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

[2024] SGHC 155

Originating Application No 116 of 2024

In the matter of Part 11 and Section 252 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Article 15 of the UNCITRAL Model Law on Cross-Border Insolvency

And

In the matter of Fullerton Capital Limited (in liquidation) (BVI Company No 1815524)

Between

(1) Jason Aleksander Kardachi
(2) Elaine Hanrahan

… *Applicants*

And

Lau Yean Liang, Raymond

… *Non-party*

GROUNDS OF DECISION

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings]
[Insolvency Law — Cross-border insolvency — Disclosure and examination orders]

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Re Fullerton Capital Ltd (in liquidation)

[2024] SGHC 155

General Division of the High Court — Originating Application No 116 of 2024
Kristy Tan JC
8 April 2024

18 June 2024

Kristy Tan JC:

Introduction

1 In HC/OA 116/2024 ("OA 116"), the joint liquidators of Fullerton Capital Limited (in liquidation) ("FCL") sought two primary reliefs. First, the recognition, in Singapore, of the liquidation of FCL in the British Virgin Islands ("BVI") as a foreign main proceeding and of the joint liquidators as the appointed foreign representatives. Second, disclosure and examination orders against named "Relevant Persons". The non-party, Mr Lau Yean Liang, Raymond ("Mr Lau"), was one of the Relevant Persons. He objected to the recognition of the liquidation of FCL as a foreign main (or non-main) proceeding and to the disclosure and examination orders sought against him.[1] After hearing the parties, I allowed the joint liquidators' application in the main. Mr Lau filed an appeal against my decision on 5 May 2024.

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[1] Mr Lau's Written Submissions dated 3 April 2024 ("LWS") at p 2: Table of Contents.

Facts

The parties

2 Mr Jason Aleksander Kardachi ("Mr Kardachi") and Ms Elaine Hanrahan ("Ms Hanrahan") are the joint liquidators of FCL ("Joint Liquidators").[2] FCL is a company incorporated in the BVI on 11 March 2014. FCL's registered office is also located in the BVI.[3]

3 Mr Lau was a shareholder and director of FCL from 11 March 2014 to 20 March 2018.[4]

4 The Relevant Persons, against whom the Joint Liquidators sought disclosure and examination orders, were:[5]

(a) Ms Zhou Li Hua ("Ms Zhou"), who is presently the sole director of FCL and was a shareholder of FCL as of 20 March 2018;[6]

(b) Mr Tan Zhenjian ("Mr Tan"), who was a director of FCL from 20 March 2018 to 15 February 2019;[7]

(c) Mr Morgan James Wilbur IV ("Mr Wilbur"), who was employed by FCL from August 2016 to December 2018;[8]

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2 1st Affidavit of Mr Kardachi filed on 1 February 2024 ("JAK's 1st Affidavit") at para 1.

3 JAK's 1st Affidavit at para 6 and pp 29–31.

4 JAK's 1st Affidavit at para 13(a); Affidavit of Mr Lau filed on 13 March 2024 ("Mr Lau's Affidavit") at para 4(h).

5 Schedules 1 and 2 to OA 116.

6 JAK's 1st Affidavit at para 13(c).

7 JAK's 1st Affidavit at para 13(b).

8 JAK's 1st Affidavit at para 13(d).

(d) Mr Lau;

(e) UOB Kay Hian Private Limited ("UOB Kay Hian"), which managed the stock brokerage account relating to certain stock that was pledged to FCL (see [7] below);[9]

(f) PDLegal LLC ("PDLegal"), which were former solicitors of FCL;[10]

(g) RHTLaw Asia LLP ("RHTLaw"), which were also former solicitors of FCL;[11] and

(h) Maybank Singapore Limited ("Maybank"), with which FCL has bank accounts.[12]

5 Ahead of the hearing of OA 116, the Joint Liquidators reached agreement with UOB Kay Hian and PDLegal on the terms of the orders sought against them and proceeded on that agreed basis in respect of these entities.[13]

6 The Joint Liquidators took steps to notify the individuals and entities set out at [4] above of OA 116, save for Mr Tan in respect of whom they were

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9 JAK's 1st Affidavit at para 42.

10 JAK's 1st Affidavit at para 44.

11 JAK's 1st Affidavit at para 46.

12 JAK's 1st Affidavit at para 48.

13 2nd Affidavit of Mr Kardachi filed on 27 March 2024 ("JAK's 2nd Affidavit") at paras 32–35 and pp 18–25; Applicants' Written Submissions dated 3 April 2024 ("AWS") at paras 61–63.

unable to give notice due to deficiencies in the records of FCL regarding his address.[14] Only Mr Lau objected to OA 116.[15]

Background to the application

HC/S 435/2019

7 On or around 10 August 2017, FCL entered into a loan contract ("Contract") with Discovery Key Investments Limited ("DKI"), a company incorporated in the BVI.[16] Under the Contract, FCL agreed to lend DKI a sum of CAD110,000,000 as a non-recourse loan. As security for the loan, DKI pledged its 7,200,000 common stock in The Stars Group Inc., a Canadian corporate entity ("Pledged Stock").[17] I will refer to this loan transaction as the "Transaction".

8 On 26 April 2019, DKI commenced HC/S 435/2019 ("S 435") against FCL, Mr Lau and Mr Wilbur (collectively, the "S 435 Defendants").[18] The Transaction is the subject of the dispute in S 435. DKI claims that:[19]

(a) The S 435 Defendants misrepresented to DKI that FCL was a UK-incorporated company regulated by the Financial Conduct Authority.[20]

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14 AWS at paras 40 and 52; JAK's 2nd Affidavit at para 37; Notes of Arguments for OA 116 ("NA") at p 5:6–7.

15 AWS at para 40.

16 JAK's 1st Affidavit at para 17 and p 125: Statement of Claim (Amendment No 4) in HC/S 435/2019 ("S 435 SOC") at para 2.

17 JAK's 1st Affidavit at paras 17–18 and pp 327–346.

18 JAK's 1st Affidavit at para 15 and p 93.

19 JAK's 1st Affidavit at para 19.

20 JAK's 1st Affidavit at p 128: S 435 SOC at paras 12–13.

(b) The S 435 Defendants misrepresented to DKI that FCL had the independent finances to fund the loan instead of needing to sell the Pledged Stock to raise the required capital for the loan, and that FCL would not be selling the Pledged Stock.[21]

(c) FCL breached the Contract by, *inter alia*, selling the Pledged Stock prior to the disbursement of the loan, using the proceeds of the sale to disburse the loan, and failing to respond to DKI's e-mails regarding its intent to make prepayment.[22]

(d) The S 435 Defendants are liable for unlawful means conspiracy to injure DKI by, *inter alia*, dishonestly selling the Pledged Stock and using the proceeds of sale to fund the loan to DKI.[23]

9 On 27 February 2023, DKI discontinued S 435 against Mr Wilbur.[24]

Voluntary solvent liquidation, dissolution, restoration and insolvent liquidation, in turn, of FCL

10 On 28 March 2022, FCL's board and members initiated a voluntary solvent liquidation of FCL. One Ms Zhang Yingxia ("Ms Zhang") of "Hunan Province, China" was appointed as a voluntary liquidator pursuant to a directors' resolution dated 28 March 2022.[25] On 20 April 2022, Ms Zhang submitted a statement to the Registrar of Corporate Affairs in the BVI declaring that the liquidation of FCL was completed and that FCL could be struck off the

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21 JAK's 1st Affidavit at pp 151–152: S 435 SOC at paras 63–65.

22 JAK's 1st Affidavit at pp 152–154: S 435 SOC at paras 66–68.

23 JAK's 1st Affidavit at pp 156–157: S 435 SOC at paras 73–76.

24 JAK's 1st Affidavit at para 23.

25 JAK's 1st Affidavit at para 7 and pp 46–47.

Register of Companies. The dissolution of FCL was finalised on 20 April 2022.[26] On 11 July 2022, Ms Zhang wrote to FCL's Singapore solicitors at the time, PDLegal, requesting that they cease acting for FCL in S 435 as FCL "has now been dissolved".[27]

11 On 5 October 2022, DKI made an application ("BVI Restoration Application") to the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of the Virgin Islands ("BVI High Court") for an order that the dissolution of FCL be declared void and that FCL be restored to liquidation on the Register of Companies in the BVI, so as to enable DKI to continue with S 435. DKI also nominated Ms Hanrahan (*ie*, the second applicant in OA 116) and Mr Patrick Bance ("Mr Bance") to be the voluntary liquidators of FCL upon its restoration to the Register of Companies.[28]

12 On 10 October 2022, the BVI High Court made an order ("BVI Restoration Order") under which, *inter alia*:[29]

(a) the dissolution of FCL was declared void;

(b) it was ordered that FCL be restored to the Register of Companies and be deemed never to have been dissolved or struck off the Register;

(c) Ms Hanrahan and Mr Bance were appointed as the joint liquidators of FCL upon its restoration to the Register of Companies ("Joint Voluntary Liquidators");

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26 JAK's 1st Affidavit at para 7 and pp 51 and 58.

27 JAK's 1st Affidavit at pp 52–53.

28 JAK's 1st Affidavit at para 8 and pp 62–65.

29 JAK's 1st Affidavit at paras 9–10 and pp 77–79.

(d) the Joint Voluntary Liquidators were empowered, *inter alia*, (i) to investigate the affairs of FCL and to assess the applicability of ss 209, 210 and 211 of the BVI Business Companies Act 2004 (No 16 of 2004) ("BVI BCA") (regarding steps a voluntary liquidator of a company in voluntary liquidation is to take where he is of the opinion that the company is insolvent), and (ii) to take such steps as they deemed fit in S 435; and

(e) it was ordered that "[DKI]'s claim for its costs to be paid by [FCL] be adjourned *sine die*".

13 On 27 October 2022, FCL was restored to the Register of Companies in the BVI.[30]

14 Following initial investigations by the Joint Voluntary Liquidators, they concluded that FCL was no longer in a position to pay its debts as they fell due.[31] The Joint Voluntary Liquidators reached this conclusion because FCL was liable to pay DKI costs of USD67,303.29 for the BVI Restoration Application but was unable to do so. No documents available to the Joint Voluntary Liquidators showed that FCL was solvent.[32]

15 On 12 December 2022, the Joint Voluntary Liquidators provided notice to the Official Receiver, in accordance with s 209(2) of the BVI BCA, that they intended to proceed with the liquidation of FCL as an insolvent liquidation and as if they had been appointed under the provisions of the Insolvency Act 2003

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30 JAK's 1st Affidavit at p 82.

31 JAK's 1st Affidavit at para 11.

32 JAK's 2nd Affidavit at para 25(a) and p 83.

(No 5 of 2003) (BVI) ("BVI IA"). The Joint Voluntary Liquidators accordingly became the joint liquidators of FCL.[33]

16 On 25 July 2023, DKI, as the sole creditor of FCL, resolved to appoint Mr Kardachi as a joint liquidator of FCL upon the resignation of Mr Bance due to personal circumstances.[34]

17 On 27 November 2023, FCL entered into a funding agreement with DKI for DKI to provide funding to the Joint Liquidators to investigate the affairs of FCL and to commence the necessary actions or applications in the relevant jurisdictions.[35]

BVI High Court's sanction of proceedings by the Joint Liquidators

18 On 8 December 2023, the Joint Liquidators applied to the BVI High Court for permission to (a) commence and maintain proceedings before any court of competent jurisdiction as the Joint Liquidators considered appropriate to seek recognition and enforcement of the BVI Restoration Order within such jurisdictions; and (b) commence and maintain proceedings / applications before any court of competent jurisdiction as the Joint Liquidators considered appropriate against any necessary person or entity to request disclosure of relevant information / documents concerning the actions or affairs of FCL ("BVI Sanction Application").[36]

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33 JAK's 1st Affidavit at para 11 and p 84.

34 JAK's 1st Affidavit at para 12 and pp 90–91.

35 JAK's 1st Affidavit at para 51.

36 JAK's 1st Affidavit at para 26 and pp 376–385.

19 On 12 December 2023, the BVI High Court made an order granting the BVI Sanction Application ("BVI Sanction Order").[37]

OA 116

20 On 1 February 2024, the Joint Liquidators commenced OA 116 to seek recognition, in Singapore, of the insolvent liquidation of FCL in the BVI ("BVI Liquidation") as a foreign main proceeding and of the Joint Liquidators as the appointed foreign representatives, as well as disclosure and examination orders against the Relevant Persons.

The parties' cases

The Joint Liquidators' case

21 The Joint Liquidators submitted that the BVI Liquidation must be recognised because the requirements under Art 17 of the Third Schedule to the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), which sets out the Model Law on Cross-Border Insolvency (30 May 1997) ("Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL") as adapted and enacted in Singapore ("SG Model Law"), were satisfied:

> (a) The BVI Liquidation was a "foreign proceeding" within the meaning of Art 2(*h*) of the SG Model Law as it was a proceeding pursuant to a law relating to insolvency in which FCL's assets and affairs were subject to control and supervision by the BVI courts, for the purpose of liquidation.[38]

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37 JAK's 1st Affidavit at para 28 and pp 459–460.

38 AWS at para 25(b).

(b) The Joint Liquidators were "foreign representatives" within the meaning of Art 2(*i*) of the SG Model Law as they were appointed under the BVI Restoration Order to investigate FCL's affairs (albeit Mr Bance was later replaced by Mr Kardachi). The Joint Liquidators' BVI Sanction Application was also granted under the BVI Sanction Order.[39]

(c) The requirements under Arts 15(2) and (3) of the SG Model Law were satisfied. In respect of Art 15(2), the Joint Liquidators' counsel confirmed at the hearing of OA 116 that they were proceeding under Art 15(2)(*c*).[40] The existence of the BVI Liquidation and the appointment of the Joint Liquidators was evidenced by: the BVI Restoration Order appointing the Joint Liquidators (see [12] above); the Joint Liquidators' notification to the Official Receiver dated 12 December 2022 that FCL's liquidation would continue as an insolvent liquidation (see [15] above); the creditor's resolution appointing Mr Kardachi in place of Mr Bance as a Joint Liquidator (see [16] above); and the BVI Sanction Order (see [19] above).[41] In respect of Art 15(3), OA 116 was accompanied by a statement identifying all foreign proceedings and proceedings under Singapore insolvency law in respect of FCL that were known to the Joint Liquidators.[42] Specifically, the Joint Liquidators averred that (i) no proceedings under Singapore insolvency law or other legal proceedings had been commenced in respect of FCL in Singapore save for OA 116 and S 435, and (ii) no proceedings under Singapore insolvency law or other legal proceedings had been

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39 AWS at paras 25(a) and (c).

40 NA at p 8:11–15.

41 AWS at paras 26(a)–(d).

42 AWS at para 26(e).

commenced in respect of FCL elsewhere save for the BVI Sanction Application.[43]

(d) OA 116 was submitted to the General Division of the High Court, which is the court mentioned in Art 4 of the SG Model Law.[44]

(e) The public policy exception in Art 6 of the SG Model Law did not apply: the recognition sought by the Joint Liquidators was not contrary to the public policy of Singapore. No contravention of public policy had been identified by any person affected by OA 116, including Mr Lau. While Mr Lau had alleged in his affidavit that the Joint Liquidators were improperly appointed, his allegations were unsubstantiated. The Joint Liquidators were appointed pursuant to an unchallenged order of the BVI High Court (*viz*, the BVI Restoration Order). In fact, Mr Lau had been informed of the BVI Restoration Application but did not participate in the hearing of the BVI Restoration Application or take any action in relation to the BVI Restoration Application or the BVI Restoration Order.[45]

22 The Joint Liquidators further submitted that the BVI Liquidation should be recognised as a "foreign main proceeding" pursuant to Art 17(2) of the SG Model Law because the BVI was FCL's centre of main interests ("COMI"). Under Art 16(3) of the SG Model Law, FCL's COMI was presumed to be the BVI because FCL's registered address prior to its liquidation was in the BVI.[46] This presumption was not displaced as the relevant factors pointed evenly to

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43 JAK's 1st Affidavit at para 14.

44 AWS at para 26(f).

45 AWS at paras 34–37; JAK's 2nd Affidavit at para 18 and pp 75–76, 78 and 80–81.

46 AWS at para 29.

various jurisdictions.[47] At the hearing of OA 116, the Joint Liquidators' counsel additionally argued that the proceedings in relation to the BVI Restoration Application also pointed in favour of the BVI as FCL's COMI.[48]

23 In the alternative, the Joint Liquidators submitted that the BVI Liquidation should be recognised as a foreign non-main proceeding.[49]

24 As for the disclosure and examination orders sought, the Joint Liquidators submitted that these orders should be granted pursuant to Art 21(1)(*d*) of the SG Model Law and Art 21(1)(*g*) of the SG Model Law read with s 244 of the IRDA.[50] The documents and information sought by the Joint Liquidators were limited to those relating to FCL's assets, affairs, rights, obligations or liabilities.[51] Specifically:

> (a) As against Ms Zhou, Mr Tan, Mr Wilbur, Mr Lau, RHTLaw and Maybank, the Joint Liquidators sought an order to be empowered to require these persons to (i) submit an affidavit containing such information as the Joint Liquidators may require "pertaining to [their] dealings with [FCL] and/or the Transaction and/or the Pledged Stock"; (ii) produce any books, papers or other records in their possession, power or control "pertaining to [FCL's] affairs, including but not limited to, [their] dealings with [FCL] and/or the Transaction and/or the Pledged Stock" (save in the case of Maybank, from whom documents pertaining to FCL's bank account and transactions concerning the Pledged Stock

47 AWS at paras 30–31.

48 NA at pp 8:30–9:1 and 10:8–9.

49 AWS at para 32.

50 AWS at paras 41–45.

51 AWS at para 46.

were sought); and (iii) appear before the court to be examined orally "concerning their dealings with [FCL] and/or the Transaction and/or the Pledged [Stock]" ("Disclosure and Examination Order").[52] The Joint Liquidators also sought for the Disclosure and Examination Order to have "injunctive effect" by way of an order that it "shall have effect as against each [of these persons] in the same way as an order made under s 244 of the IRDA would have against that [person]" ("Injunctive Effect Order").[53]

(b) As against UOB Kay Hian, the order sought, by consent, was for UOB Kay Hian to produce certain affidavits it had filed in S 435.[54]

(c) As against PDLegal, the order sought, by consent, was for PDLegal to produce "any books, papers or other records in its possession or control pertaining to [FCL's] affairs, including but not limited to, its dealings with [FCL] and/or the Transaction and/or the Pledged Stock".[55]

25 The Joint Liquidators explained that the Transaction appeared to be the only material transaction performed by FCL prior to its insolvency.[56] The documents and/or information sought would allow the Joint Liquidators to investigate the allegations made in S 435 in order to consider the positions to take in S 435; investigate whether there had been improper conduct or mismanagement in relation to the Pledged Stock or proceeds arising from their

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52 Prayer 1(3) and Schedules 1 and 2 to OA 116 read with JAK's 2nd Affidavit at para 35 and pp 23–25.

53 AWS at para 68.

54 JAK's 2nd Affidavit at para 33; NA at pp 6:16–7:1.

55 JAK's 2nd Affidavit at para 34; NA at p 7:5–7.

56 AWS at para 47.

sale; and ascertain whether FCL may have claims against its former directors or agents for breaches of duties. This was ultimately for the proper administration of FCL's liquidation.[57]

26 The persons against whom the orders were sought could provide relevant documents or information:

(a) Ms Zhou and Mr Tan's directorships fell within the material period during which the possible sale of the Pledged Stock and the use of the sale proceeds were likely to have taken place.[58] Although they resided in China, s 244 of the IRDA applied extra-territorially (citing *Xu Wei Dong v Midas Holdings Ltd* [2022] SGHC 268 at [28] and [34]).[59] Further, while the Joint Liquidators had not given notice of OA 116 to Mr Tan due to the deficiencies in the records of FCL, the Joint Liquidators anticipated that they could obtain his contact details from other Relevant Persons if the request for disclosure in OA 116 was granted.[60]

(b) Mr Wilbur was deeply involved in the Transaction and had been a defendant in S 435. According to Mr Lau, Mr Wilbur had instructed him to sell the Pledged Stock and disburse the loan to DKI, and Mr Wilbur played a central role in negotiating and executing the Transaction.[61]

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57 AWS at para 48 read with paras 19(b)–(c).

58 AWS at paras 49–50.

59 AWS at para 51.

60 AWS at para 52.

61 AWS at paras 53–54.

(c) Mr Lau was deeply involved in the Transaction and was a defendant in S 435. According to Mr Lau, Ms Zhou had requested that he help to continue to "monitor the loan". This indicated that he continued to be involved in the Transaction, notwithstanding his resignation as FCL's director and the transfer of his shares in FCL to Ms Zhou in March 2018.[62] In response to Mr Lau's allegation that the Joint Liquidators were in a position of conflict and would share information and/or documents provided by Mr Lau with DKI, the Joint Liquidators averred that they would act in accordance with their professional duties and the relevant laws, and only use information obtained from OA 116 for the purposes of the liquidation of FCL and in the interest of the liquidation estate. Further, it was not improper for the Joint Liquidators to obtain funding from DKI to meet the costs and expenses associated with the investigations into the affairs of FCL.[63]

(d) UOB Kay Hian managed the stock brokerage account relating to the Pledged Stock and executed FCL's instructions in this regard.[64]

(e) RHTLaw were former solicitors of FCL and thus likely held records of FCL relating to the Transaction or to other assets and transactions involving FCL that may be available and/or recoverable for the benefit of creditors.[65] PDLegal were also former solicitors of FCL.[66]

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62 AWS at paras 55–56 read with para 49.

63 AWS at paras 57–59; JAK's 2nd Affidavit at para 28.

64 AWS at para 60.

65 AWS at para 65.

66 AWS at para 60.

(f) As FCL had bank accounts with Maybank, Maybank may have details regarding the sale proceeds of the Pledged Stock and any related transactions.[67]

Mr Lau's case

27 Mr Lau argued that the BVI Liquidation should not be recognised as a foreign main proceeding because FCL's COMI was Hong Kong, China or alternatively, Singapore.[68] FCL's activities pointed to Hong Kong as its COMI:

(a) China was the location from which control and direction were administered. From 2018 to 2022, FCL's shareholder and directors, namely Ms Zhou and Mr Tan, were based in China. The first liquidator appointed pursuant to FCL's voluntary solvent liquidation, Ms Zhang, was based in China. Her appointment reflected FCL's director's recognition that "FCL's centre of gravity" was in China.[69]

(b) FCL's operations were in China. FCL stated in its incorporation documents that it would not be carrying on business with persons resident in the BVI.[70] In one of the Contract documents, *viz* a Stock Secured Financing Agreement between FCL and DKI dated 10 August 2017 ("Loan Agreement"), a Hong Kong address was stated for "Fullerton Capital Limited".[71] DKI, FCL's sole creditor, was based in Hong Kong. This was evidenced by the fact that DKI had signed the

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67 AWS at para 66.

68 LWS at para 5.

69 LWS at paras 15–16.

70 LWS at para 17; JAK's 1st Affidavit at p 41.

71 LWS at para 18; JAK's 1st Affidavit at p 339.

Contract documents in Hong Kong.[72] When the Joint Liquidators attempted to contact Ms Zhou in 2022, they addressed their letters to an address in Hunan, China.[73] DKI served its letter of demand for its claim relating to the Transaction at "[FCL's] Hong Kong addresses reflected in the Loan Agreement and in company searches done on other "*Fullerton Capital*" entities in Hong Kong …".[74] FCL's registered address in the BVI was merely a "letterbox" address – none of its employees, managers, directors, creditors, bank accounts or assets was in the BVI; no business was conducted there and the Contract documents were not signed there.[75]

(c) While UK law governed the Contract,[76] this was irrelevant to FCL's COMI. UK law was chosen because it facilitated the transfer of title to the Pledged Stock contemplated by the Contract and not because FCL considered the UK to be its COMI.[77]

28 Even if the location of FCL's control and management was to be regarded as Singapore (where Mr Lau resided) on the basis of DKI's allegation in S 435 that Mr Lau was the alter ego and controlling mind of FCL (which he denied), this merely meant that FCL's COMI was Singapore and not the BVI.[78]

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72 LWS at para 19.

73 LWS at para 20.

74 LWS at para 21; JAK's 1st Affidavit at p 145: S 435 SOC at para 43.

75 LWS at para 22.

76 JAK's 1st Affidavit at pp 329 and 341.

77 LWS at para 23.

78 LWS at para 24.

29 The Joint Liquidators' allegation that the factors pointed evenly towards different jurisdictions was incorrect – all the factors pointed away from the BVI.[79] Further, the acts of the Joint Liquidators in investigating the affairs of FCL were irrelevant in establishing FCL's COMI because the main inquiry concerned the actions of FCL when it was alive and flourishing. Even if the court considered the acts of the Joint Liquidators, FCL's COMI would shift to Singapore rather than the BVI.[80]

30 Mr Lau also argued that the BVI Liquidation should not be recognised as a foreign non-main proceeding either.[81]

31 As for the Disclosure and Examination Order sought against Mr Lau, Mr Lau argued that it should not be granted. Mr Lau was an "interested person" under Art 22(1) of the SG Model Law. Accordingly, in granting discretionary relief, the court had to be satisfied that his interests were adequately protected.[82] In this regard:

> (a) The information he held was of strategic importance in S 435. There was a real danger that the Joint Liquidators would share the information with DKI, as they had to report their findings in OA 116 to FCL's committee of creditors, which included DKI. This would prejudice his defence in S 435.[83] DKI was also funding the Joint Liquidators to investigate the affairs of FCL, which meant that the Joint Liquidators were acting in furtherance of DKI's interest to obtain

79 LWS at paras 26–27.

80 LWS at paras 29–31.

81 LWS at para 34.

82 LWS at paras 37–40.

83 LWS at para 43.

information on Mr Lau's "evidence" and "defence strategy" in S 435. This was an abuse of process by DKI.[84]

(b) Mr Lau would be prejudiced if the Joint Liquidators were allowed to cross-examine him prior to actually taking legal action against him.[85]

(c) He would also be prejudiced by the Joint Liquidators' use and disclosure in S 435 of documents and evidence obtained pursuant to OA 116.[86]

Issues for determination

32 Three main issues arose for determination:

(a) whether the requirements for recognising a foreign proceeding under Art 17 of the SG Model Law were satisfied ("Art 17 Issue");

(b) if the first issue was decided in the affirmative:

(i) whether the BVI Liquidation should be recognised as a foreign main or non-main proceeding ("COMI Issue"); and

(ii) whether the Disclosure and Examination Order sought against Mr Lau should be granted ("Discretionary Relief Issue").

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84 Mr Lau's Affidavit at para 17.

85 LWS at paras 44–47.

86 LWS at paras 48–50.

33 I address each issue in turn.

Art 17 Issue

34 The SG Model Law has the force of law in Singapore pursuant to s 252(1) of the IRDA. Under Art 17(1) of the SG Model Law, the court must recognise a proceeding if (a) it is a foreign proceeding within the meaning of Art 2(*h*); (b) the person or body applying for recognition is a foreign representative within the meaning of Art 2(*i*); (c) the application meets the requirements of Arts 15(2) and (3); and (d) the application has been submitted to the court mentioned in Art 4. This is subject to Art 6, under which the court may refuse recognition if that would be contrary to the public policy of Singapore.

35 While neither Mr Lau nor any other person took issue with any of the formal and substantive requirements for recognition under Art 17(1) of the SG Model Law, I nevertheless considered whether the Joint Liquidators had satisfied the essential elements for recognition of the BVI Liquidation in Singapore.

Foreign proceeding

36 The first requirement under Art 17(1) is that the BVI Liquidation must be a foreign proceeding within the meaning of Art 2(*h*).

37 Article 2(*h*) defines a "foreign proceeding" as:

> … a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation[.]

38 For a proceeding to qualify as a foreign proceeding under Art 2(*h*), (a) the proceeding must be collective in nature, meaning that it must involve all creditors of the debtor generally and deal with substantially all of the debtor's assets and liabilities; (b) the proceeding must be a judicial or administrative proceeding in a foreign State; (c) the proceeding must be conducted under a law relating to insolvency or adjustment of debt; (d) the property and affairs of the debtor company must be subject to control or supervision by a foreign court in that proceeding; and (e) the proceeding must be for the purpose of reorganisation or liquidation: *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2023] 2 SLR 421 ("*Ascentra*") at [29], [66] and [104].

39 I was satisfied that the BVI Liquidation is a foreign proceeding within the meaning of Art 2(*h*). The satisfaction of the second and fifth requirements cannot possibly be controversial. As for the other requirements:

(a) The BVI Liquidation is a collective proceeding. It proceeds under the BVI IA,[87] and is subject to provisions thereunder (of which the court may take judicial notice under s 59(1)(*b*) of the Evidence Act 1893 (2020 Rev Ed) as the BVI is a member of the British Commonwealth) that are concerned generally with the rights of all of FCL's creditors, such as s 207 which governs the distribution of the assets of a company in liquidation (see, similarly, *Ascentra* at [106]). Further, there was no suggestion that any assets or liabilities of FCL were not dealt with in the liquidation (see *Ascentra at* [104(b)]).

(b) The BVI IA, under which the BVI Liquidation is conducted, is a law relating to insolvency.

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87 JAK's 1st Affidavit at para 11.

(c) FCL's assets and affairs are subject to control and supervision by the BVI courts in the liquidation, as evidenced by the terms of the BVI Restoration Order and the BVI Sanction Order made by the BVI High Court.[88]

Foreign representatives

40 The second requirement under Art 17(1) is that the Joint Liquidators must be foreign representatives within the meaning of Art 2(*i*).

41 Article 2(*i*) defines a "foreign representative" as:

> … a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's property or affairs or to act as a representative of the foreign proceeding[.]

42 I was satisfied that the Joint Liquidators are foreign representatives within the meaning of Art 2(*i*). The fact of appointment of the foreign representative in the foreign proceeding suffices: *Re Tantleff, Alan* [2023] 3 SLR 250 ("*Tantleff*") at [92], citing the *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, UN Sales No E.14.V.2 (2014), Part two at para 86. Ms Hanrahan and Mr Bance were appointed as the Joint Voluntary Liquidators of FCL pursuant to the BVI Restoration Order (see [12] above). On determining that FCL was no longer in a position to pay its debts, they continued to conduct the insolvent liquidation of FCL as if they had been appointed liquidators under the BVI IA, further to the 12 December 2022 notice given to the Official Receiver under s 209(2) of the BVI BCA (see [14]–[15] above) and in accordance with s 211(1) of the BVI BCA. Mr Kardachi replaced Mr Bance as a Joint Liquidator of FCL upon Mr

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88 See also JAK's 1st Affidavit at para 31(a).

Bance's resignation (see [16] above). The BVI Sanction Order was made in respect of Ms Hanrahan and Mr Kardachi as the Joint Liquidators.[89] In these circumstances, the Joint Liquidators qualified as foreign representatives. Mr Lau's counsel also confirmed at the hearing of OA 116 that Mr Lau had no standalone objection to the recognition of the Joint Liquidators as foreign representatives.[90]

Articles 15(2) and (3)

43 The third requirement under Art 17 is that the requirements of Arts 15(2) and (3) must be satisfied.

44 Articles 15(2) and (3) stipulate what must accompany an application for recognition:

> 2. An application for recognition must be accompanied by —
>
> (*a*) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative;
>
> (*b*) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or
>
> (*c*) in the absence of evidence mentioned in sub-paragraphs (*a*) and (*b*), any other evidence acceptable to the Court of the existence of the foreign proceeding and of the appointment of the foreign representative.
>
> 3. An application for recognition must also be accompanied by a statement identifying all foreign proceedings and proceedings under Singapore insolvency law in respect of the debtor that are known to the foreign representative.

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89 JAK's 1st Affidavit at pp 459–460.

90 NA at p 3:25–29.

45 I agreed with the Joint Liquidators' submissions (set out at [21(c)] above) that the requirements of Arts 15(2)(*c*) (on which they relied) and (3) were satisfied.

Article 4

46 The final requirement under Art 17 is that OA 116 must be submitted to the court mentioned in Art 4(1), *viz*, the General Division of the High Court in Singapore. This was satisfied.

47 In addition, Art 4(2) states:

> Subject to paragraph 1 of this Article, the Court has jurisdiction in relation to the functions mentioned in that paragraph if —
>
> (*a*) the debtor —
>
> (i) is or has been carrying on business within the meaning of section 366 of the Companies Act 1967 in Singapore; or
>
> (ii) has property situated in Singapore; or
>
> (*b*) the Court considers for any other reason that it is the appropriate forum to consider the question or provide the assistance requested.

48 In the present case, there was no evidence of the matters set out in Art 4(2)(*a*). However, I was satisfied, under Art 4(2)(*b*), that the Singapore court was the appropriate forum to grant recognition of the BVI Liquidation and to provide the assistance requested in OA 116. FCL was involved in S 435; several of the Relevant Persons were located in Singapore (*eg*, Mr Wilbur and Mr Lau); and the Pledged Stock and their sale proceeds were potentially handled by financial institutions in Singapore (*eg*, UOB Kay Hian and Maybank).[91] In 2023, after having been contacted by Ms Hanrahan for information, UOB Kay

[91] AWS at para 33.

Hian indicated that "[a]s there is no automatic recognition of the BVI Court Order in Singapore, please take steps to obtain a Singapore Court Order recognising [the liquidators'] appointment and authority to act on behalf of [FCL]";[92] and Maybank asked for "a certified true copy of the court order issued by the courts of Singapore recognising … the joint liquidators of [FCL]".[93] Recognition of the BVI Liquidation and of the Joint Liquidators as foreign representatives would enable them to take steps in Singapore to organise, investigate and obtain information regarding FCL's affairs.[94] This would facilitate a fair and efficient administration of FCL's liquidation that protects the interests of all creditors and other interested persons, including the debtor FCL, which is an objective of the SG Model Law (see *Re Thresh, Charles and another (British Steamship Protection and Indemnity Association Ltd and another, non-parties)* [2023] SGHC 337 ("*Thresh*") at [72]).

Public policy exception

49 Turning to consider whether the public policy exception under Art 6 applied, it is trite that preventing the exercise of or limiting a person's rights on public policy grounds is an exceptional measure, and the burden is on the party invoking such grounds to specify the public policy engaged and how it has been (or will be) violated: *Thresh* at [42]. To my understanding, Mr Lau did not oppose the recognition of the BVI Liquidation on public policy grounds; he certainly did not articulate any public policy that would allegedly be violated by the recognition of the BVI Liquidation as a foreign proceeding and of the Joint Liquidators as foreign representatives.

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92 JAK's 1st Affidavit at para 42 and p 490.

93 JAK's 1st Affidavit at para 48 and p 525.

94 AWS at para 19.

50 While Mr Lau made allegations in his affidavit as to the propriety of the Joint Voluntary Liquidators' decision to proceed with an insolvent liquidation, these were not framed as a public policy objection. Further, his allegations appeared to stem from his misunderstanding that the determination of FCL's insolvency was based on DKI's claims in S 435;[95] whereas the Joint Liquidators had neither accepted nor denied DKI's claims in S 435 and had proceeded on the basis of unpaid costs owed by FCL to DKI arising from the BVI Restoration Application.[96] Indeed, following the Joint Liquidators' explanation in this regard in Mr Kardachi's reply affidavit, Mr Lau "acknowledge[d] that [his] earlier allegation (that the [Joint Liquidators] had wrongfully admitted [DKI's claims in S 435]) was erroneous" [footnote in original omitted].[97] At the hearing of OA 116, Mr Lau's counsel then questioned if the BVI High Court had ordered costs to be paid to DKI. In response, the Joint Liquidators' counsel elaborated that, while the BVI High Court had ordered DKI's claim for its costs to be "adjourned *sine die*" under the BVI Restoration Order, the Joint Voluntary Liquidators had taken the view that costs would follow the event; FCL would be liable to pay DKI's costs of the BVI Restoration Application; and it was hence in FCL's interest to accept DKI's proposal for costs to be agreed in the discounted amount of USD67,303.29 to avoid incurring additional costs of a court assessment.[98] This appeared to me a reasonable view to take, although this consideration was not in any event relevant to determining the recognition application. As Mr Lau's counsel conceded, whether or not FCL should have been put into insolvent liquidation was a matter for the BVI courts.[99] This was

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95 Mr Lau's Affidavit at paras 14–16.

96 JAK's 2nd Affidavit at para 25.

97 LWS at para 5.

98 JAK's 2nd Affidavit at p 101; NA at pp 7:30–8:7.

99 NA at p 7:26–28.

rightly acknowledged. Whether or not a foreign insolvency proceeding was properly commenced is irrelevant to the granting of recognition: *Re Zetta Jet Pte Ltd and others* [2018] 4 SLR 801 at [13]. It is neither required nor desirable for a recognition court to delve into the merits of a foreign insolvency proceeding as a recognition proceeding is a light-touch process: *Re PT Garuda Indonesia (Persero) Tbk and another matter* [2024] 3 SLR 254 ("*PT Garuda*") at [95]. In the present case, as the BVI Sanction Order clearly demonstrated, the BVI High Court treated FCL as being in insolvent liquidation.

Conclusion

51 I therefore concluded that, pursuant to Art 17(1) of the SG Model Law, this court must recognise the BVI Liquidation. This led me to consider whether the BVI Liquidation should be recognised as a foreign main or non-main proceeding.

COMI Issue

Foreign main proceeding

52 I began by considering whether the BVI Liquidation should be recognised as a foreign main proceeding.

Legal principles

53 Article 2(*f*) of the SG Model Law defines "foreign main proceeding" as "a foreign proceeding taking place in the State where the debtor has its [COMI]". Only foreign main proceedings qualify for automatic reliefs under Art 20(1): *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet (No 2)*") at [28].

54 Pursuant to Art 16(3) of the SG Model Law, in the absence of proof to the contrary, the debtor's registered office is presumed to be its COMI. This presumption operates as a starting point subject to displacement by evidence to the contrary: *Zetta Jet (No 2)* at [31].

55 The relevant date to determine a debtor's COMI is the date the application for recognition is filed: *Zetta Jet (No 2)* at [53].

56 The factors to determine COMI must be objectively ascertainable by third parties generally, with a focus on creditors and potential creditors in particular: *Zetta Jet (No 2)* at [76]. Factors that the court may consider include the location from which control and direction were administered, the location of creditors, the location of operations and the governing law: *Tantleff* at [37]. The focus is on determining the centre of gravity of the objectively ascertainable factors: *Zetta Jet (No 2)* at [80]. However, as stated in *Zetta Jet (No 2) at* [81], where the factors do not clearly tip in favour of a particular location, the Art 16(3) presumption would operate in favour of taking the location of the debtor's registered office as its COMI:

> … where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. *Where the scale does not clearly tip either way, the location of the registered office will be taken to be the COMI by default.* And, as is the case here, if there are background disputes between shareholders affecting questions of management and direction, that again may, on the facts, lead to the conclusion that the presumption or default position should be upheld. [emphasis added]

Analysis

57 Applying Art 16(3) of the SG Model Law, the BVI, where FCL's registered office is located (see [2] above), is presumed to be FCL's COMI. The date of the Joint Liquidators' recognition application in OA 116, and therefore the relevant date for the COMI determination, is 1 February 2024.

(1) Location of control and direction

58 Ms Zhou, who is presently the sole director of FCL, resides in China.[100] Letters from the Joint Liquidators to Ms Zhou were also sent to China.[101] I was not, however, persuaded that this was a material factor pointing to China as FCL's COMI. As the court in *Re Rooftop Group International Pte Ltd and another (Triumphant Gold Ltd and another, non-parties)* [2020] 4 SLR 680 explained, the question is whether it was objectively ascertainable by third parties that the debtor's operational decisions were being made at the location of its controller (at [18] and [21]):

> 18 … [T]he fact that the second applicant [who was the primary decision maker for the first applicant] is a US citizen, or may have been largely present in the US, would not also point definitively to the US as the first applicant's COMI. In this regard, there was little evidence that would have been available to third parties demonstrating that operational decisions of the first applicant were being made in the US. I could not see that any creditor would regard the US as the centre of gravity of the first applicant simply because of the second applicant.
>
> …
>
> 21 While it is correct that the time for assessment of a debtor company's COMI, as I laid down in *Zetta Jet (No 2)* … is at the point of application, it does not follow that all possible factors extant at that point would go towards determining the COMI. The focus is on factors which are *objectively ascertainable* by third parties (see *Zetta Jet (No 2)* at [76]). Thus, the fact that the second applicant may have been in sole control at this point, would not be determinative.
>
> [emphasis in original]

59 In the present case, there was no evidence of what exactly Ms Zhou did *vis-à-vis* FCL. Even assuming, however, that she made the operational decisions of FCL, I did not think that third parties would be able to objectively ascertain

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100 JAK's 1st Affidavit at para 13(c).

101 JAK's 1st Affidavit at pp 362–374.

that she (*qua* FCL's director) resided in China, much less that FCL's operational decisions were being made in China.

60 Mr Lau also argued that the appointment of Ms Zhang, who was based in China, as FCL's voluntary liquidator (when FCL was first placed in voluntary solvent liquidation) "reflected FCL's director's recognition that FCL's centre of gravity was in China and the liquidator should be based in that country".[102] I found this argument to be speculative. There was no evidence of the reasons for Ms Zhang's appointment.

61 I therefore found that the location from which control and direction of FCL was supposedly administered was not a determinative factor in determining its COMI.

(2) Location of creditor

62 I also placed little weight on the location of DKI (*ie*, FCL's creditor) as a factor. While the location of creditors is typically a relevant consideration, it was unclear on the evidence before me where DKI is based. DKI was incorporated in the BVI (see [7] above), but provided a Hong Kong address in the Loan Agreement for notification purposes.[103] That DKI may have had an office in Hong Kong was insufficient evidence for me to conclude that DKI was based there.

(3) Location of operations

63 FCL was in insolvent liquidation at the time the recognition application was filed. At the hearing of OA 116, the Joint Liquidators' counsel submitted

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102 LWS at para 16.

103 JAK's 1st Affidavit at p 339.

that FCL should be regarded as a dormant company as it had placed itself in voluntary solvent liquidation prior to its insolvent liquidation. The operations of FCL preceding its voluntary solvent liquidation were thus "historical" and irrelevant to the determination of its COMI.[104] I did not accept that FCL's operations prior to its voluntary solvent liquidation should be disregarded. The court in *Tantleff* explained that the jurisprudential basis of the COMI requirement is to determine where the debtor company was centred "while it was alive and flourishing" (at [45]).

64 Mr Lau gave no evidence of the nature of FCL's operations prior to its voluntary solvent liquidation. The Joint Liquidators stated that the Transaction appeared to be the only material transaction performed by FCL prior to its insolvency,[105] and Mr Lau appeared content to confine his submissions (so far as FCL's "operations" were concerned) to the Transaction. In this regard, Mr Lau pointed to the fact that a Hong Kong address was stated for "Fullerton Capital Limited" in the Loan Agreement[106] and suggested that Hong Kong was therefore the location of FCL's operations.[107] However, it appeared to be seriously disputed in S 435 that FCL was located at that (or any) Hong Kong address:

(a) DKI had pleaded in the S 435 SOC at paras 43 and 44 that:[108]

> 43. [DKI] served the Demand Letter, *inter alia*, at [FCL's] Hong Kong addresses reflected in the Loan Agreement and in company searches done on other "*Fullerton Capital*" entities in Hong Kong and the UK.

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104 NA at p 8:24–29.

105 JAK's 2nd Affidavit at para 31(a).

106 JAK's 1st Affidavit at p 339.

107 LWS at para 18.

108 JAK's 1st Affidavit at p 145: S 435 SOC at paras 43–44.

> 44. However, there was no sign of any company by the name of "*Fullerton Capital Limited*" at either of the Hong Kong addresses reflected in the company searches or the Loan Agreement.
>
> [emphasis added in underline]

(b) In response, FCL had pleaded that: "Insofar as paragraphs 43 to 46 [of the S 435 SOC] contain allegations against [FCL], they are *not admitted*, and [DKI] is put to strict proof thereof" [emphasis added].[109]

65 There were also disputes in S 435 which made the locus of the activities relating to the Transaction difficult to discern. For example, the parties disputed:

(a) whether Mr Lau wholly owned and managed FCL (as claimed by DKI)[110] or Mr Wilbur managed and coordinated the Transaction (as claimed by FCL);[111] and

(b) whether Mr Wilbur had a residential address in Singapore at the material time (as claimed by DKI[112] but denied by FCL[113]).

66 Given these disputes of fact to be resolved in S 435 (see [64] and [65] above), I did not think it was safe to proceed as if there was sufficient evidence of what FCL's activities in relation to the Transaction were, much less where those activities took place.

67 Mr Lau also pointed to the fact that, in FCL's incorporation documents, FCL had checked a box stating "Company will NOT be carrying on business

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109 JAK's 1st Affidavit at p 252: Defence of FCL (Amendment No 5) in S 435 ("S 435 Defence") at para 49.

110 JAK's 1st Affidavit at p 126: S 435 SOC at para 4.

111 JAK's 1st Affidavit at p 232: S 435 Defence at para 3.

112 JAK's 1st Affidavit at p 127: S 435 SOC at para 7.

113 JAK's 1st Affidavit at p 233: S 435 Defence at para 6.

with persons resident in the BVI" [emphasis added].[114] I did not think this precluded FCL from carrying on business from the BVI, although I accepted that there was no evidence that FCL had conducted its business activities in the BVI. In the same way, however, there was just no evidence on where FCL had conducted its (indeterminate) business activities / operations.

68 In these circumstances, I found that prior to FCL's liquidation, the factors concerning FCL's operations were disputed and did not clearly tip in favour of a particular location; the presumption that the BVI was FCL's COMI was not displaced.

69 One last issue concerned whether FCL's activity in the time between (a) when it was placed in voluntary solvent liquidation and (b) when the liquidation proceeded as an insolvent liquidation, should be taken into account. At the hearing of OA 116, the Joint Liquidators' counsel submitted that the events to restore FCL to the Register of Companies (which followed after FCL placed itself in voluntary solvent liquidation and was dissolved) should be considered relevant factors for the determination of FCL's COMI, and these took place in the BVI.[115] He accepted that the actions of foreign representatives were not relevant in the ascertainment of a debtor's COMI (which is in line with *Zetta Jet (No 2)* at [102]–[103]), but argued that his submission did not rely on anything the Joint Liquidators (who acted in the *insolvent* liquidation) had done.[116] This was an interesting perspective but, in my view, it rested on somewhat artificial lines being drawn between the voluntary solvent liquidation, dissolution, restoration and insolvent liquidation, in turn, of FCL. To my mind,

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114 LWS at para 17; JAK's 1st Affidavit at p 41.

115 NA at pp 9:18–20, 9:28–29 and 10:9–10.

116 NA at p 10:7–8.

these events were, in the circumstances of the present case, part of the continuum of the liquidation of FCL, which this court was now being asked to recognise. After all, (a) under the BVI Restoration Order, FCL was "deemed" never to have been dissolved (see [12(b)] above), and (b) the insolvent liquidation arose simply by virtue of the voluntary solvent liquidation continuing as an insolvent liquidation (with the Joint Voluntary Liquidators similarly continuing as joint liquidators) after FCL was unable to pay its debts (see [15] above). In any event, it was unnecessary for me to decide the issue. If the Joint Liquidators' counsel's point was valid, it would only reinforce that the BVI was FCL's COMI. However, even disregarding the point, my findings at [64]–[68] above already indicated that the BVI should be taken as FCL's COMI.

(4) Governing law

70 The governing law of the Contract is UK law. Mr Lau's argument that UK law was chosen because it facilitated the execution of the agreement under the Contract and not because FCL considered the UK its COMI (see [27(c)] above) is a bare assertion. I also noted that Mr Lau allegedly had another company in the UK bearing the name "Fullerton Capital".[117] While there was insufficient evidence for me to make a finding as to the connection, if any, between the alleged UK company and FCL, I was unconvinced by Mr Lau's assertion as to the reason for selecting UK law as the governing law of the Contract. I regarded the choice of UK governing law as yet another factor in the mix of factors which did not point cohesively to any "centre of gravity".

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117 JAK's 1st Affidavit at p 126: S 435 SOC at para 6.

Conclusion

71 I therefore concluded that the presumption that the BVI was FCL's COMI was not displaced. The BVI Liquidation qualified as a foreign main proceeding and had, under Art 17(2)(*a*) of the SG Model Law, to be recognised as such in Singapore.

Foreign non-main proceeding

72 Art 2(*g*) of the SG Model Law defines "foreign non-main proceeding" as "a foreign proceeding, *other than a foreign main proceeding*, taking place in a State where the debtor has an establishment" [emphasis added], with "establishment" defined in Art 2(*d*). Given my finding that the BVI Liquidation should be recognised as a foreign main proceeding, the alternative of recognising the BVI Liquidation as a foreign non-main proceeding no longer arose.

Orders made

73 I therefore ordered that the BVI Liquidation be recognised as a foreign main proceeding.[118] I also ordered, further to my finding at [42] above, that the Joint Liquidators be recognised in Singapore as the foreign representatives of FCL and of the BVI Liquidation.[119]

Discretionary Relief Issue

74 At the hearing of OA 116, Mr Wilbur, Mr Lau, UOB Kay Hian and PDLegal were legally represented. I have explained the positions taken by UOB Kay Hian, PDLegal and Mr Lau on the orders sought by the Joint Liquidators

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118 Order of Court dated 8 April 2024 (HC/ORC 1743/2024) ("ORC 1743") at para 1.

119 ORC 1743 at para 2.

against them (see [24(b)]–[24(c)] and [31] above). For completeness, Mr Wilbur's counsel indicated that Mr Wilbur took no position on any of the orders sought in OA 116.[120]

75 Ms Zhou, Mr Tan, RHTLaw and Maybank were absent and unrepresented, although notice was given to them of OA 116 (save for Mr Tan, as explained at [6] above).[121] RHTLaw had attended an earlier case conference in OA 116 and had not taken any position.[122] Maybank had informed the Joint Liquidators' solicitors that it would not be attending the hearing of OA 116.[123]

76 I made the Disclosure and Examination Order and the Injunctive Effect Order against Ms Zhou, Mr Tan, Mr Wilbur and Mr Lau, with liberty granted to them to apply for any directions or orders they thought necessary or convenient.[124] In addition, in relation to Mr Lau, I ordered the Joint Liquidators to provide an undertaking that they would not disclose to DKI documents and information directly relevant to DKI's claim against Mr Lau in S 435, which they obtained from Mr Lau pursuant to the Disclosure and Examination Order, save for documents and information already obtained in S 435 and subject to the Joint Liquidators having liberty to apply to the court to do so ("Undertaking").[125] On 23 April 2024, Mr Kardachi filed an affidavit to provide the Undertaking on behalf of the Joint Liquidators.[126]

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120 NA at p 4:22.

121 JAK's 2nd Affidavit at para 8.

122 NA at p 6:9–12.

123 Letter from Setia Law LLC to court dated 3 April 2024 at Annex, Tab 1.

124 ORC 1743 at paras 3, 4 and 6.

125 ORC 1743 at para 9.

126 3rd Affidavit of Mr Kardachi filed on 23 April 2024 at para 6.

77 I did not make the Disclosure and Examination Order against RHTLaw and Maybank because I did not think it was necessary to do so at this juncture. I was of the view that, upon this court's recognition of the BVI Liquidation and of the Joint Liquidators as the foreign representatives, RHTLaw and Maybank, as the former solicitors and the bankers of FCL respectively, would be obliged to provide FCL's information and documents to the Joint Liquidators. As regulated service providers, they could be expected to voluntarily comply with their obligations without the need for a further court order compelling them to do so. In any event, I made clear that the Joint Liquidators were entitled to seek further orders if necessary.[127] I granted the orders agreed to by UOB Kay Hian and PDLegal.[128]

78 I will explain the grounds of my decision with specific reference to only the orders made against Mr Lau, since he was the only person who objected to OA 116 and is the only person who has appealed against my decision.

Legal principles

79 The Disclosure and Examination Order was sought pursuant to Art 21(1)(*d*) of the SG Model Law and Art 21(1)(*g*) of the SG Model Law read with s 244 of the IRDA (see [24] above). The Injunctive Effect Order was sought pursuant to Art 21(1)(*g*) of the SG Model Law read with s 244 of the IRDA.[129]

80 Articles 21(1)(*d*) and (*g*) of the SG Model Law list some of the reliefs that the court may grant upon recognition of a foreign proceeding. They state:

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127 ORC 1743 at paras 5 and 6.

128 ORC 1743 at paras 7 and 8.

129 NA at p 12:2–9.

> **Article 21. Relief that may be granted upon recognition of a foreign proceeding**
>
> 1. Upon recognition of a foreign proceeding, whether a foreign main proceeding or a foreign non-main proceeding, where necessary to protect the property of the debtor or the interests of the creditors, the Court may, at the request of the foreign representative, grant any appropriate relief, including —
>
> …
>
> (*d*) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's property, affairs, rights, obligations or liabilities;
>
> …
>
> (*g*) granting any additional relief that may be available to a Singapore insolvency officeholder, including any relief provided under section 96(4) of this Act.

81 Article 22(1) states that in granting relief under Art 21, the court must be satisfied that the interests of creditors and other interested persons are adequately protected. To achieve this, pursuant to Art 22(2), the court may subject relief granted under Art 21 to conditions it considers appropriate.

82 Section 244 of the IRDA states:

> **Inquiry into company's dealings, etc.**
>
> **244.**—(1) Where a company is in judicial management or is being wound up, the Court may, on the application of any person mentioned in subsection (2), summon to appear before the Court —
>
> (*a*) any officer of the company;
>
> (*b*) any person who was previously an officer of the company;
>
> (*c*) any person known or suspected to have in his or her possession any property of the company or supposed to be indebted to the company; or
>
> (*d*) any person whom the Court thinks capable of giving information concerning the promotion, formation, business, dealings, affairs or property of the company, including any banker, solicitor or auditor,

> and the Court may require any person mentioned in paragraphs (*a*) to (*d*) to submit an affidavit to the Court containing an account of the person's dealings with the company or to produce any books, papers or other records in the person's possession or under the person's control relating to the promotion, formation, business, dealings, affairs or property of the company.
>
> (2) The persons mentioned in subsection (1) are —
>
> …
>
> (*b*) in the case of a company being wound up, the Official Receiver or liquidator; …
>
> …
>
> (3) In a case where a person, without reasonable excuse, fails to appear before the Court when he or she is summoned to do so under this section or there are reasonable grounds for believing that a person has absconded, or is about to abscond, with a view to avoiding his or her appearance before the Court under this section, the Court may, for the purpose of bringing that person and anything in his or her possession before the Court, cause a warrant to be issued to a police officer —
>
> (*a*) for the arrest of that person; and
>
> (*b*) for the seizure of any books, papers, records, money or goods in that person's possession,
>
> and may authorise a person arrested under such a warrant to be kept in custody, and anything seized under such a warrant to be held until that person is brought before the Court under the warrant or until such other time as the Court may order.
>
> (4) Any person who appears or is brought before the Court under this section may be examined on oath concerning the promotion, formation, business, dealings, affairs or property of the company.
>
> …

83 Section 244 of the IRDA is derived from s 285 of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"): *Ong Jane Rebecca v Lim Lie Hoa* [2023] 5 SLR 656 ("*Ong Jane Rebecca*") at [11]. The two-stage test for whether an order should be made under s 285 of the Companies Act, set out in *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in*

compulsory liquidation) [2015] 3 SLR 665 ("*Celestial*"), would, by extension, apply to s 244 of the IRDA. Under the test:

> (a) First, the liquidator has to show that there is some reasonable basis for his belief that the person concerned can assist him in obtaining relevant information and/or documents, and that the information / documents are reasonably (and not absolutely) required: *Celestial* at [43(a)]. There is a general predisposition in favour of the liquidator's views because he, being an officer of the court, is presumed to be neutral, independent and acting in the best interest of the company: *Celestial* at [43(a)].
>
> (b) Second, once the first stage is satisfied, the court will have to decide if the order should be granted: *Celestial* at [43(b)]. The court should be careful not to make an order that is wholly unreasonable, unnecessary or oppressive to the person concerned: *Celestial* at [43(b)]. While the risk of a respondent being exposed to liability is a relevant factor in determining whether there would be oppression, it does not present a bar against the making of an order: *Celestial* at [44(b)]. The closer a proposed respondent is to being a defined target, the more oppressive an order for examination is likely to be: *Celestial* at [44(b)].

84 In *Picard (foreign representative of Bernard L Madoff Investment Securities LLC) v FIM Advisers LLP* [2010] EWHC 1299 (Ch), the English High Court had to consider Arts 21(1)(d) and 22 of Schedule 1 to the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK) ("CBIR"). Schedule 1 to the CBIR contains the Model Law as adapted for application in Great Britain ("UK Model Law") (see reg 2). Arts 21(1)(d) and 22 of the UK Model Law and Arts 21(1)(*d*) and 22 of the SG Model Law are in similar terms.

In applying Art 21(1)(d) of the UK Model Law, the English High Court held that (a) the court must be satisfied as a "jurisdictional" matter that the information sought concerned the debtor's assets, affairs, rights, obligations or liabilities; (b) if so satisfied, the court then had a discretion to order the delivery of that information, and in exercising that discretion, must have regard to all relevant circumstances and ensure that the interests of the person against whom the order was sought were adequately protected; and (c) it was appropriate for the court to have regard to the principles upon which the court would exercise its powers under ss 236 and 366 of the Insolvency Act 1986 (c 45) (UK) ("UK IA"): *Picard* at [23]–[24]. Section 236 of the UK IA is similar to s 244 of the IRDA (while s 366 of the UK IA, concerning inquiry into a bankrupt's dealings and property, is similar to s 335 of the IRDA): *Ong Jane Rebecca* at [12].

85 In *PT Garuda*, the court highlighted that Art 22(1) of the SG Model Law called for a balance to be struck between the relief sought by a foreign representative and the interests of the person that may be affected by such relief (at [154]–[155]).

86 I accepted the Joint Liquidators' submission that, pursuant to Art 21(1)(*g*) of the SG Model Law, this court could grant relief provided for under s 244 of the IRDA.

87 Having regard to the above statutory provisions and case law, it was my view that, whether the Examination and Disclosure Order was sought under Art 21(1)(*d*) of the SG Model Law, or under Art 21(1)(*g*) of the SG Model Law read with s 244 of the IRDA, the requirements to be satisfied were the same, *viz*:

(a) First, the documents / information must concern the debtor's property, affairs, rights, obligations or liabilities ("Content Element"). This requirement is inherent in the language of Art 21(1)(*d*) and s 244(1).

(b) Second, the liquidator must show that there is some reasonable basis for his belief that the person concerned can assist him in obtaining relevant information and/or documents, and that the information / documents are reasonably (and not absolutely) required ("Reasonable Basis Element"). This requirement mirrors the first stage of the test in *Celestial*, and the principles applicable to the first stage of that test would apply (see [83(a)] above). I further considered whether the phrase in the Art 21(1) *chapeau* "where necessary to protect the property of the debtor or the interests of the creditors" meant that a higher threshold than reasonableness had to be shown in respect of the basis for the liquidator's belief and the utility of the information / documents sought. I did not think so. Liquidators are duty-bound to try and obtain as full a picture as possible of the company's affairs; to maximise the return to those interested in the liquidation by increasing the company's assets or reducing its debts; and to identify potential claims to maximise recovery for creditors: *Re Lion City Holdings Pte Ltd* [2003] 3 SLR(R) 493 at [18]; *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 at [138]; *Celestial* at [52(a)]. In my view, the taking of steps to facilitate any of these purposes would be "necessary to protect the property of the debtor or the interests of the creditors". The liquidator's pursuit of information / documents based on his reasonable belief that these could be obtained from the person concerned and were

reasonably required to facilitate any of these purposes would, in turn, also be regarded as "necessary to protect the property of the debtor or the interests of the creditors".

(c) Third, on satisfaction of the above two requirements, the court had a discretion whether to make the order. In exercising its discretion, the court must have regard to all relevant circumstances and ensure that the interests of the affected person are adequately protected, which includes not making an order that is wholly unreasonable, unnecessary or oppressive to him; a balance must be struck between the relief sought and the interests of the affected person ("Discretion Element"). This requirement arises under Art 22(1) of the SG Model Law as well as mirrors the second stage of the test in *Celestial*, and the principles applicable to the second stage of that test would apply (see [83(b)] above).

Analysis

Content Element

88 In my view, the information, documents and examination sought from / of Mr Lau concerned only FCL's property, affairs, rights, obligations or liabilities (see [24(a)] above). The Content Element was satisfied.

Reasonable Basis Element

89 The Reasonable Basis Element was also satisfied. Mr Lau was a former shareholder and director of FCL, including at the material time of the Transaction. There was more than reasonable basis for the Joint Liquidators to believe that he had information and/or documents concerning FCL's property,

affairs, rights, obligations or liabilities, including but not limited to the Transaction and/or the Pledged Stock.

90 Such information and/or documents were also reasonably required for the Joint Liquidators to discharge their duties. First, they would assist the Joint Liquidators in reconstructing the circumstances that resulted in FCL's demise. Second, they would likely offer guidance in respect of the position to be taken by FCL in S 435, thereby ensuring judicious expenditure on legal fees. Third, they would likely better position the Joint Liquidators to determine whether FCL had claims against any former directors or employees for breach of their fiduciary duties. To give a concrete example, even taking *Mr Lau's version of events* that FCL had been entitled to sell the Pledged Stock (as he appeared to suggest,[130] contrary to DKI's case in S 435), this would mean that the sale proceeds belonged to FCL and it would *still* be in the interest of the liquidation estate to ascertain from Mr Lau how and where that property of FCL had been applied.

Discretion Element

91 In my view, the Disclosure and Examination Order was not oppressive to Mr Lau, and especially when coupled with the Undertaking that I ordered the Joint Liquidators to provide, adequately protected his interests.

92 First, I rejected Mr Lau's allegation that the Joint Liquidators would deal improperly (in DKI's favour) with the information obtained from him because DKI was funding the Joint Liquidators' investigation into FCL's affairs.[131] Mr Lau had no basis for his speculation. As a starting point, it is orthodox for a

130 Mr Lau's Affidavit at paras 4(e)–(g).

131 Mr Lau's Affidavit at para 17.

liquidator to seek funding from creditors with a view to meeting the costs and expenses associated with investigations into the affairs of the company: *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2023] 4 SLR 1575 at [27]. The fact of creditor funding alone does not mean that a liquidator will fail to act properly and objectively. In *Celestial*, the appellants, from whom the respondent-liquidator sought disclosure of documents relating to the company's trade dealings, affairs and property under s 285 of the Companies Act, alleged that the respondent was not an objective liquidator because he focused on claims which could be made to maximise recovery for the company's creditors, particularly the "Blackrock creditors" who were funding him under a Funding Agreement (at [51(b)]). The Court of Appeal rejected this argument (at [52(b)]):

> … [The] objection was unsustainable as one of the Respondent's duties as a liquidator was precisely to maximise recovery for Celestial's creditors. *The fact that these creditors include the Blackrock creditors who agreed to fund the investigation and pursue potential claims was irrelevant.* The Respondent would be [in] breach of his duties as liquidator if he did not seek to determine whether there were claims that could be pursued for the benefit of the creditors in general despite being put in funds to do so by some creditors. [emphasis added]

93 Second, the general principle is that information obtained by a liquidator under s 244 of the IRDA is to be used only for the purpose of assisting the liquidator to discharge his duties, and not for any purpose that does not afford a benefit to the company in liquidation: *Rashmi Bothra v SuntecCity Thirty Pte Ltd and others* [2023] 2 SLR 535 at [39]. I noted, in this connection, that Mr Kardachi had deposed that the Joint Liquidators would "act in accordance with the relevant laws, and only use information obtained from OA 116 for the purposes of the liquidation of [FCL] and in the interest of the liquidation

estate".[132] Mr Lau provided no evidence that would lead me to believe otherwise.

94 Third, to address Mr Lau's concern that DKI was part of the committee of creditors to whom the Joint Liquidators had to report,[133] I ordered the Joint Liquidators to provide the Undertaking. To recapitulate, the Undertaking effectively precluded the Joint Liquidators from disclosing to DKI documents and information directly relevant to DKI's claim against Mr Lau in S 435, which they obtained from Mr Lau pursuant to the Disclosure and Examination Order, save for documents and information already obtained in S 435 (see [76] above). While I also gave the Joint Liquidators liberty to apply, in the event the Joint Liquidators do subsequently make an application, I expect to be addressed on a specific set of information / documents with precise reasons why these need to be disclosed, and I will of course hear Mr Lau again (should he wish), before making any decision in respect of the concrete and defined situation presented at that time.

95 Fourth, I did not accept Mr Lau's objection that the Joint Liquidators would have a "dry run" at cross-examining him prior to taking any legal action against him.[134] That a liquidator has in mind the possibility of litigation is not a bar to an examination order; it is legitimate for the liquidator to seek examination orders with a view to investigating whether a claim exists: *Celestial* at [57]. Indeed, information may be sought and facts and documents discovered in relation to a specific claim that the liquidator contemplates against an examinee: *Liquidator of W&P Piling Pte Ltd v Chew Yin What and others*

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132 JAK's 2nd Affidavit at para 28.

133 LWS at para 43.

134 LWS at para 46.

[2004] 3 SLR(R) 164 at [29(f)]. Further, it was not the case that the Joint Liquidators had taken or decided to take legal action against Mr Lau. They made clear that their objective was to "ascertain whether [FCL] *may* have claims against the former directors/agents of [FCL] for breach of duties" [emphasis added],[135] and Mr Kardachi expressly deposed that "[t]he Joint Liquidators have not concluded at this juncture that there are indeed claims to be made against Mr Lau and/or other Affected Persons (or any other parties for the matter)".[136] I did not think it was improper for the Joint Liquidators to investigate the possibility of such claims, including by examination of (among other persons) Mr Lau.

96 Fifth, I did not think that Mr Lau was being oppressively targeted in OA 116. When the Joint Liquidators filed OA 116, they sought the Disclosure and Examination Order against financial institutions, FCL's former solicitors, and three other persons who were involved with FCL in the capacity of shareholder, director or employee (*ie*, Ms Zhou, Mr Tan and Mr Wilbur), besides Mr Lau.

97 For completeness, Mr Lau did not allege that the Disclosure and Examination Order was oppressive in that it would take up inordinate time and/or costs on his part. In any event, he had liberty to apply, if he deemed it appropriate, for compensation of his reasonable costs incurred in complying with the order.

98 For all these reasons, I took the view that the balance should be struck in favour of making the Disclosure and Examination Order (coupled with the

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135 AWS at para 19(c).

136 JAK's 2nd Affidavit at para 31(c).

order for the Joint Liquidators' Undertaking); Mr Lau's interests were adequately protected under these orders.

Conclusion

99 I therefore made the Disclosure and Examination Order against Mr Lau. I also made the Injunctive Effect Order as it simply confirmed the effect of an order made under s 244 of the IRDA.

Summary of orders made in OA 116 affecting Mr Lau

100 In summary, I ordered:

(a) the recognition, in Singapore, of the BVI Liquidation as a foreign main proceeding;[137]

(b) the recognition, in Singapore, of the Joint Liquidators as the foreign representatives of FCL and of the BVI Liquidation;[138]

(c) the Disclosure and Examination Order,[139] subject to the Joint Liquidators' Undertaking,[140] against Mr Lau;

(d) the Injunctive Effect Order (in relation to the Disclosure and Examination Order);[141] and

(e) the grant of liberty to the Joint Liquidators and Mr Lau to apply.[142]

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137 ORC 1743 at para 1.

138 ORC 1743 at para 2.

139 ORC 1743 at para 3.

140 ORC 1743 at para 9.

141 ORC 1743 at para 4.

142 ORC 1743 at paras 5 and 6.

101 I made no order for costs as between the Joint Liquidators and Mr Lau. I considered this to be fair. Although Mr Lau was unsuccessful in resisting the recognition application, his arguments were not involved and the Joint Liquidators would, in any event, have had to satisfy this court of the requirements for recognising the BVI Liquidation as a foreign main proceeding. Mr Lau could also be said to have had some small success in that I had ordered the provision of the Undertaking. To be clear, the Joint Liquidators remained entitled to have their costs of the application paid out of the assets of FCL as an expense of the liquidation.

Kristy Tan
Judicial Commissioner of the High Court

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