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

[2024] SGHC 298

Originating Application No 603 of 2024 and Summonses Nos 2020 and 2021 of 2024

In the matter of Section 264(2) of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Zipmex Asia Pte Ltd

Between

Zipmex Pte Ltd

… *Applicant*

And

(1) Zipmex Asia Pte Ltd
(2) Ellyn Tan Huixian

… *Respondents*

Originating Application No 605 of 2024

In the matter of Section 170(2) of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Zipmex Asia Pte Ltd

Between

Zipmex Pte Ltd

… *Applicant*

And

Zipmex Asia Pte Ltd

… *Respondent*

JUDGMENT

[Insolvency Law — Winding up — Liquidator]
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v
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Aidan Xu @ Aedit Abdullah J
19 August 2024

27 November 2024 Judgment reserved.

Aidan Xu @ Aedit Abdullah J:

1 Zipmex Pte Ltd ("ZPL") has applied to set aside the resolutions purportedly passed at a creditors' meeting and for leave to proceed. I allow the application to proceed and set aside the resolutions on the basis of substantive irregularities. The Court will appoint a liquidator. The first respondent, Zipmex Asia Pte Ltd ("ZAPL"), applied for a converse order that the creditors' meeting was not invalid and for sealing. I allowed the sealing order but dismiss ZAPL's order for a declaration of validity.

Background

2 ZPL is a wholly owned subsidiary of ZAPL.[1] The sole director of both ZPL and ZAPL is Mr Marcus Lim ("Mr Lim").[2] On 26 February 2024, ZPL was wound up by the court and Mr Wong Pheng Cheong Martin ("Mr Wong") was appointed as its liquidator.[3] On 29 April 2024, Mr Lim declared that ZAPL was unable to continue as a going concern by reason of its liabilities, and appointed Ms Ellyn Tan Huixian ("Ms Tan") as ZAPL's provisional liquidator.[4] In a letter dated 10 May 2024, Ms Tan provided notice of a creditors' meeting, requesting for creditors to submit their proofs of debt and special proxy forms.[5] ZPL submitted its proof of debt for the amount of $48,972,453 by way of a letter dated 17 May 2024.[6]

3 On 20 May 2024, an extraordinary general meeting ("the EGM") for ZAPL was held. Two resolutions were passed at the EGM: (a) a special resolution for the voluntary winding up of ZAPL pursuant to s 160(1)(*b*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"); and (b) an ordinary resolution appointing Ms Tan as the liquidator of ZAPL.[7]

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1 Applicant's Joint Written Submissions dated 13 August 2024 ("AJWS") at para 4.

2 AJWS at paras 2 and 4.

3 Respondents' Joint Written Submissions dated 13 August 2024 ("RJWS") at para 3.

4 Affidavit of Wong Pheng Cheong Martin (Huang Pingchang Martin) dated 21 June 2024 ("WPCM-1") at para 6.

5 AJWS at para 6.

6 AJWS at para 6.

7 AJWS at para 7.

4 On 20 May 2024, a creditors' meeting was also held (the "Creditors' Meeting"). During the Creditors' Meeting, ZPL objected to the appointment of Ms Tan as the liquidator of ZAPL and nominated Mr Wong as an alternative candidate.[8] Ms Tan rejected $42,515,205 out of $48,972,453 of ZPL's proof of debt and claims allegedly amounting to approximately $24m by certain Thai customers[9] represented by Mr Verapat Pariyawong ("Mr Verapat") (the "Thai Customers") (although I find that upon closer examination, the proof of debt by the Thai Customers was for a lesser sum of $16.6m),[10] for the purposes of voting at the Creditors' Meeting. Although ZPL and Mr Verapat questioned whether Ms Tan had the power to adjudicate and/or reject proofs of debts for the purposes of voting at the Creditors' Meeting, Ms Tan did not adjourn the said meeting, and maintained her position that the aforementioned claims should be rejected.[11] Ms Tan declared that the five tabled resolutions were approved by the creditors present and voting. This included a resolution confirming the appointment of Ms Tan to act as the sole liquidator of ZAPL for the purposes of winding up, amongst other things.[12]

5 ZPL took the view that the Creditors' Meeting was fraught with procedural and substantive irregularities. ZPL wrote to ZAPL and Ms Tan on 21 May 2024, notifying them of the said irregularities and invited them to take the necessary steps to convene a further creditors' meeting of ZAPL for the

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8 AJWS at para 10(a).

9 AJWS at para 10(b).

10 Although the AJWS at para 10(b) makes reference to a sum of $24m, the proof of debt submitted by the Thai Customers as detailed in the Affidavit of Ellyn Tan Huixian dated 18 July 2024 ("ET-1") at para 31 and p 1081 was listed at approximately $16.6m.

11 AJWS at para 10(c)–(e).

12 AJWS at para 10(g).

reappointment of the liquidator(s).[13] However, no further steps were taken by ZAPL and Ms Tan.[14]

6 As ZAPL was voluntarily wound up on 20 May 2024, an automatic stay arose pursuant to s 170(2) of the IRDA, preventing the continuation or commencement of any action or proceeding against the company except by the permission of the Court. ZPL therefore applied for leave to be granted to commence and continue the present action against ZAPL pursuant to s 170(2) of the IRDA (the "Leave Application").[15]

7 ZPL also applied for an order that the Creditors' Meeting be declared invalid and the resolutions passed thereat be declared void by reason of substantive irregularities,[16] or an order pursuant to s 264(2) of the IRDA read with r 179(1) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (the "CIR Rules") that the Creditors' Meeting be declared invalid and the resolutions passed thereat be declared void, by reason of procedural irregularities (collectively, the "Setting Aside Application").[17]

8 Further, ZPL applied for an order that Ms Tan's purported exercise of her functions and powers as a liquidator for ZAPL and any ensuing steps taken by her be declared void; and that Mr Wong should be appointed as ZAPL's liquidator in her stead (the "Application for Appointment of Liquidator").[18]

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13 AJWS at para 11.

14 AJWS at para 11.

15 AJWS at para 16.

16 Originating Application for HC/OA 603/2024 prayer (1).

17 Originating Application for HC/OA 603/2024 prayer (2).

18 Originating Application for HC/OA 603/2024 prayers (3) and (4).

9 In turn, ZAPL applied in Summons No 2020 of 2024 for a declaration that the Creditors' Meeting was not invalid by reason of ZAPL's non-compliance with reg 28 of the Insolvency, Restructuring and Dissolution (Voluntary Winding Up) Regulations 2020 ("VWU Regulations"). Regulation 28(1) states that: "[t]he notice of a meeting to be sent to each creditor or contributory of the company must be accompanied by the general and special forms of instrument of proxy".

10 ZAPL also applied for summonses for the sealing of Ms Tan's affidavit dated 18 July 2024. ZPL did not object to the sealing of Ms Tan's affidavit, and I so ordered on 19 August 2024. I reserved judgment on the rest of ZPL's and ZAPL's applications. My decision regarding these applications is set out in this judgment.

Overview of ZPL's arguments

11 With regards to the Leave Application, ZPL submits that it is necessary for ZAPL to be named as a respondent in the Setting Aside Application.[19] ZPL argues that the court should exercise its discretion to grant leave to commence proceedings against ZAPL, with reference to the factors set out in *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management*") — namely, the nature of the claim, the existing remedies, and other factors such as the views of the majority creditors and the need for an independent inquiry.[20]

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19 AJWS at para 17.

20 AJWS at paras 18–19.

12 With regards to the Setting Aside Application proper, ZPL contends that the Creditors' Meeting is invalid, and the resolutions passed thereat are void as there were substantive irregularities in the Creditors' Meeting:

(a) Ms Tan had no power, as a provisional liquidator, to adjudicate on proofs of debt for the purposes of voting at a creditors' meeting called pursuant to s 166 of the IRDA;[21] and Ms Tan's partial rejection of ZPL's proof of debt was incorrect and unjustified due to a lack of supporting documentation and explanations.[22]

(b) The resolution considered at the Creditors' Meeting was incorrectly worded as a confirmation of Ms Tan's appointment as ZAPL's liquidator instead of for the appointment of liquidators of ZAPL.[23]

(c) The Notice of Creditors' Meeting dated 10 May 2024 was not accompanied by a general proxy form, in contravention of reg 28 of the VWU Regulations.[24] Instead, ZAPL's creditors were only provided with a special proxy form.

13 ZPL also argues that the Creditors' Meeting had procedural irregularities. These pertain broadly to: (a) the failure to deliver the Notice of Creditors' Meeting within the timeframe stipulated under s 445(1) of the IRDA read with reg 3(2) of the Insolvency, Restructuring and Dissolution (Electronic Meeting and Resolution by Correspondence) Regulations 2020 and

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21 AJWS at para 26(a).

22 AJWS at para 29.

23 AJWS at para 30.

24 AJWS at para 33.

s 166(2)(*a*) of the IRDA; (b) the shorter deadline imposed by Ms Tan for the lodging of proxy forms as compared to that stipulated in reg 32 of the VWU Regulations; (c) an alleged difference in the notice of meeting circulated to various Thai Customers and/or Mr Verapat from the Notice of Creditors' Meeting; and (d) certain resolutions of the special proxy form being unsuitable for inclusion in a special proxy.[25] It is ZPL's position that some of these procedural irregularities may have caused substantial injustice.

14 On the basis that the Setting Aside Application is allowed, ZPL nominates Mr Wong as the liquidator for ZAPL.[26]

Overview of the respondents' arguments

15 Regarding the Leave Application, the respondents argue that leave should not be granted for the commencement of proceedings against ZAPL. The respondents similarly accept that the relevant principles are set out in *Korea Asset Management*,[27] but argue that the Setting Aside Application is not *bona fide* and is instead unmeritorious.

16 In relation to the Setting Aside Application, the respondents submit that there were no substantive irregularities in the Creditors' Meeting.[28] Their

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25 AJWS at para 38.

26 AJWS at para 43.

27 RJWS at para 34.

28 RJWS at para 10.

reasons, which address each of the three points raised by ZPL above (at [12]), are summarised as follows:

(a) Rule 101 of the CIR Rules applied to legitimise Ms Tan's adjudication of proofs of debts for the purposes of voting. In particular, the interests of justice and the need to protect the interests of all creditors necessitated Ms Tan's power to so adjudicate, prior to the Creditors' Meeting.[29] There was no substantive injustice caused to ZPL as ZPL was not precluded from voting and there was no "real impact" on the outcome of the Creditors' Meeting.[30]

(b) The alleged resolution to confirm the nomination of Ms Tan was in line with s 167 of the IRDA and was not an irregularity.[31] Even if the drafting of the resolution was irregular, it was a procedural irregularity and not a substantive one.[32]

(c) There was good reason for Ms Tan to not include a general proxy form. Ultimately, the failure to include a general proxy form was a procedural, instead of substantive, irregularity.[33]

17 In so far as there were any procedural irregularities, they did not result in any injustice, much less substantial injustice to ZPL or any creditor.[34] The respondents further contend that Ms Tan's actions while appointed as ZAPL's

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29 RJWS at paras 65–66.

30 RJWS at para 76.

31 RJWS at para 42.

32 RJWS at para 47.

33 RJWS at para 56.

34 RJWS at para 11.

liquidator were valid,[35] and that Mr Wong should not be appointed as the replacement liquidator.[36]

Issues

18 I previously granted the sealing order, which was not opposed. The issues arising for my present determination are:

(a) Whether leave should be granted for ZPL to proceed.

(b) If (a) is answered in the affirmative, whether the grounds for setting aside are made out. This comprises a few sub-issues:

(i) First, whether there are any substantive irregularities at the Creditors' Meeting – namely, Ms Tan's power to adjudicate the proofs of debt for voting; the appointment of Ms Tan as the liquidator; and the absence of general proxies – rendering the meeting invalid and the resolutions passed thereat void.

(ii) Second, if there are no substantive irregularities, whether there are any procedural irregularities at the Creditors' Meeting which would cause substantial injustice that could not be cured, rendering the meeting invalid and the resolutions passed thereat void.

(c) If (b) is answered in the affirmative (*ie,* the meeting is invalid and the resolutions are void), what the appropriate course of action is.

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35 RJWS at para 12.

36 RJWS at para 13.

Decision

19 Having considered the arguments and the affidavits, I grant the application for leave to proceed, and order that the Creditors' Meeting is invalidated by reason of substantive irregularities.

The Leave Application

20 Section 170(2) of the IRDA states that: "[a]fter the commencement of the winding up, no action or proceeding may be proceeded with or commenced against the company except by the permission of the Court and subject to such terms as the Court may impose". Both parties correctly point me to the decision of *Korea Asset Management*, where the court considered the guidelines in deciding whether to grant leave from the automatic moratorium arising after the commencement of winding up, under the predecessor provision of s 170(2) of the IRDA in the Companies Act (Cap 50, 1994 Rev Ed). The relevant considerations were said to be (at [46]–[57]):

(a) the timing as to when application for leave is made;

(b) the nature of the claim, which includes considerations of whether the applicant seeks to avail itself of a benefit that would not otherwise be available to it through the conventional winding up procedure (*ie*, filing of proof of debts), whether the claim would prejudice the claims of other legitimate creditors, and whether the claim is likely to be satisfied;

(c) the existing remedies available, including, whether the claim or right sought by the applicant can be adequately or conveniently dealt with within the insolvency regime; and

(d) other "matrix" factors such as the views of the majority creditors, the need for an independent inquiry, and the choice of liquidator.

21 ZPL argues that the Setting Aside Application is brought in a bid to address Ms Tan and ZAPL's non-compliance with the substantive and procedural requirements under the IRDA. The Setting Aside Application seeks to preserve the rights and interests of ZAPL's creditors. Further, Ms Tan's failure to convene a further creditors' meeting of ZAPL means that the matters raised in the Setting Aside Application necessarily have to be dealt with outside the insolvency regime. As Ms Tan was ZAPL's nominee, which was opposed to by a majority creditor, there is a need for an independent inquiry.[37]

22 On the other hand, the respondents say that the Setting Aside Application is not a *bona fide* application. Instead, it is a veiled attempt to effect the replacement of ZAPL's provisional liquidator with ZPL's liquidator. The matters in the Setting Aside Application can be dealt with within the insolvency regime as Ms Tan had offered to call a second creditors' meeting and resign if Mr Wong received the necessary votes.[38] Additionally, where the court takes the view that there is no merit to the Setting Aside Application, leave should not be granted.[39]

23 In my view, the nature of ZPL's claim is of particular relevance here. ZPL's claim relates to an application to set aside the resolutions passed at the Creditors' Meeting, which is understandably not a benefit that is available to it through the conventional winding up procedure. The declaration of the

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37 AJWS at para 19.

38 RJWS at para 108.

39 RJWS at para 109.

invalidity of a proceeding under Parts 4 to 11 of the IRDA, which includes a creditors' meeting summoned under s 166 of the IRDA for the nomination of a liquidator by the company under s 167 of the IRDA, on the basis of irregularities pursuant to s 264(2) of the IRDA, must be obtained by way of an application to the court. This is borne out by the wording of r 179 of the CIR Rules itself, which states that:

> 179.—(1) An application *for an order* under section 264(2) of the Act declaring a proceeding under Parts 4 to 11 of the Act to be invalid, or for an order under section 264(3) of the Act declaring proceedings at a meeting held for the purposes of those Parts of the Act to be void, is not allowed unless the application is made —
>
> (*a*) within a reasonable time; and
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> (*b*) before the party applying has taken any fresh step after becoming aware of the irregularity.
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> (2) *An application under this rule may be made by summons and the grounds of objection must be stated in the summons or the affidavit supporting the application.*
>
> [emphasis added]

A declaration of invalidity, on the basis of substantive irregularities (which cannot be cured by s 264(2) of the IRDA), must also be obtained by way of an application to the court.

24 For this same reason, the consideration of the existing remedies (*ie,* the non-possibility of dealing with ZPL's claim within the insolvency regime) also weighs in favour of granting leave. This is especially since Ms Tan did not convene a further creditors' meeting upon ZPL's request. Although Ms Tan had expressed that she was willing to convene a second creditors' meeting and resign from her role as the liquidator, this was only on the condition that Mr Wong obtained the necessary votes from the other creditors. This is insufficient to remedy all the substantive and procedural irregularities as alleged

by ZPL. In any case, the point stands that Ms Tan has not convened any further creditors' meeting at the time of ZPL's application.

25 The respondents' allegation that ZPL's claim is a veiled attempt to replace ZAPL's liquidator with ZPL's liquidator lost much force when ZPL categorically stated, during the hearing, that it was willing to accept a fresh appointment of any liquidator for ZAPL – the choice of an alternative liquidator did not have to be confined to Mr Wong.

26 I am satisfied that there is ample justification for leave to be granted for the foregoing reasons.

The Setting Aside Application

27 ZPL argues that the matters raised (at [12(a)]–[12(c)] above) are substantive irregularities, while the respondents maintain that they are procedural irregularities that do not cause substantial injustice.

28 The first question is whether the irregularity is procedural or substantive. This is because if the irregularity is substantive in nature, s 264(2) of the IRDA cannot even apply to remedy the irregularity. In *Thio Keng Poon v Thio Syn Pyn and others and another appeal* [2010] 3 SLR 143 ("*Thio Keng Poon*") (at [65]), the court held that the predecessor provision to s 264(2) of the IRDA, *ie,* s 392(2) of the Companies Act (Cap 50, 2006 Rev Ed), had no application where the irregularity is procedural as opposed to substantive. This principle applies with equal weight to s 264(2) of the IRDA which clearly states that:

> (2) A proceeding under Parts 4 to 11 is *not invalidated by reason of any procedural irregularity* unless the Court is of the opinion that the irregularity has caused or may cause substantial

> injustice that cannot be remedied by any order of the Court and by order declares the proceeding to be invalid.
>
> [emphasis added]

In summary, a proceeding is not invalidated by a procedural irregularity, unless the irregularity has caused substantial injustice.

29 In s 264(1) of the IRDA, "procedural irregularity" is defined to include a reference to: (a) the absence of a quorum at a meeting of a corporation, at a meeting of directors or creditors of a corporation or at a joint meeting of creditors and members of a corporation; and (b) a defect, irregularity or deficiency of notice or time. Apart from this, not much is provided in the statute to assist with the determination of whether an irregularity is a procedural or substantive one.

30 In *Thio Keng Poon*, the court set out certain principles in so determining. Generally, the court is required to "assiduously examine the aim or object of the requirement which was not complied with" (*Thio Keng Poon* at [69]). The court should determine whether the irregularity changes the substance of the aim or object of the requirement (*ie,* "the thing to be done"). If so, the irregularity is substantive. On the other hand, if the irregularity merely departs from the prescribed manner in which "the thing is to be done" without changing the substance of it, the irregularity is procedural (*Thio Keng Poon* at [66], citing Palmer J in *Cordiant Communications (Australia) Pty Ltd v The Communications Group Holdings Pty Ltd* [2005] NSWSC 1005 at [102]–[104]). Essentially, the test laid down in *Thio Keng Poon* is whether the act complained of changes the substance of the aim or object of the requirement, as opposed to departing from the prescribed manner in which the requirement is to be fulfilled.

Whether Ms Tan's adjudication of proofs of debt is a substantive irregularity

31 ZPL argues that there is no power conferred by statute for the provisional liquidator appointed under s 161 of the IRDA to examine or reject proof of debts for the purposes of voting at the creditors' meeting.[40] On the contrary, s 171(1) read with s 161(2) of the IRDA establishes that such adjudication of proof of debts is prohibited.[41] The powers conferred on a provisional liquidator are set out in s 161(2), which states that "[s]ubject to section 171, a provisional liquidator has and may exercise all the functions and powers of a liquidator in a creditors' winding up, subject to such limitations and restrictions as may be prescribed by regulations". Section 171(1) however provides that "[t]he powers conferred on a provisional liquidator by section 161 *must not be exercised during the period before the holding of the meeting of the creditors* under section 166, except with the sanction of the Court" [emphasis added].

32 The respondents instead rely on r 101 of the CIR Rules, which states that:[42]

> 101.—(1) *The chairperson has power to admit or reject, in whole or in part, a proof for the purpose of voting, but the chairperson's decision is subject to appeal to the Court.*
>
> (2) If the chairperson is in doubt whether a proof is to be admitted or rejected, the chairperson must mark the proof as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.
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> [emphasis added]

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40 AJWS at para 26(a).

41 AJWS at para 26(b).

42 RJWS at para 65.

Although the respondents accept ZPL's argument that r 85 of the CIR Rules mandates that the provisions in Part 5, Division 6 of the CIR Rules (which includes r 101) only apply to court-ordered winding ups, the respondents continue to assert that there is a potential carve out within r 85 – the provisions may apply where "the nature of the subject matter or the context otherwise requires".[43] The respondents say that the interests of justice and the need to protect the interests of all creditors necessitate that Ms Tan was endowed with the power to adjudicate proofs of debt prior to the Creditors' Meeting.[44] In this vein, the respondents raise the fact that ZAPL had been in restructuring proceedings since May 2022, which were eventually terminated in or around January 2024, and did not "[enter] voluntary liquidation proceedings from a standing start".[45] During this period, multiple debts and relationships had allegedly crystallised,[46] and it transpired that ZPL's proof of debts was based on outdated information and the Thai Customers were not creditors of ZAPL.[47]

33 I accept ZPL's arguments. The controlling provisions regarding the powers of the provisional liquidator are ss 161(2) and 171 of the IRDA. They make clear that the powers of the provisional liquidator under s 161(2) are not to be exercised prior to the creditors' meeting without leave from the court. The power to adjudicate on proofs of debt falls squarely within these restricted powers and is not one of the exceptions within s 171(2) of the IRDA. Rule 101, contained within the CIR Rules in the form of subsidiary legislation, cannot

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43 RJWS at para 65.

44 RJWS at para 66.

45 RJWS at para 67.

46 RJWS at para 68.

47 RJWS at paras 69–71.

override the express requirements within primary legislation (see s 19(*c*) of the Interpretation Act 1965 (2020 Rev Ed)).

34 In any case, r 101 is excluded by reason of r 85. Rule 85 makes clear that r 101 only applies to a court-ordered winding up, instead of a voluntary winding up, as is the present case. It is difficult to see how the protracted nature of ZAPL's restructuring prior to the winding up, and/or the extensive number of relationships, if so, constitutes a "nature of the subject matter or the context" which requires an exception to the non-applicability of r 101.

35 Ms Tan's adjudication of ZPL's proof of debt was exercised prior to the holding of the Creditors' Meeting. Ms Tan's own evidence in her affidavit was that she had conducted a preliminary adjudication of ZPL and the Thai Customers' proofs of debt prior to the Creditors' Meeting.[48] No leave of court was obtained for such preliminary adjudication.

36 Ms Tan had no power to adjudicate on proofs of debt prior to the Creditors' Meeting. This constitutes a substantive irregularity and is sufficient in and of itself to grant the Setting Aside Application. The proofs of debt, submitted by the creditors, are for the purpose of voting. The adjudication of these proofs of debt by the chairperson of the meeting affects the alleged creditors' voting rights, and the probability of the tabled resolutions being passed.

37 Although ZPL went into the merits of Ms Tan's adjudication, it is not necessary, in light of the conclusion I have reached above (at [36]), for me to

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[48] ET-1 at paras 40 and 42.

conduct an examination into these merits in the alternative scenario that Ms Tan had a power to so adjudicate.

Whether the resolution to confirm Ms Tan's appointment as the liquidator is a substantive irregularity

38 The resolution to confirm the appointment of Ms Tan as the liquidator of ZAPL is improper.

39 ZPL, relying on *Sysma Construction Pte Ltd v EK Developments Pte Ltd* [2007] 2 SLR(R) 742 ("*Sysma*"), submits that the meeting could not be left with only just the confirmation of the company's choice of the provisional liquidator.[49] This was a substantive irregularity.

40 The respondents argue that the resolution for the confirmation of Ms Tan as the liquidator is consistent with s 167 of the IRDA, in that the company had nominated Ms Tan to be the liquidator of the company.[50] Instead, there are good reasons why Ms Tan had not adopted the usual resolution convention for the appointment of liquidators of the company sought to be wound up.[51] The respondents point me to the fact that the Creditors' Meeting was not conducted in bad faith and in fact involved a very consultative process, as well as the fact that there was no support for Mr Wong's nomination as an alternative liquidator.[52] In any event, it was a procedural irregularity with no injustice.[53] There was no complaint made that acts taken by Ms Tan prejudiced the rights

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49 AJWS at para 31.

50 RJWS at paras 41–42.

51 RJWS at para 42.

52 RJWS at paras 44–45.

53 RJWS at para 47.

of ZAPL's creditors.[54] The creditors present approved the appointment of Ms Tan and no other objections were raised at the meeting.[55]

41 Section 167(1) reads:

> 167.—(1) The company must, and the creditors may at their respective meetings, nominate a person to be liquidator for the purpose of winding up the affairs and distributing the assets of the company, and if the creditors and the company nominate different persons, the person nominated by the creditors is to be liquidator, and if no person is nominated by the creditors, the person nominated by the company is to be liquidator.

42 To nominate here means to be chosen or selected at the respective meeting, *ie,* the company's meeting or the creditors' meeting, with priority given to the creditors' selection. Section 167, however, goes no further than that in specifying what is to be done at the creditors' meeting. The CIR rules do not provide further guidance.

43 In *Sysma*, the court found that the creditors' meeting is not merely to confirm the company's appointment of the liquidator, but to also consider other persons (*Sysma* at [10]). I respectfully agree. The creditors' meeting is for the creditors to determine whom they should nominate and make their choice of liquidator which, under s 167, would be the actual liquidator where there is a conflict between the creditors' choice and the company's choice.

44 The strongest argument for the respondents is that the majority of creditors at the Creditors' Meeting approved Ms Tan's appointment. However, this is not determinative. They simply voted on the person put before them; there was no contest. Given that there was no contest, and no canvassing or calling of

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54 RJWS at para 49.

55 RJWS at paras 45 and 48.

other candidates, the votes in favour of Ms Tan cannot be given that much weight – certainly, it can be interpreted as a positive selection of Ms Tan by each vote, but it just as much can also be taken as going along with the sole choice available.

45 This is not a mere procedural matter. It goes towards a substantive issue, going to the choice and the ability of the creditors to participate fully and in an informed manner in the appointment of the company's liquidator. Finally, the fact that there was no protest at the meeting does not assist the respondents. Any substantive breach cannot be remedied by silence except where there is waiver or estoppel.

Whether the lack of general proxy forms is a substantive irregularity

46 The absence of general proxy forms is fatal.

47 ZPL argues that the omission of general proxy forms in the Notice of Creditors' Meeting was a substantive irregularity,[56] because the sole use of special proxies prevented wider consideration at the Creditors' Meeting.[57]

48 The respondents argue that there was good reason for the exclusion of the general proxy forms implemented to comply with the COVID-19 (Temporary Measures) (Alternative Arrangements for Meetings) (Corporate Insolvency) Order 2020 which imposed stricter restrictions on the verification, authentication and counting of votes in virtual meetings.[58] They further emphasise that the manner in which the meetings were chaired by Ms Tan was

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56 AJWS at para 33(b).

57 AJWS at para 33.

58 RJWS at paras 52–53.

inclusive and all special proxies had the platform to raise their concerns in an open-dialogue fashion.[59] The failure to include a general proxy form was a procedural, instead of substantive, irregularity.[60] This procedural irregularity did not cause substantial injustice, as the creditors in attendance had the opportunity to amend their vote on any of the resolutions, support ZPL's nomination of Mr Wong and air their concerns.[61]

49 An irregularity was clearly occasioned by the lack of general proxies. Regulation 28 of the VWU Regulations provides that:

> 28.—(1) The notice of a meeting to be sent to each creditor or contributory of the company must be accompanied by the general and special forms of instrument of proxy.
>
> (2) No name or description of any person is to be written or printed on the form of an instrument of proxy before the instrument is sent to the creditors or contributories.

50 I agree with ZPL that the sole use of special proxies is a substantive problem, rather than a mere procedural irregularity. The special proxy meant that the ability of those present to vote on matters was circumscribed – they could only vote and act on the matter identified in the special proxy form. Such circumspection or limitation meant that other issues could not be voted on or determined, thus affecting the ability of the meeting to go into other matters, namely, the nomination of the creditors' choice of liquidator, due to the first matter being phrased as "[c]onfirming the appointment of [Ms Tan] … to act as the sole Liquidator of the Company for the purpose of such winding up".[62]

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59 RJWS at para 55.

60 RJWS at para 56.

61 RJWS at para 57.

62 ET-1 at p 108.

Relief

51 I find that the Creditors' Meeting is invalid for reasons of substantive irregularities, and that the resolutions passed thereat, including the appointment of Ms Tan as the liquidator of ZAPL, are void. I also dismiss ZAPL's application (in Summons No 2020 of 2024) for an order that the Creditors' Meeting is not invalid, for the same reasons at [46]–[50] above.

52 In view of this, it is unnecessary for me to go further to consider whether there are procedural irregularities which have caused substantial injustice.

Applicability of s 176(1) of the IRDA

53 However, ZAPL argues that even if the Creditors' Meeting is void, ZPL's prayer, for an order that Ms Tan's exercise of the functions and powers of a liquidator be declared void, should be dismissed.[63] This is because s 176(1) of the IRDA states that "[t]he acts of a liquidator are valid despite any defects that may afterwards be discovered in the liquidator's appointment or qualification".[64]

54 ZPL's initial submissions did not address this provision.[65] I invited parties to put in further submissions on the applicability and scope of s 176, namely, whether s 176 would apply to validate all the acts of the liquidator, done before and after the defects are discovered.

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63 RJWS at para 97.

64 RJWS at para 98.

65 AJWS at para 40.

55 Both parties take the view that s 176 can apply to validate all the acts of the liquidator, done before and after the defects are discovered,[66] albeit for different reasons. However, they disagree as to whether s 176 applies in the present case.

56 ZPL argues that s 176(1) applies to validate all acts of the liquidator, regardless of when these acts were done, on the basis of r 178 of the CIR Rules. Rule 178(1) states that:

> 178.—(1) No defect or irregularity in the appointment or election of a scheme manager, a receiver or manager, an interim judicial manager, a judicial manager, a liquidator, or a member of a committee of inspection (each called an officeholder) vitiates *any act* done by the officeholder in good faith.
>
> [emphasis added]

ZPL submits that r 178(1) should be read with s 176 and that the words "any act" in r 178(1) indicate that the validation of the liquidator's acts is not contingent on when the acts were done.[67] However, ZPL takes the view that s 176 only applies when the defects in the liquidator's appointment are discovered before or at the point of the purported appointment. According to ZPL, the date of discovery ought to be the date on which the defects in liquidator's appointment were first discovered and notified to the liquidator.[68] In the present case, this would be on or before 20 May 2024, the date on which the resolution confirming Ms Tan's appointment was passed. As the defects in

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66 Applicant's Further Submissions dated 18 October 2024 ("AFS") at para 4; Respondents' Further Submissions dated 18 October 2924 ("RFS") at para 5(a).

67 AFS at para 4(b).

68 AFS at para 7.

the present case were discovered before Ms Tan's appointment, s 176(1) does not even apply.[69]

57 The respondents submit that s 176(1) of the IRDA can apply to validate acts done after the discovery of defects.[70] The respondents refer to the purported position in other common law jurisdictions for this view. However, the respondents contend that s 176(1) applies in the present case to validate Ms Tan's acts as the liquidator. The respondents disagree with ZPL that s 176(1) of the IRDA only applies when defects are discovered before the purported appointment.[71] Further, the date of discovery is the date the court determines the present applications.[72]

58 Contrary to both parties' submissions, the appropriate interpretation of s 176(1) of the IRDA is that it should only apply to cure acts up to the point of the discovery of defects in the appointment. In other words, the acts of the liquidator, performed after the discovery of defects in his or her appointment, cannot be validated under s 176(1).

59 Section 176(1) of the IRDA states that "the acts of a liquidator are valid despite any *defects that may afterwards be discovered* in the liquidator's appointment or qualification" [emphasis added]. The word "afterwards" in s 176(1) of the IRDA places an additional qualification on the provision.

60 The respondents' submission, that the language of s 176(1) of the IRDA does not place a timing restriction of when the acts sought to be validated must

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69 AFS at para 5.

70 RFS at para 7.

71 Respondents' Further Reply Submissions dated 25 October 2024 ("RFRS") at para 5.

72 RFS at para 5(b).

be done,[73] is therefore contrary to the plain wording of the provision. In so far as the respondents rely on *OBG Ltd and another v Allan and others* [2008] 1 AC 1 (at [91]) for this, that decision relates to s 232 of the Insolvency Act 1986 (c 45) (UK) ("UK Insolvency Act"). Section 232 of the UK Insolvency Act is not *in pari materia* to s 176(1) of the IRDA and, crucially, does not place a qualifier as to timing. Section 232 of the UK Insolvency Act states:

> **Validity of office-holder's acts**
>
> The acts of an individual as administrative receiver, liquidator, or provisional liquidator of the company are valid notwithstanding any defect in his appointment, nomination or qualifications.

61 ZPL's submission is that the discovery of the defects must accrue "after" the appointment of the liquidation. I disagree. The more appropriate interpretation of s 176 is that the reference point for when the defects must be found to accrue "after" is the time at which the acts sought to be validated were done, and not the appointment of the liquidator. The phrase "the liquidator's appointment or qualification" is to be read as a descriptor of the type of defects that may suffice for the purpose of s 176(1).

62 On a plain reading of s 176(1), the discovery of the defects in the liquidator's appointment or qualification must accrue after the occurrence of the acts sought to be validated. The provision only applies to validate acts prior to the discovery of the defects in the liquidator's appointment or qualification.

63 I turn to examine the legislative history of s 176(1). Section 176(1) was originally proposed as cl 268 in the Companies Bill (Bill No 58/1966) ("Companies Bill"). The explanatory statement to the Companies Bill states that

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[73] RFS at para 28.

"[c]lause 268 is new and provides for the validity of the acts of liquidators, *bona fide* and without notice of defects in their appointment or qualification". This further suggests that s 176(1) only applies to validate the acts of the liquidators conducted before they were put on notice of the defects in their appointment or qualification.

64 There are no prior cases that discuss this provision. An examination of the similar provisions in s 139(9) of the IRDA (in relation to the acts of a liquidator in a compulsory winding up) and s 151 of the Companies Act 1967 (2020 Rev Ed) ("Companies Act") (in relation to the acts of directors and certain officers) does not assist either.

65 Nonetheless, the view that s 176(1) only applies to validate acts prior to the discovery of defects in the liquidator's appointment or qualification is also supported by academic commentary. The learned authors of Harold Foo & Beverly Wee, *Annotated Guide to the Singapore Insolvency Legislation: Corporate Insolvency* (Academy Publishing, 2023) ("*Annotated Guide to Singapore Insolvency Legislation*") state at paras 10.465–10.466 that:

> 10.465
>
> … Section 176(1) provides that notwithstanding any *subsequent discovery* of a defect in the liquidator's appointment or qualification, *any act(s) of the liquidator are treated as valid.*
>
> 10.466
>
> Section 176(1) validates acts of the liquidator notwithstanding such defects in order to prevent the unwinding of transactions that have been entered into and prejudicing rights that have accrued since the liquidator's appointment.
>
> [emphasis added]

66 Additionally, this interpretation is also consistent with the Australian, English and Malaysian positions regarding their equivalent or similar statutory provisions.

(1) The position in Australia

67 The Australian position is relevant as s 176(1) was adopted from s 268(1) of the Companies Act 1961 (Vic). The respondents argue that the Australian courts accept that acts done after the discovery of defects can be validated. However, the cases relied on by the respondents do not stand for this proposition.

68 The first case the respondents rely on is *Re Deisara Pty Ltd (in liq)* [1992] 7 ACSR 737 ("*Re Deisara*"). According to the respondents, in that case, the court found that the acts which the liquidator performed from the time of his appointment to 6 December 1990 were valid, despite the purported discovery of the defect on 28 September 1990.[74]

69 In my view, this is not an accurate reading of *Re Deisara*. In that case, the court had ordered for one Mr Jackson to be appointed as the company's "liquidator", even though no winding up application had been filed at that time. The appointment was therefore more appropriately for Mr Jackson to be the provisional liquidator of the company. Nonetheless, as Mr Jackson was advised that he had been appointed as the company's liquidator, he took steps to call proofs of debt and maintained and stored the company's assets, amongst other things. Mr Jackson was later informed, on 28 September 1990, that the winding up order was defective. Nonetheless, he took the view that he should continue

[74] RFS at paras 8–10.

to act until the court ordered for his appointment to be set aside, given that it was an order by a superior court of record and was valid until it was set aside (*Re Deisara* at 738). The order for Mr Jackson's appointment as liquidator was only vacated on 6 December 1990. As the defective court order for Mr Jackson's appointment was operative until 6 December 1990, 6 December 1990 was the date when the defects were "discovered". Notwithstanding the fact that Mr Jackson continued to perform work after 6 December 1990, he did not seek for, and the court did not validate, any acts performed by Mr Jackson after that date. Therefore, *Re Deisara* does not stand for the proposition that acts done after the discovery of defects may be validated.

70 The respondents also rely on *Davidson v Global Investments International Ltd (No 2)* (1996) 19 ACSR 332 ("*Davidson*") where the court allegedly rejected the suggestion that a provisional liquidator "should not have taken any further action once he was aware of the challenges to his appointment": *Davidson* at 336.[75] However, this statement must be understood in its context. The court's reasoning was that the provisional liquidator "was appointed by the court and had an obligation to carry out his duties in accordance with the order of the court" (*Davidson* at 336). The situation in *Davidson* is therefore similar to that in *Re Deisara*, where there was an effective court order in place, justifying the provisional liquidator's conduct of his duties even if he was aware of the challenges to his appointment.

71 *Parkinson v Morkaya* [2008] NSWSC 1183 ("*Parkinson*") also does not clearly support the respondents' position.[76] In *Parkinson*, although the purported provisional liquidator, Mr Dunphy, was not an official liquidator and thus not

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75 RFS at para 12.

76 RFS at para 11.

eligible to be appointed by the court as a provisional liquidator, the court ordered that his acts from the date of his alleged appointment till the date of the hearing were valid notwithstanding the defects in his qualification (*Parkinson* at [1]). The respondents say that although it was not clear when the defect was discovered, it was unlikely to be on the same day as the hearing itself.[77] This is, at best, speculative. In the absence of any clear indication as to when the defect was found to have been discovered in that case, *Parkinson* is of little assistance in determining whether acts subsequent to the discovery may be validated.

72 On the contrary, there is authority for proposition that the equivalent provision in Australia only validates acts done prior to the discovery of the defects. In the Victorian Supreme Court decision of *The Mercantile Bank of Australia Ltd v Dinwoodie* (1902) 28 VLR 491, Holroyd J said that the provision (at 501):

> … may very well validate acts done by, say, liquidators who were not or, indeed, never could have been legally appointed, if there is nothing on the face of the proceedings to indicate that they have in any way been improperly appointed. *The object is to validate their acts until those acts are called into question, or until, rather, the validity of their appointment is called into question*; but even then the acts done by them up to that date are valid, although they could never have been legally done.
>
> [emphasis added]

73 Academic commentary in *McPherson: The Law of Company Liquidation* (LBC Information Services, 4th Ed, 1999) ("*McPherson Australia*") (at p 348) further supports the view that there are limits to the provision:

> … the liquidator's acts are *validated only insofar as the defects in qualification or appointment are discovered 'afterwards'*, ie after the acts in question have been done. It follows that, *once*

[77] RFS at para 11.

> *any such defects have been discovered, the liquidator cannot validly perform further acts in purported reliance upon this validating provision.*
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> [emphasis added]

(2) The position in the UK

74 As indicated above (at [59]), s 232 of the UK Insolvency Act is similar, but not identical, to s 176(1) of the IRDA. The respondents acknowledge that the commentary in *McPherson & Keay: The Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) ("*McPherson & Keay UK*"), which replicates the view in *McPherson Australia* (see above at [73]), takes the view that the object of s 232 is to "validate their acts until those acts are called into question, or until, rather, the validity of their appointment is called into question".[78] However, the respondents submit that as this analysis would be inconsistent with *Davidson*, the learned authors erred in using the phrase "until … the validity of their appointment is called into question".[79]

75 *Davidson* does not stand for the proposition that a liquidator's acts after the discovery of the defects in his appointment are valid. As explained above (at [70]), *Davidson* may be interpreted as a case where the court found that "discovery" of the defects occurred when the operative court order of appointment was set aside. It was for this reason that the court held that the provisional liquidator was justified in continuing his purported duties until the setting aside of his appointment and should be remunerated accordingly.

76 In fact, other English authorities cohere with the view in *McPherson & Keay UK*. In *Re Bridport Old Brewery Co* (1867) LR 2 Ch App 191

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78 RFS at para 18.

79 RFS at para 19.

("*Re Bridport*"), there was no meeting held to confirm the resolution providing for the winding up of the company and the appointment of the liquidator. The appellants argued that the resolution was invalid and that, accordingly, the liquidator had no title and could not effectually deal with the assets. The respondents however argued that the liquidator's acts in dealing with the said assets were valid under s 67 of the Companies Act 1862 (25 & 26 Vict c 89) (UK) (*ie*, the predecessor provision to s 232 of the UK Insolvency Act). Sir G J Turner LJ held (at 194) that s 67 should be interpreted restrictively as:

> … *mean[ing] no more than that all proceedings taken by the liquidator before the invalidity of his appointment is shewn, shall be held valid*; when his appointment has been shewn to be invalid, I do not think that it was intended by this section to give validity to his proceedings. I am therefore of opinion, that unless the resolution for a voluntary winding-up can be shewn to be valid and effectual, serious difficulties will arise in the way of the liquidator dealing with the assets.
>
> [emphasis added]

77 This is also supported by the *obiter dictum* in *Andrew Bland and another v JDK Construction Limited (in liquidation) and another* (2023) EWHC 2805 (Ch) ("*JDK Construction*"). The respondents attempt to distinguish *JDK Construction* on the basis that the defect in that case related to the entire basis of the voluntary liquidation, *viz*, that the liquidation did not happen at all.[80] This is unconvincing. The court's decision in that case was two-fold. First, because there was no valid winding up of the company, s 232 of the UK Insolvency Act did not apply. Second, even if s 232 of the UK Insolvency Act applied, "it would not operate to validate acts done after the defect in the liquidators' appointment had been identified" (*JDK Construction* at [47]). It is thus clear that the court contemplated that even if there was a valid winding up of the company, s 232

[80] RFS at para 32.

of the UK Insolvency Act would not apply to validate acts done subsequent to the discovery of defects in the liquidator's appointment.

(3) The position in Malaysia

78 The respondents also refer to the Malaysian position in their submissions. Section 127 of the Companies Act 1965 (No 125 of 1965) (M'sia) (the "Malaysian Companies Act") is equivalent to s 176(1) of the IRDA, but applies to acts of a director, manager or secretary instead. Section 127 of the Malaysian Companies Act states that:

> The acts of a director or manager or secretary shall be valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

79 In *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495 ("*Sazean Engineering*"), the court reasoned that the qualifier in s 127 of the Malaysian Companies Act, namely, the phrase "notwithstanding any defect that may afterwards be discovered in his appointment or qualification", meant that the provision was circumscribed in its scope (*Sazean Engineering* at [58]). The court held (at [60]):

> The meaning inherent in that phrase must be that when the subject director did the impugned acts, *he was not aware of the defects that are afflicting or blighting his qualification as a director.* By that same token, it would be inimical to common sense if a director can be allowed by law to do acts in his capacity as a director when at the same time he was in full knowledge of the fact as regards his legal status as a director. …
>
> [emphasis added]

80 *Sazean Engineering* therefore supports the position that, due to the qualifier of "afterwards", only acts done before the discovery of the defects may be validated. Although ZPL suggests that *Sazean Engineering* is not relevant

because it applies to directors rather than liquidators,[81] this distinction is superficial. It has been accepted that s 151 of the Companies Act (which is *in pari materia* to s 127 of the Malaysian Companies Act) concerning directors, managers or secretaries is parallel to s 176(1) of the IRDA (see, *eg, Annotated Guide to Singapore Insolvency Legislation* at para 10.468). There is no reason for an arbitrary distinction between the provisions. Further, the fact that s 127 of the Malaysian Companies Act has been repealed and replaced with s 204 of the Companies Act 2016 (No 777 of 2016) (M'sia), which replaces the phrase "notwithstanding any defect that may afterwards be discovered in his appointment or qualification" with "notwithstanding any defect that is discovered after his appointment", is immaterial. The Malaysian Parliament could have had a different intention in deciding to amend the provision, which is not before me.

(4) Applicable interpretation of s 176(1) of the IRDA

81 For all the foregoing reasons, I take the view that s 176(1) only applies to validate any acts by the liquidator prior to the discovery of the defects in the liquidator's appointment.

82 Considering the plain wording of s 176(1), ZPL's reliance on r 178(1) of the CIR Rules does not hold water (see above at [56]). The CIR Rules, as subsidiary legislation, cannot modify the meaning of primary legislation.

83 There arises the subsequent question of when the defects of the liquidator's appointment are found to have been discovered for the purposes of

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[81] Applicant's Further Reply Submissions dated 25 October 2024 ("AFRS") at para 8.

s 176(1). In my view, what would amount to a discovery of defects depends on an examination of the specific facts.

84 In *Re Deisara* and *Davidson*, the Australian courts appear to have considered that the time of "discovery" was only when there was a definitive determination of the defects in the liquidator's appointment. The mere challenge to the liquidator's appointment or the mere possibility of a defect was insufficient. While this may be explained on the basis that the provisional liquidators in those cases were court-appointed, and thus bore "an obligation to carry out [their] duties in accordance with the order of the court" (*Davidson* at 336), I am conscious that there is merit in ensuring that well-meaning liquidators, who are carrying out their duties in good faith (see r 178 of the CIR Rules) should not be unduly hampered or penalised.

85 In so far as there may be concerns of situations where liquidators are wrongly appointed and conduct acts in their capacity as liquidators under fraud or deceit, leading to a wrongful dissipation of the company's assets, these may be addressed by the good faith requirement in r 178 of the CIR Rules. Therefore, where there is a reasonable basis for taking the view that there is no defect, and the matter is contested, I am of the opinion that the court should be slow to find notice or knowledge of the defects until the determination by the court.

86 Accordingly, I order that Ms Tan's exercise of the functions and powers of a liquidator, and all ensuing steps taken and acts done in connection with ZAPL's liquidation, before today, are valid. However, any subsequent acts will be void.

87 In considering the appropriate relief, the option of ordering the creditors' meeting to be reconvened is undesirable, in so far as the chairperson of the

meeting would need to be re-appointed. I am also cognisant of the fact that there are some concerns of partiality, as raised by the respondents and one other creditor, if Mr Wong were to be appointed as the liquidator of ZAPL given that he is the current liquidator of ZPL (which is itself an alleged creditor of ZAPL).[82] Accordingly, I find that the appropriate recourse in the present case is for the court to appoint a liquidator. This power is provided under s 173 of the IRDA, which reads: "[i]f from any cause there is no liquidator acting, the Court may appoint a liquidator". Directions will be given to parties and creditors on alternative nominations for a court-appointed liquidator, as well as for any cost orders.

Aidan Xu
Judge of the High Court

Justin Yip Yung Keong, Lam Zhen Yu, Wong Sze Qi and Cheang Hui Xuan (Withers KhattarWong LLP) for the applicant in HC/OA 603/2024 and HC/OA 605/2024;
Daniel Chia Hsiung Wen, Tang Yuan Jonathan and Low Hui Xuan Carrisa (Prolegis LLC) for the respondents in HC/OA 603/2024 and respondent in HC/OA 605/2024.

[82] RJWS at paras 101(e) and 104.