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

[2022] SGHC 304

Originating Summons No 828 of 2021

In the matter of Sections 254, 327 and 411 of the Companies Act (Cap 50)

And

In the matter of Kyen Resources Pte Ltd (in liquidation)

Between

Feima International (Hongkong) Limited (in liquidation)

… *Plaintiff*

And

(1) Kyen Resources Pte Ltd (in liquidation)
(2) Chan Kheng Tek (in his capacity as a joint and several liquidators of Kyen Resources Pte Ltd (in liquidation)
(3) Goh Thien Phong (in his capacity as a joint and several liquidator of Kyen Resources Pte Ltd (in liquidation)

… *Defendants*

JUDGMENT

[Insolvency Law — Winding up — Liquidator]
[Evidence — Proof of evidence — Proof of debt owed by related company]
[Debt and Recovery — Right of set-off — Insolvency set-off]

TABLE OF CONTENTS

BACKGROUND FACTS 4

THE PARTIES 4

EVENTS LEADING TO REJECTION OF THE PROOF OF DEBT 6

REASONS PROVIDED THE KYEN LIQUIDATORS FOR THE REJECTION OF THE PROOF OF DEBT 10

THE RELEVANT ISSUES 12

THE GENERAL APPROACH IN RELATION TO AN APPLICATION UNDER RULE 93 14

WHETHER THE KYEN LIQUIDATORS' "PRIMARY GROUND" FOR REJECTION SHOULD BE AFFIRMED 15

OVERVIEW 15

WHETHER THE KYEN LIQUIDATORS ARE JUSTIFIED IN ACCOUNTING FOR THE COUNTERCLAIMS IN ADJUDICATION OF THE PROOF OF DEBT 16

The parties' original submissions on the Threshold Issue 16

The parties' additional submissions on the Threshold Issue 21

(1) Feima's submissions 22

(2) The defendants' submissions 25

My decision: the Kyen Liquidators are not entitled to account for the counterclaims in their adjudication of the Proof of Debt 28

(1) The relevant issues 28

(2) Whether the Kyen Liquidators' quasi-judicial role entitle them to account for the counterclaims in adjudication 28

(A) Precedent 30

(B) Principle 33

(C) Policy 36

(D) Application to the present case 37

(3) Whether the Insolvency Set-off applies in the present case.....39

WHETHER THE KYEN LIQUIDATORS HAVE SUCCESSFULLY PROVED THEIR COUNTERCLAIMS FOUNDED ON DISHONEST ASSISTANCE AND KNOWING RECEIPT.....42

CONCLUSION ON THE KYEN LIQUIDATORS' "PRIMARY GROUND" FOR REJECTION.....43

WHETHER THE KYEN LIQUIDATORS' "ALTERNATIVE GROUNDS" FOR REJECTION SHOULD BE AFFIRMED.....43

OVERVIEW.....43

WHETHER A HEIGHTENED SCRUTINY OF THE PROOF OF DEBT IS NECESSARY IN THE PRESENT CASE.....44

The parties' arguments.....*44*

My decision: a heightened scrutiny of the Proof of Debt is not necessary in the present case.....*47*

(1) The applicable law.....47

(A) No general need for heightened scrutiny for cases involving related companies.....*47*

(B) "Triggers" that will raise a court's suspicion to require more evidence in cases involving related companies.....*48*

(C) Facts that will negate need for more evidence in cases involving related companies.....*50*

(D) Summary of the overall position involving the need for more evidence for cases involving related companies.....*51*

(2) Application to the present case.....53

(A) No need for a wholesale insistence of more evidence.....*53*

(B) No "triggers" that require more evidence in respect of specific claims.....*53*

WHETHER THE KYEN LIQUIDATORS' DECISION TO REJECT THE INTERCOMPANY CLAIMS SHOULD BE AFFIRMED.....54

The parties' general arguments *54*

My decision: the Kyen Liquidators' decision to reject the Intercompany Claims should be rejected *56*

(1) Whether Feima's supporting documents should be viewed with suspicion 56

(A) No need for "heightened scrutiny" in the present case *56*

(B) Feima's audited financial statements can be relied on *56*

(C) Kyen's audited financial statements can be relied on *62*

(D) Kyen's statement of affairs *63*

(2) Whether Feima has made out its claims 64

(A) Overview of Feima's claims *64*

(B) USD 25,824,511.08 due from Kyen to Feima as a result of goods sold by Feima to Kyen *65*

(C) RMB 124,145,239.85 due from Kyen to Feima as a result of payments made by Feima to or on behalf of Kyen *68*

(D) USD 5,182,755.32 due from Kyen to Feima as a result of payments made by Feima to Kyen or on Kyen's behalf *68*

CONCLUSION ON THE KYEN LIQUIDATORS' "SECONDARY GROUND" FOR REJECTION 71

CONCLUSION 71

Feima International (Hongkong) Ltd (in liquidation)
v
Kyen Resources Pte Ltd (in liquidation) and others

[2022] SGHC 304

General Division of the High Court — Originating Summons No 828 of 2021
Goh Yihan JC
6 October 2022

5 December 2022 Judgment reserved.

Goh Yihan JC:

1 The plaintiff is Feima International (Hongkong) Limited (in liquidation) ("Feima"). This is Feima's application, pursuant to r 93 of the Companies (Winding Up) Rules (Cap 50, R 1, 2006 Ed) ("the Rules"), for the following orders:[1]

> (a) The decision of the second and/or third defendants, in each of their capacities as the joint and several liquidators of Kyen Resources Pte Ltd (in liquidation) ("Kyen") (which is the first defendant), to reject Feima's proof of debt dated 2 September 2020 to the extent of USD 49,355,996.30 ("the Proof of Debt") be reversed and/or varied;

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[1] HC/OS 828/2021 dated 13 August 2021.

(b) The Proof of Debt be admitted in full, or such part thereof as the court determines, in the liquidation of Kyen;

(c) The costs of the proceedings be provided for; and

(d) Such further and/or other orders as the court deems fit.

2 As is evident from the prayers, the present application arises out of the second and third defendants' (collectively, "the Kyen Liquidators") rejection of the Proof of Debt for the sum of USD 49,355,996.30. This aggregate sum is comprised of (a) inter-company payments allegedly made by Feima on Kyen's behalf amounting to RMB 124,145,239.85 and USD 5,182,755.32 less the sum of HKD 12,957.94 (collectively, "the Intercompany Claims"), and (b) the sum of USD 25,824,511.08, which appeared to be for the sale and purchase of goods between Kyen and Feima (the "Purchase Debts").[2] Despite praying for the full amount to be restored, Feima has clarified that it does *not* seek to reverse the Kyen Liquidators' decision in relation to USD 16,818,150.82 of the Intercompany Claims that have been assigned under a deed of assignment ("Deed of Assignment"). Feima is content for this sum to remain rejected for the purposes of the Proof of Debt.[3] As such, the remaining amount in contention that was claimed by Feima in its Proof of Debt was USD 32,079,540.97. This remaining figure of USD 32,079,540.97 is made up of the following sums:[4]

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2 Defendants' Written Submissions dated 29 September 2022 ("DWS") at [3.4.1]; Plaintiff's Written Submissions dated 29 September 2022 ("PWS") at [4]; Second Affidavit of Chan Kheng Tan dated 25 October 2021 ("2 CKT") at [3.2.1].

3 PWS at [3].

4 Letter from plaintiff's counsel dated 6 October 2022 at [6].

(a) USD 9,006,360.26 due from Kyen to Feima as a result of goods sold by Feima to Kyen (being the USD 25,824,511.08 sum less the USD 16,818,150.82 debt assigned).

(b) RMB 124,145,239.85 (or USD 17,890,425.39 based on the exchange rate of 6.9392 RMB/USD as at 6 August 2019) due from Kyen to Feima as a result of payments made by Feima to or on behalf of Kyen.

(c) USD 5,182,755.32 due from Kyen to Feima as a result of payments made by Feima to Kyen or on Kyen's behalf.

3 For completeness, there was also a sum of HKD 12,957.94 (or USD 1,652.04 based on the exchange rate of 7.8436 HKD/USD as at 6 August 2019) that was due from Feima to Kyen as a result of amounts paid by Kyen on behalf of Feima (instead of an amount being owed by Kyen to Feima). As I will mention below (at [118]), I do not deal with this sum due from Feima to Kyen as this would not affect the amount claimed by Feima in its Proof of Debt. I should note that the sum of USD 32,079,540.97 is a different figure from what was quoted in the plaintiff's letter dated 6 October 2022 (which was USD 32,537,845.48). This is despite the fact that the same figures were being added up from [2(a)]–[2(c)], excluding the sum of HDK 12,957.94, which would not be significant relative to the remaining sum. It appears to me that the plaintiff has added the figures wrongly in its above-mentioned letter. I will proceed with the remaining sum of USD 32,079,540.97 in this judgment but parties are at liberty to write in for clarification if needed.

Background facts

The parties

4 By way of background, Kyen is a Singapore company in liquidation. The second and third defendants are the joint and several liquidators of Kyen.[5] Before liquidation, Kyen was primarily involved in the trading of commodities and foreign currency derivative instruments.[6]

5 Feima is the immediate holding company of Kyen. Feima owns 86% of Kyen's shares.[7] In turn, Feima is a wholly-owned subsidiary of Shenzhen Feima International Supply Chain Co Ltd ("SZFM"). Collectively, Kyen, SZFM and Feima are part of a network of companies.[8] As such, Kyen shared common directors with other companies in the same network. These common directors included Mr Huang Zhuangmian, Mr Zheng Jianjiang, Ms Wang Limei, and Mr Chen Xi ("Mr Chen").[9] As a network of related companies, Kyen's trading and finance operations are closely coordinated with the other entities including SZFM and Feima.[10]

6 The defendants made detailed submissions about Feima's control over Kyen's operations. In particular, the defendants say that, first, Feima entered into a management and administrative services agreement with Kyen

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5 First Affidavit of Chan Kheng Tek dated 19 August 2021 ("1 CKT") at [1.1.1].

6 PWS at [2].

7 2 CKT at [3.1.2].

8 2 CKT at [3.1.3].

9 2 CKT at [3.1.5].

10 2 CKT at [3.1.3].

("Management and Administrative Services Agreement")[11], under which Feima provided Kyen with several corporate services such as: (a) making financial and trading arrangements on Kyen's behalf, (b) operating the Kyen bank accounts, and (c) supervising the sale and purchase of assets on Kyen's behalf.[12] Second, the defendants also say that, in line with the close coordination of the group's trading and finance operations, Feima's directors and management were closely involved in Kyen's finance operations.[13] I shall refer to some of these submissions below.

7 In addition, the defendants submit that the Kyen Liquidators' identified several large transactions under which payments in the aggregate amount of USD 159.3m were made by Kyen to several third parties ("the Third Party Transactions") during their investigation into Kyen's affairs.[14] The Kyen Liquidators have been unable to account for and reconcile the Third Party Transactions. In particular, they were unable to identify any consideration received by Kyen for each of the Third Party Transactions.[15] They also say that they were unable to find evidence that these transactions were in discharge of any genuine pre-existing debt owned by Kyen to the respective third parties. They further allege that Feima knew of and/or had a pre-existing relationship with Infinite Future Limited ("IFL"), to which Kyen had paid USD 18,785,000. IFL later paid out these amounts to Feima's director, Mr Yan Xiaoyang ("Mr Yan") and also to Mr Chen (a common director of Kyen and Feima, see

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11 2 CKT at pp 104–116.

12 DWS at [3.2.2]

13 DWS at [3.2.3].

14 DWS at [3.3.1].

15 DWS at [3.3.2].

above at [5]).[16] I shall also refer to some of these submissions in greater detail later on.

Events leading to rejection of the Proof of Debt

8 I come now to the Kyen Liquidators' rejection of the Proof of Debt. On 2 September 2020, the Feima Liquidators submitted the Proof of Debt for the sum of USD 49,355,996.30 with the Kyen Liquidators. The supporting documents for the Proof of Debt included the following:

(a) Kyen's own audited financial statements showing that USD 64,696,911 (which was equivalent to HKD 505,727,215) was payable by Kyen to Feima as at 31 December 2017.[17]

(b) Feima's audited financial statements showing that HKD 505,727,215 and HKD 385,549,890 were payable by Kyen to Feima as at 31 December 2017 and 31 December 2018, respectively.[18]

(c) An extract of the statement of affairs filed by one of the Kyen directors which states that Feima has an unsecured claim of USD 49,355,996.30 against Kyen.[19]

(d) Feima's detailed ledger, including details showing how the balance of HKD 505,727,215 that was payable by Kyen as at

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16 DWS at [3.3.1].

17 First Affidavit of Choi Tze Kit Sammy dated 13 August 2021 ("1 CTKS") at [12(1)]; PWS at [4(1)].

18 1 CTKS at [12(2)]; PWS at [4(2)].

19 1 CTKS at [12(3)]; PWS at [4(3)].

31 December 2017 was gradually reduced by a series of about 133 separate transactions to HKD 384,549,890 by 31 December 2018.[20]

9 On 8 October 2020, in response to the supporting documents provided, the Kyen Liquidators replied to state that:[21]

> *…It is insufficient for Feima International (Hongkong) Limited (In Liquidation) ("Feima HK") to rely merely on the Statement of Affairs of Kyen as proof of the debt that has been incurred. This is not least because the Feima HK's* ***accounts do not reflect the assignment of debt to Shanghai Pudong Development Bank pursuant to Deed of Assignment dated 25 Oct 2018 for USD16.8m****. We are not otherwise able to reconcile the amount claimed with Kyens internal records.*
>
> *We therefore require the contemporaneous documents underlying debt in order to properly ascertain its genesis and legitimacy.*
>
> *In light of the above, please provide us the following documents:*
>
> > *a) All of Feima HK's audited accounts from the year in which Kyen's debts to Feima HK were first accrued;*
> >
> > *b) Any and all underlying contemporaneous documents (i.e. all contracts, bills of lading, invoices etc.) to support Feima HK's claim by 15 October 2020. …*
>
> [italics in original; emphasis added in bold italics]

10 In relation to the Deed of Assignment referred to in the extract above, and as I have mentioned above at [2], Feima has confirmed that it would no longer be claiming for USD 16,818,150.82 in respect of the debt assigned to Shanghai Pudong Development Bank ("SPDB"). Feima is not claiming for this amount because the Deed of Assignment remains in force, and Feima accepts that this would remain the case until it has been set aside by a court. In this regard, Feima has not been able to secure the necessary funding to apply to set

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20 1 CTKS at [12(4)]; PWS at [4(4)].

21 1 CTKS at [13].

aside the Deed of Assignment. What remains in contention for present purposes, as I alluded to above at [2], is therefore the sum of USD 32,079,540.97. Nonetheless, I will still refer to the sum of USD 49,355,996.30 in my narration of the facts since this was the sum in contention before the present application.

11 On 22 October 2020, the Kyen Liquidators' solicitors replied to say that there remains insufficient evidence for them to admit Feima's claim of USD 49,355,996.30 against Kyen. The solicitors requested that the Feima Liquidators provide the following information by 28 October 2020:[22]

(a) Feima's full audited accounts for the financial year ending 31 December 2017 and 31 December 2018; and

(b) any and all underlying contemporaneous documents that support Feima's claims in its letter dated 16 September 2020.

12 On 24 November 2020, Feima provided:[23]

(a) The relevant pages from Feima's audited financial statements showing the amounts owing by Kyen as at 31 December 2017 and 31 December 2018.

(b) Two detailed ledgers showing details of the balances that were owing from Kyen to Feima. Feima also provided contemporaneous documents of about 462 pages, as further supporting documents for the transactions shown on the two ledgers.

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22 1 CTKS at [15(3)].

23 1 CTKS at [18].

13 On 18 March 2021, the Kyen Liquidators' solicitors wrote to Feima, SZFM, and Shanghai Yinjun Industry Co Ltd to raise the issue of the allegedly unexplained Third Party Transactions.[24] The solicitors also requested Feima's response to a list of questions. Feima's solicitors in Hong Kong, Tung, Ng, Tse & Lam ("TNTL"), wrote back to request for, among other things, details of one of the transactions disputed, namely, payments by Kyen to Dynamic Commodity Limited of USD 119.4m from November 2017 to December 2017. TNTL also stated that the Feima Liquidators were investigating the suspicious disposition of Feima's properties and asked that details be provided of the corresponding sales by Kyen for the goods Kyen allegedly purchased from Feima from 1 January 2016 to the date of Kyen's winding up order.[25]

14 The Kyen Liquidators' solicitors have described TNTL's response as being a reply with the very same queries that the Kyen Liquidators had asked of the Feima Liquidators. As such, on 12 May 2021, the Kyen Liquidators' solicitors wrote to TNTL without providing any of the information requested and stated that the Feima Liquidators' response only "serves to frustrate the Liquidators' own efforts in investigating the suspicious disposition of Kyen's property".[26] Thereafter, the Kyen Liquidators' solicitors concluded that "the [Kyen Liquidators' will proceed as it deems fit, without any further reference to your clients, including but not limited to the adjudication of your client's proof of debt".[27]

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24 1 CTKS at [26].

25 1 CTKS at [28]–[29].

26 1 CTKS at p 631.

27 1 CTKS at p 632.

Reasons provided the Kyen Liquidators for the rejection of the Proof of Debt

15 On 23 July 2021, by way of a Notice of Rejection of Proof of Debt, the Kyen Liquidators stated that the entirety of the Proof of Debt for the sum of USD 49,355,996.30 had been rejected[28], on the basis of two alternative grounds:

(a) First, the Kyen Liquidators asserted the following about the quantum of Kyen's counterclaims against Feima's claims:[29]

> *"The* ***quantum of the Company's counterclaims against you exceeds your Claim*** *(the "Counterclaims"). Your Claim is therefore rejected in its entirety and you are a debtor of the Company.* ***The Counterclaims are for losses suffered by the Company in certain transactions*** *("Transactions") between the Company, on the one hand, and Infinite Future Limited ("IFL"), Richland International Company Limited ("RICL") or Dynamic Commodity Limited ("DCL"), on the other, which have been caused and/or occasioned by you. The particulars of the Transactions and the relevant correspondence are* ***enclosed hereto as Annex A*** *to this Notice."*
>
> [italics and bold italics in original]

(b) Second, the Kyen Liquidators rejected the claim up to the amount of USD 44,900,112.83 for three reasons as set out in the enclosed spreadsheet, namely:[30]

(i) The Kyen Liquidators have not received sufficient supporting documents to support the claim for the amounts claimed by Feima.

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28 1 CTKS at [34].

29 1 CTKS at [35].

30 1 CTKS at [38].

(ii) In respect of the 2017 management fees for the amount of USD 2,000,000 ("the Management Fees Claim") (this is part of the Intercompany Claims), that sum is rejected on the basis that Feima had breached the terms of the Management and Administrative Services Agreement.

(iii) In respect of the claims totalling USD 16,818,150.82, these were the subject of the Deed of Assignment. As mentioned above at [2], Feima has confirmed that it is no longer pursuing any claim in relation to this sum.

16 The Kyen Liquidators have provided further details of their reasons for rejection in the relevant affidavits filed for this application. As gleaned from the parties' respective submissions for this application, these reasons may be summarised as such:

(a) First, Kyen has a claim against Feima for *dishonest assistance* in the amount of USD 159.3m, arising from the following unexplained and suspicious payments which Kyen made to third parties (*ie*, the Third Party Transactions):[31]

(i) Payments in the aggregate of USD 18,785,000.00 that were made to IFL.

(ii) Payment of the sum of USD 7,616,800.00 that was made to Richland International Company Limited.

[31] 2 CKT at [4.1.2].

(iii) Payments in the aggregate of USD 13,506,390.27 that were made to Dynamic Commodity Ltd ("DCL") ("DCL Payments"); and

(iv) Payments in the aggregate of USD 119.4m that were made to DCL on the purported basis of a Sales Contract for the purchase and delivery of copper cathodes ("DCL Copper Payments").

(b) Second, Kyen has a claim against Feima for *knowing receipt* of funds in the sum of USD 42,382,430.66, representing monies received by Feima from DCL, which the Kyen Liquidators believe are traceable to the DCL Copper Payments.[32]

(c) Third, the Kyen Liquidators rejected the Proof of Debt on the basis that there has been insufficient evidence to support the debt claimed (save the Management Fees Claim which the Kyen Liquidators rejected on the basis that there has allegedly been a breach of the Management and Administrative Services Agreement).[33]

The relevant issues

17 In my view, the following relevant issues arise in the present case.

18 First, what is the applicable law to be applied in scrutinising the validity of the Kyen Liquidators' rejection of the Proof of Debt?

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32 2 CKT at [4.1.4].

33 1 CTKS at [46].

19 Second, with the applicable law in mind, we come to the assessment of the Kyen Liquidators' reasons for rejection of the Proof of Debt:

(a) In relation to the Kyen Liquidators' "primary ground" founded on the counterclaims, namely, the allegations of dishonest assistance and knowing receipt:

(i) Are the Kyen Liquidators justified in accounting for the counterclaims in the adjudication of the Proof of Debt, rather than by way of formal legal proceedings?

(ii) If the Kyen Liquidators are so justified, whether they have successfully proved a counterclaim founded on dishonest assistance?

(iii) Again, if the Kyen Liquidators are so justified, whether they have successfully proved a counterclaim founded on knowing receipt?

(b) In relation to the Kyen Liquidators' "alternative grounds", are any of these made out on the facts?

20 I should say that if the Kyen Liquidators are not justified in accounting for the counterclaims in the adjudication of Feima's proof, then I should *not* go further to consider the validity of its counterclaims in dishonest assistance and knowing receipt. More specifically, if I am of the view that the Kyen Liquidators should have pursued legal proceedings against Feima in respect of these counterclaims, then it will not be appropriate for me to express any view on the merits of these claims. As we shall see below, I did in fact conclude that the Kyen Liquidators are *not* justified in accounting for the counterclaims in the

adjudication of the Proof of Debt as there were complex issues involved which cannot be easily resolved by simple arithmetic.

The general approach in relation to an application under rule 93

21 The general approach in relation to the present application is not really in dispute. To begin with, the present application is brought pursuant to rule 93 of the Rules which states:

> **Appeal by creditor**
>
> 93. If a creditor or contributory is dissatisfied with the decision of the liquidator in respect of a proof, *the Court may, on the application of the creditor or contributory, reverse or vary the decision*; but subject to the power of the Court to extend the time, no application to reverse or vary the decision of the liquidator in a winding up by the Court rejecting a proof sent to him by a creditor, or person claiming to be a creditor, shall be entertained, unless notice of the application is given before the expiration of 21 days from the date of the service of the notice of rejection.
>
> [emphasis added]

22 In this regard, the creditor bears the burden of proving the debt on a balance of probabilities. When assessing a proof of debt, the liquidator's duty is to ensure that the assets of the company are only distributed to the creditors who have debts that were genuinely created and remain legally due (see the decision of the Court of Appeal in *Fustar Chemicals Ltd (Hong Kong) v Liquidator of Fustar Chemicals Pte Ltd* [2009] 4 SLR(R) 458 ("*Fustar CA*") at [20]).

23 In doing so, the liquidator must examine and investigate every proof of debt and the grounds of the debt (see rule 92 of the Rules). In this regard, the liquidator is not bound by the audited accounts but is entitled to go behind them to determine the veracity of the debt claimed (see the High Court decision of *Blasco, Martinez Gemma v Ee Meng Yen Angela and another and another*

matter [2021] 3 SLR 1360 at [59]–[61]). Indeed, in *Fustar CA*, the Court of Appeal held as follows (at [13]):

> The established principles of law are not disputed in the present case. In the winding up of a solvent company, the unsecured assets of the company will ordinarily be applied *pari passu* in satisfaction of its liabilities (subject to any preferential payments) and the surplus distributed among its members. The duty to pay the company's debts resides with the liquidator, who may exercise powers given to a liquidator in a winding up by the court as provided under s 305 Companies Act (Cap 50, 2006 Rev Ed). In a winding up, a creditor bears the burden of proving the debt on a balance of probabilities (see *Westpac Banking Corporation v Totterdell* [1997] 142 FLR 137 and *The Trustee in Bankruptcy of Lo Siu Fai Louis v Toohey* [2005] 4 HKC 51). The liquidator must assess every proof of debt lodged and may call for further evidence in support of the claim. In considering a proof, the liquidator is not bound by the audited accounts or audit confirmations entered into by the company, and is entitled to go behind them to determine the veracity of the debt claimed …

24 With this general approach in mind, I turn to consider the validity of the Kyen Liquidators' grounds for rejecting the Proof of Debt.

Whether the Kyen Liquidators' "primary ground" for rejection should be affirmed

Overview

25 In relation to the Kyen Liquidators' "primary ground" for rejection of the Proof of Debt founded on the counterclaims of dishonest assistance and knowing receipt, the threshold issue is whether the Kyen Liquidators are justified in accounting for the counterclaims in dishonest assistance and knowing receipt in the adjudication of Feima's proof, rather than by way of formal legal proceedings. For convenience, I shall term this as the "Threshold Issue".

26 In my view, the Kyen Liquidators' "primary ground" for rejecting the Proof of Debt turns on this very point. For reasons that I will develop, I do not think that the Kyen Liquidators are entitled in accounting for the counterclaims in the adjudication of Feima's proof. In my view, in the light of the substantive disputes of facts, the Kyen Liquidators should have properly commenced legal proceedings against Feima. As such, because of the conclusion I have reached, I will not address the parties' arguments on the merits of the counterclaims, especially if the Kyen Liquidators do decide to pursue both counterclaims by way of legal proceedings.

Whether the Kyen Liquidators are justified in accounting for the counterclaims in adjudication of the Proof of Debt

The parties' original submissions on the Threshold Issue

27 I begin by canvassing the parties' original submissions on the Threshold Issue. In their original submissions, the defendants attempted to justify the Kyen Liquidators' decision to account for the counterclaims by rejecting the Proof of Debt. The defendants say that, in the exercise of their quasi-judicial function, the Kyen Liquidators are obliged to admit only "true liabilities" of Kyen. More specifically, the defendants submit that a liquidator is entitled to reject a liability which, though enforceable against the company, is not a "true liability of the company". In support of this proposition, they cite the High Court of Australia decision in *Tanning Research Laboratories v O'Brien* [1990] 91 ALR 180 ("*Tanning*"), where Brennan and Dawson JJ held (at 184):

> The principles which determine enforceability of the liability to which a proof of debt relates are, in the main, the same as the principles which would be applied in an action brought directly against the company to enforce that liability. Those principles include the law relating to the barring of actions by time: see, for example, *Motor Terms Co. Pty. Ltd. v. Liberty Insurance Ltd.* (1967) 116 CLR 177. But this general rule is qualified. As the

> parties whose interests are affected by admission of a proof of debt are the general body of creditors and the contributories rather than the company in liquidation, there are some liabilities which would be enforceable against the company but which a liquidator is not bound to admit to proof of debt lest the interests of creditors and contributories may be unjustly affected. *A liquidator may properly reject a proof of debt if the liability, though enforceable against the company, is not a true liability of the company but is founded merely on some act or omission on the part of the company which unjustly prejudices the interests of the creditors or contributories in the assets available for distribution***.** In this respect, there is no reason to distinguish between the position of a liquidator and that of a trustee in bankruptcy: see *Ayerst v. C & K. (Construction) Ltd.* (1976) AC 167.
>
> [emphasis added]

28 According to the defendants, Brennan and Dawson JJ explained that a claim is not a "true liability of the company" if there are (at 185):

> *Circumstances tending to show fraud or collusion or miscarriage of justice or that a compromise was not a fair and reasonable one, in the sense that even if not fraudulent it was foolish, absurd and improper, or resulted from an unequal position of the parties* (see *In re Hawkins; Ex parte Troup* ((1895) 1 QB 404, at p 409)) offer occasions for the exercise by the Court of Bankruptcy of its power to inquire into the consideration for the judgment." It is not necessary in this case to determine the scope of this qualification. It suffices to note that *it qualifies the principles governing the admission or rejection of a proof of debt by arming the liquidator with grounds for rejecting a proof of debt additional to any grounds available under the general law.* For present purposes, the relevant consideration is that no liability which is unenforceable against the company by the general law can found a debt admissible to proof in a winding up.
>
> [emphasis added]

I should note that the defendants have not accurately quoted this passage. This is because the first sentence in quotation is actually *not* from *Tanning* but from the earlier case of the High Court of Australia decision in *Wren v Mahony* (1972) 126 CLR 212 ("*Wren*") at 223. In *Wren*, Barwick CJ had explained the grounds on which a court of bankruptcy will inquire into the validity of a judgment debt

in the adjudication of a bankruptcy application, *ie*, to "go behind" any judgment on which the creditor relies on to ascertain whether the judgment was founded on a real debt. Had the defendants referred to this underlying case, it might have been clear that these passages in *Tanning* are not relevant in the present application, which is not concerned with whether I should question the validity of an existing judgment debt.

29 Be that as it may, the defendants advance two justifications why the Kyen Liquidators are entitled to account for the counterclaims by rejecting the Proof of Debt.

30 First, the defendants emphasise that the Kyen Liquidators are entitled to account for the counterclaims as they are exercising their *quasi-judicial* function to determine the "true liabilities" of Kyen.[34] In my view, this does not take the defendants very far. This amounts to nothing more than an assertion that the defendants are entitled to so account without providing any reason why, apart from the fact that they are the liquidators of Kyen.

31 Further, if the Kyen Liquidators are suggesting that I should give deference to their decision because it was made in a quasi-judicial capacity, then that is a proposition I cannot accept. Indeed, it would not be legally accurate to assert that the role of the liquidator *remains* that of a quasi-judicial function, even on an *appeal* of the liquidator's own decision. In this regard, I refer to the relevant portion of a seminal Australian textbook which elaborates on this point (see Michael Murray and Jason Harris, *Keay's Insolvency: Personal and*

[34] DWS at [5.3.4].

Corporate Law and Practice (Thomson Reuters, 10th Ed, 2018) at pp 602–603):

> *Appeal against liquidator's decision*
>
> …
>
> If a creditor's proof of debt is rejected by the liquidator the creditor may appeal by seeking court orders under IPSCA s 90-15 and, other than in exceptional circumstances, should not institute legal proceedings against the company. …
>
> On any appeal hearing, the courts apply the same rules to liquidators who are examining proofs of debt as those applied to trustees of bankrupt estates. In such a proceeding, a *liquidator who defends* their decision to reject a proof of debt *is no longer acting in a quasi-judicial capacity*, rather the liquidator takes the role of an *adversary in the litigation*. …
>
> [emphasis added]

The key takeaway is that there should no longer be any emphasis placed on the *quasi-judicial* function of the liquidator once an appeal has been brought. This is because the liquidator no longer acts in that capacity when defending his own decision, and instead, he will take on "the role of an adversary in the litigation". On an appeal, the views formed by the liquidator when he was acting quasi-judicially is not legally enforceable and no deference has to be given (see Andrew R Keay, *McPherson & Keay's Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 12-067, citing the Australian decision of *Tanning*). Given this shift in perspective on an appeal, even if the liquidator was of the view that it was entitled to adjudge and conclude the company's *own* claim or counterclaim against the creditor's proof of debt, that can always be overridden by the supervising court as those views are non-binding. Thus, the repeated emphasis of the liquidator's quasi-judicial role does not assist the defendants' arguments. There is no special threshold to overcome when the court overrides the decision of the liquidator, even if the liquidator can be

described as exercising a quasi-judicial function (see the High Court decision of *MWA Capital Pte Ltd v Ivy Lee Realty Pte Ltd (in liquidation)* [2017] SGHC 216 at [44]–[45]).

32 Second, the defendants say that Kyen's counterclaims clearly arise from "[c]ircumstances tending to show fraud or collusion or miscarriage of justice".[35] This is because, according to the defendants, the evidence shows that Feima had dishonestly assisted Kyen's directors in procuring the Third Party Transactions, and that Feima was in knowing receipt of monies traceable to the DCL Copper Payments. Further, the defendants say that Feima's involvement in the Third Party Transactions was suspicious because it also entered into a transactions with Kyen and IFL where the same amount of nickel cathodes were sold by Kyen to various entities and then sold back to Kyen. In other words, no commercial transaction took place. Finally, the defendants say that their concerns about these Third Party Transactions were not adequately addressed by Feima's Liquidators. Accordingly, it is in Kyen's and its creditors' interests that the Kyen Liquidators account for these counterclaims in the adjudication of the Proof of Debt, rather than by any formal legal proceedings.

33 In my view, the defendants' second justification likewise does not take them very far. In the first place, *Tanning* does not assist them as the cited passage from Brennan JJ and Dawson JJ does not relate at all to whether and how the Kyen Liquidators are entitled to rely on the counterclaims founded on dishonest assistance and knowing receipt. The defendants' argument that the liquidator's duty to admit only "true liabilities" of the company therefore does

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[35] DWS at [5.3.5].

not assist them in the situation when the Kyen Liquidators are adjudicating on Kyen's own counterclaim.

34 Furthermore, even if I were to accept that *Tanning* is relevant, then, as Feima points out, where the liquidator seeks to set-off a creditor's debt by way of a counterclaim, the burden is on the liquidator to prove on a balance of probabilities its counterclaim (including the quantum of the counterclaim) (see, *eg*, *Castleplex Pty Ltd (in liq), Re; Labaj v Hambleton* [2010] QCA 59 ("*Labaj*") at [29] and *Re JPF Clarke (Construction) Ltd (in a company voluntary arrangement) Maze Inns Ltd and others v Hunt and others* [2019] Lexis Citation 379 at [70]–[73], [110], [128]). Thus, the defendants cannot attempt to circumvent their burden of proving dishonest assistance and knowing receipt by saying that their claims of dishonest assistance and knowing receipt are "[c]ircumstances tending to show fraud or collusion or miscarriage of justice" and that the Kyen Liquidators are therefore justified in simply accounting for these counterclaims against the Proof of Debt, without commencing legal proceedings. This, in my view, cannot be the case. The defendants retain the burden of proof in proving their counterclaims.

The parties' additional submissions on the Threshold Issue

35 Because I was concerned that the parties had not adequately appreciated the importance of the Threshold Issue in their original written submissions, I wrote to the parties a week before the oral hearing to invite them to address me on the following questions:

(a) Are the Kyen Liquidators justified in accounting for the counterclaims (in dishonest assistance and knowing receipt) in the

adjudication of the Proof of Debt, rather than by way of formal legal proceedings?

(b) In particular, would the Kyen Liquidators be going beyond the adjudication of proof of debts by sitting as a judge of a matter (*ie*, the validity of its own claims) that it has raised on its own accord?

(c) Relatedly, is it incumbent on the Kyen Liquidators to show that they had made an attempt to pursue the counterclaims (see *Labaj* at [29])?

36 Both parties responded with additional submissions promptly, for which I am grateful.

(1) Feima's submissions

37 Feima's primary submission is that the procedures for adjudication of proof of debts only operate to resolve claims *against* Kyen. These procedures therefore have no application to cross-claims *by* Kyen. In support of what it calls the "Cross-claims Rule", Feima cites the recent High Court decision of *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd (in compulsory liquidation) (Metax Eco Solutions Pte Ltd, intervener)* [2021] 4 SLR 556 ("*Lim Siew Soo*").[36] In that case, Sembawang Engineers and Constructors Pte Ltd ("Sembawang") commenced suit against Metax Eco Solutions Pte Ltd ("Metax"). Before judgment was given in the suit, Sembawang went into insolvent liquidation. Sembawang's liquidator applied to court for directions on two questions of law concerning the application of the estate costs rule. In this context, Vinodh Coomaraswamy J said this (at [11]):

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[36] Plaintiff's Further Written Submissions dated 4 October 2022 ("PFWS") at [5].

> The Company commenced suit against the defendant at the end of 2012 claiming about $3.6m in damages. The defendant rejected the claim and counterclaimed about $2.1m from the Company. The fact that the Company is the plaintiff in the suit is significant. It means that the parties' dispute cannot be resolved simply by the liquidator adjudicating a proof of debt. The adjudication procedure operates only to resolve claims *against* the Company. It has no application to claims *by* the Company. The fact that the defendant has a counterclaim in the suit is also significant. It means that each party is simultaneously in the position of a plaintiff and a defendant in the suit.
>
> [emphasis in original]

38 Feima therefore seizes on the learned judge's statement that "[t]he adjudication procedure operations only to resolve claims *against* the Company" [emphasis in original] to argue that the Kyen Liquidators have no right to account for their counterclaims in dishonest assistance and knowing receipt by adjudication of the Proof of Debt.

39 However, for completeness, Feima highlights one exception to the Cross-claim Rule, which is that the defendants are entitled in certain circumstances to raise the defence of insolvency set-off ("Insolvency Set-off"), which is provided for by s 88(1) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("BA"), and made applicable to liquidation via s 327(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA").[37] These provisions continue to be relevant for the present application due to the savings provisions in the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") (see ss 525 and 526). For completeness, I reproduce the relevant provisions from the BA and the CA below:

BA

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37 PFWS at [7].

> **Mutual credit and set-off**
>
> **88.**—(1) Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.
>
> **CA**
>
> **Proof of debts**
>
> **327.**—(2) Subject to section 328, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

40 Feima submits that Insolvency Set-off does not apply in the present case for three reasons.[38] First, the defendants have never raised a *set-off* but have only tried to argue for *cross-claims* for dishonest assistance and knowing receipt. Second, Insolvency Set-off does not apply to claims arising from the Third Party Transactions. This is because, on the defendants' characterisation, those transactions are payments of cash out of Kyen for no consideration and would constitute a misappropriation of company assets that do not constitute a "mutual dealing" within the meaning of s 88(1) of the BA. Third, Insolvency Set-off does not apply to claims which give rise to insolvency clawback. Again, if the Third Party Transactions are payments of cash out of Kyen with no consideration, they would constitute undervalue transactions and/or unfair preferences, for which no insolvency set-off should be available.

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[38] PFWS at [8]–[17].

41 Feima further submitted that it is incumbent on the Kyen Liquidators to show that they had tried to pursue the counterclaims.[39] In this regard, Feima says that even if the alleged counterclaims can be considered, the defendants would need to prove the counterclaims to this court's satisfaction. As such, the fact that the defendants have taken no steps to pursue their supposed counterclaim is a relevant factor against them having satisfied this onus.

(2) The defendants' submissions

42 The defendants' primary submission is that the Kyen Liquidators are justified in accounting for the counterclaims in adjudication because it is both their duty and within their power to do so.[40] The defendants draw on the High Court's explanation of the quasi-judicial role of a liquidator in *Fustar Chemicals Ltd v Ong Soo Hwa (liquidator of Fustar Chemicals Pte Ltd)* [2009] 1 SLR(R) 844 (at [26]) as follows:

> … the quasi-judicial role of a liquidator whose approach to the entire process of proof (admission or rejection), just like that of a judicial manager's must, as explained by Lai Kew Chai J in *ERIPIMA SA v Chee Yoh Chuang* [1997] 1 SLR(R) 923 at [4], "be entirely as if he is sitting in judgment like a judicial officer. As his role is quasi-judicial, he cannot act unjudicially, capriciously or arbitrarily" …

43 Accordingly, the defendants effectively *repeat* their original submissions in the following manner:[41]

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39 PFWS at [18]–[20].

40 Defendants' Supplemental Written Submissions dated 4 October 2022 ("DSWS") at [2.1.2].

41 DSWS at [2.1.4],

(a) First, in adjudication, the liquidator's duty is to admit only "true liabilities of the company" and to "ensure that assets of the insolvent company are distributed amongst those who are justly, legally and properly creditors". Pursuant to this duty, the Kyen Liquidators are entitled to go behind a judgment or estoppel "in circumstances tending to show fraud or collusion" (citing *Fustar CA* at [13]–[14]).

(b) Second, the Kyen Liquidator's power to go behind a judgment or estoppel in these circumstances is analogous to asserting Kyen's cross-claim(s) in respect of the putative creditor's fraud or collusion.

(c) Third, Kyen's cross-claims arise from circumstances tending to show fraud or collusion or miscarriage of justice.

Furthermore, the defendants submit that the Kyen Liquidators are not going beyond their role in adjudicating the Proof of Debt by accounting for its cross-claims. The defendants submit that the Kyen Liquidators' quasi-judicial role includes the discretion to account for Kyen's claims in adjudication, including by way of set-off. In this regard, the defendants cite the English decision of *Re National Wholemeal Bread and Biscuit Co* [1892] 2 Ch 457 ("*Re National Wholemeal Bread*"), in which the creditor submitted that the liquidator did not have the power to assert the company's own claim by way of set-off, but Vaughan Williams J rejected this argument and held that the liquidator can consider any set-off asserted (at 460). Accordingly, the defendants submit that the Kyen Liquidators must be in a position to assert, during their adjudication of the proofs, Kyen's counterclaims.[42]

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[42] DSWS at [3.1.4].

44 Indeed, Mr David Chan ("Mr Chan"), who appeared on behalf of the defendants, further submitted before me that since *Tanning* allowed the liquidators to go behind a judgment debt on the basis of fraud and collusion, that must surely mean that the Kyen Liquidations are equally justified in determining that there was either dishonest assistance, knowing receipt, or both, and assert this by way of a counterclaim against Feima.

45 More broadly, the defendants suggest that a strict requirement that a liquidator must prosecute a counterclaim by way of formal legal proceedings is artificial and not supported by the authorities. Indeed, they say that this cannot be in the best interests of the general body of creditors of an insolvent company, as in the present case. Further, they argue that *Labaj* does not impose a requirement that the Kyen Liquidators must have tried to pursue the counterclaims in order to account for the same in adjudication. For convenience, I set out the relevant paragraph of *Labaj* (at [29]):

> Some reference was made to the pleadings in the District Court action referred to above. In its defence in that action, the company had claimed a set off. That set off was based on the same facts as were relied upon to support a counterclaim. The liquidators have made no attempt to pursue the counterclaim and there was no evidence at first instance in the present proceedings to support it. The onus of proving a set off is on the party alleging it. Those allegations therefore cannot assist the liquidators in the present proceedings.

46 Finally, the defendants argue that the circumstances of the present case point towards the Kyen Liquidators rightly deciding not to pursue legal proceedings against Feima. First of all, Feima was already in compulsory liquidation when the Proof of Debt was filed. The Kyen Liquidators therefore decided that it was not commercially viable to commence proceedings against Feima given the prohibitive costs involved and the dim prospects of recovery.

Second, given the wholesale denial by Feima Liquidators of Kyen's counterclaim in this case, it is apparent that any legal proceedings between the parties would have been complex and costly. As such, the defendants say that it is in the best interests of Kyen's general body of creditors not to formally prosecute the counterclaims (and presumably, assert the counterclaims by way of accounting for the counterclaims in the adjudication of the Proof of Debt). Moreover, in light of Feima Liquidators' wholesale denial of Kyen's counterclaims, filing a proof of debt in Feima's liquidation for the same counterclaims would be an exercise in futility.

My decision: the Kyen Liquidators are not entitled to account for the counterclaims in their adjudication of the Proof of Debt

(1) The relevant issues

47 I am of the view that the parties' additional submissions raise the following relevant issues:

(a) First, whether the Kyen Liquidators' quasi-judicial role entitle them to account for the counterclaims in adjudication.

(b) Second, and relatedly, whether the Cross-claim Rule applies in the present case.

(c) Third, whether Insolvency Set-off applies in the present case.

(2) Whether the Kyen Liquidators' quasi-judicial role entitle them to account for the counterclaims in adjudication

48 I turn then to the first issue. It is trite law that when the liquidator ascertains and discharges the liabilities of the insolvent company, he or she acts in a quasi-judicial capacity. The Court of Appeal in *Fustar CA* examined the

duties of a liquidator in assessing a proof of debt extensively. Most pertinently, the court held (at [13]) that "[t]he liquidator must assess every proof of debt lodged and may call for further evidence in support of the claim". And in doing so, as Etherton J explained in *Re Menastar Finance Ltd (in liq), Menastar Ltd v Simon* [2003] BCLC 338 at [44] that:

> [t]he power of a liquidator is, in this respect no different from that of the court itself, since the liquidator, in deciding whether to accept or reject a creditor's proof in whole or in part, is acting in a quasi judicial capacity… His statutory duty is to ensure that the company's property is collected in and applied in satisfaction of its liabilities *pari passu* among its proper creditors.

49 Likewise, as Lai Kew Chai J put it in the High Court decision of *ERPIMA SA v Chee Yoh Chuang and another* [1997] 1 SLR(R) 923 ("*ERPIMA SA*") at [4], the liquidator's quasi-judicial role is "as if he is sitting in judgment like a judicial officer. As his role is quasi-judicial, he cannot act unjudicially, capriciously or arbitrarily".

50 The rationale for the liquidator's quasi-judicial role is founded on the efficiency of the liquidation process. Necessarily, if the liquidator was made to resolve every point of dispute in court, this may not be economical and proportionate considering the costs and time involved – especially for an already insolvent company. The liquidator's quasi-judicial role can thus be said to entitle them to oversee simple disputes of facts in order to ensure a practical and efficient conclusion of the liquidation process. However, this is always subject to the court's overarching supervision to oversee the process and reject what the liquidator has done if it was inappropriate. For example, albeit in a different context, under s 218(4) of the IRDA, the liquidator has the wide discretion to decide on the estimated value of a debt which "does not bear a certain value" (by reason of it being subject to any contingency or for other reasons), but

s 218(5) then goes on to provide that any person aggrieved by the estimate made by the liquidator may then appeal this value to the court.

51 Having regard to the above elucidation of the quasi-judicial role, I disagree with the defendants' argument that the Kyen Liquidators' quasi-judicial role entitles them to account for the counterclaims in the adjudication of the Proof of Debt where there are *complex* disputes of facts involved (such as those involving dishonest assistance and knowing receipt). In my judgment, the defendants' argument is wrong for the following reasons founded on precedent, principle, and policy.

(A) PRECEDENT

52 First, in terms of precedent, there is nothing in the case law that entitles a liquidator to account for the company's counterclaim against a creditor in the adjudication of a proof of debt where there are *complex* disputes of facts involved (as opposed to simple ones involving mutual debts which automatically cancel each other out as a matter of arithmetic). Whilst it is true that the English decision of *Re National Wholemeal Bread* suggests that a liquidator can consider counterclaims or cross-claims to be set-off and accounted for, these are *only* in relation to relatively simple cases where there was little dispute as to the existence and amount of the counterclaims and cross-claims involved. I refer to the relevant portion of the holding in *Re National Wholemeal Bread* which elaborates on this principle (at 460):

> I am against you on the question of fraudulent preference being a matter of set-off. The position of the liquidator is very like that of a trustee in bankruptcy. He *may allow anything as a set-off which is a matter of account*; but he *must not avoid or rescind an agreement.*
>
> …

> I hold that for the purposes of today the set-off is admissible upon the examination of the proof by the liquidator *for the purposes of the account which he has to take in order to arrive at the amount,* if any, for which the proof is to be admitted.
>
> [emphasis added]

Importantly, Vaughan Williams J opined that a liquidator "may allow anything as a set-off which is a matter of account" and that the set-off was permitted "for the purposes of the account which he has to take in order to arrive at the amount". These phrases suggest that the court was identifying the net balance of the claims due by taking *an account* of what was owing from each party in respect of the mutual debts or dealings, *ie*, it was a matter of simple arithmetic. Indeed, the facts of *Re National Wholemeal Bread* involved the relatively straightforward issue of whether an employee of the company in liquidation was overpaid his salary.

53 There is also the English case of *Re Bank of Credit and Commerce International SA (No 6); Mahfouz v Morris and others* [1994] 1 BCLC 450 ("*BCCI (No 6)*"), where the issue arose as to whether cross-examination and discovery should be ordered in the hearing of appeal against the liquidator's rejection of the proof of debt. The liquidators had rejected the proof on the ground that the company had claims for fraudulent and wrongful trading and misfeasance against the individual creditor, which the liquidators regarded they were entitled to set-off and account against the amounts due. In determining the issue of whether cross-examination was required, the court held that cross-examination would be ordered where it was "necessary for fairly disposing of the particular issue". Whether it was necessary depended on the circumstances of the particular case (at 453). For example, where there was "no documentary evidence of any description [that] has been put forward to support" a bare assertion (at 454), then cross-examination would be required. This suggests that

liquidators cannot simply account for a counterclaim without a more detailed examination of the underlying facts, especially in a case which involved complex facts.

54 Looking to the local jurisprudence, we have the High Court decision of *ERPIMA SA* where the plaintiff company had sought orders from the court to reverse the defendant judicial managers' decision to reject their proof of debt. In the end, due to conflicting affidavit evidence, the court concluded that the resolution of the issues in dispute (*eg*, whether the company could set-off and counterclaim) required trial in the usual way (at [25]):

> *In the light of the conflicting affidavit evidence*, which in some issues certainly were not backed up by documentary evidence, *the conclusion was irresistible that the resolution of the issues required the trials in the usual way of both suits instituted by the plaintiffs*. Evidence by affidavits were inappropriate to resolve the issues. … This would require an investigation of the "factual matrix" leading to the agreement. *The third question was whether the company could set off and counterclaim,* even if there was liability under the agreement, *for the sums mentioned earlier in this judgment.*
>
> [emphasis added]

55 Thus, the court dismissed the application but ordered that the outcome of the proof of debt should abide by the final determination of the two suits in which all issues in controversy amongst the parties can be dealt with comprehensively (at [2] and [26]). What can be gleaned is that the court recognised that if there are contentious counterclaims which involve untangling a complex web of issues arising from various dealings between the parties, then those disputes will first need to be resolved by trial before the arithmetic resumes.

(B) PRINCIPLE

56 Pulling together the threads from the various authorities, it appears to me that these are the applicable principles:

(a) First, while a liquidator is entitled to account from the proof of debt any counterclaim/cross-claim, this can only be allowed where the factual matrix is *not complex* such that it remains a matter of simple arithmetic, *ie*, it is a straightforward matter of identifying the net balance of claims.

(b) However, if there are substantial disputes as to the existence and amounts of the counterclaim/cross-claim which do require a *complex* web of facts and issues to be untangled, then these must usually be resolved by way of a full trial (or other mode of trial necessary for fairly disposing of the issues) *before* the arithmetic can resume.

57 Nevertheless, a liquidator can take the risk and make his own assessment that the accounting exercise did not require a trial. This would then put the burden on the creditor to make an appeal to court to correct any errors, and the court may then subsequently find that a trial or limited cross-examination was necessary to resolve the issues. This would be consonant with the policy rationale underlying the efficient proof of debt process (see *ERPIMA SA* at [5], albeit in the context of judicial managers):

> The entire process of proof, admission or rejection is ordinarily completed before the judicial manager puts up his proposals on the best way to deal with the company under judicial management. It is therefore quite fast and certainly not as formal as a court trial. He does not have to deliver a reasoned judgment. One exception is where a proof of debt involves controversial disputes of facts, where the company under the judicial management on the facts known has to oppose the

> admission of a claim and where interpretation of agreements is involved. A judicial manager in those cases is not expected to adjudicate upon the matter. He is perfectly entitled to reject the proof of debt and the creditor is not without remedy. Such a creditor may appeal under reg 80.

However, I would caveat that in so doing, the fact that the liquidator had made no attempt to pursue the counterclaim would likely mean that a court is less likely to conclude that the liquidator's decision to account from the proof of debt any counterclaim was correct. This is especially if what the liquidator had were mere allegations and the evidence was lacking (see *Labaj* at [29]) unless some proper explanation can be given as to why the counterclaims were not pursued further by way of initiating proceedings or otherwise.

58 Further, it would often be the case that where the allegations made against a creditor are rather grave in nature (such as those of misfeasance and fraud), then the allegation must ordinarily be tested by cross-examination (see *BCCI (No 6)* at 454). In the present case, one of the bases of the Kyen Liquidators' counterclaims in the adjudication of the Proof of Debt encompasses that of dishonest assistance. In order to prove dishonest assistance, one must necessarily satisfy the court (amongst other elements of the test) that the assistance given was indeed *dishonest*, *ie*, whether the party has "such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them" (see the decision of the Court of Appeal in *George Raymond Zage III and another v Ho Chi Kwong and another* [2010] 2 SLR 589 ("*George Raymond Zage*") at [22]). Such claims necessarily require the process of trial to uncover the truth of the matter and whether the standards of honest conduct were breached.

59 More broadly, the defendants' argument fundamentally misunderstands the judicial function. In the first place, as Lai J had so eloquently put it in *ERIPIMA SA* (at [4]), "[a]s [the liquidator's] role is quasi-judicial, he cannot act unjudicially, capriciously or arbitrarily". A moment's reflection will reveal that a judge cannot act in his or her own cause. In my view, it would certainly be "unjudicial" for a liquidator of an insolvent company to assert a counterclaim based on *her* own assessment of the facts in *her* adjudication of a creditor's proof of debt. In saying this, I accept that the liquidator is not representing the insolvent company and stands as an objective (and independent) officer of the court to see to the proper end of the company. I also accept that the adjudication of the proof of debt process necessarily entails the liquidator acting in the insolvent company's interest *to some extent* – because, in adjudicating a creditor's proof of debt, she is necessarily making an adjudication not from a position of pure neutrality but from the perspective of the insolvent company's creditors' best interests. But I think it crosses the line for a liquidator to essentially advance, adjudge, and summarily conclude the company's *own* claim or counterclaim where it involved complex and highly-fact dependent issues (which likely required a trial to be resolved), against the creditor's proof of debt, save for a formal appeal to the court under the Rules. This, in my view, cannot be the case.

60 Indeed, the defendants' argument misunderstands the distinction between adjudicating on a claim *by* the creditor and a claim *against* the creditor. This distinction is so trite that Coomaraswamy J cited no authority in *Lim Siew Soo* when he concluded that (at [11]) "[t]he adjudication procedure operates only to resolve claims *against* the Company. It has no application to claims *by* the Company" [emphasis in original]. Thus, when the cases refer to the liquidator being duty-bound to admit only the "true liabilities" of the company,

that is in relation to claims *against* the insolvent company, not claims *by* the company. This is clear from a plain reading of a passage that the defendants rely on repeatedly (see *Tanning* at 184):

> … A liquidator may properly reject a proof of debt if the liability, though enforceable *against* the company, is not a true liability of the company but is found merely on some act or omission on the part of the company which unjustly prejudices the interests of the creditors or contributories in the assets available for distribution…
>
> [emphasis added]

This passage clearly refers to claims against the insolvent company and has nothing to do with claims asserted *by* the insolvent company itself. Perhaps an appropriate analogy may be found in the use of promissory estoppel (see the English Court of Appeal decision of *Combe v Combe* [1951] 2 KB 215), whereas the adjudication procedure can be used as a *shield* in relation to claims against the insolvent company, it cannot be used as a *sword* against creditors in asserting the insolvent company's own counterclaims.

(C) POLICY

61 Finally, my conclusion that the Kyen Liquidators are not entitled to account for the counterclaims (where a complex factual matrix is involved) does not detract from the policy reason behind the adjudication procedure, which is to ensure efficiency in the liquidation process. The quest for efficiency in the liquidation process cannot be pursued at all costs. While the *overall* interests of the insolvent company's creditors are important, that cannot be allowed to trump the *individual* interest of a creditor who may be aggrieved by the adjudication of an unadjudicated (by way of legal proceedings) counterclaim against it.

(D) APPLICATION TO THE PRESENT CASE

62 In the present case, Kyen's counterclaims in knowing receipt and dishonest assistance are necessarily issues which are highly-fact dependant and may require a full trial to decide. There are thorny issues which have to be resolved before one can proceed further: (a) in respect of dishonest assistance, whether the assistance was indeed *dishonest* (as I have canvassed above at [58]), and (b) with respect to knowing receipt, whether there was knowledge on the part of the recipient that the assets received are traceable to a breach of fiduciary duty, and in this regard, the recipient's state of knowledge had to be such as to make it *unconscionable* for the recipient to retain the benefit of the receipt (see *George Raymond Zage* at [23]). These issues (as opposed to a simple restitution claim) may be so complex that it might mandate that those disputes to be resolved first by formal legal proceedings before the arithmetic resumes by setting off. Accordingly, for reasons founded on precedent, principle, and policy, I do not find that this was a case that was so simple that the Kyen Liquidators' quasi-judicial role entitled them to account for the counterclaims in adjudication without resolving the disputed facts and issues by way of trial.

63 More specifically, I agree with Mr Alexander Yeo ("Mr Yeo"), who appeared for Feima, that the Kyen Liquidators' rejection of the Proof of Debt based on these alleged counterclaims was really founded on a list of questions that the Kyen Liquidators had tendered to Feima.[43] For illustration purposes, I set out some of these questions that were found in a letter dated 18 March 2021 from the solicitors of the Kyen Liquidators and use this as an example:[44]

> 5.3.5 In respect of the DCL Payments:

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43 Minute Sheet dated 6 October 2022 at p 9.

44 1 CTKS at p 897.

> (a) Were the DCL Payments made on the basis of any underlying agreements/contracts between DCL and the Company?
>
> i. If so, please provide us with copies of all relevant documents to the said agreements/contracts.
>
> ii. If not, please explain the basis of the DCL Payments.
>
> (b) What consideration (if any) did the Company receive for the DCL Payments?

It appears that what the Kyen Liquidators were alluding to was that the DCL Payments were unusual and contrary to accepted commercial practice, and was thus effected by the directors in breach of their fiduciary duties as the liquidators were unable to identify any consideration received or evidence that this was made in discharge of any genuine pre-existing debt owed (see above at [7]). As mentioned above at [13], the then-solicitors of Feima, TNTL, replied by requesting for further information on certain issues and stated that they found it inappropriate to respond to the list of questions unless such information was provided.[45] Kyen's solicitors subsequently replied by stating that the "response is unhelpful and only serves to frustrate the [Kyen Liquidators'] own efforts in investigating the suspicious disposition of Kyen's property".[46] Essentially, the matter was left hanging in the air and no proper conclusion was reached. Given this ambiguous state of affairs, the Kyen Liquidators cannot then go on to draw the inference that there was absolutely *no basis* for the DCL Payments to be made, such that Kyen could found a claim against Feima in dishonest assistance or knowing receipt arising from this allegedly suspicious third party transaction. All that the Kyen Liquidators have from the list of questions is their own suspicions, but they must go further to crystalise this counterclaim.

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45 1 CTKS at p 910.

46 1 CTKS at p 912.

64 In my view, given the lack of evidence and complexity of the issues involved, the appropriate course of action would have been to bring these issues to trial to fairly investigate them before the Kyen Liquidators are entitled to account for the counterclaims. It cannot be that two potentially complex counterclaims (dishonest assistance and knowing receipt) can be made out on the basis of a series of questions. I simply do not have sufficient material before me to confidently decide either way on these issues as these matters would require a fuller investigation. In any event, as I have alluded to above at [20], I say no more about the merits of the dishonest assistance and knowing receipt counterclaims.

(3) Whether the Insolvency Set-off applies in the present case

65 I turn now to the point highlighted by Feima (see above at [39]) concerning whether the defendants were entitled in certain circumstances to raise the defence of Insolvency Set-off. In my judgment, Insolvency Set-off cannot be invoked in the present case.

66 First, the defendants have never run their case on the basis that there was a set-off. Indeed, as Feima points out, the defendants have repeatedly stated that they can raise *counterclaims* for dishonest and/or knowing receipt. Indeed, this is the basis for the Kyen Liquidators' rejection of the Proof of Debt. They cannot be allowed to recharacterise that reason as a set-off at this point.

67 Second, Insolvency Set-off under s 88(1) of the BA (read with s 327(2) of the CA) does not apply to claims arising from the Third Party Transactions (*ie*, the large and suspicious transactions made to third parties). The main thrust of the defendants' complaint is that these transactions were wrongfully made as Kyen had paid out cash to these third parties but for no consideration at all. But

if that was the case being run, then this would constitute a *misappropriation* of company assets which would not satisfy the requirement that there be a "mutual dealing" within meaning of s 88(1) of the BA (see above at [39] for the provision). I develop this point further below.

68 The law on Insolvency Set-off is well-established: (a) it is *mandatory* and parties are not permitted contractually to exclude its effect, and (b) it is an automatic *self-executing* procedural directive which takes effect without the need for further intervention and arises by operation of law (irrespective of the parties' wishes) (see the High Court decision of *CIMB Bank Bhd v Italmatic Tyre & Retreading Equipment (Asia) Pte Ltd* [2021] 4 SLR 883 at [134]). Mutuality is important to the operation of Insolvency Set-off, and this is evident from the text of s 88(1) of the BA: "[w]here there have been any mutual credits, mutual debts or other *mutual dealings* …" [emphasis added].

69 In relation to the requirement of *mutual dealings*, it is also well-settled that liability arising from misfeasance proceedings, such as those involving a misappropriation of funds belonging to an insolvent company or conversion of the company's property, is *not* a claim arising from *mutual dealings* and Insolvency Set-off would not be applicable. The simple explanation is that the misfeasance cannot constitute a "dealing" for the purposes of set-off (see the English Court of Appeal decision of *Manson v Smith (liquidator of Thomas Christy Ltd)* [1997] 2 BCLC 161 at 164):

> First, r 4.90 and its predecessors require there to be *mutual debts or mutual dealings*. When Mr Manson *improperly withdrew money from the company this did not constitute a dealing between him and the company. A misappropriation of assets is not a dealing.* Mr Manson will object to the following analogy, but I hope he will forgive me for it is only an analogy: *the thief who steals my watch does not deal with me.* Similarly, *the man who steals money from a company does not obtain the*

> *money by a dealing within* r 4.90. Accordingly, his liability to repay money he has misappropriated cannot be set off against any debt owing to him by the company.
>
> [emphasis added]

70 A misappropriation of the insolvent company's funds is not a "dealing" as the funds were improperly taken from the company without consent. Similarly, a conversion of property also cannot constitute a "dealing" (see the House of Lords decision in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2002] 1 AC 336 at [35]–[36]). Thus, as the Court of Appeal in *Parakou Investment Holdings Pte Ltd and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals* [2018] 1 SLR 271 observed at [67]: "as a general rule, statutory set-off is not available when the debt owed by the counterparty to the debtor is based on the misfeasance or other wrongdoing by the counterparty". To permit a set-off in these circumstances would be unfair as it would favour the person who misappropriated the company assets and the wrongdoer could evade the consequences of his by recovery through set-off instead of having to prove in the winding up in competition with other creditors. This principle of law has also been applied to deny Insolvency Set-off in the context of dishonest assistance claims as well, as the court would be loath to "allow a dishonest assistor in effect to obtain pound for pound reimbursement" (see *Goldtrail Travel Ltd (in liquidation) v Aydin and others* [2015] 1 BCLC 89 at [167]; though the judgment decision overturned on appeal on a separate factual point in *Goldtrail Travel Ltd (in liquidation) v Aydin and others* [2016] 1 BCLC 635).

71 Therefore, I find that Insolvency Set-off under s 88(1) of the BA (read with s 327(2) of the CA) does not apply to claims arising from the Third Party Transactions as the misappropriation of assets do not constitute *mutual dealings*.

72 However, there is an *added* complication to be dealt with here. The orthodox factual matrix where this issue arises is where the creditor who had misapplied company funds was ordered to restore the amount lost, and the creditor then asserts Insolvency Set-off as a *defence* against those claims. However, on the present facts, the rather unusual feature of the case is that the Kyen Liquidators are the ones seeking to assert the Insolvency Set-off, rather than the creditor (Feima).

73 Ultimately, it does not matter materially which party seeks to assert Insolvency Set-off (and the Kyen Liquidators cannot waive such a set-off even if they wished to) because Insolvency Set-off is mandatory and self-executing by operation of law *irrespective* of the parties' wishes (as I have set out above at [68]). Thus, regardless of which party is attempting to invoke the Insolvency Set-off, this cannot be permitted *in both scenarios* (whether it is the liquidator invoking it or the creditor) as the misappropriation of assets simply do not constitute mutual dealings.

Whether the Kyen Liquidators have successfully proved their counterclaims founded on dishonest assistance and knowing receipt

74 As I have said above, given that I have found that the Kyen Liquidators are not justified in accounting for the counterclaims in the adjudication of the Proof of Debt given the complex factual matrix and issues underlying these (without resolving these intricate issues at trial), I should not go further to consider the validity of its counterclaims in dishonest assistance and knowing receipt. In the circumstances, it would not be appropriate for me to express any view on the merits of these claims.

Conclusion on the Kyen Liquidators' "primary ground" for rejection

75 For the reasons given above, I reject the Kyen Liquidators' "primary ground" for rejection of the Proof of Debt. I turn now to consider their "alternative grounds" for rejection.

Whether the Kyen Liquidators' "alternative grounds" for rejection should be affirmed

Overview

76 Having concluded that the Kyen Liquidators' "primary ground" for rejecting the Proof of Debt founded on the counterclaims must fail, I turn to their "alternative grounds". In summary, the defendants argue generally that the Proof of Debt must be subject to "strict proof" because Feima is not only Kyen's parent company with common directors between them, but there were also extensive contractual and personnel arrangements that allowed Feima to influence Kyen's affairs and to effect intercompany transfers with great ease.[47] In essence, the defendants say that a heightened scrutiny of the Proof of Debt is warranted because Feima is the parent company of Kyen.

77 From this general position, the defendants then maintain their rejection of three categories of Feima's claims, namely (a) the Intercompany Claims, (b) the Management Fees Claim, and (c) the Purchase Debts.[48] For each category, the defendants explain their reasons for rejection, which all draw from either their argument that Feima is to be put to "strict proof" or that Feima had been guilty of dishonest assistance or knowing receipt.

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47 DWS at [6.2].

48 DWS at [6.3]–[6.5].

78 In view of the defendants' arguments, I will discuss the relevant issues in the following order:

(a) First, whether, generally speaking, a heightened scrutiny of the Proof of Debt is necessary because Feima is the parent company of Kyen.

(b) Second, whether, in respect of the three categories of Feima's claims, the defendants have made out a valid ground for rejection.

Whether a heightened scrutiny of the Proof of Debt is necessary in the present case

The parties' arguments

79 The defendants say that a creditor must be put to strict proof of the claims in its proof of debt if it has a close relationship and/or common controllers with the company in liquidation. In essence, they assert that a heightened scrutiny of the Proof of Debt is necessary in the present case. In support of this point, the defendants cite the High Court decision of *Re Ice-Mack Pte Ltd (in liquidation)* [1989] 2 SLR(R) 283 ("*Re Ice-Mack*") (at [17]):

> *Given the close relationship between these two associate companies, the dominant position in them of Mr Valibhoy and his family*, the paradoxical situation in this case in which the person now filing all the affidavits on behalf of the applicant was the same person who controlled and managed the company before it was wound up, *and the great ease with which inter-company transactions between the companies were clearly devised and implemented, it was necessary at the very least to put the applicant to strict proof of its assertions.*
>
> [emphasis added]

80 Thus, the defendants say that in assessing the evidence put forth by the creditor, the liquidator is bound to take extraordinary steps to scrutinise a proof

of debt on the basis that it could be a false claim, in cases where he has reason to be suspicious of its genuineness or legal validity. Such steps would include going behind the company's audited accounts to determine the veracity of the creditor's claims.

81 In this regard, Mr Chan brought me through some correspondence and minutes of meetings between the parties, such as the ones I reproduce now:[49]

> Attendees
> Chen Xi, CEO of Feima International
> Zhang Jianjiang, Chief Financial Officer of Feima International
> Wang Limei, General Manager of Feima International's Financial Department
> Yan Xiaoyang, Managing Director of Feima Hong Kong
> Jacky Lai Yeu Leong, Singapore Kyen ******
> Huang Yongxin, Accountant of Feima Hong Kong
> Hellen Wu, Accountant of Shanghai Yinjun
>
> Meeting topic *Improving the Financial Reporting Structure of Feima International's overseas entities*
>
> …
>
> After 1 January, 2017:
>
> An existing team is available to take over:-
>
> Financial/accounting statements: Huang Yongxin to take over and, guided/integrated by Jacky Lai, and Mr. Yan will supervise the final integration results.
>
> Financial/fund management: taken over by Lu Yanyan (Feima Hong Kong)/Liao Jue (Feima Hong Kong), guided by Long Taijin. Mr. Yan will supervise the final integration results, in accordance with the needs of the Headquarters., System: in line with Hong Kong's financial system.
>
> [emphasis in original]

The defendants highlight that Mr Yan (a director from Feima) was responsible for supervising one of Kyen's employees in the final integration of the results

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[49] Affidavit of Quek Kwang Woei dated 16 December 2021 at pp 67–70.

for the financial statements and preparation of the accounts. Also, the defendants also point out that, in relation to financial/fund management, Mr Yan was to supervise the final integration results. This, the defendants argue, showed that the accounts were controlled by Mr Yan. The defendants argue that there were concerns raised due to the control exerted by Mr Yan and this would cast doubts on the robustness of any financial statements recorded by Feima and Kyen.[50]

82 In turn, Feima submits that while a liquidator has the power to look behind the audited financial statements and audit confirmations, a creditor's proof of debt should not be lightly rejected if the debt has been consistently acknowledged in audited accounts and/or through audit confirmation statements (citing *Fustar CA* at [21]).[51] Thus, where the debts are included as part of the audited accounts of the company and approved by the directors and shareholders at the annual shareholders' meetings, the liquidator should not expend funds to scrutinise such debts unless he has reason to suspect that they were entered in the books to defraud creditors (citing *Fustar CA* at [31]).

83 In this regard, Mr Yeo brought me through several key facts in the present case which he says shows that a heightened scrutiny is not required. First, the plaintiff in this case is now under the control of the independent Feima Liquidators, who are officers of the Hong Kong Court exercising their duties in bringing the application (and are evidently not common directors in the network of related companies). Second, the main individual who was operating Feima, Mr Yan, is not actually one of the common directors of the related companies

50 Minute Sheet dated 6 October 2022 at p 17.

51 PWS at [33].

(see the list of common directors above at [5]).[52] Further, the records in possession by the Feima Liquidators show that there was in fact little involvement by the common directors in the management of Feima.[53]

My decision: a heightened scrutiny of the Proof of Debt is not necessary in the present case

(1) The applicable law

(A) NO GENERAL NEED FOR HEIGHTENED SCRUTINY FOR CASES INVOLVING RELATED COMPANIES

84 In my view, a so-called "heightened scrutiny" is not generally necessary for cases involving related companies because it adds nothing to the usual principle that the burden is on Feima to prove its debt on a balance of probabilities. Indeed, it does not add anything to this principle to say that the creditor is to be put to "strict proof". All that might be meaningfully said is that the *evidence* required to discharge the burden placed on the creditor might differ in every case depending on the circumstances.

85 Indeed, *Re Ice-Mack* was quite a different case from the present facts. In *Re Ice-Mack*, an issue arose as to whether the pages from the applicant company's ledger books were sufficient proof of debt against a company that was being wound up. The creditor and debtor companies were "related" in that the same person, Mr Valibhoy, managed both companies. Yong Pung How J (as he then was) stated (at [11]) that in an arms-length situation, an audit confirmation would be strong evidence of the correctness of the credit or debit balance. However, as that confirmation was signed on behalf of the company

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52 Minute Sheet dated 6 October 2022 at p 8.

53 PWS at [74].

by the same person managing the associated companies (Mr Valibhoy), it could not be accepted as evidence of the debt unless it was corroborated by more independent evidence.

86 I therefore do not read *Re Ice-Mack* as standing for a *general* proposition that a heightened scrutiny is necessary once there is a close relationship and/or common controllers with the company in liquidation. Indeed, what the cases reveal is that *more evidence* is needed only if there are circumstances warranting suspicion. Thus, in the Court of Appeal decision of *Capital Realty Pte Ltd v Chip Thye Enterprises (Pte) Ltd* [2000] 3 SLR(R) 419 ("*Capital Realty*") at [24], Chao Hick Tin JA held that an audit confirmation was strong *prima facie* evidence of debt. Chao JA distinguished the case of *Re Ice-Mack* as being inapplicable (at [31]) since there were no circumstances warranting suspicion on the signing of the audit confirmation despite the close friendship of the debtor and creditor. Indeed, the mere close friendship between the debtor and creditor does not, without more, raise any suspicion.

(B) "TRIGGERS" THAT WILL RAISE A COURT'S SUSPICION TO REQUIRE MORE EVIDENCE IN CASES INVOLVING RELATED COMPANIES

87 However, there will be certain "triggers" that will raise a court's suspicion to require more evidence in a given case. Coming back to the case of *Re Ice-Mack*, while the creditor's own audited financial statements were provided, the statements did not attest to any debt owed by the company at all. The only thing shown was that Mr Valibhoy owed a debt to the creditor, but the applicant had failed to produce proper evidence of the various loans and payments it had allegedly made for and on behalf of the insolvent company. The court rejected Mr Valibhoy's explanation that he had agreed to bear the debt that was originally incurred by the company personally so that the creditor

would not be put to loss as a result of the company's winding up. The explanation was rejected because the debt was incurred before the company was wound up and the company's own audited accounts did not lend any support to the existence of the alleged debt. Those circumstances led the court to reject the only documentary evidence in support of the proof of debt – which was a solitary audit confirmation by the debtor company signed by Mr Valibhoy himself. It should be noted that the court's suspicion was only triggered in that case because Mr Valibhoy's explanation did not square with the facts, rather than based *purely* on the mere presence of the connection between Mr Valibhoy and the insolvent company *per se*.

88 Similarly, the Hong Kong High Court decision of *Re Adam Holdings Ltd* [1985] 2 HKC 608 ("*Re Adam Holdings*") stands as an example of when a court's suspicion was triggered. In that case, a creditor who was the subsidiary of a company that was also compulsorily wound up submitted a proof of debt to the Official Receiver. This proof was supported by ledger entries of the group of companies, and a draft account sent to the creditor by the debtor company, prepared by accountants, to confirm the balance due. However, no audited statements were produced. The primary documents were also lost. The ledger entries were also filled with discrepancies. Given these discrepancies and the overall state of the evidence tendered in support of the proof of debt, Jones J rejected the proof of debt. Once again, the court's suspicion was triggered, not by the mere fact that the credit was related to the insolvent company, but by the discrepancies in the accounts.

89 In all these cases, there was something specific, whether it be a material discrepancy in the factual account provided by the creditor or inconsistencies within the documentary record, that triggered the court's suspicion. This then

led to the court needing more evidence such as the production of the primary documents. Once again, it is not just the mere presence of a close relationship between the insolvent company and the creditor that, by itself, led to the court requiring more than the production of audited financial statements. Indeed, given the prevalence of related companies, a rule to this effect would be impractical and run counter to the need for efficiency in the liquidation process.

(C) FACTS THAT WILL NEGATE NEED FOR MORE EVIDENCE IN CASES INVOLVING RELATED COMPANIES

90 On the contrary, there are facts that will *negate* the need for more evidence in cases involving related companies. In this regard, the Hong Kong High Court held in *Grand Gain Investment Ltd v Cosimo Borrelli and another* [2006] HKCU 872 (at [18]) that weight should be given to the fact that the accounts concerned have been audited. This is since the audit process requires the auditor to be satisfied that the accounts provide a true and fair of the company's financial position. However, if there is a "trigger" fact, such as evidence that shows that the accounts are or may be inaccurate, or doubt is cast on the manner in which the auditor carried out his duties, that will certainly be a factor the court will consider.

91 This was also alluded to in *Capital Realty*, where the Court of Appeal held that audit confirmation constituted strong *prima facie* evidence of a debt (at [24]). Unlike the case of *Re Adam Holdings*, it appeared that there were no discrepancies in the record of debts in any of the audited statements in *Capital Realty* such that any suspicions were raised.

(D) SUMMARY OF THE OVERALL POSITION INVOLVING THE NEED FOR MORE EVIDENCE FOR CASES INVOLVING RELATED COMPANIES

92 A summary of the overall position as to the approach to be taken on the evidence required to support a proof (even those given by a *connected/related party*), as well as the application of these principles, can be gleaned from the Court of Appeal decision of *Fustar CA*(at [18]):

> … It seems to us that the overriding concern of the courts in all the above cases was to ensure that that legitimate creditors and contributories of a company should not be prejudiced by spurious claims made by related parties under the guise of being creditors. What is spurious would depend on the facts of each case. The principle that can also be gleaned from this brief overview is that the duty of the liquidator in assessing a proof of debt is to ensure that while genuine debts are admitted and false claims are rejected, he must act *fairly* in discharging his duties. He must, at all times, be independent and hold an even hand in dealing with the often competing interests of creditors, contributories and his appointers. *A liquidator must never favour the interests of his appointers over that of the other legitimate claimants to the company's assets.*
>
> [emphasis in original]

93 As such, the Court of Appeal laid down key principles and frameworks to be applied when assessing the judgment made by the liquidator. First, although a liquidator had extensive powers to go behind documents, a liquidator must have a reasonable basis on which to query a debt that appeared to be genuine (see *Fustar CA* at [20]). A proof of debt should not be lightly rejected if the debt had been consistently acknowledged in audited accounts or through audit confirmation statements (see *Fustar CA* at [21]).

94 A liquidator is thus only bound to take extraordinary steps to scrutinise a proof of debt on the basis that it could be a false claim in cases where he has reason to be suspicious about its genuineness or legal validity. The factors to be considered include, *inter alia* (see *Fustar CA* at [20]):

(a) the origins of the debt,

(b) the length of time the debt has been due,

(c) how the company has treated the debt in its financial statements,

(d) the business of the debtor company; and

(e) the relationships between the claimants and the controlling shareholders of the company.

In assessing these factors, the liquidator must rely on: (a) knowledge of the general principles of company accounting, (b) the auditing practice of companies by independent auditors, (c) the effect and implication of directors' and shareholders' approvals annually of company accounts made in compliance with the law, (d) the customary insolvency practice in verifying debts, and (e) some degree of common sense in understanding human relationships (see *Fustar CA* at [20]).

95 By way of application, in *Fustar CA*, the liquidator rejected the creditor's proof of debt because, among others, the creditor company was a related party and there was no independent confirmation of the underlying transactions through primary supporting documents or witnesses. The court disagreed and found the debt to be genuine for the following reasons (at [27]–[30]): (a) the insolvent company had consistently acknowledged the debt in question, the accounts were complete and did not contain discrepancies, (b) the figures in the audited financial statements, the audit confirmations, the ledger entries and the creditor's audited financial statements all corroborated each other, and (c) the fact that the auditors relied on a common director (behind the

creditor and insolvent company) for information did not *in itself* suggest that the accounts stated were wrong.

96 I come now to apply these principles to the present case.

(2) Application to the present case

(A) NO NEED FOR A WHOLESALE INSISTENCE OF MORE EVIDENCE

97 To begin with, I do not agree with the Kyen Liquidators' insistence that it is necessary for *each and every* debt claimed by Feima to be independently verified with reference to the relevant supporting documents before they can be admitted. Indeed, this *wholesale* insistence on the primary documents for every debt reveals a pre-existing reluctance to consider each debt on its own merits and to only require for the supporting documents where necessary. Indeed, this was something which the Court of Appeal in *Fustar CA* was careful to guard against (at [21]):

> … while we accept that the burden of proof ordinarily rests on the creditor to substantiate a proof of debt *this does not mean that the only means* by which a creditor can prove a proof of debt must be through the *production of primary documents.*
>
> [emphasis added]

(B) NO "TRIGGERS" THAT REQUIRE MORE EVIDENCE IN RESPECT OF SPECIFIC CLAIMS

98 More specifically, unlike the cases of *Re Ice-Mack* and *Re Adam Holdings*, I do not think that there are "triggers" in the present case that warrant the court requiring more evidence than is usual in respect of Feima's claims. This is because, on a general level, Feima's claim is supported by different financial documents which corroborate each other. These documents include (a) the detailed ledger of Feima, together with the underlying *supporting*

documents for many of the entries listed within, (b) the *audited* financial statements of both Kyen and Feima, and (c) a Kyen statement of affairs filed by one of its directors with the Kyen Liquidators. Thus, taken broadly, Feima's claims are not based merely on its own assertions, but are also justified by reference to either financial statements that have been independently audited, or based on external documents. As was the case in *Fustar CA* (at [21]), the debt has been consistently acknowledged in audited accounts or through audit confirmation statements. The fact that there were some common directors between the creditor and the insolvent company, *in and of itself*, does not raise suspicions.

99 With this general approach in mind, *ie*, that I do not require any more than the usual evidence (there is no need for "heightened scrutiny" or that Feima should be put to "strict proof"), I will turn to the specific financial documents concerned.

Whether the Kyen Liquidators' decision to reject the Intercompany Claims should be affirmed

The parties' general arguments

100 The defendants' objection against the Intercompany Claims flows from its general position that Feima should be put to "strict proof" of its claims due to its relationship with Kyen. They in turn raise five specific objections, namely:

(a) Feima's audited financial statements cannot be relied upon because these were qualified to the extent that Feima's auditors issue an adverse opinion on the same.[54]

[54] DWS at [6.3.2]–[6.3.5].

(b) Feima's reliance on Kyen's audited accounts is misplaced as those accounts are unreliable as they were prepared under the control and supervision of Feima, which was involved in the Third Party Transactions.[55]

(c) Feima's reliance on Kyen's statement of affairs is similarly unreliable because Kyen's directors have not provided the Kyen Liquidators with any satisfactory explanation as to why several key transactions were omitted from the statement of affairs during its preparation.[56]

(d) Feima's bank payment advices do not identify any underlying basis or justification for the transactions that had taken place.[57]

(e) Feima has only provided the underlying agreements for one of the Intercompany Claims, namely, the solicitors fees allegedly paid by Feima. But even this claim does not stand up to scrutiny.[58]

Accordingly, the defendants submit that Feima has not discharged its burden of proof that the Intercompany Claims are true liabilities that are due from Kyen.

101 Feima's general response is that its claims are supported by different types of financial documents, all corroborating one another, including (a) the detailed ledger of Feima together with supporting documents for much of the

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55 DWS at [6.3.6].

56 DWS at [6.3.7].

57 DWS at [6.3.7].

58 DWS at [6.3.8].

entries listed therein, (b) the audited financial statements of both Kyen and Feima, and (c) a Kyen statement of affairs filed with the Kyen Liquidators.

My decision: the Kyen Liquidators' decision to reject the Intercompany Claims should be rejected

(1) Whether Feima's supporting documents should be viewed with suspicion

(A) NO NEED FOR "HEIGHTENED SCRUTINY" IN THE PRESENT CASE

102 As I had alluded to above, viewed broadly, the Kyen Liquidators' general objection against the Proof of Debt flows from what they see as the unreliability of the supporting documents provided by Feima. These documents include (a) Feima's audited financial statements, (b) Kyen's audited financial statements, (c) Kyen's director's statement of affairs, (d) Feima's bank payment advices, and (e) missing underlying agreements. I will deal with (a), (b) and (c) as these permeate Feima's claims more generally. I will address (d) and (e) when I discuss the relevant claims.

103 I have already explained why there is no need to adopt a "heightened scrutiny" in the present case. There are no facts that triggers suspicion to do this. As such, I dismiss the defendants' attempt to cast doubt *generally* on (a) Feima's audited financial statements, (b) Kyen's audited financial statements, and (c) Kyen's director's statement of affairs.

(B) FEIMA'S AUDITED FINANCIAL STATEMENTS CAN BE RELIED ON

104 More specifically, the Kyen Liquidators contend I should disregard or accord little weight to Feima's own audited financial statements because their own independent auditors issued a disclaimer of opinion on those statements. In

doing so, the defendants say that the auditors raised concerns on the very existence, accuracy, and valuation of Feima's assets and liabilities.[59]

105 In my view, the disclaimer made by the auditors in the 2018 audited financial statements was indeed quite significant and could be some cause for concern. I reproduce the relevant portions of the disclaimer for context:[60]

> **Disclaimer of Opinion and Adverse Opinion**
>
> We were engaged to audit the financial statements of Feima International (Hongkong) Limited …
>
> *We do not express an opinion on the financial statements of the company*. Because of the significance of the matters described in the Basis for Disclaimer of Opinion section of our report, *we have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these financial statements*. In all other respects, in our opinion the financial statements have been properly prepared in compliance with the Hong Kong Companies Ordinance.
>
> **Basis for Disclaimer of Opinion**
>
> 1. No direct confirmations for trade debtors, other debtors, prepayment and deposits included in the statement of financial position as at 31 December 2018 have been obtained. We were *unable to satisfy ourselves by alternative means the existence, accuracy and valuation of trade debtors and other debtors, prepayment and deposits* included in the statement of financial position … These balances have been fully provided for impairment loss in the statement of financial position as at 31 December 2018.
>
> 2. No direct confirmations for trade creditors, other creditors and accruals and advance payment from customers included in the statement of financial position as at 31 December 2018 have bene obtained. We were unable to satisfy ourselves by alternative means the completeness and accuracy of trade creditors, other creditors and accruals and advance payment from customers included in the statement of financial position …

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59 DWS at [6.3.4].

60 1 CTKS at p 1003.

> [bold in original; emphasis added in italics]

In essence, the auditors were of the view that they "do not express an opinion on the financial statements of the company" as they "have not been able to obtain sufficient appropriate audit evidence to provide a basis for an audit opinion on these financial statements". Significantly, it was also stated that there was "[n]o direct confirmations for trade debtors, other debtors, prepayment and deposits" and the auditors were unable to "satisfy [themselves] by alternative means the existence, accuracy and valuation of trade debtors and other debtors, prepayment and deposits included in the statement of financial position". That is quite a wide qualification to make in respect of the company's financial statements, and this does give me some pause as to the reliability and veracity of Feima's 2018 audited financial statements.

106 Feima argues that the auditor's adverse opinion and qualification does not apply to the debts owed by Kyen to Feima due to the auditors agreeing to a full impairment of the Kyen debt and thus the qualification "does not apply to the debt owing by Kyen to Feima" and only applied to the other debts.[61] Feima adduced a letter from the auditors dated 27 August 2022 in support of this argument.[62] However, a close examination of the letter reveals that the auditors do not actually state that the audited financial statements should be qualified in the manner alleged by Feima:

> We refer to your letter dated 19 August 2022 regarding the audited financial statements of the Company for the year ended 31 December 2018 ("AFS 2018") and are writing with our reply as follows:-
>
> Impairment of debts owing by Kyen Resources Pte Limited

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61 Third Affidavit of Choi Tze Kit Sammy dated 31 August 2022 ("3 CTKS") at [6(2)].

62 3 CTKS at p 7.

> *According to the Company's records*, as at 31 December 2018, there were debts due from Kyen Resources Pte. Limited totalling HK$384,549,890, which remained unsettled and long outstanding. We also found that Kyen Resourses Pte Limited was under liquidation during the course of our audit of the Company's financial statements. We therefore agreed the Company's full impairment for the amount due from Kyen Resources Pte. Limited amounting to HK$384,549,890 based on our impairment assessment as we found that its recoverability is low.
>
> [underlined in original; emphasis added in italics]

The auditor's letter does not address the concern over the veracity and valuation of Feima's debtors. Instead, it only stated that the auditors agreed to a full impairment of Kyen's debt to Feima because the auditors assessed that the debt's recoverability was low given Kyen's liquidation, and that the debt remained unsettled and long outstanding. The auditor's letter is prefaced by the words "[a]ccording to the Company's records" (which could mean that the auditors took the information given to them at face value) before stating that the value of the debts due from Kyen, and the auditors do not actually confirm that they had specifically audited and assessed the *legitimacy* of the debt in question by reviewing all the relevant supporting documents.

107 Nevertheless, as against this, there are the audited statements from 2017 which showed that there was a debt of HKD 505,727,215 that was payable by Kyen to Feima as at 31 December 2017 (see [8(b)] above), and the 2017 statements corroborated the Proof of Debt. What is pertinent to note is that within the 2017 statements, the auditors gave the opinion that except for other matters (which do not concern the debt owing by Kyen to Feima), the "financial statements give a true and fair view of the financial position of

[Feima] as at 31 December 2017".[63] Thus, the qualification that was made in the 2018 audited financial statements were not made in the 2017 audited financial statements. It is also relevant to note that the figure in 2017 was much greater (HKD 505,727,215) than that in 2018 (HKD 385,549,890), but this greater figure in 2017 was deemed to be accurate by the auditors.

108 In this connection, I also note that Feima's detailed ledger corroborated *both* of these numbers (together with the supporting documents), and included details showing how the balance of HKD 505,727,215 that was payable by Kyen as at 31 December 2017 was gradually reduced by a series of about 133 separate transactions to HKD 384,549,890 by 31 December 2018.[64]

109 Additionally, the figure of HKD 505,727,215 is itself corroborated by Kyen's *own* financial statements for 2017 (being the latest set of audited financial statements produced for Kyen). The 2017 audited financial statements showed that the total figure of USD 64,696,911 (roughly equivalent to the figure of HKD 505,727,215) was payable by Kyen to Feima under the "immediate holding company" category for the trade payables (USD 16,513,410) and non-trade payables (USD 48,183,501).[65] Thus, Kyen's *own* auditors (which were completely different from the auditors performing the audit for Feima) agreed with the accounting of the transactions between Feima and Kyen, as reflected in its financial statements. The Kyen auditors had stated their professional opinion on the Kyen financial statements for 2017 as follows:[66]

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63 1 CTKS at p 979.

64 1 CTKS at [12(4)]; 1 CTKS at pp 182–189.

65 1 CTKS at p 1058.

66 1 CTKS at p 1028.

> [the 2017 Kyen financial statements were] properly drawn up in accordance with the provisions of the Companies Act, Cap 50 (the "Act") and Financial Reporting Standards in Singapore ("FRSs") so as to give a true and fair view of the financial position of the Company as at 31 December 2017 and of the financial performance, changes in equity and cash flows of the Company for the year ended on that date. …

110 Lastly, weight must be given to the statement of affairs filed by one of the Kyen directors which states that Feima has an unsecured claim of USD 49,355,996.30 against Kyen.[67]

111 Taking all of the circumstances holistically, even though there was the qualification made in the 2018 statements, I find that all the other documents (consisting of Feima's audited financial statements in 2017, Kyen's own audited financial statements in 2017, Feima's detailed ledger, and Kyen's statement of affairs) provided sufficient corroboration for the Proof of Debt to be admitted. Notably, there was a similar circumstance which occurred in *Fustar (CA*) where the earlier audited financial statements were unqualified by auditors, but then the later financial statements became qualified (at [28]). Despite this, the Court of Appeal did not necessarily find this fatal to admitting the proof of debt as there were other corroborating information. Coming back to the present facts, the fact that the 2018 statements had qualifications does not necessarily mean that the earlier set of accounts must be discarded entirely (especially given that the 2017 statements covered the larger sum of HKD 505,727,215). Further, the fact that the Proof of Debt was a debt that Kyen had *itself* consistently acknowledged as being owed and unpaid within its *own* audited financial statements in 2017 (without qualification) and in its statement of affairs, meant

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67 2 CKT at p 766.

that Feima's Proof of Debt should not be lightly rejected, because "[s]uch acknowledgements amount to an admission of the debt" (see *Fustar CA* at [21]).

(C) KYEN'S AUDITED FINANCIAL STATEMENTS CAN BE RELIED ON

112 For completeness, the defendants also argue that Kyen's audited financial statements in 2017 and Kyen's statement of affairs cannot be relied upon. I turn to these arguments now.

113 As for Kyen's audited financial statements in 2017, the defendants' objection is that these statements are unreliable because they were prepared under the control and supervision of Feima. Further, while having such control and supervision, Feima was involved in the Third Party Transactions. As such, the defendants say that there is a legitimate concern over the probative value of these accounts and the Kyen Liquidators are hence justified in going beyond Kyen's accounts.[68] I do not agree with this submission. In the first place, I do not think that the Kyen Liquidators have successfully raised any suspicion that is needed to trigger a heightened scrutiny of the documents. Their assertions of the alleged Third Party Transactions, which are connected to their counterclaims in dishonest assistance and knowing receipt, cannot be resolved simply on the Kyen Liquidators' own adjudication. Second, Kyen's financial statements are audited without qualification of the debt in question (as I have mentioned at [109] above). Kyen's auditors have in their independent audit report stated that the financial statements for FY2017 have been properly drawn up in accordance with the statutory requirements. These statements are assessed to give a true and fair view of Kyen's financial position as at 31 December 2017.

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68 DWS at [6.3.6].

114 In *Fustar CA*, a similar complaint was raised as the controlling common director of both the creditor and insolvent companies was the source from which the auditors had gleaned their financial information. Notwithstanding this, the Court of Appeal was slow to conclude that this necessarily casted doubt on the information in the accounts (at [28]):

> … Who else but [the controlling common director] would have extensive information about the Company at his finger tips? The fact that the auditors relied on [the controlling common director] for information does not in itself suggest that the accounts stated were wrong.

Thus, just because Mr Yan (a director from Feima) was responsible for supervising Kyen's employee in the preparation of the Kyen accounts, this does not *by itself* necessarily raise any suspicions or make the audited financial statements unreliable.

(D) KYEN'S STATEMENT OF AFFAIRS

115 Turning then to Kyen's statement of affairs, the defendants say that this is not reliable evidence because several key transactions were omitted from it during its preparation and Kyen's directors have not provided the Kyen Liquidators with any satisfactory explanation for the said omissions.[69] I disagree with this submission. First, the statement of affairs does, in fact, state that Feima has an unsecured claim of USD 49,355,996.30 against Kyen. Second, the statement of affairs serves a merely corroborative function and Feima does not need to depend on it for the Proof of Debt.

116 Having concluded that there is nothing on the facts to cause me to generally doubt the reliability of (a) Feima's audited financial statements,

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69 DWS at [6.3.7].

(b) Kyen's audited financial statements, and (c) Kyen's director's statement of affairs, I now consider if Feima has successfully made out its claims based on these financial statements, as well as its general ledger and other supporting documents.

(2) Whether Feima has made out its claims

(A) OVERVIEW OF FEIMA'S CLAIMS

117 I turn first to Feima's detailed ledger to meet the defendants' argument that Feima had not produced the underlying agreements or bank payment advices for its claims. In my judgment, the detailed ledger has set out more than 200 transactions that Feima had with Kyen from 2016 onwards. It shows clearly that the USD 49,355,996.30 claimed in the Proof of Debt as comprising, amongst other things, the following balances:[70]

(a) The Purchase Debts of USD 25,824,511.08 due from Kyen to Feima as a result of goods sold by Feima to Kyen.[71]

(b) The Intercompany Claims of RMB 124,145,239.85 due from Kyen to Feima as a result of payments made by Feima to or on behalf of Kyen, and USD 5,182,755.32 due from Kyen to Feima as a result of payments made by Feima to Kyen or on Kyen's behalf.

118 For completeness, I do not deal with HKD 12,957.94 due from Feima *to Kyen* as a result of amounts paid by Kyen on behalf of Feima, as this would not affect the Proof of Debt, being a liability from Feima *to Kyen*.

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70 2 CKT at [3.2.1].

71 2 CKT at [6.1.2].

(B) USD 25,824,511.08 DUE FROM KYEN TO FEIMA AS A RESULT OF GOODS SOLD BY FEIMA TO KYEN

119 In respect of the Purchase Debts of USD 25,824,511.08 due from Kyen to Feima as a result of the sale of goods, I am satisfied that in every instance where payment has been made by Kyen as a result of goods supplied by Feima to Lyen from 2016 onwards, the Feima Liquidators have provided supporting documents such as bank transaction statements and bank advice to show the date, the transaction amount and the bank account details for the monies which were transferred from Kyen to Feima. The defendants' general objection is that Feima's bank payment advices do not identify any underlying basis or justification for the transactions that had taken place. I do not accept this objection as being capable of rejecting the Proof of Debt in relation to the USD 25,824,511.08 outright. As I said above, there is no particular "trigger" that would justify me taking a heightened scrutiny of the claims in the Proof of Debt. I therefore do not accept that I should go behind each and every of the claims, including the bank payment advices, to ascertain the underlying basis or justification for the transaction. This would go beyond the pale and I do not think this is necessary for the present case.

120 Going then into the specifics, in the first place, out of the USD 25,824,511.08 due from Kyen to Feima as a result of the sale of goods, the Kyen Liquidators have not raised any challenge to USD 3,348,040.47. Thus, leaving aside the Kyen Liquidators' objections to the other claims, this sum of USD 3,348,040.47 claimed in the Proof of Debt should be admitted. Indeed, Mr Chan confirmed before me that if I were not with him on the "primary" ground of rejection, then this sum of USD 3,348,040.47, being unchallenged by the Kyen Liquidators, should be admitted. For the avoidance of doubt, this sum of USD 3,348,040.47 is derived from the balance of USD 25,824,511.08 stated

in the general ledger, *less* USD 5,067,813.82 and USD 590,505.97 arising from the allegedly non-genuine transactions (which I will consider below), and *less* USD 16,818,150.82 being the amounts assigned to SPDB and for which Feima no longer claims.

121 I turn then to the remaining claim of USD 5,067,813.82 and USD 590,505.97 under this head. This claim arises out of Purchase Contract P-CU-F192 entered into between Kyen and Feima for the sale of copper cathodes by Feima to Kyen ("the Purchase Contract"). The Kyen Liquidators' objection is premised on the fact (a) that they are unable to locate any documentary evidence of the goods being delivered to Kyen pursuant to the Purchase Contract, and (b) that, in the ordinary course of Kyen's business, Kyen would purchase the copper cathodes first and then sell them to a third party. In this respect, the Kyen Liquidators were unable to find any evidence to suggest that the copper cathodes were ever sold to a third party.

122 I reject the Kyen Liquidators' reasons for objection for the following reasons. First, I reject the Kyen Liquidators' reason that they are unable to locate any documentary evidence of the goods being delivered to Kyen. In this regard, the Purchase Contract states that the copper cathodes are to be delivered to Shanghai, China. The relevant bills of lading do show the delivery of the copper cathodes to Shanghai.[72] In addition, there are contemporaneous documents showing that the transaction had taken place. For instance, Feima had issued a final invoice reflecting the figures concerned, a debit note for the sum of USD 590,505.97 was issued on 18 July 2018, and the Purchase Contract was formally entered into between Feima and Kyen on 4 July 2018. Finally, the

[72] 3 CTKS at pp 12–19.

general ledger and audited financial statements of both Feima and Kyen support and confirm the contemporaneous documents that this balance is being owed. I do not think that the Kyen Liquidators, when faced with these documents, can simply reject the claim on the basis that they were unable to locate any documentary evidence of the goods being delivered to Kyen.

123 More broadly, I do not think that there is any fact which might trigger suspicion that the transaction is fictitious. Indeed, as Feima points out, the general ledger shows numerous transactions between Feima and Kyen for the sale of goods by Kyen to Feima since 2016. The fact is that there has been a consistent pattern of such business dealings since 2016, which have all been documented in a consistent manner. The Kyen Liquidators cannot pick a single transaction and dispute it on the basis that they cannot find the relevant documents, when they have not challenged the other transactions which have been documented in a similar manner.

124 Accordingly, in relation to the USD 25,824,511.08 due from Kyen to Feima as a result of goods sold by Feima to Kyen, I reject the Kyen Liquidators' decision to reject:

(a) USD 3,348,040.47, which has not been challenged;

(b) USD 5,067,813.82 and USD 590,505.97, for which I reject the reasons for rejection.

I, however, affirm the Kyen Liquidators' decision to reject the USD 16,818,150.82, being the amount assigned to SPDB and for which Feima no longer claims.

(C) RMB 124,145,239.85 DUE FROM KYEN TO FEIMA AS A RESULT OF PAYMENTS MADE BY FEIMA TO OR ON BEHALF OF KYEN

125 In respect of the RMB 124,145,239.85 due from Kyen to Feima as a result of payments made by Feima to or on behalf of Kyen, the Kyen Liquidators' objection is that "there is insufficient evidence that these were genuine transactions made by [Feima] on [Kyen's] behalf".[73]

126 I reject the Kyen Liquidators' rejection of this claim. In my judgment, the claim of RMB 124,145,239.85 is supported by evidence found in the ledger, the bank transaction confirmations that support the entries in the ledger, and which are corroborated by Kyen and Feima's audited financial statements and by the Kyen's director's statement of affairs. I agree with Feima that the bank transfer confirmations show *real transfers*. The ledger, audited financial statements and statement of affairs then *confirm* that these transfers give rise to a debt.

(D) USD 5,182,755.32 DUE FROM KYEN TO FEIMA AS A RESULT OF PAYMENTS MADE BY FEIMA TO KYEN OR ON KYEN'S BEHALF

127 In relation to the USD 5,182,755.32 due from Kyen to Feima as a result of payments made by Feima to Kyen or on Kyen's behalf, the Feima Liquidators have provided a ledger showing that this sum was arrived at after a series of 90 USD transactions which took place from 17 February 2016 to 31 July 2019. These 90 transactions reflected in the general ledger comprise of transactions showing:

(a) USD payments made from Kyen (either by Kyen itself or on Kyen's behalf) to Feima.

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[73] 2 CKT at [5.1.5].

(b) USD payments made by Feima either directly to Kyen or on Kyen's behalf. This included legal fees paid on behalf of Kyen of USD 100,000 on 10 December 2018 and of USD 50,000 on 2 April 2019 ("the Legal Fees").

(c) Management fees of USD 2,000,000 due from Kyen to Feima for 2017 (this being the basis of the Management Fees Claim, see [15(b)(ii)] above).

128 The Kyen Liquidators have made specific objections to the Legal Fees and the Management Fees Claim, which I will deal with. But apart from these specific objections, the Kyen Liquidators' objection to the remainder of the USD 5,182,755.32 is premised on similar objections as above that centre on the lack of evidence. I reject these objections for the same reasons as above. Indeed, in respect of this sum of USD 5,182,755.32, I note that for each payment that has been made, at least a copy of the bank confirmation statement or advice has been provided. These documents show the date of the transfer, the parties to the transfer, and the bank account involved in the transfer, and in some instances, documents showing exactly what the payment was for. I therefore do not accept the Kyen Liquidators' objection founded on lack of documentation.

129 I turn to the Legal Fees. The Kyen Liquidators' rejection is based on there being no evidence of the relevant legal services being provided. More importantly, Feima was not even the party which made the relevant payments. In this regard, the Kyen Liquidators reject Feima's explanation that a third party, Uni-Tops International (Hong Kong) Ltd ("Uni-Tops") had made payment of the amount on Feima's behalf, as there is no evidence that Kyen agreed to be liable to Feima for the payments made by Uni-Tops.

130 I disagree with the Kyen Liquidators' rejection. Instead, I accept the Feima Liquidator's explanation, which is based on the provision of (a) the Special Legal Service Contract governing the provision of legal services from the law firm to Kyen, (b) email correspondence showing that the USD 150,000 was expressly noted by Kyen's staff as expenses of Kyen, and (c) Feima's journal vouchers showing that the payment to Kyen's law firm by Uni-Tops resulted in an amount due by Feima to Uni-Tops. I agree that it is likely that the journal vouchers were recorded in this manner is that Uni-Tops was paying on behalf of Feima and this was the conclusion of the investigations.

131 I turn then to the Management Fees Claim. This claim is based on a signed Management and Administrative Services Agreement between Feima and Kyen that expressly provides at Clause 5.2 that Kyen shall pay Feima a management fee of USD 2,000,000 for such calendar year or other mutually agreed amount. The Kyen Liquidators' rejection is based on Feima's alleged knowing receipt of and dishonest assistance in relation to the Third Party Transactions. As a result, the Kyen Liquidators say that Feima has breached Clause 4.1 of the Management and Administrative Services Agreement, which require the Manager to serve Kyen in good faith. By breach of this clause, the Kyen Liquidators say that Feima is not entitled to the fees under the Management and Administrative Services Agreement.

132 I reject this rejection on the ground that the Kyen Liquidators have not made out their counterclaims in dishonest assistance and knowing receipt. As I have said above, the proper avenue for adjudicating on these heavily fact-dependent claims is not the adjudication procedure. Accordingly, the very premise of the Kyen Liquidators' rejection, namely, the breach of Clause 4.1 has not been established.

Conclusion on the Kyen Liquidators' "secondary ground" for rejection

133 In summary, I disagree with the Kyen Liquidators' rejection of the following claims in the Proof of Debt. I consequently find that they should be admitted in these amounts:

(a) In relation to the Purchase Debts of USD 25,824,511.08 due from Kyen to Feima as a result of goods sold by Feima to Kyen:

(i) USD 3,348,040.47, which has not been challenged,

(ii) USD 5,067,813.82 and USD 590,505.97,

(iii) but *not* USD 16,818,150.82 (in respect of the Deed of Assignment that Feima is no longer claiming).

(b) In relation to the Intercompany Claims:

(i) RMB 124,145,239.85 due from Kyen to Feima as a result of payments made by Feima to or on behalf of Kyen in full; and

(ii) USD 5,182,755.32 due from Kyen to Feima as a result of payments made by Feima to Kyen or on Kyen's behalf in full.

Conclusion

134 For all the reasons given above, I allow Feima's application except in relation to USD 16,818,150.82 that is the subject of the Deed of Assignment.

135 I am thankful to both Mr Yeo and Mr Chan, as well as their respective teams, for their able and helpful submissions.

136 Unless the parties are able to agree on the appropriate costs order for this application, they are to write in with their brief submissions on the matter within 14 days of this decision.

Goh Yihan
Judicial Commissioner

Yeo Alexander Lawrence Han Tiong and Chew Jing Wei (Allen & Gledhill LLP) for the plaintiff;
Chan Ming Onn David, Fong Zhiwei Daryl, Tan Kah Wai and Lai Wei Kang Louis (Shook Lin & Bok LLP) for the defendants.