lai* [1991] 2 SLR(R) 300 ("*Malaysia Credit Finance*"). Prof Tham suggested that it might be "arguable" that, by virtue of the Choice of Courts Agreements Act 2016 (2020 Rev Ed) ("CCAA"), the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 164, 1985 Rev Ed) ("RECJA") and the Reciprocal Enforcement of Foreign Judgments Act 1959 ("REFJA"), a cause of action might merge with a foreign

judgment where that foreign judgment is registered and/or enforced under those pieces of legislation, but this was not the case here.

96 We express the preliminary view that the position in *Malaysia Credit Finance* is correct and note that this is in line with the English common law position (see *Carl-Zeiss-Stiftung v Rayner and Keeler Ltd and Others (No 2)* [1966] 2 All ER 536 ("*Carl-Zeiss-Stiftung*") at 561 and 567; and *Black v Yates* [1991] 3 WLR 90 at 102). It follows that the Vessel A Claims did not merge into the Default Judgment.

97 It seems to us that the Liquidators appear to have thought that the failure of the Vessel A Claims to merge with the Default Judgment would result in the Default Judgment not being enforceable or recognised as a debt. That is not correct. The validity of the Default Judgment as a debt is a separate matter from the question of whether a foreign default judgment and its underlying cause of action merges. In relation to the former question, we have noted our rejection of the Liquidators' argument that the Default Judgment was invalidly obtained by virtue of the operation of s 227D(4)(*c*) of the CA (at [94] above). Therefore, the only practical consequence of merger not having occurred would be that the validity of the assignment of the Default Judgment would have to be considered separately from the Vessel A Claims, with the approach to the latter being the same as the approach towards the Vessel B Claims – that is, whether the Assignments were champertous and/or otherwise contrary to public policy.

Whether the Assigned Claims offend the law of maintenance and champerty

The appropriate framework for assessing whether an assignment is champertous

98 We take this opportunity to consider the appropriate framework for assessing whether an assignment is champertous. As we have noted, a bare right to litigate is generally not assignable, because if it is found to be champertous, it would generally be void and unenforceable (see the decision of the Privy Council in *Massai Aviation Services and another v Attorney General and another* [2007] UKPC 12 at [12]). The three exceptions to this were set out in *Re Vanguard* (at [43]): an assignment of a bare cause of action (or the fruits of such actions) will not be struck down: (a) if it is incidental to a transfer of property; (b) if the assignee has a legitimate interest in the outcome of the litigation; or (c) if there is no realistic possibility that the administration of justice may suffer as a result of the assignment. These are noted as being disjunctive exceptions, in that an assignment of a bare cause of action would not be struck down as long as any one of these exceptions was satisfied.

99 While we broadly agree with the substance of the *Re Vanguard* test, we think it needs to be refined in order to ensure that due weight is placed on the importance of the interest in safeguarding the administration of justice. In our view, the exceptions noted above should not be independent and disjunctive limbs, such that the satisfaction of any *one* of them would render an assignment permissible under the law of maintenance and champerty. Instead, even if either of the first two limbs are satisfied, there should be a further independent requirement that the assignment must not adversely impact the administration of justice. This follows from our analysis at [65]–[86] above which focuses on the broader policy considerations that underlie the law in this area. In our view, this revised test would also better explain the result in *Trendtex*. There, the

House of Lords held that a primary assignment of a cause of action for damages against the Central Bank of Nigeria to Credit Suisse was not itself champertous because Credit Suisse had a genuine and substantial interest in the success of the assigned claim (at 694). However, the assignment as a whole was nevertheless found to be champertous because that assignment manifestly had not excluded the possibility of a further assignment to a party without any such interest, and Credit Suisse had indeed assigned that cause of action to a third party.

The Default Judgment

100 Under the framework described above (at [99]), we do not think that the assignment of the Default Judgment would be rendered void by operation of the law of champerty and maintenance.

101 The Judge agreed with the Debtor that the assignment of the Default Judgment represented the assignment of a judgment debt (see Judgment at [54]–[56]). The Liquidators had argued below, and again now on appeal, that the Default Judgment is a mere right to litigate – first, because it only entitles the Assignor to commence an action to enforce the same, and second, because all that the Assignor had was the statutory right to file a proof of debt against it for adjudication. It was contended that this was a statutory right and not a property right, and ought to be viewed as a personal right which had been assigned by the Assignor to the Debtor in order to enable the latter to then assert an insolvency set-off.

102 In our view, the Judge was correct to characterise the Default Judgment as a species of debt (see *Crooks v Newdigate Properties Ltd and others* [2009] EWCA Civ 283 at [22]). Assignment of such a debt is treated as a transfer of

property; any action brought to enforce the right to that debt is part and parcel of the assignee's ownership of the debt, and thus not champertous provided that it does not adversely impact the administration of justice (see *Re Oasis Merchandising Services Ltd* [1997] 2 WLR 764 at 769; and *Camdex Intl Ltd v Bank of Zambia* [1998] QB 22 ("*Camdex*") at 32).

103 We also note that the fact there has been no formal application for recognition or enforcement of the Default Judgment in Singapore is no bar to its provability for the purpose of insolvency set-off, so long as "the demand is capable of being liquidated, or ascertained with precision at the time of pleading" (see *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 272). In short, a debt may be regarded as liquidated and capable of being set-off even if further litigation may be required (see Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) at para 2.15). On the present facts, once we accept that the Default Judgment was a debt, it was capable of being assigned without falling foul of the policy against champerty and maintenance. However, as noted in our analysis at [59]–[90], the assignments in this case were invalidated by reason of offending the broader policy in favour of *pari passu* distribution in an insolvency setting.

The Assigned Claims

104 As for the Assigned Claims, we touch on three main issues: (a) whether the Debtor had a genuine commercial interest in taking the Assignments by reason of its relationship with the Assignor; (b) whether the assignment of the Vessel B Claims contravened the NAC; and (c) whether the Vessel B Claims were incapable of being set off against OTPL because the latter's assets became subject to a trust upon the onset of insolvency.

Whether the Debtor had a genuine commercial interest in the Assigned Claims

105 The Debtor argued that it had a genuine commercial interest in enforcing the Assigned Claims because both the Vessel A Claims and Vessel B Claims "directly relate[d] to" or "directly concern[ed]" the rights, title, interest and benefits in and to the subject matter of the assignment, and also because it had an interest in asserting set-off. In the alternative, it argued that it had a genuine commercial interest in seeking to reduce its parent group's liability to OTPL.

106 We disagree with both arguments. In *Trendtex*, Lord Roskill elaborated on the nature of a genuine commercial interest at 779 as follows:

> The court should look at the totality of the transaction. If the assignment is of a property right or interest and the cause of action is ancillary to that right or interest, or if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for its own benefit, I see no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.

107 In *Re Vanguard*, Chua JC (as he then was) noted at [44] that "the question in each case is the same, namely, whether the maintainer's interest in the litigation justifies his intervention".

108 After *Trendtex*, the trend of most decisions in the UK and in Singapore has been towards a widening of what amounts to a genuine commercial interest. As the High Court of England and Wales observed in *Zagora Management Ltd v Zurich Insurance plc* [2019] EWHC 140 (TCC) at [10.13.3(3)], "the tide of recent authorities indicated a considerable relaxation of the approach to questions of assignment and champerty in favour of looking at the transaction as a whole rather than encouraging a narrowly focussed view of the commercial aspects". Where an assignment is of a cause of action, "courts must hunt for the 'something more', some genuine commercial interest over and above the

assignee's right in acquiring the cause of action and the monetary rewards that will accompany that assignment" (see *Modern Doctrines* at p 197).

109 A genuine commercial interest may be demonstrated by (see *Modern Doctrines* at p 178):

(a) the assignor and assignee falling into one of the (developing, and not closed) recognised categories by which the assignee will be found to have a genuine and pre-existing commercial interest (for example an insurer-insured relationship: see *Compania Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101);

(b) the assignor and assignee sharing a close identity of interest (such as where reputational damage might be incurred by both a company and that company's sole director and shareholder, and a contractual claim for such damage is assigned by the former to the latter: see *Nicholson v Knox Ukiwa & Co (a firm)* [2008] EWHC 1222 (QB) at [102]); or

(c) the cause of action not possessing a solely personal character (such as claims for defamation or for personal injury: see *Trendtex* at 778).

110 Having regard to the totality of the transactions, we fail to see a commercial interest in the Debtor enforcing the Assigned Claims that should be upheld by the court. This is for two main reasons.

111 First, in considering the sufficiency of the Assignee's interest, the focus is on the interest as between the assignor and assignee, such as a pre-existing debtor-creditor relationship (as existed in *Trendtex*) or where for example the

assignor has previously sold property to the assignee purchaser and separately seeks to assign a cause of action relatable to the property which was previously conveyed. That the Debtor stood to gain from the assignment in the context of its relationship with OTPL cannot, in itself, be sufficient. If that were the case, *any* assignment of any claim would involve a genuine commercial interest.

112 Second, we do not accept that the fact that the Debtor and the Assignor belong to the same corporate group can in itself constitute a sufficient interest so as to justify the Assigned Claims. We agree with the Judge that the mere fact that the parties to the assignment are part of the same corporate group does not, without more, cloak the transaction with legitimacy or imbue it with a genuine commercial interest where there is in fact none.

113 While the Debtor relies on *Scholle Industries Pty Ltd v AEP Industries (NZ) Ltd* [2007] SASC 322 ("*Scholle*"), a decision of the Supreme Court of South Australia, the facts of that case involved something more than the mere fact of the assignee's corporate relationship with the assignor. In seeking to justify the assignment of a claim in negligence for the sale of defective taps, the assignee had argued that:

> (a) the alleged loss to the assignor had been suffered as a result of action taken to assist the assignee;
>
> (b) the assignee , at the time of the assignment, was already engaged in litigation with the defendants for losses in respect of the same conduct causing loss to the assignor;
>
> (c) the replacement taps which were supplied by another subsidiary belonging to the same corporate group as the assignee became the

property of the assignee and that the cause of action in negligence should "follow" the passing of the property;

(d) the assignee was a wholly owned subsidiary of the assignor and had an interest in the financial viability of the assignor; and

(e) regard should be had to the interests of the corporate group as a whole rather than just that of an individual member (at [18]).

It was in those circumstances that the court accepted that it was reasonably arguable that the assignee had a genuine commercial interest (at [23]–[24]). Clearly, *Scholle* stands in contrast with the present case, in which there is no evidence before us of transactions between the Debtor and Assignor which show a close identity of interest in relation to the Assigned Claims, nor how the Debtor was involved in the Assigned Claims prior to the Assignments such that it would have a pre-existing commercial interest therein.

Whether the non-assignment clause bars the assignment of the Vessel B Claims

The scope of the non-assignment clause

114 As noted above at [14], the Storage Agreement contained a non-assignment clause prohibiting the assignment or novation of the rights and obligations of parties under the agreement without prior written consent of the other party, whose consent shall not be unreasonably withheld. It was undisputed that the Assignor did not obtain the prior written consent of OTPL before executing the Assignments; the Debtor has also not alleged that OTPL unreasonably withheld consent.

115 It is common ground between the parties that (a) the Vessel B Storage Agreement is a contractual claim, alleging that OTPL had acted in breach of implied obligations under the Storage Agreement), and that (b) the Vessel B Document Claim is *prima facie* a *tortious* claim (involving claims for misrepresentation, conspiracy, and for OTPL inducing HLT to breach the Second Sale Contract).

116 In his brief, Prof Tham suggested that the approach in *Fiona Trust* could potentially be applicable to non-assignment clauses in general, and in this took a different view from the Judge who had held that the NAC only barred the assignment of contractual claims but not tortious ones. In Prof Tham's view, this is justified on the basis that non-assignment clauses in some contexts serve a similar purpose to arbitration clauses in protecting parties against the possibility of facing a multiplicity of proceedings. Prof Tham contends that the *Fiona Trust* approach could apply *if* it is established here that the parties did have such an intention.

117 However, Prof Tham notes that the Judge's discussion of the *Fiona Trust* approach and its applicability in this context would not be material if the Judge was right to find that the application of the rules of contractual construction pointed to the NAC only being applicable to contractual rights and obligations.

(1) The interpretive approach to non-assignment clauses

118 In our view, protecting parties against the possibility of facing a multiplicity of proceedings is but one of several possible purposes of non-assignment clauses, and not a particularly significant one at that. Restrictions on assignment may be put in place for a variety of reasons.

119 First, a contracting party may have "a genuine commercial interest in seeking to ensure that he is in contractual relations only with a person whom he has selected as the other party to the contract". For example, in building contracts and syndicated loan agreements, the attitude of the counterparty to the contractual obligations including as to dispute resolution and to enforcement may be crucial (see Ying Khai Liew, *Guest on the Law of Assignment* (4th ed, Sweet & Maxwell, 2021) ("*Guest*") at 4-02). There may equally be a desire to deal with the supplier rather than a financier in relation to disputed invoices (see Roy Goode and Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (6th Ed, 2017) ("*Goode and Gullifer*") at 3-38). In specific contexts such as insurance, there will be clearly identifiable reasons why one party would want to retain control over the identity of those who can assert contractual rights against them. In this regard, Paul Macmahon in "*Rethinking Assignability*" (2020) 79(2) CLJ 288 at 293 notes that the significance of a party's genuine commercial interest, in ensuring that contractual relations are only with the person he has selected as the other party to the contract, requires an understanding of the wider relationships between them. The parties may rely on post-contractual cooperation to modify their mutual obligations by agreement during the course of performance, for example when seeking forbearance in the other party enforcing their rights when they meet unexpected difficulties in performing. The simple point is that the identity of the party holding the right will often determine whether such cooperation is likely to be forthcoming.

120 Second, there may be specific concerns as to the identity of any potential counterparty not just in the context of the commercial transaction, but as an opponent in litigation. For this reason, the Hong Kong High Court in *Yook Tong Electric Co Ltd v Pirelli Cavi E Sistemi Spa* [2004] HKCU 723 found a non-

assignment clause in a distribution agreement to continue to be applicable even after termination of that agreement, because the defendant had a distinct interest in preserving its right to deal with someone it knew when faced with litigation even after the termination (at [13]). Parties to a contract might have concerns that assignment would modify both performance of the contract as well as the obligations or liabilities that they might be exposed to in respect of that contract.

121 Third, there may be a wish on the part of the obligor to preserve set-off rights as against the obligee-assignor (see Michael Bridge, "*The Nature of Assignment and Non-Assignment Clauses*" [2016] 132 LQR 47 ("*Bridge*") at 57).

122 Fourth, there may be a desire not to deal with two parties, having to assert a set-off defence against one and an additional counterclaim against the other, or to deal with multiple assignees or to become embroiled in a dispute between assignor and assignee (*Bridge* at 57). As the court in *Linden Gardens* expressed in similar terms (at 106), the obligor may not wish to create "a position in which the right to future performance and the right to benefits accrued under the contract should become vested in two separate people" (unless the contrary is shown with careful and intricate drafting).

123 The broad range of possible considerations makes it clear that the particular concerns underlying the *Fiona Trust* approach, namely avoiding the proliferation of separate proceedings, does not apply with as much force to non-assignment clauses; instead, a much wider range of concerns may be at play. Put another way, the commercial considerations underlying arbitration clauses and non-assignment clauses are distinct: arbitration clauses are suggestive that parties intend to deal with each other in *the same forum* even where there are a range of disputes arising out of their relationship; non-assignment clauses on

the other hand are suggestive that parties intend to deal *with each other* in respect of a commercial arrangement or any disputes arising thereunder.

124 Notwithstanding this distinction on the underlying concerns, we think it is useful to approach the interpretation of non-assignment clauses in a broadly similar way as advanced by Lord Hoffmann in *Fiona Trust* (at [7]): the construction of any non-assignment clause should be influenced by whether the parties, as rational businessmen, were likely to have intended that only some of the questions arising out of their relationship were to be settled as between each other, and that they would be content for other questions to be decided between one original party to the contract and an assignee. More specifically, could they have intended that a claim that the contract was repudiated should be decided in proceedings between the original contracting parties but that a dispute over whether repudiation was induced by misrepresentation could be assigned to a third party to prosecute? We find this unlikely.

125 In our view, parties to a non-assignment clause are likely to have intended to have wanted to deal only with each other and so to expect that any disputes arising out of their relationship would only involve the original contracting parties. The clause should ordinarily be construed on this basis unless a contextual or literal interpretation of the clause leads to a different conclusion. This would generally point in favour of non-assignment clauses prohibiting assignments of both contractual and tortious rights which arise from the underlying contract.

(2) Application to the present case

126 For convenience, we first reproduce the NAC:

> TRANSFER OR ASSIGNMENT OF AGREEMENT
>
> Unless otherwise provided hereunder, the rights and obligations of [the Assignor] and [OTPL] under the Agreement shall not be assigned or novated without the prior written consent of the other Party, whose consent shall not be unreasonably withheld.

127 We do not think the plain text of the NAC within the context of the Storage Agreement inevitably leads to the conclusion that the parties intended to prohibit the transfer of their contractual but not tortious rights and obligations. The three strongest indications of this identified by the Judge were: (a) the reference to rights and obligations being "assigned or novated" within the NAC itself; (b) the express reference in other clauses of the Storage Agreement to rights and obligations other than of a contractual nature, contrasted with the lack of any such reference in the NAC; and (c) the heading of the relevant section which read "Transfer or Assignment of *Agreement*" [emphasis added] (see Judgment at [28]–[30]).

128 As to the first reason, while it is true that novation can only apply to contractual entitlements, it does not follow as a matter of logic that a reference to novation must exclude the possibility of the clause applying to tortious claims. Grammatically, nothing about the disjunctive "or" suggests that assignment *and* novation must be concepts that *conjunctively* apply to any individual right or obligation under the clause; it suffices that a right or obligation falling under the clause is capable of being either assigned *or* novated. As to the second reason, the references in other clauses to non-contractual rights and obligations (such as a provision for exclusions and indemnities to apply "irrespective of any claim in tort, under contract or

otherwise at law") is equivocal at best. It could equally be said that the lack of any stipulation as to the nature of the rights and obligations referred to in the NAC points towards *all* kinds of rights and obligations being caught by the NAC. Finally, the heading of the section is of limited interpretative value because it has to be read not in isolation but in the light of the terms of the clause itself which featured the more expansive formulation of "rights and obligations…under the Agreement", which could encompass tortious rights arising out of or in connection with the performance of the Agreement.

129 Accordingly, if the issue had arisen, we would have been inclined to find that the NAC prohibits the assignment of both contractual and tortious rights and obligations under the Storage Agreement. The NAC would thus cover the Vessel B Document Claim, which parties accepted was tortious in nature.

The effect of breach of the non-assignment clause

130 We turn to consider the effects of breaching the NAC. In this regard, the caselaw and academic commentary is muddied with contrasting approaches (see G H Tolhurst, "Assignment, Prohibitions, Promises and Breach of Contract" (2024) 2 CCLR 78 ("G H Tolhurst")). In proceedings below, the Debtor argued that the academic commentary of Professor Roy Goode and others supported the view that an assignment in breach of a non-assignment clause (a "non-compliant assignment") would nonetheless take effect in equity, because a non-assignment clause functions only as a contractual condition on the duty to perform, and not as a restraint on alienation that affects the nature of the chose as an alienable asset. Put simply, the argument is that a non-assignment clause does *not* prevent property rights from passing, even if the assignment is in breach of that clause. Following this logic, the Debtor would have acquired an equitable interest in the Vessel B Claims sufficient for the purposes of asserting

legal and insolvency set-off, regardless of whether the NAC was breached. In oral submissions, Mr Sreenivasan noted that even if the Debtor retained a beneficial interest in the Assigned Claims, it would be a beneficiary of a trust who would not be able to sue OTPL directly without bringing in the Assignor.

131 The Judge disagreed with the Debtor and affirmed the position in *Linden Gardens*, accepted locally in *Total English Learning Global Pte Ltd v Kids Counsel Pte Ltd* [2014] SGHC 258 ("*Total English Learning*") (at [64]) and by the Singapore International Commercial Court in *Arris Solutions, Inc and others v Asian Broadcasting Network (M) Sdn Bhd* [2017] 4 SLR 1 ("*Arris Solutions*") (at [20]), that a non-compliant assignment is ineffective both at law and in equity. He noted that although the academic arguments cited by the Debtor may have been "attractive", they did not represent the position in Singapore. Further, the view advanced by the Debtor could render non-assignment clauses nugatory, with potential wide-ranging implications on the commercial world and the court was ill-placed to effect such change.

132 Prof Tham's opinion on this is that it is unhelpful to consider whether an assignment in breach of a non-assignment clause can be effective in equity but not at law; it is instead better to consider whether a non-assignment clause renders an assignment ineffective in both law and equity *only* as against the debtor or the obligor, or *also* as between the assignor and the assignee. *Linden Gardens*, correctly interpreted, stands for the proposition that a non-assignment clause renders a non-compliant assignment ineffective only against the debtor or the obligor, but not as between assignor and assignee. Following this view, the NAC would not stop the Assigned Claims from being validly assigned (assuming other requirements for a valid equitable assignment to be effected are met); however, by virtue of the NAC, OTPL would have a defence against being made liable at law and/or in equity to the assignee, in this case, the Debtor.

133 To add to the complexity of the issue, we would add that in our view, the central issue as to whether the Debtor could assert insolvency set-off in respect of the Vessel B Claims was not just one that concerned the question of whether the assignment was valid and whether debts were *mutual*, but also whether they were *provable*.

134 Section 218(2) of the IRDA states:

> (2) Subject to this section and section 203, the following are provable where a company is in judicial management or an insolvent company is being wound up:
>
> (*a*) any debt or liability to which the company —
>
> (i) is subject at the commencement of the judicial management or winding up, as the case may be; or
>
> (ii) may become subject after the commencement of the judicial management or winding up (as the case may be) by reason of any obligation incurred before the commencement of the judicial management or winding up, as the case may be;

135 Sections 219(2) and (3) of the IRDA state:

> (2) Where there have been any mutual credits, mutual debts or other mutual dealings between a company and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings must be set off against each other and only the balance is a debt provable in the judicial management or the winding up of the company, as the case may be.
>
> (3) There is to be excluded from any set-off under subsection (2) any debt or liability of the company which —
>
> (*a*) is not a debt provable in judicial management or winding up; or
>
> (*b*) arises by reason of an obligation incurred at a time when the creditor had notice that an interim judicial manager had been appointed under section 94(3), or that the application for a judicial management

> order or the application for winding up (as the case may be) relating to the company was pending.

136 In our view, regardless of whether the beneficial interest in the Vessel B Claims had passed to the Debtor, the Vessel B Claims are not provable debts under s 218(2)(*a*) of the IRDA because OTPL could not have been said to be subject to them *from the Debtor's perspective*. We agree with Prof Tham that OTPL would have been entitled to ignore the assignment of the Vessel B Claims by virtue of their being in breach of the NAC and treat the claims as still lying with the Assignor. To have OTPL incur liability otherwise would be completely at odds with the function, purpose, and presence of the NAC. It follows that if the Vessel B Claims are not provable debts, it is unnecessary to consider whether beneficial interest has in fact passed for the purposes of assessing whether there is mutuality for insolvency set-off to apply.

137 In respect of the precise effect of a non-compliant assignment, we limit ourselves to the observation that it may be possible for the assignment to be valid only as between the assignor and assignee, and we hesitate to say more at this juncture given that arguments relating to the assignor-assignee relationship in the face of a non-compliant assignment are not before us. As a final point, we also note that it may be conceptually possible for an obligor to pursue remedies such as an award of damages for breach of contract when there has been a non-compliant assignment, although the determination of this question would depend on a conclusive finding on the effect of a non-compliant assignment (see G H Tolhurst at 89–97), a question which we decline to decide in the present case, because it is not necessary to do so.

Whether a statutory trust arises over the assets of a company placed under judicial management

138 Finally, as the issue has been extensively argued by the parties, we also take this opportunity to set out our views on whether a statutory trust arose over the assets of OTPL when it entered into judicial management under the CA. In our view, the Judge was correct to hold that a statutory trust *of the kind that arises in liquidation* does not arise in the judicial management of a company under the CA. We confine our discussion in this manner because this is all that the Liquidators are seeking to argue, and also because the concept of a "statutory trust" is a generally amorphous one.

The origin of the statutory trust and its rationales

139 The notion of a statutory trust started taking root as early as the 19th century, when Lord Cairns LC opined in *In re Albert Life Assurance Co* (1871) 15 Sol J 923, one of the earliest reported cases on this issue, that (at 924):

> … the assets of the company from the moment of winding up, …become fixed and inalienable; the executive and direction of the *company are unable to alienate them or to part with them for any purpose*; they become fixed and impressed with the trust declared … a trust by which all the assets of the company are to be *applied in discharge of the liabilities of the company.* [emphasis added]

140 This was repeated in substantially similar terms a few years later in *Oriental Inland Steam Co* (1874) LR 9 Ch App 557 ("*Oriental Inland Steam*") where James LJ opined (at 559):

> … The English Act of Parliament has enacted that in the case of a winding-up the assets of the company so wound up *are to be collected and applied in discharge of its liabilities*. That makes the property of the company clearly trust property. It is properly affected by the Act of Parliament with an obligation to be dealt with by the proper officer in a particular way. Then it has ceased

> to be beneficially the property of the company; … [emphasis added]

141 Mellish LJ also stated in that case (at 560):

> No doubt winding up differs from bankruptcy in this respect, that in bankruptcy the whole estate, both legal and beneficial, is taken out of the bankrupt, and is vested in his trustee or assignees, whereas in a winding up the legal estate still remains in the company. But, in my opinion, the beneficial interest is clearly taken out of the company. … from the time of the winding-up order all the powers of the directors of the company to carry on the trade or to deal with the assets of the company shall be wholly determined, and nobody shall have any power to deal with them except the official liquidator, and *he is to deal with them for the purpose of collecting the assets and dividing them amongst the creditors*. It appears to me that that does, in strictness, constitute a trust for the benefit of the creditors … [emphasis added]

142 It appears that the law as set out in those cases had remain undoubted for some time, as those propositions were cited and repeated a century or so later in *Ayerst v C & K (Construction) Ltd* [1975] 3 WLR 16 ("*Ayerst*"), a leading case on the concept of the statutory trust in liquidation (at 22–23). Among the cases where the statutory trust was invoked, Chitty J's explanation in *In re North Carolina Estate Co Ltd* (1889) 5 TLR 328 also stands out as being instructive:

> Under the Companies Act of 1862 it was clear that after a winding up order the assets of the company were to be collected and applied in discharge of its liabilities, and that the assets were fixed by the Act of Parliament with *a trust for equal distribution among creditors* (*In re Oriental Inland Steam Co* LR 9 Ch App 557, 559; *In re Vron Colliery Co* (1882) LR 20 ChD 442). *No creditor, therefore, could be allowed, by taking proceedings at his own will and pleasure, to destroy, waste, or impair assets which were subjected to a trust for the general benefit of all creditors alike.* [emphasis added]

143 From these statements, it is clear that two rationales for the statutory trust can be discerned. The first is that a statutory trust *preserves* the assets of a

company in liquidation (the "Preservation Rationale"). Second, and relatedly, the assets of the company are preserved for the purpose of *distribution* (the "Distribution Rationale"). These two rationales work together to safeguard the integrity of the liquidation process, and each rationale does not operate in isolation from the other.

144 This is illustrated in *Oriental Inland Steam*, where the issue was whether an execution creditor of an English company that was being wound up in England was entitled to keep the fruits of its execution in India. The Court of Appeal of England and Wales held that a statutory trust arose over all the property of the company in liquidation, including its property in India. As a result, the company ceased to be the beneficial owner of its property upon its winding up and its property in India was not liable to be subsequently seized by the execution creditors of the company. Those were to be distributed in England upon the footing of equality (at 557–561).

145 Similarly, in *Stichting Shell Pensioenfonds v Krys and another* [2015] AC 616 ("*Stichting*"), the appellant was a regulated Dutch pension fund incorporated in The Netherlands which invested large sums in a company known as Fairfield Sentry Ltd ("Fairfield"), which was incorporated in the British Virgin Islands. Fairfield invested in a scheme controlled by Bernard Madoff, who was subsequently convicted of a major fraud. Immediately after Madoff's arrest the appellant obtained a pre-judgment garnishing attachment from a Dutch court over approximately US$71m in Fairfield's account in the Dublin branch of a Dutch bank. About six months later a court in the British Virgin Islands ordered the winding up of Fairfield and appointed the respondents as liquidators. The respondents applied in the British Virgin Islands for an injunction to restrain the appellant from pursuing the proceedings against Fairfield in The Netherlands.

146 The Privy Council held on appeal that the respondents were entitled to the injunction they sought. Lord Sumption and Lord Toulson JJSC delivered the decision and held that the making of a winding-up order divested the company of the beneficial ownership of its assets, and subjected them to a statutory trust for their distribution in accordance with the rules of distribution provided for in statute (at [14]). For this reason, having also found that the appellant was subject to the jurisdiction of the courts of the British Virgin Islands, the Privy Council exercised its discretion to grant an anti-suit injunction, since there was nothing to suggest that allowing the appellant to gain an advantage over other comparable creditors would be consistent with the ends of justice. The appellant had invested in a company incorporated in the British Virgin Islands and must, as a reasonable investor, have expected that if that company became insolvent it would be wound up under the law of that jurisdiction (at [43]).

147 We further note that the existence of a statutory trust, as well as the Preservation and Distribution Rationales, have been implicitly accepted by this court in *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 ("*Michael Ng*") and *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*Sculptor Finance*"). While the two cases differed on whether a statutory trust arose on the presentation of the winding-up application or instead on the making of the winding-up order, the twin Preservation and Distribution Rationales were evident in the reasoning of both cases. In *Michael Ng*, the court observed that a "statutory scheme comes into place to *preserve* the assets of the company for *pari passu distribution* among the unsecured creditors" [emphasis added] (at [31]). Subsequently in *Sculptor Finance*, this statement was explained as referring to the statutory trust (at [43]). We also note that while the court in *Sculptor Finance* overruled *Michael Ng*'s holding that the statutory trust arose

on the making of a winding-up application, the existence of the statutory trust and its Preservation and Distribution Rationales were neither in doubt nor disturbed.

148 The Preservation and Distribution Rationales are indeed apparent from the wording of the IRDA. The Preservation Rationale is reflected in s 140(1) of the IRDA, which provides that "[w]here a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator must take into his or her custody or under his or her control all the property and things in action to which the company is or appears to be entitled", and s 133(1), which provides that when a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding may be proceeded with or commenced against the company except by permission of the court and in accordance with such terms as the court may impose. These two provisions reflect the Preservation Rationale in that they shield the assets of the company from proceedings brought by creditors while the company is being wound up. Further supporting the Preservation Rationale are the avoidance provisions contained in the IRDA, including ss 130(1), 224, 225, 228, 229 and 438 therein, as those provisions aid the liquidators of a company to reconstitute its assets when the company is being wound up. Additionally, the Distribution Rationale is reflected in ss 144 and 203 of the IRDA. In particular, s 144(2)(*i*) outlines the liquidator's power to "do all such other things as are necessary for winding up the affairs of the company and distributing its assets" and s 203 stipulates the priority in which unsecured debts must be repaid.

The imposition of a statutory trust negates mutuality

149 It is important to emphasise at this juncture that the statutory trust that arises in liquidation is not the same as a trust as that is traditionally understood.

As we observed in *Vintage Bullion DMCC v MF Global Singapore Pte Ltd* [2016] 4 SLR 1248 at [54], "a statutory trust does not necessarily bear all the indicia which characterises a common law trust". This is "particularly so when the trust is imposed by statute and is in the context of the exercise of a public function" (see *Re Lehman Brothers International (Europe) (No 2)* [2012] 1 BCLC 487 at [189], *per* Lord Collins). Indeed, "the incidents and complications of a trust may be added or taken away in the statutory model", the consequence being "the instrumental use of a trust as a device rather than meaningfully deploying the institution of a trust" (see James Yip and Man Yip, "Statutory Trusts and Trusty Statutes" (2024) 35 King's Law Journal 5 at 8). Intuitively, it is no surprise that statutory trusts may give rise to questions as to its nature and effects, prompting Robert French CJ to once question – "at which point does the creation of a so-called statutory trust give rise to a legal and equitable chimera – a beast born of an unholy fusion?" (see Robert French, "Trust and statutes" (2015) 39 Melbourne University Law Review 629 at 647).

150 In the context of a liquidation, there are two key features which vest the statutory trust with legal content. The first is that, on the making of a winding up order, a company loses all custody and control of its property, and all powers of dealing with the company's assets are transferred to the liquidator who is bound to act in accordance with the statutory scheme of the liquidation (see *Sculptor Finance* at [43] and [50]). It has been explained that all that is intended to convey by the terminology of a statutory trust "was to give to the property of a company in liquidation that essential characteristic which distinguished trust property from other property, *viz*, that it could not be used or disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons" (see *Ayerst* at 23).

151 The second feature, as we recognised by in *Sculptor Finance*, is that the company "is divested of beneficial interest in its assets" (at [52], citing Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 2nd Ed, 2009) at para 7.006). The High Court in *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 ("*Power Knight*") held to similar effect, describing the statutory trust as (at [51]):

> … a purpose trust, *with the beneficial interest 'in suspense'*. The company holds the legal title to its property on trust for the purposes of the statutory scheme administered by the liquidator. Since this scheme is intended to be for the benefit of the unsecured creditors, it may loosely be said that the statutory trust is 'in favour of' the unsecured creditors. However, this is a misleading use of language, for it then becomes natural to regard the unsecured creditors as ordinary beneficiaries having beneficial interests in the company's assets, when in fact, during the course of the winding up, they have only a hope of obtaining such interests. In principle, therefore, I agree with the view that, notwithstanding that the making of a winding-up order brings into existence a statutory trust, unsecured creditors have no proprietary interests in a company's property: *Mitchell v Carter* [1997] 1 BCLC 681 (*per* Millett LJ at 686), *Re Calgary and Edmonton Land Co Ltd (in liquidation)* [1975] 1 WLR 355 (*per* Megarry J at 359), *Re A Caveat, ex parte The Canowie Pastoral Company Limited* [1931] SASR 502 (*per* Angas Parsons J at 505), *Ayerst, Bulcher v Talbot* (*per* Lord Hoffmann at [28]), and *Commissioner of Stamp Duties v Livingston* ([47] *supra*). [emphasis added].

152 The import of this view is that the imposition of a statutory trust from the time when a winding-up order is made negates mutuality, since mutuality in the context of an insolvency set-off is premised on each party against whom the set-off operates having beneficial ownership of their respective claims and crossclaims immediately before the imposition of the statutory trust. We therefore disagree with the suggestion by both Prof Wee and the Debtor that the element of mutuality is not destroyed by the statutory trust (see [47] and [53] above).

A statutory trust of the kind that arises in liquidation does not arise in judicial management

153 Having examined the Preservation and Distribution Rationales of the statutory trust that arises *in liquidation* and its two key features, we express the view (albeit provisionally) that a statutory trust *of that kind* does not arise in the judicial management of a company.

154 First, as a matter of principle, we agree with the Judge and the Debtor that the purpose of a statutory trust does not cohere with the judicial management regime. As we explained earlier, the statutory trust that arises in liquidation serves the Preservation and Distribution Rationales, meaning that it is intended to *preserve* a company's assets for the purpose of *pari passu distribution* among unsecured creditors. These rationales are not applicable in the context of a judicial management. The Preservation Rationale does not apply as the task of a judicial manager, broadly, is to perform one or more of the following functions as set out in s 89(1) of the IRDA (which corresponds to s 227B(1)(*b*) of the CA previously in force): (a) the survival of the company, or the whole or part of its undertaking, *as a going concern*; (b) the approval under s 210 of the Companies Act 1967 or s 71 of a compromise or an arrangement between the company and any such persons as are mentioned in the applicable section; and (c) a more advantageous realisation of the company's assets or property than on a winding up. These functions do not require that the assets of the company be ringfenced by way of a statutory trust; indeed, it may be counterproductive to ringfence the assets of the company at this stage as the company may still have the potential to trade out of its financial difficulties. Likewise, it also cannot be disputed that the Distribution Rationale does not invariably apply to a judicial management.

155 Further to this, we note that the judicial managers of a company have the power and duty to "take into the custody or under the control of the judicial manager all the property to which the company is or appears to be entitled" (see s 99(1) of the IRDA). This is a point raised by the Liquidators in support of their position that a statutory trust arises as well on the making of a judicial management order. To similar effect, Prof Wee also argues – on his secondary position that a statutory trust *does arise* in judicial management – that it is irrelevant that there is no distribution in judicial management, and that the focus should on the fact that a judicial manager must conduct the judicial management "in accordance with the statutory scheme".

156 We are unpersuaded by this argument for two reasons. First, as the majority in *Linter Textiles* rightly observed (at [54]), the change in control of the affairs of the company has no impact upon its beneficial ownership of its assets. In our view, this is eminently correct. To draw an analogy, suppose that a company's management is replaced through a shareholders' resolution. In that situation, it does not follow that the company is divested of beneficial ownership in respect of its assets. Second, while Prof Wee makes the point that the judicial manager must conduct the judicial management "in accordance with the statutory scheme", the "statutory scheme" in judicial management is clearly different from that which governs the assets of a company in liquidation. In a judicial management, ringfencing the assets of the company by way of a statutory trust would inhibit the ability of the judicial manager to rescue the company from its precarious financial situation. This contrasts with the liquidation process, where the statutory scheme, through various provisions, *preserves* the assets of the company for the purpose of *distribution*. It is for this purpose that it can be said that a statutory trust arises to uphold the Preservation and Distribution Rationales. In our view, this was the basis for Lord Diplock's

statement in *Ayerst* that the import of the statutory trust was that property of the company "could not be used of disposed of by the legal owner for his own benefit, but must be used or disposed of for the benefit of other persons" (at 23). Therefore, it is not irrelevant that there is no distribution in judicial management; to the contrary, the fact that there is no distribution is the *key reason* why a statutory trust of the kind arising in liquidation likely does not arise in judicial management.

157 We also note that while s 89(2) of the IRDA states that "[a] judicial manager or an interim judicial manager of a company must perform the functions of the judicial manager or interim judicial manager in the interests of the company's creditors as a whole", which is in some respects similar to s 227R(1) of the CA previously in force which afforded protection to creditors from the actions of a judicial manager, it does not follow from the existence of such a duty that a statutory trust arises in favour of the creditors of the company when it is in judicial management. Instead, this creditor-regarding duty is best understood as simply being a statutory duty imposed on the judicial manager, as an officer of the court, to act in accordance with his statutory functions, and nothing more. The existence of such duty does not go further to mean that a statutory trust is impressed on the assets of the company for the benefit of its creditors. For instance, a company's directors may bear a creditor-regarding duty even before the onset of corporate insolvency proceedings (see *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024] 1 SLR 361 at [105]–[106]). Yet, it is plainly wrong to conclude that the company would begin to hold its own assets on trust for its creditors even before the onset of its insolvency.

158 We also observe that reliance was placed by the Liquidators on the moratorium that comes into effect upon the making of a judicial management

application (see s 95(1) of the IRDA and s 227C of the CA previously in force). In our view, this argument runs into two difficulties. First, the moratorium comes into effect *on the making of a judicial management application*, while the Liquidators seek to argue that a statutory trust arises *on the making of a judicial management order*. There is good reason for this difference. In the context of judicial management, the moratorium takes effect upon the application for the order so as to ensure that the statutory purposes are not compromised pending the determination of the application. On the other hand, in the case of liquidation, the moratorium generally takes effect only upon the winding up order being made pursuant to s 133(1) of the IRDA. This follows because the purpose of the liquidation moratorium is to preserve the assets once liquidation has been ordered. This difference is indicative of the absence of any connection between the moratorium imposed and the statutory trust alleged. But aside from this, the moratorium is a purely *procedural* mechanism and does not impact the substantive rights of the company and its creditors (see *Barclays Mercantile Business Finance Ltd and another v Sibec Developments Ltd and others* [1992] 1 WLR 1253 ("*Barclays Mercantile*") at 1257).

159 We turn next to the conflicting authorities that have addressed this issue. The Debtor relies on *Re Lehman Bros Europe Ltd (in administration*) [2018] 2 All ER 367 ("*Lehman Brothers*"), where it was observed that there was "no authority as to whether a statutory trust arises over the assets of a company in administration or, if so, what the scope and implications of that trust might be" (at [80]). The court also observed in *obiter* that "the obvious distinctions between the position of a company in administration and a company in liquidation … make the description 'statutory trust' inapposite in the case of administration" (at [84]).

160 This contrasts with the earlier decision in *Bloom and others v Harms Offshore AHT "Taurus" GmbH & Co KG and another* [2010] 2 WLR 349 ("*Bloom*"), on which the Liquidators rely. There, the respondents were the administrators of an English company which carried on the business of offshore oil and gas exploration in the North Sea. The appellants were one-ship companies incorporated in Germany which were pre-administration creditors of the company under time charterparties of their offshore service vessels. Without notice to the respondent administrators, the appellants commenced proceedings in the District Court of the Southern District of New York and obtained, on the basis of sums owed under the charters, an attachment order in respect of all property of the company in the Southern District of New York. However, the appellants did not disclose that the company was in administration and that the charterparties contained London arbitration agreements. The administrators brought proceedings in the aforementioned District Court seeking to vacate the attachments obtained by the appellants. The administrators also obtained a mandatory injunction from the High Court of England and Wales requiring the appellants to use their best endeavours to procure the release of the *ex parte* orders of attachment. The appellants appealed to the Court of Appeal of England and Wales, arguing among other things that the assets of a company in administration, unlike those of a company that was being wound up, were *not* subject to the trust that justified anti-suit injunctions against creditors of companies in liquidation and, hence, the appellants had not acted in breach of any statutory restriction on legal proceedings being commenced against a company in administration.

161 The court in *Bloom* observed that the statutory restriction against legal proceedings being commenced against a company in administration did not have extraterritorial effect (at [21]). Nevertheless, the court concluded that if the

court has a jurisdiction to protect the assets of a company that is being wound up by the court from foreign attachments and executions by virtue of a statutory trust, it has a similar jurisdiction in the case of a company in administration to grant an anti-suit injunction against foreign proceedings (at [24]). In the following passages, the court opined:

> 22 I *do not accept that the protection of the assets of a company in administration is to be regarded by the court as differing in substance from the protection of the assets of a company in compulsory liquidation* … If the court has a jurisdiction to protect the assets of a company that is being wound up by the court from foreign attachments and executions, in my judgment it has a similar jurisdiction in the case of a company in administration. …
>
> …
>
> 24 … *Similarly, the creditors of a company in administration are entitled to have the company and its assets dealt with in accordance with the statutory scheme applicable to such companies.*
>
> [emphasis added].

162 We do not think that *Bloom* is persuasive authority for the proposition that a statutory trust arises in judicial management under either the CA or the IRDA. As the Debtor rightly argues, the court in *Bloom* did not squarely decide that a statutory trust applies to administration (see also the observation in *Lehman Brothers* at [80]). Instead, a closer reading of *Bloom* would reveal that what the court was really saying was that it would exercise its powers under private international law to grant an anti-suit injunction to restrict legal proceedings from being commenced in a foreign court. With respect, the court did not go as far as to say that a statutory trust of the kind that arises in liquidation would also arise in judicial management to divest a company of beneficial ownership of its assets.

163 In any event, it may be noted that, unlike the judicial management regimes under the CA and the IRDA, the English administration regime that was in place in *Bloome* allowed, albeit in limited circumstances, for a distribution to be made to the company's creditors (see, for example, Insolvency Act 1986 (c 45) (UK), Schedule B1, paras 64A and 65). In this context, the administrator has been described as performing "a function similar to that of a liquidator" (see *Goode* at para 11-92). It is therefore possible that a statutory trust might well arise in such circumstances in an English administration, since both the Preservation and Distribution Rationales would be engaged. This however would be inapplicable to the judicial management regimes under the CA and the IRDA, neither of which has a mechanism for distribution at all, during the currency of the judicial management.

164 We also add that while we are grateful for Prof Wee's submission that the notion of the statutory trust should be abolished altogether, we decline to decide this issue in the present case as it is unnecessary to do so on the facts. We only briefly comment, in the light of our examination of the Preservation and Distribution Rationales, that there may remain good reasons for retaining the statutory trust in the context of liquidation instead of jettisoning it altogether.

165 Finally, if the issue had arisen, we agree with the Judge that the relevant time for determining mutuality for the purposes of insolvency set-off was the time of commencement of the winding up of OTPL, being the date of the relevant winding-up application in CWU 117 on 12 July 2021 (see Judgment at [119]–[125]).

Conclusion

166 We thus find all the Assigned Claims to be void on the grounds of public policy.

167 Given that the Debtor's appeal in CA 42 has been dismissed and the Liquidators' appeal in CA 43 has been allowed based on our acceptance of the freestanding common law public policy against assignments that are designed to undermine the regime for *pari passu* distribution, we order that costs in the aggregate sum of $66,000 (all-in) be paid to the Liquidators by the Debtor.

168 Lastly, we record our gratitude to Prof Tham and Prof Wee for their time and invaluable assistance.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Andrew Phang Boon Leong
Senior Judge

Judith Prakash
Senior Judge

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