IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 130

Companies Winding Up No 149 of 2022 (Summons No 125 of 2024)

In the matter of Section 144 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Mingda Holding Pte Ltd (in liquidation)

Jason Aleksander Kardachi (in his capacity as liquidator of Mingda Holding Pte Ltd (in liquidation))

… *Applicant*

Originating Application No 26 of 2024

In the matter of Section 204 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Mingda Holding Pte Ltd (in liquidation)

Between

Amalgamated Metal Trading Limited

… *Applicant*

And

Mingda Holding Pte Ltd (in liquidation)

… *Respondent*

JUDGMENT

[Insolvency Law — Winding up — Application by liquidator for authorisation to appoint solicitors — Whether the court has the power to grant retrospective authorisation of a liquidator's appointment of solicitors — Section 144(1)(*f*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Insolvency Law — Winding up — Funding by creditors — Approval of funding agreement — Assignment of proceeds of company's cause of action — Sections 144(1)(*g*) and 144(2)(*b*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)
[Insolvency Law — Winding up — Funding by creditors — Application for prospective advantage — Distinction between applications for prospective advantage and applications for retrospective advantage — Section 204(3) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]

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[2024] SGHC 130

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Aedit Abdullah J
1 April 2024

16 May 2024 Judgment reserved.

Aedit Abdullah J:

1 The following applications arising out of the liquidation of Mingda Holding Pte Ltd ("Mingda") are before me:

(a) Firstly, HC/SUM 125/2024 ("SUM 125"), which is an application by the liquidator of Mingda ("the Liquidator"), Mr Jason Aleksander Kardachi, for the court's authorisation:

(i) to appoint Fullerton Law Chambers LLC ("FLC") as the Liquidator's solicitors with effect from 13 July 2023 to assist him with his duties and to bring actions in the name and on behalf of Mingda, pursuant to s 144(1)(*f*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"); and

(ii) to enter into a creditor funding agreement ("the Funding Agreement") with Amalgamated Metal Trading Ltd ("AMT"),

so as to enable the Liquidator to bring actions in the name and on behalf of the company.

(b) Secondly, HC/OA 26/2024 ("OA 26"), which is an application by AMT, to be given an advantage under s 204(3) of the IRDA in respect of the Funding Agreement between AMT and Mingda.

2 The applications are opposed by the following persons, being other creditors of Mingda:

(a) Shanghai Ran Yu Lian Trading Co Ltd ("SRT");

(b) Orient Nickel Pte Ltd ("Orient"); and

(c) Mr Yang Mingdong ("Mr Yang");

3 Having considered the various parties' arguments carefully, my decision on these applications is as follows:

(a) I allow SUM 125 in part:

(i) The Liquidator is granted authorisation to appoint FLC as solicitors for Mingda. However, this authorisation shall only take effect from the date of the order resulting from SUM 125 and shall not have any retrospective effect.

(ii) The Liquidator is granted authorisation to enter into the Funding Agreement with AMT on the proposed terms.

(b) I allow OA 26. I find the advantage sought by AMT to be fair and reasonable in the circumstances, and that sufficient safeguards have been proposed.

Background to these applications

Circumstances of Mingda's insolvent liquidation

4 Mingda is currently in insolvent liquidation, having been wound up by an order of court of Teh Hwee Hwee JC,[1] dated 19 August 2022, on the application[2] of a creditor, JP Morgan Securities plc ("JPM").[3] Following his appointment, the Liquidator identified certain suspicious transactions between Mingda and its creditors – specifically, Orient and Mr Yang – shortly before and after the company was placed into winding up.[4]

5 There are links between Mingda, Mr Yang and Orient. In addition to being a creditor of Mingda, Mr Yang was the sole director and shareholder of Mingda at the time of its entry into insolvent liquidation.[5] On the other hand, Orient is a related creditor of Mingda, as various key personnel in Orient's management are related to Mingda:

(a) Mr Yang himself was a former director and shareholder of Orient up until 1 March 2022 and 28 April 2022 respectively;

(b) Ms Chew Yi Lin, a current director of Orient, was Mingda's former operations manager up until 31 May 2022;

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1 HC/ORC 4278/2022.

2 HC/CWU 149/2022.

3 Affidavit of Jason Aleksander Kardachi dated 10 January 2024 ("Liquidator's 1st Affidavit") at para 8.

4 Liquidator's 1st Affidavit at para 10.

5 Liquidator's 1st Affidavit at para 4(b); 1st Affidavit of Yang Mingdong dated 19 March 2024 ("Yang's 1st Affidavit") at para 1.1.1.

(c) Ms Rui Yinjuan, a current shareholder of Orient, is the wife of Mr Yang; and

(d) Ms Joanna Tay Xiaoyu ("Ms Tay") is the corporate secretary of both Mingda and Orient, as well as a former director of Mingda.

6 The Liquidator identified six transactions between Mingda and Orient prior to Mingda's winding up that, in his assessment, constituted unfair preferences voidable under s 225 of the IRDA.[6] On this basis, the Liquidator wrote to Orient demanding restitution in respect of these transactions.[7] Orient refused as it took the position that these transactions were not unfair preferences.[8]

7 As against Mr Yang, the Liquidator identified a payment made by Mingda to Mr Yang on the very same day as the winding up order (*viz*, 19 August 2022), and took the position that this was a void disposition of property pursuant to s 130(1) of the IRDA. On this basis, the Liquidator wrote to Mr Yang demanding repayment of the transferred sum. Like Orient, Mr Yang took the position that the Liquidator was not entitled to recover this sum.[9]

8 Shortly after, the Liquidator called a meeting of Mingda's creditors on 9 November 2022.[10] At this meeting, the Liquidator informed the creditors of his preliminary findings in respect of the six transactions between Mingda and

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6 Liquidator's 1st Affidavit at paras 11–14.

7 Liquidator's 1st Affidavit at para 15.

8 Liquidator's 1st Affidavit at paras 16–19.

9 Liquidator's 1st Affidavit at paras 20–23.

10 Liquidator's 1st Affidavit at para 25.

Orient (see [6] above).[11] Further, to facilitate coordination of the liquidation between the creditors and the Liquidator, a three-member Committee of Inspection ("COI"), constituting the following persons, was formed:[12]

(a) Mr Stephen Dempsey ("Mr Dempsey"), as representative of AMT;

(b) Ms Tay, as representative of Orient; and

(c) Mr Sun Bin ("Mr Sun"), as representative of SRT.

The Liquidator's appointment of FLC as solicitors for Mingda

9 At the first meeting of the COI on the same day (*viz*, 9 November 2022), the Liquidator sought the COI's approval to appoint solicitors to assist him with his duties, including the potential recovery of Mingda's assets. However, this resolution failed to pass. Although Mr Dempsey voted in favour, Mr Sun voted against, while Ms Tay abstained.[13]

10 Despite the COI's refusal to grant authorisation to appoint solicitors, the Liquidator approached FLC with a view to taking out an application for the court's authorisation for him to appoint FLC as solicitors to assist him in his duties, as well as to potentially represent Mingda in asset recovery actions against Orient and Mr Yang.[14]

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11 Liquidator's 1st Affidavit at para 26.

12 Liquidator's 1st Affidavit at para 27.

13 Liquidator's 1st Affidavit at para 29.

14 Liquidator's 1st Affidavit at para 31.

11 It is against this backdrop that SUM 125 has been brought by the Liquidator for the court's authorisation of his appointment of FLC as his solicitors.

The Funding Agreement between AMT and Mingda

12 Although the Liquidator intended to pursue the claims against Orient and Mr Yang, Mingda did not have sufficient funds for him to do so.[15] As such, the Liquidator wrote to AMT and SRT to enquire if they were willing to provide the necessary funds for Mingda to prosecute these claims.[16]

13 SRT did not extend any offer of funding. However, following discussions between the Liquidator and AMT, AMT expressed interest to provide funding to the Liquidator to pursue the claims against Orient and Mr Yang.[17]

14 On 22 November 2023, the Liquidator and AMT entered into the Funding Agreement whereunder AMT agreed to fund the Liquidator's costs of pursuing actions against Orient and Mr Yang on the terms contained in the Funding Agreement. However, the Funding Agreement contains a condition precedent requiring the Liquidator to obtain the court's authorisation for Mingda to enter into the Funding Agreement.[18] It is for this reason that the Liquidator's application in SUM 125 contains a prayer seeking such authorisation.

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15 Liquidator's 1st Affidavit at para 32.

16 Liquidator's 1st Affidavit at para 33.

17 Liquidator's 1st Affidavit at para 34.

18 Clause 2.1.1 of the Funding Agreement (Liquidator's 1st Affidavit at p 90).

15 Prior to the hearing of SUM 125 and OA 26, the Liquidator and AMT had brought sealing applications[19] seeking to redact certain terms of the Funding Agreement from the other creditors, including Orient, SRT and Mr Yang. After hearing submissions from the Liquidator and AMT, I was satisfied that the orders sought should be granted. Given this, only a redacted version of the Funding Agreement was served onto the other creditors, and in this judgment, no specific reference is made to the redacted terms.

16 For the purposes of the present applications, the material terms of the Funding Agreement can be briefly summarised as follows:

(a) AMT agrees to provide an indemnity (limited to a redacted maximum amount) to the Liquidator for the latter's pursuit of actions against Orient and Mr Yang ("the Indemnity").[20]

(b) In the event that any assets are recovered from the Liquidator's actions against Orient and Mr Yang (the "Recovered Assets"), the Liquidator shall distribute the Recovered Assets in the following order of priority ("the Distribution Waterfall"):[21]

(i) first, to pay AMT the total amount disbursed by AMT to the Liquidator under the Indemnity;

(ii) second, to pay AMT's "Funder's Costs" (in broad terms, AMT's reasonable legal fees and disbursements in connection with Mingda's liquidation, the recovery of AMT's debt from

19 HC/SUM 126/2024 and HC/SUM 104/2024.

20 Clause 4 of the Funding Agreement (Liquidator's 1st Affidavit at p 92).

21 Clause 3.1 of the Funding Agreement (Liquidator's 1st Affidavit at pp 91–92).

Mingda and the Liquidator's pursuit of the actions against Mr Yang);[22]

(iii) third, to pay, on a *pari passu* basis:

(A) the "Funder Creditor Amount" (in broad terms, the amount of debt adjudicated by the Liquidator to be owed to AMT);[23] and

(B) "JPM's Costs" (in broad terms, costs incurred by JPM in relation to a previous indemnity it had granted to the Liquidator in investigating matters relating to Mingda's claims against Orient and Mr Yang);[24] and

(iv) fourth, to pay the Liquidator's costs and expenses in connection with Mingda's liquidation; and

(v) fifth, to pay any surplus to Mingda's other creditors in accordance with the distribution scheme set out in the IRDA.

17 The Funding Agreement also contains a condition precedent that court approval under s 204 of the IRDA be obtained for the Recovered Assets to be distributed in accordance with the Distribution Waterfall.[25] It is for this reason that AMT has brought OA 26 to seek such authorisation.

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22 Clause 1.1.11 of the Funding Agreement (Liquidator's 1st Affidavit at p 88).

23 Clause 1.1.10 of the Funding Agreement (Liquidator's 1st Affidavit at p 88).

24 Clause 1.1.18 of the Funding Agreement (Liquidator's 1st Affidavit at p 89).

25 Clause 2.1.2 of the Funding Agreement (Liquidator's 1st Affidavit at p 90).

Summary of parties' positions

18 The outline of the parties' general position on the applications is as follows:

(a) the Liquidator's applications in SUM 125 are opposed by Orient and Mr Yang; and

(b) AMT's application in OA 26 is opposed by all three objecting creditors (Orient, Mr Yang and SRT).

Issues to be determined

19 The issues that arise for determination in the present case are as follows:

(a) First, whether the court should authorise the Liquidator's appointment of FLC in SUM 125, and if so, what the terms of this authorisation should be;

(b) Second, whether the court should authorise the Liquidator to enter into the Funding Agreement with AMT in SUM 125; and

(c) Third, whether the court should grant AMT an advantage in OA 26, and if so, what the terms of this advantage should be.

The decision

SUM 125: Whether the court should authorise the Liquidator's appointment of FLC

20 The Liquidator's application to appoint FLC as Mingda's solicitors is brought under s 144(1)(*f*) of the IRDA, which states as follows:

> **Powers of liquidator**
>
> **144.**—(1) The liquidator may, after authorisation by either the Court or the committee of inspection —
>
> …
>
> (*f*) appoint a solicitor —
>
> (i) to assist the liquidator in the liquidator's duties; or
>
> (ii) to bring or defend any action or legal proceeding in the name and on behalf of the company; …

Given that s 144(1) allows the Liquidator the option of acting on the authority of either the COI or the court to appoint solicitors, the mere fact that the COI has previously decided not to grant its approval to the Liquidator (see [9] above) is not conclusive of the matter, as the court may nonetheless grant the Liquidator the necessary authorisation.

21 The Liquidator's application is complicated by the fact that he does not merely seek prospective authorisation to appoint FLC but goes further to pray for the authorisation to be backdated to 13 July 2023. I should clarify at this juncture that, when SUM 125 was issued, the Liquidator did not initially seek retrospective authorisation. Instead, he subsequently changed his position[26] and his counsel made an oral application at the hearing to amend his prayer to include the backdating element.[27] I allowed the amendment subject to any contrary arguments by the objecting parties on the merits of the amended prayer.

22 In this regard, Orient and Mr Yang have taken issue with the Liquidator's attempt at obtaining retrospective authorisation from the court to

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26 Affidavit of Jason Aleksander Kardachi dated 18 March 2024 ("Liquidator's Reply Affidavit") at para 16.

27 Liquidator's Written Submissions at para 30.

appoint FLC. In both their written and oral submissions, Orient and Mr Yang did not raise any real objection to the Liquidator's application to the extent of the court's authorisation only having prospective effect. Instead, their objections were limited to the court granting retrospective authorisation.

23 In *Re Kirkham Pte Ltd (in compulsory liquidation)* [2023] 5 SLR 635 ("*Kirkham*"), Goh Yihan JC observed that, while the mere absence of objection from the creditors would not result in the liquidator being granted authorisation as a matter of course, the threshold that a liquidator had to cross in order to obtain authorisation from the court under s 144(1)(*f*) of the IRDA is not a high one (at [25]). I agree. Given the shape of the dispute between the parties, in that the issue of prospective authorisation is not seriously disputed (if at all), I am satisfied that the Liquidator has provided sufficient justification in his written submissions,[28] based on the factors set out in *Kirkham* at [24], for the court to grant him authorisation to appoint FLC as his solicitors on a prospective basis.

24 As it is the Liquidator's request for retrospective authorisation that is the main point of contention between the parties, this requires me to consider whether the court has the power to do so under s 144(1)(*f*) of the IRDA. It is to this issue that I now turn.

Whether the court can grant retrospective authorisation for a liquidator to appoint solicitors under s 144(1)(f) of the IRDA

25 At present, there are conflicting High Court authorities on whether s 144(1)(*f*) of the IRDA extends to allowing the court to retrospectively authorise the appointment of solicitors.

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[28] Liquidator's Written Submissions at paras 23–29.

26 A negative answer to this issue was first given by the court in *Kirkham*. In that case, it was argued that the court could grant retrospective authorisation if the liquidator had "acted promptly and within reasonable time in applying for authorisation", or if he had failed to do so, if the application was "objectively made in the company's interests and no objection from any interested party has been raised" (at [29]–[30]). Goh JC did not accept this argument, as he considered the use of the word "after" in the *chapeau* of s 144(1) to be a sufficiently unequivocal indication that the court did not have any power of retrospective authorisation or ratification of a past appointment (at [31]).

27 However, a different view was taken on the issue by Choo Han Teck J in the recent case of *Re Eye-Biz Pte Ltd (in compulsory liquidation)* [2024] SGHC 60 ("*Eye-Biz*"). Choo J said the following (at [7]–[10]):

> 7 The liquidators applied for the appointment of Drew & Napier to be ratified from the date of appointment, namely 28 December 2023. Counsel brought to my attention that the court in *Re Kirkham* was hesitant in ratifying an appointment made before the application. Counsel submitted, rightly, that liquidators would require legal advice before presenting an application of this or any other nature. It is therefore necessary that the court be empowered to ratify the appointment of solicitors.
>
> 8 I do not know the full facts and arguments in *Re Kirkham*, but the court there is right that the word 'after' in s 144(1) of the Act suggests that a liquidator may only appoint a solicitor after it has applied for leave to appoint one. But that section does not limit the court's power to specify the date when such appointment may be made. To this end, the use of the word 'ratify' may have been misleading.
>
> 9 Generally, a court has the power to ratify an act, even an error that had occurred but rectified. Even if no provision is expressly provided, this is the sort of situations [*sic*] that fall within a court's inherent powers. That power is discretionary, and the court will not exercise that power if there are reasons not to do so. In the present case, Mr Chua submitted that no specific action had been taken other than the making of this application.

> 10 Section 144(1) of the Act permits the court to grant leave to appoint a solicitor but there is no express provision as to when appointment is to take effect. In the wide and diverse applications before the court, the court has the discretion to decide when the order is to take effect. I am thus satisfied, in the circumstances of this case, leave to appoint Drew & Napier be given, and that the appointment is to take effect from 28 December 2023.

28 Unsurprisingly, the decision in *Eye-Biz* is front and centre of the Liquidator's case. The Liquidator submits that the proposition to be derived from *Eye-Biz* is that the court can grant retrospective authorisation of a liquidator's appointment of solicitors if the prior appointment by the liquidator was "for the purpose of commencing *the very application* for that approval itself" [emphasis in original].[29] In this regard, the Liquidator argues that his appointment of solicitors with effect from 13 July 2023 falls within the exception carved out in *Eye-Biz* because "no specific action has been taken by the Liquidator with the assistance of solicitors apart from the negotiation of and entering into of the Funding Agreement and the commencement of this SUM 125, and related matters".[30]

29 In oral submissions, Orient appeared to take the position that *Eye-Biz* is inconsistent with *Kirkham* and that the latter should be followed. Counsel for Orient, Ms Joycelyn Lin ("Ms Lin"), emphasised that the express wording of s 144 contemplates the liquidator's appointment of solicitors after either approval by the court or committee of inspection. If the court were to allow retrospective authorisation, this would undermine the intent and purpose of s 144 as, in every case, liquidators would simply appoint solicitors first without authorisation before putting in a belated application to backdate the court's authorisation.

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[29] Liquidator's Written Submissions at para 31.

[30] Liquidator's Written Submissions at para 32.

30 On the other hand, Mr Yang does not go so far as to argue that *Eye-Biz* is wrong. Instead, he emphasises that the facts of the present case are such that they are distinguishable from *Eye-Biz*. In this regard, counsel for Mr Yang, Ms Lee Ping ("Ms Lee"), emphasised in her oral submissions the following two distinctions between *Eye-Biz* and the present case:

> (a) First, the extent of backdating sought by the liquidator and granted by the court in *Eye-Biz* was very short. The matter was heard by Choo J on 27 February 2024 and the appointment was only backdated to 28 December 2023. Thus, the application to court in *Eye-Biz* was made very promptly after the liquidator's (unauthorised) appointment of solicitors. In contrast, the COI had already rejected the Liquidator's proposal to appoint solicitors on 9 November 2022. Yet, the Liquidator purportedly appointed FLC on 13 July 2023, before only taking out the application to court in SUM 125 in January 2024.
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> (b) Second, the fact that the Liquidator's proposal had already been rejected by the COI was highly material because it underscored the unacceptability of the delay. Faced with the rejection by one body with the power of authorisation, it was all the more incumbent for the Liquidator to apply to court soonest.

31 In my judgment, I prefer the approach in *Kirkham*, and decline, with respect, to follow *Eye-Biz*.

32 It is noteworthy that Choo J in *Eye-Biz* did not actually consider himself to be in outright disagreement with *Kirkham*. Rather, he considered he was merely distinguishing *Kirkham*, or at most, carving out a limited exception to it. His reasoning was excerpted at [27] above. In essence, it was as follows:

(a) The general proposition in *Kirkham* that the word "after" in s 144(1) of the IRDA suggests that a liquidator could only appoint solicitors after obtaining leave of court to do so is correct (*Eye-Biz* at [8]).

(b) But, starting from the premise that, because a liquidator would have to instruct solicitors to make an application under s 144(1) of the IRDA in the first place, the court must have the power to backdate the appointment of solicitors (if it approves the liquidator's s 144(1)(*f*) application) at least to the extent of covering the application for authorisation (*Eye-Biz* at [7]).

(c) The source of the power to backdate is the court's inherent powers, which generally allow the court to ratify acts or errors that have been rectified (*Eye-Biz* at [9]).

(d) The operation of the court's inherent powers in this way is not foreclosed by the language of s 144(1), as s 144(1)(*f*) permits the court to grant leave to appoint a solicitor but says nothing on when the appointment is to take effect (*Eye-Biz* at [10]).

33 With respect, I am unable to agree with steps (b) to (d) of this reasoning.

34 The starting point must of course be the text of the statute. In this regard, I agree with Goh JC in *Kirkham* that the language of the statutory provision is clear and unambiguous. Section 144(1)(*f*) plainly states that the Liquidator may appoint a solicitor *after* either the court or the committee of inspection has granted its authorisation to him. That being the case, I do not see how one can read s 144(1) as consistent with allowing the court to ratify *ex post facto* an

earlier appointment or to backdate its authorisation to a date before the time when it grants it.

35 The court in *Eye-Biz* did not dispute the correctness of this proposition in step (a) of its analysis. In my view, steps (b) to (d) of the reasoning in *Eye-Biz* cannot follow from this starting point. If the statute clearly states that the liquidator may only appoint solicitors after authorisation, carving out an exception enabling the liquidator to sometimes appoint solicitors before authorisation disregards the plain words of the text.

36 This conclusion is also confirmed by the context of s 144(1)(*f*) of the IRDA. Section 144(1) sets out powers or actions that a liquidator may only take with the imprimatur of the court or the committee of inspection. In contrast, s 144(2) sets out powers that the liquidator may unilaterally exercise without such third-party authorisation. The statute clearly draws a bright line between actions that can be taken with and without authorisation; indeed, the line is drawn even more particularly between acts requiring *prior* authorisation and acts that do not. In my respectful view, to recognise an exception of the sort in *Eye-Biz* distorts the legislative scheme. If the legislature had intended the liquidator to be able to appoint solicitors without requiring any prior authorisation, it would have set this out under s 144(2).

37 Further, apart from the text, one must give weight to the intention behind s 144 being structured in this way. The legislature has instituted a gatekeeper – either the committee of inspection or the court – before the exercise of certain powers for a reason. It must be that such powers have been deemed to require circumspection in their exercise such that third-party authorisation is required. I therefore agree with Ms Lin's submission that a jurisdiction for *ex post*

authorisation undermines the legislative intent underlying s 144(1)(*f*) of the IRDA.

38 It is for these reasons that I respectfully disagree with Choo J's reasoning in steps (c) and (d) in relation to the permissibility of invoking the court's inherent powers as the juridical source of the power to backdate the court's authorisation (see [32] above). I prefer the contrary view expressed by Goh JC in *Kirkham* that "a court's inherent power to grant a retrospective authorisation, even if such a power exists, must yield to clear statutory language that suggests otherwise" (at [35]).

39 I note also that Choo J framed the effect of s 144(1)(*f*) as "permit[ting] the court to grant leave to appoint a solicitor" (*Eye-Biz* at [10]). With respect, that might not be entirely accurate. Section 144(1)(*f*) does not merely grant the court the power to grant leave to appoint a solicitor. It certainly does that, but the more crucial point is that it prescribes that the liquidator must come to court before appointing the solicitor. Thus, to frame s 144(1)(*f*) as merely an empowering provision granting the court a freestanding power to appoint solicitors is incorrect, as the court's power cannot be divorced from the role that it plays in the process as an *ex ante* safeguard.

40 Finally, I address step (b) in Choo J's analysis. To recapitulate, the learned judge considered that there must be a power for the court to backdate its authorisation because a liquidator would have to appoint solicitors to file the application for authorisation in the first place (see [32] above). It is evident that Choo J considered s 144(1)(*f*) to create a problem of circularity as a liquidator would have to appoint solicitors to file the application for authorisation to appoint solicitors, and it was thus necessary to cut the Gordian knot by allowing the court to backdate its authorisation at least to cover the application.

41 Although this argument seems intuitively correct at first blush, I find on closer inspection that it is based on a false premise as to the effect of s 144(1)(*f*). Section 144(1)(*f*) does not have the broad effect of depriving a liquidator of capacity to appoint solicitors altogether, in the sense that prior to authorisation by the court or committee of inspection, the liquidator suffers from a lack of capacity to appoint solicitors. Rather, the true effect of s 144(1)(*f*), as Goh JC recognised in *Kirkham*, is to control the liquidator's ability to charge the costs of the solicitor's appointment to the company's estate (see *Kirkham* at [38] and [40]):

> [38] However, [the failure to obtain authorisation] does not mean that the Applicant's appointments of solicitors … were invalid prior to the resulting order in the present application. In the Malaysian High Court case of *Kang Wah Construction Sdn Bhd v Chan Ali Min Property Sdn Bhd* [1999] 4 MLJ 262, Ian Chin J held that a liquidator could still appoint a solicitor without the authorisation of the court or the COI and the absence of such authority does not render the action incompetent nor deny the solicitor of standing. Rather, the absence of such authorisation only goes towards the question of whether the liquidator is entitled to costs out of the estate or that he should personally bear the costs. I respectfully agree and adopt this approach in the present application.
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> …
>
> [40] Accordingly, in the present case, the Applicant had properly engaged the solicitors in his capacity as liquidator of the Company. Put another way, the Applicant did not lack capacity to do so simply because he had not sought prior authorisation from the court or a COI. These appointments had taken effect, albeit without the requisite authorisation, on the respective dates when the solicitors had been engaged.

42 It is therefore not the case that a liquidator cannot obtain legal advice or appoint solicitors to file the application for authorisation (*Eye-Biz* at [7]). Rather, s 144(1)(*f*) exists for the liquidator's own protection, as a liquidator who appoints solicitors without court sanction runs the risk that he will have to personally bear the solicitors' costs (see *Kirkham* at [39]). Thus, the circularity

problem that seems to have weighed on Choo J's mind is, in fact, an illusion. A liquidator has capacity to appoint solicitors to file his application in court, and even if he may turn out unsuccessful in the application, his appointment of solicitors for the purpose of making the application would not be invalid. Moreover, if the liquidator acts with reasonable prudence in filing the application to court promptly, it is likely that the court would allow him to charge the costs of the application and the incurred solicitors' costs up to that point to the company's estate such that the liquidator would not be out of pocket for an unsuccessful application. Indeed, this was precisely the outcome in *Kirkham* (at [42] and [44]).

43 For all these reasons, I respectfully prefer the approach in *Kirkham* over that in *Eye-Biz*. The court does not therefore have the power to backdate the Liquidator's appointment of FLC to 13 July 2023 as the Liquidator has sought in SUM 125. As I can only grant prospective authorisation, the Liquidator's appointment of FLC shall only be authorised from the date of the resulting order in this application (see [23] above).

Whether the Liquidator should be required to bear the costs of FLC's appointment

44 Given my decision that the court has no power to backdate its authorisation of the Liquidator's appointment of FLC, it becomes necessary to consider the question of whether the Liquidator should, in any event, be allowed to pay FLC's costs out of the company's assets.

45 In *Kirkham*, Goh JC framed the operative question as whether the liquidator had "good reasons" for not seeking the court's authorisation prior to his or her appointment of solicitors (at [40]). I find the following considerations to be relevant to answering this question (see *Kirkham* at [42]):

(a) whether the liquidator had brought the application promptly and within reasonable time;

(b) whether the liquidator had acted in good faith in the discharge of his duties; and

(c) the court should not employ the benefit of hindsight when assessing the liquidator's conduct and decision(s) at the material time.

46 The Liquidator did not make any submissions directly on this issue, as his counsel focused their attention exclusively on whether the court should grant retrospective authorisation. On the other hand, Ms Lee submitted on behalf of Mr Yang that the Liquidator should not be entitled to charge the costs of FLC's appointment to the estate,[31] generally for the reasons I have set out at [30] above.

47 Having considered the matter, I find that it would not be fair to the company and its creditors to enable the Liquidator to charge any costs that he has incurred from appointing FLC up to this point to the company's estate.

48 The Liquidator's claim that he had appointed FLC on 13 July 2023 means that nearly half a year had elapsed from the date of appointment until he filed his present application in SUM 125 for the court's authorisation for him to appoint FLC (*viz*, 10 January 2024). The length of the delay, in my view, is by itself a factor that considerably weighs against the Liquidator.

49 Moreover, I find that when viewed in the circumstances and context of this case, the length of the delay soundly crosses into the realm of unreasonable conduct. Two compounding circumstances are significant.

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[31] Yang's Written Submissions at para 3.1.6.

50 First, at the time when the Liquidator appointed FLC on 13 July 2023, he was not only acting without authorisation under s 144(1) *per se*, but was acting in defiance of the decision of the COI – one of the authorising entities in s 144(1) – who had previously (on 9 November 2022) rejected his proposal to appoint solicitors. I agree with Ms Lee that, in these premises, the reasonable thing for the Liquidator to do should have been to apply to court promptly to override the COI's decision.

51 Second, as I have highlighted above (at [45]), it is necessary to eschew the use of hindsight when assessing the reasonableness of the Liquidator's conduct. The significance of this in the present case is that, at the time when the Liquidator appointed FLC, the prevailing law at the time was that set out in the *Kirkham* decision. Indeed, by that time *Kirkham* had been the law for close to half a year given that Goh JC's decision was delivered on 25 January 2023. The contrasting decision in *Eye-Biz* was only handed down in March of this year. So, even at the time when SUM 125 was filed by the Liquidator (*ie*, 10 January 2024), the law was that set out in *Kirkham*. It follows that, as a matter of logic, the Liquidator could not claim to have relied on *Eye-Biz* when he appointed FLC without obtaining prior court authorisation. He must be taken to have known the position in *Kirkham*, and in choosing to act the way he did, he chose to run the exact risk that the court in that case had expressly cautioned against (at [43]):

> … it is clear from the present legislative framework that the Applicant should have sought such authorisation before appointing solicitors. *Any liquidator who chooses not to do so in the future would run a similar risk of having to incur the legal costs personally, unless there are, as in the present case, good reasons why this should not be ordered.*
>
> [emphasis added]

52 I therefore see no unfairness in requiring the Liquidator to bear the costs that have been incurred since his appointment of FLC personally. The law was

clear at the time he appointed FLC and he chose not to follow it. Indeed, it is clear that the Liquidator *was* cognisant of the risk he was running. When SUM 125 was first filed, the Liquidator did not seek retrospective authorisation, as an amendment application was made at the hearing itself to seek the same based on a reliance on *Eye-Biz*. It seemed to me, therefore, that the Liquidator had initially run the risk forewarned in *Kirkham* deliberately, but then somewhat opportunistically sought to rescue his position through relying on *Eye-Biz* that came well after the event. Given this, it should not come as a surprise to the Liquidator that he has to bear the consequences of the risk he chose to run materialising.

53 In fairness to the Liquidator, I have also considered his counsel's oral submission that he did not seek authorisation until SUM 125 because there would have been no point in bringing an application for authorisation if the Funding Agreement had not been successfully negotiated.

54 There is no merit in this submission. I see no axiomatic link between the success of negotiating the Funding Agreement and making an application under s 144(1)(*f*) of the IRDA for authorisation to appoint FLC. The Liquidator could, and should, have filed an application under s 144(1)(*f*) for authorisation to appoint FLC to conduct these negotiations and any preparatory work relating to the Funding Agreement.

55 Put simply, it contradicts the purpose of s 144(1)(*f*) for a liquidator to take it upon himself to act for a sustained period of time without authorisation, before coming to court and trying to present the result of his unauthorised conduct – even if beneficial to the company – as a *fait accompli*. Although the good faith of a liquidator is certainly a relevant factor, it does not by itself suffice

to insulate him from the consequences of defying the clear and unambiguous words of the statute as well as recent High Court authority confirming the same.

SUM 125: Whether the court should authorise the Liquidator to enter into the Funding Agreement with AMT

56 I come to the Liquidator's application for authorisation to enter into the Funding Agreement.

The applicable legal framework

57 As a preliminary point, I find that it is necessary to be clear on the legal basis on which the Liquidator is making his application. Under the Funding Agreement, Mingda will assign to AMT the proceeds of recovery in respect of (a) Mingda's unfair preference claims against Orient under s 225 of the IRDA; and (b) Mingda's claim for recovery of property disposed to Mr Yang after the commencement of winding up pursuant to s 130(1) of the IRDA.

58 The sources of the Liquidator's power to assign the proceeds of these two actions are in fact different. It is important to clearly delineate the source of the Liquidator's power because the requirements of the exercise of different powers by a liquidator may differ. Parties and counsel should therefore ensure that they are clear on what the relevant statutory provision or other source of the power that they are seeking to rely on is and frame their submissions to answer to those requirements accordingly.

59 For the unfair preference claims, the Liquidator identifies[32] – correctly – s 144(1)(*g*) of the IRDA as the statutory source of his power to assign the proceeds of said actions:

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32 Liquidator's Written Submissions at para 35.

> **Powers of liquidator**
>
> **144.**—(1) The liquidator may, after authorisation by either the Court or the committee of inspection —
>
> …
>
> (*g*) assign, *in accordance with the regulations*, the proceeds of an action arising under section 224, 225, 228, 238, 239 or 240.
>
> [emphasis added]

At this point, I highlight the requirement that any assignment of proceeds under s 144(1)(*g*) must be done "in accordance with the regulations". As the Liquidator identifies – also correctly – the relevant regulations in this respect are the Insolvency, Restructuring and Dissolution (Court-Ordered Winding Up) Regulations 2020 ("the IRD (CWU) Regulations").[33] Regulations 37 and 39 of the IRD (CWU) Regulations are relevant for the present discussion, and I set them out accordingly:

> **Dealings with assets**
>
> **37.** The liquidator or a member of the committee of inspection of a company must not, while acting as the liquidator or a member of the committee, directly or indirectly purchase any of the company's assets, except with the permission of the Court.
>
> **Committee of inspection not to make profit**
>
> **39.**—(1) Except with the sanction of the Court, a member of the committee of inspection of a company is not, directly or indirectly, entitled to —
>
> (*a*) derive any profit from any transaction arising out of the winding up of the company; or
>
> (*b*) receive out of the company's assets any payment for —
>
> (i) any service rendered by the member in connection with the administration of the company's assets; or

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[33] Liquidator's Written Submissions at para 36.

> (ii) any goods supplied by the member to the liquidator for or on account of the company.

60 In contrast, it is apparent from the text of s 144(1)(*g*) that it does not deal with the proceeds of an action to recover property under a void disposition pursuant to s 130(1) of the IRDA, which is the claim that the Liquidator intends to bring against Mr Yang. In this regard, the Liquidator submits that "[t]he Court has the inherent power to assign the proceeds under section 130 of the IRDA".[34]

61 I am not convinced that the Liquidator's invocation of the court's inherent powers as the basis for the assignment of the potential action based on s 130(1) is correct or necessary. In my view, there is a statutory source that the Liquidator has not relied on, which is s 144(2)(*b*) of the IRDA:

> **Powers of liquidator**
>
> **144.** …
>
> (2) The liquidator may —
>
> …
>
> (*b*) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract, with power to transfer the whole of the immovable and movable property and things in action of the company to any person or company or to sell the same in parcels.

It is noteworthy that, unlike s 144(1)(*g*), a liquidator does not require the approval from the court or the committee of inspection insofar as s 144(2)(*b*) is concerned. But as Chua Lee Ming J observed in the High Court decision in *Lavrentiadis, Lavrentios v Dextra Partners (in liquidation) and another matter* [2023] 5 SLR 1288 ("*Lavrentiadis*"), it is common practice for funders to err on the side of caution and impose a condition precedent that court approval be

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[34] Liquidator's Written Submissions at para 37.

obtained even where an assignment is being made under s 144(2)(*b*) (at [17]). The present case is no exception.

62 It is now well-established that s 144(2)(*b*) enables a liquidator to sell not only the cause of action itself, but the fruits of a cause of action as well (see the High Court decision *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Vanguard Energy*") at [24]; *Lavrentiadis* at [13]).

63 In my judgment, an application to assign recovered property under a disposition rendered void by s 130(1) of the IRDA falls within the scope of s 144(2)(*b*) rather than being a freestanding jurisdiction based on the court's inherent powers. The reason for this is the nature and effect of s 130(1). Unlike the other statutory avoidance provisions such as undervalue transactions (s 224 of the IRDA) and unfair preference (s 225 of the IRDA), s 130(1) of the IRDA does not, of itself, provide an insolvent company with a remedy (see Adrian Walters, "Void Dispositions in Compulsory Winding Up" in *Vulnerable Transactions in Corporate Insolvency* (John Armour and Howard Bennett gen eds) (Hart Publishing, 2003) at paras 8.13 and 8.47–8.48). Rather, s 130(1) is merely an invalidating provision: its only effect is to retrospectively void any disposition of property occurring during the intervening period between the winding up application and the winding up order, save for those transactions validated *ex ante* or ratified *ex post* by the court. This is evident in how s 130(1) is silent on the recovery of property that is the subject of an avoided disposition, as it leaves that up to the general law (see the English High Court decision in *In re J Leslie Engineers Co Ltd* [1976] 1 WLR 292 at 298; *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) at para 13-128).

64 The English authorities have generally described the cause of action available to the company as a "restitutionary" claim (see the English Court of Appeal decision in *Hollicourt (Contracts) Ltd (in liquidation) v Bank of Ireland* [2001] 1 BCLC 233 at [22]). This obviously includes, but is not limited to, a claim in unjust enrichment, as elucidated in the following observations by the English High Court in *Officeserve Technologies Ltd (in compulsory liquidation) v Annabel's (Berkeley Square) Ltd and others* [2018] 3 WLR 1568 (at [22]):

> In my judgment, however, the characterisation of the claim as "restitutionary" does not mean that the claim made by the company against the recipient must necessarily be a claim in what used to be called restitution, and is now called unjust enrichment. It is perhaps better seen as a claim for the "restitution" (in the old-fashioned sense of "return") of the property the subject of the disposition which by virtue of section 127 is void in law. So, if the void disposition was one relating to a property right, then the property right has not been transferred to the recipient of the physical asset the subject of that property right, and a claim will lie on behalf of the company for the return of that asset. For example, if the company had handed over possession and purported to transfer the ownership of a motorcar to a third party, but the disposition was avoided under section 127, the company's claim would be for the physical return of the motorcar under the general law of tort, that is, interference of goods.

65 The fact that s 130(1) of the IRDA is of this "slightly different" character – as noted by Trower J in the English High Court decision in *In re Fowlds (A Bankrupt)* [2022] 1 WLR 61 (at [86]) – than the other statutory avoidance provisions (which do legislate a remedy) provides a ready explanation for its exclusion from the list containing these other provisions in s 144(1)(*g*) above. Given that the actual recovery of property by the company is a matter of general law causes of action like unjust enrichment and tort, any such claims – including the intended claim against Mr Yang – are assignable under the general provision in s 144(2)(*b*) of the IRDA.

66 To sum up the above:

(a) the unfair preference claims against Orient pursuant to s 225 of the IRDA are assignable under s 144(1)(*g*) of the IRDA; and

(b) the claim against Mr Yang to recover a void disposition of property effected by s 130(1) of the IRDA is assignable under s 144(2)(*b*) of the IRDA.

67 I have found it necessary to set out the above because of the following development during the hearing:

(a) First, in her oral submissions, Ms Lee raised an objection based on the Liquidator's failure to make an explicit application for permission under regs 37 and 39 of the IRD (CWU) Regulations (see [59] above).

(b) Second, in response to this, counsel for the Liquidator, Mr Tham Wei Chern ("Mr Tham"), stated in his oral reply, quite peculiarly, that he only referred to s 144(1)(*g*) as the "backdrop" (and so regs 37 and 39 were not engaged), as the Liquidator's application was under s 204 of the IRDA. I understood this to mean that the Liquidator was essentially 'piggybacking' off AMT's application in OA 26 for priority under s 204 of the IRDA.

68 I will first address the second of these points briefly. With respect, I have grave difficulty with the Liquidator's rather cavalier disclaimer of his reliance on s 144(1)(*g*) of the IRDA. I do not see how it is possible for the Liquidator to not have to rely on s 144(1)(*g*) of the IRDA insofar as the Funding Agreement contemplates that the proceeds of the unfair preference action against Orient will be assigned to AMT. Prior to the introduction of s 144(1)(*g*) of the IRDA,

the position appeared to be that a liquidator did not have the power to assign statutory claims such as those based on the avoidance provisions (see Singapore, Ministry of Law, *Report of the Insolvency Law Committee: Final Report* (2013) (Chairperson: Lee Eng Beng SC) ("*ILRC Report*") at pp 72–73 and 79). Section 144(1)(*g*) of the IRDA was specifically introduced to remove doubt that liquidators had the power to assign the proceeds of such claims (see *Lavrentiadis* at [16]). Given this, the Liquidator has no choice but to rely on s 144(1)(*g*) of the IRDA, and more importantly, cannot simply wave away objections that he has failed to comply with its requirements.

69 AMT's application in OA 26 under s 204(3) of the IRDA is a related but different matter altogether. The issue in OA 26 is whether the court should grant AMT the advantage that the terms of the Funding Agreement seek to confer onto it. The issue in OA 26 is not whether the Liquidator and Mingda should be allowed to enter into the Funding Agreement insofar as the assignment of the proceeds of the causes of action against Orient and Mr Yang are concerned. The latter is a logically anterior matter to the former, and it is the subject of SUM 125 which is governed by ss 144(1)(*g*) and 144(2)(*b*) of the IRDA. As a result, the Liquidator cannot merely piggyback off AMT's application or fudge the issues in SUM 125 and OA 26 together as his counsel appeared to do.

Whether the Liquidator has failed to comply with the IRD (CWU) Regulations

70 I turn to address the first point at [67] above, which is Ms Lee's objection that the Liquidator has failed to comply with the IRD (CWU) Regulations.

71 In my judgment, the Liquidator has not failed to comply with the IRD (CWU) Regulations. I acknowledge the force in Ms Lee's argument to the extent that it exposes that the Liquidator's prayers could (and should) have been

drafted with more particularity, but I do not think that the Liquidator has been non-compliant with any legal requirement.

72 The crux of Ms Lee's argument is that the Liquidator has not made an express prayer seeking permission under regs 37 and 39 of the IRD (CWU) Regulations. In principle, regs 37 and 39 would be engaged because the funder in the present case, AMT, is a member of the COI. As Chua J explained in *Lavrentiadis*, the rationale underlying regs 37 and 39 is to protect the creditors of the company from the conflict of interest in dealing with a member of the committee of inspection, who in that capacity stands in a fiduciary *vis-à-vis* the other creditors (at [39]).

73 As a preliminary point, I agree that regs 37 and 39 are engaged in this case. Regulation 37 requires the court's sanction to be obtained if a member of the committee of inspection seeks to purchase, either directly or indirectly, any of the company's assets. In this case, AMT is at least indirectly purchasing Mingda's assets. Regulation 39 requires the court's sanction to be obtained if a member of the committee of inspection stands to make a profit on the transaction. In this case, depending on the amount actually disbursed by AMT under the Funding Agreement, the amount actually recovered by the Liquidator in his claims against Orient and Mr Yang, as well as the amount actually paid out to AMT under the Funding Agreement, it is possible for AMT to make a profit insofar as it is paid a larger sum than the amount it funded. Specifically, payments past the first level of the Distribution Waterfall (*viz*, repayment of the amount disbursed by AMT under the Indemnity) would amount to profit to AMT arising from the Funding Agreement.

74 Nevertheless, I do not find that the wording of regs 37 and 39 require a liquidator to take out a specific application or make an express prayer for

permission under these provisions specifically. I am cognisant that, in the *Lavrentiadis* case, the applicant liquidator did seek express permission pursuant to reg 37 (see the court's summary of the liquidator's application in *Lavrentiadis* at [11]). Indeed, the court's records indicate that no express prayer had been made during the initial issue of the summons, but the liquidator had taken out an amendment summons (HC/SUM 260/2023) to introduce express prayers relating to reg 37. However, I do not think that this is a strict legal requirement.

75 In my view, regs 37 and 39 only require that the transaction be sanctioned by the court, and do not go so far as to require a specific application or prayer to be made in respect of them. Thus, if an application is made under s 144(1)(*g*) of the IRDA for court authorisation of a proposed assignment of proceeds from a statutory avoidance claim, that would suffice by itself even if the applicant does not make a specific prayer under reg 37 and/or reg 39.

76 I would, however, caveat the breadth of this proposition. In my view, if an application is made under s 144(1)(*g*) only and the court does not actually consider the issue of whether regs 37 and/or 39 is satisfied (assuming it is engaged), then regs 37 and 39 would not have been complied with. Compliance with the regulations is not a mere formality. There are instead substantive requirements that the applicant must satisfy in order for the court to grant its sanction under the IRD (CWU) Regulations. In the case of reg 37 specifically, the applicant must show that "the terms of the transaction, including the amount of the purchase price, are fair to the general body of creditors so as to not cause detriment to the position of creditors" (see *Lavrentiadis* at [40], citing the New South Wales Supreme Court decision in *Re DH International Pty Ltd (in liq) (No 2)* [2017] NSWSC 871 at [37]). The test is similar for reg 39 (see *Lavrentiadis* at [42]). Thus, although a failure to make an express application or

prayer under regs 37 or 39 would not, by itself, result in a defective application, I emphasise that, in future applications, applicants would do well to make such specific applications or prayers. This practice has the advantage of putting all parties – including the court – on (fair) notice that an additional requirement is in play and must be complied with.

Whether the requirements for leave to enter into the Funding Agreement are satisfied

77 The applicable principles for determining an application under ss 144(1)(*g*) and 144(2)(*b*) of the IRDA are comprehensively set out in the High Court's decision in *Lavrentiadis*. In sum, relevant considerations that the court will take into account include (see *Lavrentiadis* at [19]):

> (a) whether the liquidator is acting in good faith, which is an overarching consideration;
>
> (b) whether the sale or assignment is in the interests of the company and its creditors;
>
> (c) whether the funding agreement conflicts with any public policy; and
>
> (d) whether the terms of the funding agreement conflict with any written law, in particular the IRDA and the regulations made thereunder.

(1) Whether the Liquidator is acting in good faith

78 I am satisfied that there is no reason to question the Liquidator's good faith in the present case.

79 I accept the reasons that the Liquidator has put forward in his written submissions.[35] There is no dispute that Mingda's assets fall woefully short of meeting the claims of its creditors. The claims against Orient and Mr Yang, if successful, will no doubt swell the assets of the company and improve the prospects of recovery for creditors. As no creditor other than AMT has stood forward to offer funding to the Liquidator, the Funding Agreement is the only means for the Liquidator to pursue these claims (see *Lavrentiadis* at [20]).

80 I highlight in particular two objections that the opposing creditors have made, which I shall address in turn:

(a) First, Mr Yang points to the fact that the Liquidator only intends to bring proceedings against Orient and him, and argues that the Liquidator has acted unfairly because, during the same period that the impugned payments and dispositions of property to Orient and him were made, AMT itself was paid a substantial amount.[36] To complete the argument, it appears that Mr Yang's point is that if the payments to Orient and him are voidable, so are the payments to AMT, such that the Liquidator should be bringing claims against AMT as well.

(b) Second, Orient contends that there is reason to believe that the Liquidator's decision in entering into the Funding Agreement is motivated by his own self-interest. Specifically, as things currently stand, Mingda is so hopelessly insolvent that its remaining assets are insufficient to cover even the Liquidator's costs. Thus, Orient submits

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35 Liquidator's Written Submissions at paras 40–48.

36 Yang's Affidavit at para 4.1.3.

that the Liquidator's real intention is to swell Mingda's assets so that his fees and expenses can be paid out of the proceeds of recovery.[37]

81 In my judgment, neither of these objections raise any real doubt as to the Liquidator's good faith.

82 The first objection, in sum, is to call into question the Liquidator's good faith based on supposed differential treatment of Orient and Mr Yang on the one hand, and AMT on the other. I do not accept this submission. In the first place, it is necessary to bear in mind the starting point that "a court does not readily interfere with a liquidator's discretion". Thus, it is only where the liquidator's exercise of his power is so absurd that no reasonable liquidator could have acted in that way that the court will intervene in the liquidator's decision-making (see the High Court decision in *Solvadis Commodity Chemicals Gmbh v Affert Resources Pte Ltd* [2018] 5 SLR 1337 ("*Solvadis*") at [35]).

83 This principle must include the liquidator's decision on the issue of what asset recovery or misfeasance actions that the company should bring, as well as against whom. The mere fact that there may lie a plausible cause of action against AMT, and the Liquidator has chosen not to pursue it, does not suffice to cast doubt on the Liquidator's *bona fides*. There might be good reasons for the Liquidator's decisions. For example, in relation to the unfair preference claim against Orient, Orient is potentially – I make no firm decision on this, given that it is a matter for the court hearing the substantive application – a "person who is connected with the company", such that in pursuing the claim against Orient, the Liquidator would have the advantage of a presumption of insolvency when establishing the elements of the unfair preference action (see s 226(3) of the

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[37] Chew's Affidavit at para 38–39.

IRDA). As regards Mr Yang, the Liquidator might have considered that the relatively indiscriminate effect of s 130(1) of the IRDA meant that there were good prospects of succeeding in an action against Mr Yang. These are just some examples of reasons that I can identify with relative ease as to why the Liquidator may have made the decision to pursue only Orient and Mr Yang. The existence of such readily identifiable or conceivable reasons, to my mind, means that it cannot be said that the Liquidator's decision is outrageously unreasonable for the court to have reason to doubt his good faith.

84 As for the second objection, I find that Orient's submission is based on the flawed premise that the Liquidator's interests are necessarily diametrically opposed to the creditors' interests, such that a course of action advantageous to the Liquidator must *ipso facto* mean that he is not acting in good faith in the interests of the creditors. It is no doubt true that, if Mingda succeeds in its actions against Mr Yang and Orient, the Liquidator would probably benefit from the proceeds of recovery. This happens as a matter of common sense because every liquidator is inevitably a creditor of his company; indeed, a liquidator is a preferential creditor under the statutory scheme (see s 203(1)(*a*) of the IRDA). Given this, I do not think that it suffices to impugn the Liquidator's good faith by saying that he stands to benefit from the proceeds of recovery if, as in this case, the Funding Agreement stands to benefit Mingda and its other creditors generally as well (see the Court of Appeal decision in *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 at [52]).

(2) Whether the Funding Agreement is in the interests of Mingda and its creditors

85 The Funding Agreement is clearly in the interests of Mingda and its creditors. As mentioned above, Mingda is currently hopelessly insolvent such

that not a single cent currently stands to trickle down to the unsecured creditors. In contrast, if the claims against Orient and Mr Yang pan out as the Liquidator intends, the Liquidator estimates that the unsecured creditors – including the objecting creditors – stand to recover up to 4% of their admitted claims.[38]

86 At the hearing, there was some dispute between the parties as to whether AMT stood to profit from the Funding Agreement. But, in my view, that by itself is neither here nor there (see *Vanguard Energy* at [30]), given the following observations by Chua J in *Lavrentiadis* (at [22]):

> The mere fact that the Funder stood to make a profit was clearly no reason not to authorise the Funding Agreement; it is commercially unrealistic to expect litigation funders to take the risks of funding an insolvent company's litigation and not expect to be compensated for it.
>
> [internal citations omitted]

87 Put differently, the point is that a profit-making element is a ubiquitous aspect of extensions of credit by a funder, regardless of whether the party being funded is solvent or insolvent. Indeed, as a matter of common sense, funders of insolvent companies undertake higher risks of default such that it is entirely rational behaviour for them to impose a higher interest rate as a means of protecting their position, if they do decide to even extend funding at all. The law does, in fact, recognise this. An example is the provisions found in the IRDA allowing for various levels of priority to be granted to rescue financing (see s 67 of the IRDA; and the High Court decisions in *Re Attilan Group Ltd* [2018] 3 SLR 898 and *Re Design Studio Group Ltd and other matters* [2020] 5 SLR 850). There is no reason why the law should preclude what is ordinary commercial behaviour on the part of funders.

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[38] Liquidator's 1st Affidavit at para 46.

88 Moreover, the *ILRC Report* expressly contemplates that a funder may seek, and properly receive, benefits beyond the amount of funding extended being repaid in priority to the company's other debts and liabilities (at p 72):

> … as such parties may be assuming a significant amount of risk, it may not be enough for the funding to be repaid in priority to the payment of any other debts or liabilities of the company (to which of course the liquidator is entitled, and indeed, expected, to agree). Often, the funding party will seek a proportion of the fruits of recovery as consideration for funding the recovery exercise.

89 Thus, the question is not whether AMT stands to receive a profit *per se* but whether such profit is so extravagant that it is objectionable (see *Lavrentiadis* at [23]). I am satisfied that it is not. I will consider the extent of the advantage sought by AMT in fuller detail below when addressing OA 26, but for present purposes, it suffices to say that I am satisfied that the Funding Agreement is in the interests of the creditors because, if the Liquidator is successful in recovery against Orient and Mr Yang, it is not only AMT but the other creditors – including Orient and Mr Yang – who would stand to benefit from the recoveries.[39] In this event, the creditors would have received a benefit without having to put any skin in the game as AMT has.

(3) Whether the Funding Agreement conflicts with any public policy or written law

90 I am satisfied also that the Funding Agreement does not conflict with any public policy or written law.

91 It is settled that the statutory powers of assignment relied on by the Liquidator in the present case – *viz*, ss 144(1)(*g*) and 144(2)(*b*) – are statutory

[39] Liquidator's Written Submissions at para 50.

exceptions to the doctrine of maintenance and champerty (see *Vanguard Energy* at [29]; *Solvadis* at [28]).

92 Nevertheless, in *Lavrentiadis*, Chua J considered that the court should not merely stop there but go on to consider whether, on a more general level, the funding agreement is consistent with the underlying policy of the doctrine of maintenance and champerty, which is the proper administration of justice (at [27]–[29]). In this regard, the learned judge observed that "the public policy concerns about the administration of justice are addressed where the control of the legal proceedings lies primarily with the liquidator" (at [30]).

93 This applies to the present case. The Funding Agreement does not assign the cause of action, but merely the proceeds. Indeed, insofar as the unfair preference claims are concerned, this would not be possible given that s 144(1)(*g*) only empowers a liquidator to assign the proceeds of such claims. Further, to put the point beyond doubt, the Funding Agreement contains an express stipulation that the Liquidator retains full control over the litigation, albeit with an obligation to consult with AMT:[40]

> **8. Conduct of Claims / Action**
>
> 8.1 The Liquidator is to have full and complete control of the pursuit of the Claims and/or the conduct of the Action, in that whilst the Liquidator may be required to consult the Funder on matters as provided for in this Funding Agreement, the Liquidator shall ultimately retain the sole discretion in respect of decisions to make, accept and/or reject any settlement offer(s) in connection with the Claims, save that the Liquidator shall seek the Funder's consent on the specific matters as expressly provided for in this Funding Agreement.

[40] Clause 8 of the Funding Agreement (Liquidator's 1st Affidavit at p 98).

94 For these reasons I am satisfied that the Funding Agreement is compliant with public policy.

95 As for the separate question of compliance with written law, I have found above (at [75]) that the Liquidator's failure to seek specific permission under regs 37 and 39 of the IRD (CWU) Regulations is of no strict legal consequence. For the reasons I have explained above as to why I am satisfied that the Liquidator is acting in good faith and that the Funding Agreement is in the interests of Mingda's creditors, I find that regs 37 and 39 are satisfied as well. There is therefore also compliance with written law in the present case.

(4) Conclusion

96 Given that I am satisfied that the requirements under ss 144(1)(*g*) and 144(2)(*b*) are met in this case, I allow the Liquidator's application for authorisation to enter into the Funding Agreement in SUM 125.

OA 26: Whether AMT should be granted the advantage sought under s 204(3) of the IRDA

97 I come to AMT's application in OA 26 to be given an advantage under s 204(3) of the IRDA.

The applicable legal framework

98 I start with setting out the applicable legal framework, along with some general comments on the approach that should be taken in such applications based on my observations in the present case.

99 Section 204 of the IRDA provides as follows:

> **Funding by creditors**
>
> **204.**—(1) Where in any winding up —
>
> (*a*) assets have been recovered under an indemnity for costs of litigation given by certain creditors;
>
> (*b*) assets have been protected or preserved by the payment of moneys or the giving of an indemnity by certain creditors; or
>
> (*c*) expenses in relation to which a creditor has indemnified a liquidator have been recovered,
>
> the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered, with a view to giving those creditors an advantage over others in consideration of the risks run by those creditors in giving those indemnities or paying those moneys.
>
> (2) Any creditor may apply to the Court for an order under subsection (3) prior to —
>
> (*a*) giving an indemnity for costs of litigation for recovering any assets;
>
> (*b*) paying any moneys or giving an indemnity to protect or preserve any assets; or
>
> (*c*) indemnifying a liquidator in relation to the liquidator's expenses.
>
> (3) On an application by a creditor under subsection (2), the Court may, for the purpose of giving the creditor an advantage over others in consideration of the risks to be run by that creditor in giving the indemnity or payment for the purposes mentioned in that subsection, grant an order with respect to the distribution of —
>
> (*a*) the assets mentioned in subsection (2)(*a*) that may be successfully recovered;
>
> (*b*) the assets mentioned in subsection (2)(*b*) that may be successfully protected or preserved; or
>
> (*c*) the amount of expenses mentioned in subsection (2)(*c*) that may be successfully recovered.

100 The applicable principles to an application under s 204(3) of the IRDA were comprehensively summarised by Goh Yihan JC in the High Court decision

of *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2023] 4 SLR 1575 ("*Song Jianbo*"). I adopt these principles, along with the following analytical framework set out in that case (at [8]):

(a) First, should an order under s 204(3) of the IRDA be granted to AMT?

(b) Second, what should be the terms of such an order under s 204(3) of the IRDA, such as the proportion of the award, and the extent of AMT's advantage?

(c) Third, what safeguards, if any, should be incorporated into the Funding Agreement?

101 Unlike the former s 328(10) of the Companies Act (Cap 50, 2006 Rev Ed), which had only given the court the power to make a retrospective order after the relevant assets had been recovered, s 204(3) of the IRDA empowers the court to make such orders on a prospective basis (see *Song Jianbo* at [12]). As the court in *Song Jianbo* explained, extending the court's jurisdiction to include prospective orders served to provide a measure of assurance to funding creditors, who might otherwise be reluctant to extend funding in the face of uncertainty as to whether they might subsequently be granted an advantage even if successful recoveries are made (at [17], citing the *ILRC Report* at p 74):

> … the main drawback of s 328(10) of the Companies Act was that a court can make an order only *after* the relevant assets have been recovered, protected or preserved, or *after* the relevant expenses have been recovered. Thus, at the point of providing the funds or indemnity, the funding creditors would have no assurance that the court will make an order giving them an advantage over other creditors in consideration of the risks assumed by them. There was also no certainty as to the

> terms of such an order. This is the inherent weakness of a *retrospective* order.
>
> [emphasis in original]

102 In my view, it is important that counsel do not elide the distinction between retrospective and prospective orders, especially when references are made to foreign authorities. This is because the insolvency laws of foreign jurisdictions may not provide for prospective orders. An example of this is Australian law, as the relevant provision thereunder – *viz*, s 564 of the Australian Corporations Act 2001 (Cth) – only empowers the court to make orders after the recovery of property:

> **564 Power of Court to make orders in favour of certain creditors**
>
> Where in any winding up:
>
> > (a) property *has been recovered* under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
> >
> > (b) expenses in relation to which a creditor has indemnified a liquidator *have been recovered*;
>
> the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.
>
> [emphasis added]

103 The nature of the inquiry may differ as between the prospective and retrospective context. In this regard, I note that Goh JC in *Song Jianbo* made the following comments that might, at first blush, be read as downplaying this distinction (at [20]):

> … However, this was not a material distinction in my view. As the claimant pointed out, the main differences between a prospective and retrospective order are: (a) the information available to the creditors; and (b) the certainty of recovery of

> any assets. These differences are not so material as to render the factors discussed in respect of retrospective orders irrelevant to prospective orders. …

104 I agree with Goh JC that the retrospective-prospective distinction is not so stark that the general principles and considerations identified in retrospective order cases are completely irrelevant to prospective order cases. However, I would highlight that the two differences rightly identified by Goh JC – *viz*, the information available to creditors and the certainty of recovery of any assets – are nevertheless important. In a retrospective order case, the court has the benefit of hindsight and can therefore ascertain with mathematical precision: (a) how much funding has actually been provided; and (b) how much proceeds have actually been recovered. Thus, when the court fixes the advantage that should be granted to the funding creditor, it will similarly know with certainty: (a) what proportion of the recovered proceeds would be turned over to the funding creditor; and (b) what proportion of the funding creditor's debt would be paid in priority. But, in a prospective order case, all of these are unknowns. Thus, the nature of the inquiry in prospective order cases is less (if at all) a matter of precise arithmetic but based on foresight and prediction. This is no doubt why, in *Song Jianbo*, Goh JC distilled principles, rather than mathematical averages or trends, from the foreign authorities that he relied upon.

105 An illustration of the significance of the retrospective-prospective distinction and the perils of attempting a statistical analysis from the present case may be apposite. In the present case, counsel for SRT, Mr Lam Zhen Yu ("Mr Lam"), stated in his oral submissions that it was rare for a court to grant a funding creditor an advantage in respect of 100% of its admitted debt against the company. He did so by tendering a visual aide consisting of a table of various

Australian authorities (cited by AMT) which stated the percentage of the funding creditor's admitted debt that the creditor recovered in each case.[41]

106 With respect, while I acknowledge Mr Lam's commendable effort, I do not regard this as a correct approach. It is necessary to bear in mind that these Australian authorities were retrospective order cases. In this connection, as counsel for AMT, Ms Chua Xin Ying ("Ms Chua"), observed, a simple explanation for many of these cases in which the funding creditors received mere cents in the dollar on their debts was that the recovered proceeds fell short of repaying the funding creditor's debt in full; in other words, it would not have been possible for the court to have ordered the creditor to be paid 100% of its debt in priority even if it wanted to. Thus, the fact that the funding creditor might have only been paid a small fraction of his debt is, without the specific context of the cases, equivocal or, worse, potentially misleading. It does not necessarily mean that the court did not consider the funding creditor to be undeserving, such that if a prospective order jurisdiction existed, the court would not have been willing to grant the creditor an advantage of having 100% of its debt paid in priority assuming that sufficient assets were recovered to do so. In fairness to Mr Lam, he did seem cognisant of this point as he acknowledged that in many cases where the courts awarded the funding creditor 100% of the litigation proceeds, they were likely aware that the funding creditor was not getting the full amount of its debt.

107 I would, however, go further than Mr Lam to say that, in many of the Australian cases cited by parties, the courts were mainly focused on casting the advantage as a percentage of the recovered proceeds rather than a percentage of the funding creditor's debt. It is therefore necessary to be clear, when citing an

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41 SRT's Letter to Court dated 1 April 2024 at pp 3–4.

authority, whether a reference to "100% recovery" by the court is a reference to the former rather than the latter. To take one example, SRT states that "readily granting a 100% advantage may unduly encourage the settling of claims",[42] and cites the following statement of Hodgson JA in the New South Wales Court of Appeal decision in *State Bank of New South Wales and another v Brown (as liq of Parkston Ltd (in liq)) and others* (2001) 38 ACSR 715 in support (at [92]):

> In my opinion, both purposes may be advanced by the grant of an advantage of 100 per cent of the recovered funds to supporting creditors in appropriate cases. Plainly, such a benefit can support the objective of recovering property from wrong-doers. In my opinion also, the grant of a 100 per cent advantage in cases where recovery turns out to be relatively small can also support the objective of benefiting creditors generally, by encouraging the support of litigation in cases where there is a prospect of a large recovery which would inure for the benefit of all creditors, but which may in certain eventualities result only in a small recovery. *Of course, if a 100* per cent *advantage is too readily granted in such cases, this would unduly encourage the setting of claims for less than their reasonable value; but this risk can be taken into account when settlements are approved, as well as in applications by supporting creditors to be given an advantage.*
>
> [emphasis added]

In this statement, Hodgson JA was speaking of a 100% recovery *vis-à-vis* the recovered proceeds, rather than the funder's debt. The learned judge's caution, strictly speaking, was less (if at all) that the court should be cautious about granting the funding creditor priority in the repayment of 100% of his debt, but that the court should be cautious against granting the funding creditor the entirety of the recovered proceeds.

108 Bearing this in mind, I now come to the following statement by Goh JC in *Song Jianbo*, which the objecting creditors – in particular, Mr Yang and SRT – rely upon (at [47]):

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42 SRT's Written Submissions at paras 29–30.

> In relation to whether it should be the norm for the indemnifying creditors to obtain 100% of the assets potentially recovered, that would depend on the facts and circumstances of each case, though it has been recognised that there is a "very significant evidentiary and persuasive onus which needs to be discharged before an award of 100% of the amount recovered will be appropriate" (see [*Jarbin Pty Ltd v Clutha Ltd (in liq)* (2008) 208 ALR 242] at [71]). The court must strive to achieve a just result which offers sufficient incentive to funding creditors, whilst not being punitive to the other non-funding creditors (as the recovered assets ultimately belonged to the insolvent company and its stakeholders as a whole).

109 The objecting creditors unsurprisingly emphasise the phrase a "very significant evidentiary and persuasive onus", which they submit is applicable to AMT's application. I make two points in respect of this. First, as Ms Chua pointed out in her oral reply submissions, that statement does not strictly apply in the present case given that AMT is only seeking 100% of the Recovered Assets to the extent that it is less than 100% of its admitted debt. Second, and most importantly, I find that Goh JC's reference to that phrase should not detract from the more general point that I understand him to have been making, which is to eschew any attempt at laying down hard-and-fast-rules on what percentages may be warranted in favour of an approach of achieving a "just result" on the particular facts of the case. Indeed, this is exactly the point that was being made in the case that Goh JC cited – the New South Wales Supreme Court decision in *Jarbin Pty Ltd v Clutha Ltd (in liq)* (2008) 208 ALR 242. Whilst Campbell J did say that a "very significant evidentiary and persuasive onus" had to be discharged to justify a funding creditor receiving 100% of the recovered proceeds, this statement was immediately preceded by the more general point that although (at [71]):

> [t]here are various judicial statements to the effect that allowing an indemnifying creditor 100% of the amount recovered will (or should) be rare … these statements should not be taken (as an over-literal reading of them might suggest) as being a statement of the statistical frequency with which awards of 100% of the amount recovered will be made.

110 I respectfully agree with this approach. I do not think that there is anything to be gained in attempting to generalise a case or circumstances in which a particular type of award, quantum or percentage should be granted. For this reason, I advise that it is not a fruitful exercise for counsel to attempt to draw up tables of the percentages awarded in past cases in a bid to illustrate a general statistical trend as to what awards have been granted. An application under s 204(3) of the IRDA is governed by principle rather than statistics.

Whether an order under s 204(3) of the IRDA should be granted to AMT

111 I am satisfied that an order under s 204(3) of the IRDA should be granted to AMT.

112 First, as a preliminary point on *locus standi*, AMT is a creditor with *locus standi* under s 204(2) of the IRDA to make an application for such an order. Given that the Indemnity given by AMT to the Liquidator covers both the costs of pursuing claims against Orient and Mr Yang, as well as the Liquidator's costs generally,[43] I find that AMT has given an indemnity for costs of litigation for recovery any assets and to the liquidator in relation to the liquidator's expenses under ss 204(2)(*a*) and 204(2)(*c*) respectively.

113 Second, as to the substantive question of whether AMT should be given an advantage for providing the Indemnity to the Liquidator, the following non-exhaustive list of factors identified by Goh JC in *Song Jianbo* are instructive signposts (at [23]):

> (a) the complexity and necessity of the proceedings in respect of which the funding or indemnity is given;

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43 AMT's Written Submissions at paras 38 and 40.

(b) the extent of the funding or indemnity to be provided, and the level of risk to be undertaken and the costs to be borne by the funding creditor;

(c) the failure of other creditors to provide funding or indemnity and whether the other creditors were given an opportunity to do so;

(d) the emergence of other creditors between the making of the order and the date of a distribution under the order to the funding creditor;

(e) the public interest in encouraging creditors to provide funding or indemnity to enable assets to be recovered; and

(f) the presence or absence of any objections from the other creditors, the liquidator or the Official Assignee.

(1) The necessity of the proceedings against Orient and Mr Yang

114 I am satisfied that the actions against Orient and Mr Yang, in respect of which AMT has granted the Indemnity to the Liquidator, are necessary in the present case.

115 I have noted above that Mingda is currently so hopelessly insolvent that its unsecured creditors would not receive a single cent in its liquidation. Indeed, Mingda is so deep in insolvency that its current assets do not come close to paying off in full the Liquidator's costs and expenses. In contrast, if the Liquidator succeeds in his claims against Orient and Mr Yang, the creditors stand to recover up to 4% of their admitted claims against Mingda after the relevant payouts have been made in accordance with the Distribution Waterfall. This stark difference in outcomes is a strong factor in favour of supporting the

Liquidator's intended course of action and granting AMT an order under s 204(3) of the IRDA.

(2) The public interest in encouraging AMT to provide funding to Mingda to enable assets to be recovered.

116 I am also satisfied that it would be in the public interest to empower Mingda to pursue claims against Orient and Mr Yang. This is therefore another factor in favour of granting an order under s 204(3) of the IRDA.

117 AMT submits that "there is public importance and necessity in discouraging misconduct in relation to companies" (citing *Song Jianbo* at [16]).[44] I accept this submission and agree it is apposite to the present case. Mr Yang is a former director of Mingda, and Orient is a related entity to him. The nub of the Liquidator's allegations against Orient and Mr Yang is that they have essentially committed asset-stripping against Mingda during the twilight period leading up to Mingda's insolvent liquidation (and indeed, in the case of Mr Yang, *after* Mingda had been put into liquidation). As Goh JC observed in *Song Jianbo*, "there is a public interest in encouraging a creditor to provide funding where there is allegation of misfeasance by the former director of the company" (at [39]), as Mr Yang is in the present case.

(3) The level of risk undertaken by AMT

118 I turn to the level of risk undertaken by AMT. This is the major point of disagreement between AMT and SRT, who is the principal objecting creditor in OA 26.

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44 AMT's Written Submissions at para 43.

119 AMT submits that it bears considerable risk in entering into the Funding Agreement.[45] It emphasises that there is no assurance that the contemplated litigation against Orient and Mr Yang would result in the successful recovery of assets. AMT does not only undertake the risk that the Liquidator fails in court, as even if he does, there is the additional risk that the Liquidator may fail in obtaining satisfaction of the judgment from the defendants.[46]

120 On the other hand, SRT contends that the level of risk undertaken by AMT is "low to moderate at best", pointing to the following factors:[47]

(a) First, that because AMT's funding has come relatively late in the liquidation, a lot of the legwork (in terms of investigations) has already been completed by the Liquidator such that AMT is acting with greater certainty and confidence in success. This stands in contrast to a case where funding is extended prior to (and/or to enable) investigations by the liquidator, in which there is considerably more risk due to uncertainty as to the results of the liquidator's investigations.

(b) Second, that AMT has instituted a fixed cap on the amount of the Indemnity provided to the Liquidator as a means of limiting the amount of risk that it is undertaken.

(c) Third, that the clawback actions against Orient and Mr Yang that AMT intends to fund are not particularly complex, as they do not entail any particularly involved dispute of fact or novel issues of law.

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45 AMT's Written Submissions at p 22.

46 AMT's Written Submissions at para 47.

47 SRT's Written Submissions at para 21.

121 The points raised by SRT are valid. I accept that it is generally true that there is greater uncertainty when funding is extending earlier on in the process, and I also accept that the clawback actions – especially that against Mr Yang, in light of the breadth of s 130(1) of the IRDA – are unlikely to be particularly complex in terms of fact and/or law. The inclusion of a cap is also a form of *ex ante* risk management by AMT.

122 That said, I accept AMT's submission that enforcement risk against Orient and Mr Yang does cast doubt on the prospects of successful recovery. I agree that it is too shortsighted for the court to focus only on the complexity of the dispute between Mingda and the potential defendants, and to not consider the difficulty that may be involved in actually recovering assets from Orient and Mr Yang in the event that judgment is obtained. Ultimately, it is the latter that really matters, given that an unsatisfied judgment is to a judgment creditor worth little more than the paper on which it is printed. In this regard, I accept AMT's submission[48] that Orient having itself raised the risk of unsuccessful enforcement[49] casts a shadow over the prospects of successful recovery. This is especially because it is the claim against Orient that really matters, as the value of the claim against Mr Yang (approximately S$15,000) is a drop in the ocean when compared to the claim against Orient (approximately US$5.28m).[50]

123 In these circumstances, while I would agree that the risk borne by AMT is not necessarily high, I find that it is closer to moderately high than "low to moderate" as SRT contends. It is thus nonetheless a factor in favour of granting an order under s 204(3) of the IRDA.

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48 AMT's Written Submission at para 48.

49 Affidavit of Chew Yi Lin at para 27.

50 AMT's Written Submissions at para 11.

(4) The failure of other creditors to provide funding to Mingda when given the opportunity to do so

124 I also consider the failure of Mingda's other creditors to provide funding despite having been given the opportunity to do so to be a strong factor in favour of granting AMT an order under s 204(3) of the IRDA (see *Song Jianbo* at [37]).[51] In the face of the other creditors' unwillingness to extend funding to support the Liquidator's pursuit of asset recovery actions, the offer from AMT is the Liquidator's only chance at a better outcome for Mingda's creditors.

(5) Objections by other creditors to AMT's application

125 Finally, Mr Yang points to the presence of objections by creditors to OA 26 as a relevant consideration to be taken into account.[52] In my view, although the point is valid at the level of principle, I agree with AMT that significantly less weight ought to be given to the views of objecting creditors where, as in the present case, they are the precise targets of the litigation that the Liquidator intends to embark on. As a matter of common sense, such creditors have an interest in disabling the company from pursuing its claims against them. This contradicts the policy of enabling insolvent companies to seek redress against wrongdoers (see [117] above), which s 204 of the IRDA is intended to support.

126 For the avoidance of doubt, I confine my observations to the present case, and do not go so far as to lay down a broad proposition that the court must completely disregard the views of an objecting creditor merely because it is a target of the contemplated litigation.

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51 AMT's Written Submissions at para 44.

52 Yang's Written Submissions at para 3.3.6.

(6) Conclusion

127 Based on all the factors above, I conclude that this is an appropriate case to make an order under s 204(3) of the IRDA in favour of AMT.

What the terms of the order under s 204(3) of the IRDA should be

128 I turn to consider the terms of the order under s 204(3), which concern how the assets that may be recovered by the Liquidator should be distributed (see *Song Jianbo* at [43]).

129 To recapitulate, AMT seeks priority in respect of: (a) the amount disbursed to the Liquidator under the Indemnity; (b) its Funder's Costs; and (c) its admitted debt against Mingda, which is to be paid *pari passu* with the costs incurred by JPM in previously funding the Liquidator's investigations (see [16] above). Under the proposed Distribution Waterfall, AMT seeks priority in respect of 100% of these sums before any Recovered Assets are distributed in accordance with the statutory scheme. In this case, this would mean that the Recovered Assets would be first applied to the payment of the expenses of the liquidation (in accordance with s 203(1)(*a*) of the IRDA), before any residue is distributed *pari passu* between Mingda's other creditors.

130 I am satisfied that AMT is entitled to the priority sought.

131 First, AMT has capped its priority to the extent of 100% of its admitted debt due from Mingda. It is not claiming 100% of the Recovered Assets for itself.[53] Since AMT is not claiming anything in excess of the debt owing to it, it

[53] AMT's Written Submissions at para 54.

cannot be said that AMT stands to receive an undue reward for its assistance (see *Song Jianbo* at [49]).

132 Second, as to why an advantage to the extent of 100% of AMT's debt is justified, the reason for this is that AMT is the only creditor that has come forward to provide funding despite other creditors having the chance to do so (see *Song Jianbo* at [50]).[54] In my view, in circumstances where, as in the present case, the other creditors stand to benefit without having put anything on the line, it does not generally lie in their mouth to argue that it is unfair for AMT to seek priority over them. I reiterate that, but for AMT's extension of funding, all creditors would leave Mingda's liquidation without a single cent. AMT is essentially giving the other creditors a free ride to potentially making some recoveries. Put simply, the other creditors are no worse off by the Liquidator entering into the Funding Agreement with AMT and AMT receiving the priority it seeks. Contrary to SRT's submission, I struggle to see how, by any stretch, it can be said that the priority sought by AMT is "unfair and punitive" to Mingda's non-funding creditors.[55]

133 Third, I also agree with AMT that it should be rewarded for stepping up to the plate despite being one of Mingda's smallest creditors. Having taken it onto itself to offer funding that enables other creditors – including SRT, which holds more than 50% of Mingda's unsecured debt – a possibility of making some recovery, I agree that it is just for AMT to be rewarded for assuming a disproportionately larger burden relative to its stake in Mingda's liquidation

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54 AMT's Written Submissions at para 56.

55 SRT's Written Submissions at para 27.

(see the New South Wales Supreme Court decision in *Re Waterfront Investments Group Pty Ltd (in liq)* [2016] NSWSC 687 at [8]).[56]

What safeguards should be incorporated into the Funding Agreement

134 The final point that falls to be determined is whether there are adequate safeguards within the Funding Agreement, or if the court should impose any additional safeguards (see *Song Jianbo* at [59]).

135 AMT highlights that the following safeguards have been put into place:[57]

(a) First, the Liquidator retains full and complete control of the pursuit of the claims against Orient and Mr Yang, including the sole responsibility to provide instructions to Mingda's solicitors;

(b) Second, although AMT has a right to be consulted and heard in respect of certain matters, the Liquidator ultimately retains the sole discretion in respect of decisions in the litigation;

(c) Third, the Liquidator is free to act in any manner he deems fit to comply with his legal and statutory duties; and

(d) Fourth, any creditor who may be prejudiced by the court's order in OA 26 is to be granted liberty to apply.

136 AMT has framed these safeguards in materially identical terms to that which the court in *Song Jianbo* considered to be adequate.[58] I see no reason why these safeguards cease to be so in the present case. In oral submissions, Ms Lee

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56 AMT's Written Submissions at para 67(2).

57 AMT's Written Submissions at paras 68 and 70.

58 AMT's Written Submissions at para 69.

submitted that the liberty to apply should be granted in the same terms as that in *Song Jianbo*, which sets out more comprehensively that "any other person who is or may be affected by the order to have liberty to have the order reviewed, set aside, or varied" (at [61]). As AMT does not raise any dispute to this, I am content to adopt this more substantial formulation.

137 For completeness, I will address the additional safeguards that SRT has proposed.

138 SRT submits that, under the Funding Agreement: (a) the Funder Creditor Amount should be expressly limited to AMT's proof of debt claim; and (b) the Funder's Costs should be limited and fixed by the court; and (c) JPM's costs should be properly explained and/or disclosed before being paid.[59] In sum, SRT's contention is that the definitions of these terms under the Funding Agreement are too broad, such that there is too much uncertainty in terms of their scope and potential value.

139 I find this to be unnecessary. I agree with AMT that the fact that these sums are subject to adjudication by the Liquidator is a sufficient safeguard for the interests of the creditors.[60] If the other creditors subsequently find that the Liquidator has acted unfairly or in abdication of his responsibilities, they have a statutory right of recourse to the courts (see s 190 of the IRDA).

140 A similar point can be made about SRT's proposal that the Funding Agreement expressly state that the Liquidator settle his costs and expenses in accordance with s 139(3) of the IRDA and r 148 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules

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59 SRT's Written Submissions at paras 35–42 and 46–47.

60 AMT's Written Submissions at para 74.

2020.[61] As this is a safeguard imposed and prescribed by law, I see no reason why it has to be superfluously duplicated as a term within the Funding Agreement.

Conclusion

141 To conclude, I summarise my decision on the applications before me:

(a) I allow SUM 125 in part:

(i) The Liquidator is granted authorisation to appoint FLC as solicitors for Mingda. However, this authorisation shall only take effect from the date of the order resulting from SUM 125 and shall not have any retrospective effect.

(ii) The Liquidator is granted authorisation to enter into the Funding Agreement with AMT on the proposed terms.

(b) I allow OA 26. I find the advantage sought by AMT to be fair and reasonable in the circumstances, and that sufficient safeguards have been proposed.

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61 SRT's Written Submissions at paras 44–45.

142 Costs directions on these applications shall be given separately.

Aedit Abdullah
Judge of the High Court

Tham Wei Chern and Samuel Ang Rong En (Fullerton Law Chambers LLC) for the applicant in SUM 125 and the respondent in OA 26;
Chua Xinying and Chia Su Min, Rebecca (Allen & Gledhill LLP) for the applicant in OA 26;
Justin Yip Yung Keong, Lam Zhen Yu and Wong Sze Qi (Withers KhattarWong LLP) for the non-party Shanghai Ran Yu Lian Trading Co Ltd;
Pillai Pradeep G, Lin Shuling Joycelyn and Chong Wei Jie (PRP Law LLC) for the non-party Orient Nickel Pte Ltd;
Lee Ping and Yong Ying Jie (Shook Lin & Bok LLP) for the non-party Yang Mingdong.