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

[2023] SGHC 83

Originating Application No 707 of 2022 and Summons No 583 of 2023

In the matter of Sections 139(1), 150(1) and 201(1) of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Kirkham International Pte Ltd (in liquidation)

Between

DB International Trust (Singapore) Limited

… *Applicant*

And

(1) Medora Xerxes Jamshid
Liquidator of Kirkham International Pte Ltd (in liquidation)
(2) Kirkham International Pte Ltd (in liquidation)

… *Respondents*

JUDGMENT

[Insolvency Law — Winding up — Removal of liquidator]

[Insolvency Law — Winding up — Meaning of a “creditor” under s 150(1) of the IRDA]
[Insolvency Law — Winding up — Admission of a proof of debt for the limited purpose of voting at a creditors’ meeting]

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DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid and another

[2023] SGHC 83

General Division of the High Court — Originating Application No 707 of 2022 and Summons No 583 of 2023
Goh Yihan JC
13 March 2023

4 April 2023 Judgment reserved.

Goh Yihan JC:

1 This is the applicant's application for the following orders:

(a) the first respondent be removed as the liquidator of the second respondent and for Mr Luke Anthony Furler ("Mr Furler") and Ms Ellyn Tan Huixian ("Ms Tan") of Quantuma (Singapore) Pte Ltd ("Quantuma") to be appointed as the joint and several liquidators of the second respondent in his stead;

(b) further and/or in the alternative, the first respondent shall within three days from the date of the Order herein, summon a meeting of the creditors of the second respondent to be convened within seven days, for the purpose of determining whether a committee of inspection ("COI") should be appointed and if so, who are to be members of the COI ("Creditors' Meeting"); and

(c) the first respondent shall admit the Proof of Debts ("PODs") filed by the creditors only for the purpose of voting at this Creditors' Meeting.

2 By way of introduction, the applicant is DB International Trust (Singapore) Limited. It is the trustee of US$9,000,000, 14.25% secured bonds ("the Bonds") issued by Kirkham Finance Limited ("KFL") for the benefit of three bondholders, Maiora Global Fund SPC ("Maiora"), Country Squire Corporation, and Colony Park. Maiora holds 92% of the aggregate principal amount of the Bonds. The Bonds were secured by various agreements, including a Parent Company Share Pledge Agreement dated 15 June 2015 ("the Share Pledge").

3 KFL is a subsidiary of the second respondent, Kirkham International Pte Ltd (in compulsory liquidation) ("KIPL"). KIPL was a company incorporated in Singapore on 18 January 2011. Its main function was to be a holding investment company in resources. At the time of the Bonds issuance, KIPL had a 95% shareholding in PT Borneo Prima Coal Indonesia ("BPCI"), which is an Indonesian company that holds mining concessions for coking coal in Central Kalimantan, Indonesia. These shares are KIPL's primary assets. Under the Share Pledge, KIPL's shares in BPCI have been pledged to the applicant as security for the Bonds.

4 KIPL was wound up on 20 November 2020 on just and equitable grounds pursuant to s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"). The first respondent, Mr Medora Xerxes Jamshid ("the Liquidator"), was appointed as its liquidator. When KFL defaulted on the Bonds, the applicant became entitled to claim the monies owed

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by KFL under the transaction documents from KIPL in full. It was in this light that the applicant claimed to be a creditor of KIPL and hence possessed the requisite legal standing to bring this application.

5 After hearing the parties and considering their respective submissions as well as the relevant documents, I allow the applicant's primary prayer in its application for the Liquidator to be removed as KIPL's liquidator and for the proposed liquidators to be appointed in his stead. I provide the reasons for my decision below.

The applicant's reasons in support of its application

6 To begin with, the applicant advanced four reasons in its written submissions in support of its application for the Liquidator to be removed.

(a) The Liquidator has failed to display sufficient vigour in carrying out his duties despite being appointed as KIPL's liquidator two years ago. In this regard, the Liquidator has (i) allowed an unauthorised party, Mr Garry David Taylor ("Mr Taylor"), a former director of KIPL, to act for and on behalf of KIPL in Indonesia, and this has caused the dilution of KIPL's shareholding in BPCI, and (ii) not personally undertaken any investigations into the affairs of KIPL but has instead relied on ongoing investigations by KPMG as a basis for delaying the progress of the liquidation.

(b) The Liquidator failed to obtain the requisite approvals and comply with his statutory obligations. In this regard, the Liquidator has (i) failed to seek the court's approval for his appointment of solicitors until he was reminded by the applicant in this application, (ii) not sought

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the court's sanction in entering into a funding agreement with Rasia FZE (Dubai), and (iii) adopted an erroneous position that the applicant like many others who have filed a proof of debt ("POD") cannot be regarded as "creditors" for the purposes of convening a creditors' meeting to form a COI.

(c) There is a conflict of interest in the continued appointment of the Liquidator as he may try to justify his past conduct and demonstrate that it did not cause any loss. This may place the Liquidator in a position of potential conflict concerning future investigations.

(d) There has been a justifiable loss in the creditors' confidence in the Liquidator's ability to realise the assets of KIPL.

7 I will address each of these reasons in turn, with reference to the relevant facts. However, I turn first to the applicable principles.

The applicable principles

General principles

8 The present application is made under s 139(1) of the IRDA, which provides that "[a] liquidator appointed by the Court may resign or on cause shown be removed by the Court". This applies to the *compulsory* winding-up regime. Section 139(1) is identical and derived from s 268(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). Accordingly, as a starting point, the principles applicable to s 268(1) of the Companies Act must be equally applicable to s 139(1) of the IRDA. In this regard, Tan Lee Meng J in the High Court decision of *Hong Investment Pte Ltd v Tai Thong Hung Plastics Industries (Pte) Ltd* [2010] SGHC 375 adopted the principles articulated in

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Woon and Hicks, *The Companies Act of Singapore – An Annotation* (LexisNexis, Looseleaf Ed, 2004, Issue 2) ("*Woon and Hicks*") (at para 3105-3125) to his application of s 268(1) of the Companies Act, as follows (at [5]):

> *Removal of liquidators for cause* See also s 268(1). A liquidator may be removed if there is some unfitness of the person by reason of his personal character, or from his connection with other parties or from the circumstances in which he is involved: *Sir John Moore Gold Mining Co* (1879) 12 Ch D 325, 331 per Jessel MR. Thus, for instance, if a liquidator refuses to take action against miscreant directors because he is one of them or because they are his friends, he may be removed by the court: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156. If the liquidator is not independent or impartial because of his connection with persons against whom there might be pending claims, there would be cause to have him removed: *Re: Charterland Goldfields* (1909) 26 TLR 132. Similarly, if it appears that the liquidator is in a position where his duty and interest conflict: *Re International Properties Pty Ltd* (1977) 2 ACLR 488, 492.
>
> The court has power to remove a liquidator not only because of his personal unfitness, but also on the ground that it is in the interest of the liquidation that he should be replaced: *Chua Boon Chin v McCormack* [1979] 2 MLJ 156, 158; *Re Adam Eyton Ltd* (1887) 36 Ch D 299, 303-304. In *Procam (Pte) Ltd v Nangle* [1990] 3 MLJ 269 Thean J declined to order the removal of a liquidator on the ground that it was not in the interest of the liquidation to do so, given the advanced state of the liquidation. Moreover, the errors made by the liquidator were made in good faith and did not prejudice the liquidation.

9 While the principles articulated in *Woon and Hicks* are undoubtedly helpful in providing *examples* of situations where s 268(1) of the Companies Act may be successfully invoked, it is, in my view, more important to have regard to the *general* basis for how s 268(1) of the Companies Act, and correspondingly s 139(1) of the IRDA, is to be applied. Such a general basis will help us understand *why* the situations suggested in *Woon and Hicks* should result in the successful invocation of s 268(1), and how other situations might also result in the same.

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10 In the High Court decision of *Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 ("*Petroships*"), Vinodh Coomaraswamy J had to consider the principles in relation to the removal of a liquidator pursuant to s 302 of the Companies Act. Similar to but also distinct from s 268(1), s 302 allows the court, on cause shown, to remove a liquidator and appoint another liquidator in a *voluntary* winding up. In the subsequent High Court decision of *Liquidators of Ace Class Precision Engineering Pte Ltd (in members' voluntary liquidation) v Tan Boon Hwa* [2022] 3 SLR 539 ("*Tan Boon Hwa*"), Tan Siong Thye J held that the principles articulated in *Petroships* in relation to s 302 apply equally to s 174 of the IRDA, which is derived from s 302 (at [99]).

11 More broadly, given the similarity in wording between ss 268(1) and 302 of the Companies Act (and, correspondingly, ss 139(1) and 174 of the IRDA), Coomaraswamy J's statement of the law in *Petroships* in relation to s 268(1) of the Companies Act should also apply to s 139 of the IRDA and therefore govern the present application, with appropriate adjustments to be made for the distinction between a solvent and an insolvent liquidation (see *Petroships* at [126]).

12 Applying the principles laid down in *Petroships* to s 139(1) of the IRDA, the broad effect of the relevant authorities is that, to show cause under this section, the applicant "must establish that the removal of the liquidator is in the real, substantial and honest interest of the liquidation and will advance the purposes for which the liquidator was appointed" (see *Petroships* at [109(b)]). While this may be seen as a two-limb test that is concerned with

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the interest of the liquidation and the purpose for which the liquidator is appointed (see *Petroships* at [127] and *In re Adam Eyton Ltd, Ex parte Charlesworth* (1887) 36 Ch D 299 at 306), it might be difficult to differentiate the two limbs if they are meant to be cumulatively satisfied. Rather, as Coomaraswamy J stressed in *Petroships*, it is important to first pay heed to the purpose for which the liquidator was appointed, so as to set "the standard by which the court is to assess the actions of the liquidator which have been impugned" (at [125]).

13 Therefore, rather than to conceive the appropriate test under s 139(1) of the IRDA as a cumulative two-limb test, it is better to think of it as a two-stage test that is to be applied sequentially:

(a) the *first stage* would involve the court assessing the purposes for which the liquidator was appointed, which would be co-extensive with the purposes for the liquidation (see *Petroships* at [125]); and

(b) the *second stage* would involve the court assessing whether the removal of the liquidator is in the "real, substantial and honest interest of the liquidation", bearing in mind the purposes determined at the first stage.

If the court concludes at the end of the two stages that the removal of the liquidator is in the "real, substantial and honest interest of the liquidation", then the applicant would have shown cause for the liquidator concerned to be removed. This would enliven the court's discretion to remove the liquidator. The court would then have to consider if it should exercise its discretion to remove the liquidator. Of course, if the court had already concluded that the removal of the liquidator is in the "real, substantial and honest interest of the

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liquidation", it would usually follow that the court will exercise its discretion to remove the liquidator concerned.

14 This manner of conceptualising the test under s 139(1) of the IRDA also explains why the examples given in *Woon and Hicks* amount to cause for the removal of liquidators. To take one example, in *Chua Boon Chin v McCormack John Maxwell and others* [1979–1980] SLR(R) 121, the High Court removed the liquidators in a members' voluntary liquidation because one of them was concurrently a director of the company. In that case, the first stage of the analysis above would reveal that one of the purposes of the liquidation must be to ensure the fair distribution of the company's assets. Bearing this purpose in mind and proceeding to the second stage of the analysis, the removal of the liquidators would be in the real, substantial, and honest interest of the liquidation since there was real doubt whether the liquidators will discharge their responsibilities properly given one of them is a director of the company.

Specific principles in relation to the present application

15 With these general principles in mind, I come to the specific principles in relation to the present application.

16 In this regard, the present application concerns an insolvent liquidation. While *Petroships* and *Tan Boon Hwa* both involved solvent liquidations, Coomaraswamy J had, in the course of distilling the applicable considerations in relation to solvent liquidations in *Petroships*, also set out the relevant purposes of an insolvent liquidation. The learned judge had (at [130]) referred to Andrew R Keay, *McPherson's Law of Company Liquidation* (Sweet & Maxwell, 3rd Ed, 2013) ("*McPherson*") (at para 1-005):

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> …
>
> The purposes of the liquidation of insolvent companies are often seen as: first, providing a procedure that allows for an equitable and fair distribution of the assets of the debtor company amongst its creditors. This means that one or more creditors are not discriminated against and one or some creditors do not profit at the expense of other creditors …; second, in providing for the winding up of a company which is hopelessly insolvent, liquidation serves the community at large as it is not good for society that companies who are insolvent are able to continue to trade; third, liquidation is designed to allow for an investigation of the company's affairs by an independent and appropriately qualified person, with particular emphasis on the circumstances which precipitated the winding up. Such an investigation may reveal improper or dishonest conduct by officers of the company or others associated with the company that should be punished by prosecution or civil action. Further, the investigation may disclose the fact that there were unfair dispositions of property, which has reduced the ability of the company to pay its creditors.

17 As can be seen from this extract from *McPherson*, there are, broadly speaking, three purposes of an insolvent liquidation, namely, (a) providing a procedure that ensures an equitable and fair distribution of assets among creditors, (b) serving the community at large by not allowing insolvent companies to continue to trade, and (c) allowing for an investigation into the company's affairs by an independent and appropriately qualified person, especially in relation to the circumstances that led to the winding up. In relation to the possibility of an investigation, a liquidator in a compulsory liquidation may be reasonably expected to exercise his broad powers of investigation if he considers this to be necessary in his professional assessment (see *Petroships* at [139]). These purposes, which are by no means exhaustive, set the standards by which I should assess the actions of the Liquidator in the present case.

18 Following from these purposes, I will need to consider whether the removal of the Liquidator is in the "real, substantial and honest interest of the liquidation". In this regard, as Coomaraswamy J said in *Petroships*, it is

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necessary to ask who is primarily interested in the results of the liquidation, since this would directly inform what the interest of the liquidation is (at [131]). In the context of an insolvent liquidation such as in the present case, an insolvent company is liquidated primarily in the creditors' interest. The creditors are the primary stakeholders because their interests prevail over the interests of other persons likely to be affected by the winding up, such as shareholders (see *McPherson* at para 3-104). As such, I will give predominant weight to the creditors' wishes in assessing whether the removal of the Liquidator is in the real, substantial, and honest interest of the liquidation. In most cases, the creditors' wishes will coincide with the purposes of the liquidation. For example, it must be that creditors would like for the liquidation to provide a procedure that ensures an equitable and fair distribution of assets among creditors. As such, if a liquidator is not doing what is reasonably necessary to achieve this, then it must be in the creditors' interest in the liquidation to remove the liquidator.

Whether the applicant has shown cause for the Liquidator to be removed

19 Applying the principles above, I conclude that the applicant has shown cause for the Liquidator to be removed as KIPL's liquidator. In gist, bearing in mind the three purposes of an insolvent liquidation, I find that the removal of the Liquidator is in the "real, substantial and honest interest of the liquidation".

Whether the Liquidator has failed to display sufficient vigour in carrying out his duties

The general law

20 I turn to the first reason advanced by the applicant. In general, it is well established that a liquidator's failure to display sufficient vigour in carrying out

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his duties can justify his removal. Thus, in *Re Keypak Homecare Ltd* [1987] BCLC 409 ("*Re Keypak*"), the liquidator was removed because, despite being in office for three months, the liquidator had, among others, made no examination of the sales and purchase ledgers, conducted no investigation in order to ascertain whether stock is missing and, if so, what happened to it. Additionally, he had made no inquiries of the company and had not taken any evidence or interviewed any of the employees of the business who might have told him what was going on in the weeks before the company's cessation of trade (at 413).

21 To find that a liquidator had not displayed sufficient vigour in carrying out his duties, it is not necessary to conclude that the liquidator was at fault, or that he has acted wrongfully or ineptly (see the High Court decision of *Yap Jeffery Henry and another v Ho Mun-Tuke Don* [2006] 3 SLR(R) 427 at [22]). This proposition was similarly articulated in the English High Court decision of *Re Edennote Ltd* [1995] 2 BCLC 248, where the court stressed that, in coming to his decision to remove the liquidator concerned, "no attack has been made on his integrity and good faith" (at 270). In my view, this follows from the general principle above that the removal of a liquidator is justified on what is in the "real, substantial and honest interest of the liquidation", which does not necessarily require the liquidator to have acted wrongfully or ineptly.

22 Relatedly, a liquidator's failure to exercise sufficient vigour in carrying out his duties may also lead to the company suffering loss. In this case, the courts have held that it would be in the best interest of the liquidation for the liquidator to be removed. Thus, in the Federal Court of Australia decision of *City & Suburban Pty Ltd v Smith (as liquidator of Conpac (Aust) Pty Ltd (in liq)) and another* (1988) 28 ACSR 328 ("*City & Suburban*"), there was

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evidence that the directors concerned had used the company's profits to earn secret profits. Despite this, the liquidator failed to conduct a proper investigation into the matter. The liquidator also incorrectly used funds of the company to make termination payments to employees of a different company controlled by the directors of the first company. This happened because the liquidator had failed to ascertain the facts necessary to obtain appropriate legal advice and, in any event, on the basis of the facts known to him, failed to obtain appropriate legal advice (at 335). In the circumstances, the Federal Court of Australia held that there might have been a possibility that the liquidator's actions have caused loss to the company and its creditors. The court further rejected the liquidator's argument that he ought not to be removed unless the court was satisfied that a breach of duty had been clearly established; rather, the court held that a *prima facie* case of breach would suffice (at 339).

Whether the Liquidator has unjustifiably allowed Mr Taylor to act for and on behalf of KIPL in Indonesia

(1) The parties' positions

23 Returning to the present case, the applicant cites, in effect, two examples that show how the Liquidator has failed to display sufficient vigour in carrying out his duties. The first is that the Liquidator has unjustifiably allowed Mr Taylor to act for and on behalf of KIPL in Indonesia, and the second is that the Liquidator has unjustifiably not personally undertaken any investigations into the affairs of KIPL.

24 Beginning with the first example, it will be recalled that the Bonds were secured by the Share Pledge and that under the Share Pledge, KIPL's shares in BPCI have been pledged to the applicant as security for the Bonds. The

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Liquidator claims that he was informed by the BPCI directors in January 2022 on the steps that Mr Taylor had taken for and on behalf of KIPL to nullify the Share Pledge in the Indonesian courts. The Liquidator then proceeded to ratify Mr Taylor's actions after obtaining separate indemnities from Rasia FZE (Dubai) and Mr Taylor in relation to Mr Taylor's actions and proceedings in Indonesia. In a Statement Letter of KIPL dated 3 February 2022, the Liquidator made the following ratification:[1]

> In connection with the ongoing winding up proceedings of the Company in Singapore, it has been brought to the Liquidator's attention that the Company has had to taken [*sic*] certain steps to protect its assets, interests and rights in Indonesia.
>
> The Liquidator, on behalf of the Company, hereby ratifies (as if the same were undertaken by the Liquidator himself): all actions, announcements, commencement of proceedings, powers of attorney, resolutions and notices issued in relation to protecting the Company's assets, interests and rights in Indonesia, from the date of the Winding Up Order (i.e. 20 November 2020) to the date of this Statement Letter. This also ratifies any actions taken by Mr. Garry David Taylor's in signing any letters and resolutions on behalf of the Company, *including but not limited to signing of the shareholders' resolution of PT Borneo Prima Coal Indonesia* and signing of powers of attorney for the appointment of Budidjaja International Lawyers as the Company's counsel in Indonesia to commence any court proceeding and legal action for and on behalf of the Company in Indonesia.
>
> [emphasis added]

25 The applicant argues that the Liquidator's ratification had facilitated the dilution of KIPL's shareholding in BPCI. As of 29 December 2021, the issued share capital of BPCI was 6,000 shares, with KIPL holding 5,700 shares. However, the issued share capital of BPCI had increased to 20,000 on 21 January 2022. Despite this, the number of shares held by KIPL did not

[1] Affidavit of Medora Xerxes Jamshid dated 25 November 2022 at p 57.

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change. In effect, KIPL's shareholding in BPCI was reduced from 95% to 28.5%. Despite KIPL being a 95% shareholder of BPCI at the time of the share issuance, the Liquidator was not consulted or asked to sign any shareholders' resolution approving the issuance of the shares. Instead, the applicant submits that it appears that Mr Taylor had authorised or signed a shareholders' resolution approving the share issuance on behalf of the Liquidator, who then ratified his actions.

26 In response, the Liquidator explains that he had only ratified Mr Taylor's actions to a limited extent and on the basis that those actions were in the best interest of KIPL's creditors. The Liquidator points out that he did not accede to all of the requests of ratification made to him by the BPCI directors. In particular, the Liquidator informed the BPCI directors that he could not authorise Mr Taylor's undertaking and assumption of the powers and duties of a director of the KIPL, given that it had been wound up since November 2020. Further, while the Liquidator was agreeable to ratify Mr Taylor's actions, he had requested a summary of the proceedings in Indonesia, as well as a list and copies of all documents that he had signed on behalf of the KIPL from November 2020 to January 2022, as well as any other relevant documents. This is so that the Liquidator could make an informed decision whether to ratify Mr Taylor's actions. It was after such consideration and further correspondence between the parties that the Liquidator provided the ratification on 31 January 2022.

27 Moreover, while the Liquidator admits that the issuance of the shares in BPCI "is far from ideal", he was ultimately not involved in this affair. In this regard, he submits that while it is not clear what documents were signed to facilitate the share issuance, it is clear that the Liquidator did not sign, or ratify,

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any document on behalf of KIPL in relation to the matter. The Liquidator also says that it is not obvious that the share issuance has had an adverse impact on the value of KIPL's shares since it has apparently resulted in an injection of needed capital into BPCI.

(2) My decision: the Liquidator unjustifiably allowed Mr Taylor to act for and on behalf of KIPL in too broad a manner

28 In my judgment, the Liquidator has unjustifiably allowed Mr Taylor to act for and on behalf of KIPL in too broad a manner. As such, I find that he has failed to exercise sufficient vigour in the carrying out of his duties. I say so for the following reasons.

29 First, while I can accept that the Liquidator had provided the ratification on 31 January 2022 on the basis that the application to nullify the Share Pledge was in the interests of KIPL's creditors as it would potentially increase the pool of assets available for distribution to the unsecured creditors, I do not think this objective was clearly expressed in the broadly framed ratification. In this regard, it is important that the ratification purported to "ratify any actions" taken by Mr Taylor in signing any letters and resolutions on behalf of the Company, "*including but not limited to*" [emphasis added] the signing of the shareholders' resolution of BPCI, as well as the signing of powers of attorney for the appointment of Budidjaja International Lawyers as the Company's counsel in Indonesia to commence any court proceeding and legal action for and on behalf of the Company in Indonesia. Therefore, despite what the Liquidator may say his intention was, the broad framing of this ratification clearly extends to the signing of letters and resolutions *beyond* those necessary to progress the application to nullify the Share Pledge. This is clearly unnecessary and

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unjustifiable for it effectively gives Mr Taylor a broad latitude to act on behalf of KIPL in matters *other than* the said nullification proceedings.

30 Second, I find it unsatisfactory that the Liquidator did not find out about the share issuance, which appears to have taken place sometime between December 2021 and January 2022, before he gave the ratification on 31 January 2022. Indeed, by the Liquidator's own admission, he only found out about the share issuance and the resulting dilution of KIPL's shares in BPCI when he read the affidavit filed by Mr Anil Sharma in support of the applicant's application here. Since Mr Sharma's affidavit is dated 20 October 2022 and the Liquidator's own affidavit attesting to how he found out about the share issuance is dated 25 November 2022, I can only surmise that the Liquidator only found out about the share issuance and the resulting dilution between October and November 2022. This is at least *eight months* after he had provided the ratification on 31 January 2022. This is unsatisfactory considering that these very shares constituted KIPL's primary assets.

31 While the Liquidator has now tried to cast the blame on BPCI by saying that he is not a director of, and has no control over BPCI, this is not a satisfactory explanation. This is because given that the primary purpose of the liquidation was to preserve and distribute KIPL's assets, it would be reasonable to expect the Liquidator to assure himself of the status of KIPL's primary asset (in the form of the shares in BPCI) before providing any ratification that may affect those shares. Furthermore, it was not as if the Liquidator was not put on notice of the need to check on the status of KIPL's shareholding in BPCI. While Mr Keith Han, who appeared for the applicant, referred me to some correspondence between the Liquidator's solicitors and BPCI's solicitors in January 2022 to make good this point, I find that it is not necessary for me to

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focus on those emails. Instead, on 9 March 2022, the Joint Official Liquidators of RF Investment Holding Limited (in official liquidation) ("RF Investment"), which is a contributory and creditor of KIPL, asked for confirmation "if KIPL, *being the 95% shareholder of BPCI* continues to exert control over the operations of BPCI" [emphasis added].[2] The Liquidator did not respond to this specifically. But had he turned his attention to the matters raised in the letter, which were not irrelevant to the liquidation at that point, he might have realised that KIPL's shares in BPCI had been diluted.

32 Third, while the Liquidator has now followed up on the share issuance by seeking clarifications from the parties involved, I do not think that this is sufficient to show that the Liquidator had been vigorous in the carrying out of his duties. It is always easy to ask questions after problems have arisen. But it is more difficult to avoid having to ask those questions by preventing the problems from arising in the first place. What the Liquidator is doing now, in the face of KIPL's primary asset being diluted, is to be expected. However, the Liquidator's lack of vigour in carrying out his duties lies in failing to prevent, or at least recognise, the share dilution in the first place. In that regard, albeit with the benefit of hindsight, I do not think that the Liquidator has acted satisfactorily.

33 Accordingly, for all these reasons, I find that the Liquidator has failed to display sufficient vigour in carrying out his duties by unjustifiably allowing Mr Taylor to act for and on behalf of KIPL in Indonesia in too broad a manner, which has plausibly resulted in loss to KIPL in the form of the dilution of its shares in BPCI.

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[2] Affidavit of Anil Sharma dated 2 February 2023 at p 503.

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Whether the Liquidator has unjustifiably not undertaken any personal investigations into the affairs of KIPL

(1) The parties' positions

34 The applicant advances a second example of how the Liquidator has failed to display sufficient vigour in carrying out his duties, and this is that the Liquidator has unjustifiably not undertaken any personal investigations into the affairs of KIPL. In this regard, the applicant complains that the Liquidator has simply engaged KPMG Services Pte Ltd (Singapore) ("KPMG") to carry out forensic investigations into KIPL's affairs. Moreover, the scope, purpose and progress of these investigations are unknown. Yet, the Liquidator has consistently used the ongoing KPMG investigations to explain the lack of progress in the liquidation.

35 The Liquidator's response is essentially that the circumstances leading to KIPL's winding up warranted the KPMG investigation. In this regard, Mr Taylor, shortly after his appointment as director of KIPL on 11 July 2019, uncovered multiple suspicious transactions that raised serious questions and, in his opinion, may have involved fraud, bad faith and/or breach of directors' duties. As a result, in October 2020, Mr Taylor caused KIPL to apply to be wound up on the basis that it was just and equitable to do so. Indeed, at that time, there was a concern of a multitude of frivolous suits being brought against KIPL from fictitious or disputed creditors.

36 After the Liquidator commenced the liquidation of KIPL, he found the records maintained by the former management to be in poor shape. There were various loans to KIPL which did not appear to be supported by documentation, or for which there was no clear commercial justification. On or around

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6 September 2021, the Liquidator formally engaged KPMG to investigate into the affairs of KIPL. KPMG has not completed their investigations. However, on 1 December 2022, KPMG issued an interim report.

(2) My decision: the Liquidator has unjustifiably not undertaken any personal investigations into the affairs of KIPL

37 In my judgment, the Liquidator has unjustifiably not undertaken any personal investigations into the affairs of KIPL but has, instead, relied exclusively on KPMG to conduct the relevant investigations. As such, I find that he has failed to exercise sufficient vigour in the carrying out of his duties. I have come to this conclusion for the following reasons.

38 First, while I can accept that the Liquidator had valid reasons to doubt the records maintained by the former management of KIPL so as to launch an investigation, it is unsatisfactory that the investigation has still not been completed even though more than two years have passed since his initial appointment as liquidator. In this regard, the Liquidator has not provided a good explanation why it took him almost one year after his initial appointment in November 2020 to decide to appoint KPMG to conduct the investigation into KIPL's affairs. I say this despite the explanation provided by Mr Daniel Soo, who appeared for the Liquidator, that the Liquidator had other matters to attend to during the intervening period. Further, while I accept that KPMG will require some time to complete its investigation, it is unsatisfactory that the Liquidator does not appear to have sought regular updates from KPMG on the state of the investigation. Indeed, in his affidavit filed in this present application, the Liquidator has not exhibited any correspondence between him and KPMG in the period between September 2021 and November 2022. In fact, the only correspondence that the Liquidator has exhibited is an email between his

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solicitors and KPMG on 24 November 2022, where KPMG was asked if it was ready to issue its interim report. Given that the present application was filed on 20 October 2022, I can only surmise that the said email was prompted by the application and that, if the application had not been filed, the Liquidator might have continued to allow KPMG's investigation to continue in abeyance without seeking any update in the interim. In essence, it appears that the Liquidator was content to let the KPMG investigation to go on for more than a year without seeking any update.

39 Second, while it is reasonable for a liquidator to engage external expertise to supplement areas of his investigation, it is quite a different matter for a liquidator to effectively delegate *all* responsibility of such investigation to the external party. In this regard, a liquidator has the responsibility of providing the scope, purpose and progress of these investigations to interested parties. I understand the Liquidator's position to be that since he has not admitted any PODs, there are no creditors who can claim to be interested in these investigations. However, even if I accept that the Liquidator's approach can be maintained (and see my conclusions to the contrary below), it remains that putative creditors such as the applicant remain interested parties who should be kept informed of the investigations. It is unsatisfactory that the Liquidator has not provided much information on, for instance, the scope of KPMG's investigation, to interested parties. For example, on 22 October 2021, the Joint Official Liquidators of RF Investment sought clarification as to the involvement and scope of KPMG's investigation. Further, on 9 March 2022, the Joint Official Liquidators also asked for the basis of KPMG's appointment and indicated that COI approval should have been sought for its engagement. The Liquidator merely responded to say that the KPMG report will be shared once a COI has been formed. Indeed, the Liquidator has not even exhibited the letter

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of engagement with KPMG in his affidavit here which would have set out the scope of the investigation. A few days before the hearing for this matter, the Liquidator applied to admit a further affidavit, in which he exhibited an update dated 25 January 2023 that he gave to parties who have filed a POD, including the applicant. I allowed the affidavit to be admitted since the applicant did not object. However, this update has come quite late in the day and appears, once again, to have been prompted by the present application.

40 Third, even disregarding the Liquidator's failure to provide information on KPMG's investigations to interested parties, it appears to me that the scope of such investigation is also objectively unclear. As I have mentioned above, the Liquidator has not exhibited the letter of engagement with KPMG that would have clarified such scope. If KPMG has been engaged to investigate into the affairs of KIPL so as to ascertain the veracity of the PODs that have been filed, then it is puzzling why the applicant has not been asked for further documentation or information in relation to its POD. Indeed, the Liquidator's only response to date in relation to the applicant's POD is that he has been unable to verify the underlying debt. Mr Soo's explanation during the hearing was that the scale of the investigation is very large and that it goes beyond just the applicant's alleged debt. Be that as it may, that does not explain why, even after KPMG has seen it fit to issue an interim report, the applicant was never asked about the POD it has filed. Without intending to express any doubt on the actual rigour of KPMG's investigation, this does show that, absent further clarification from the Liquidator, the scope of KPMG's investigation to be unclear.

41 Accordingly, for all these reasons, I find that the Liquidator has failed to display sufficient vigour in carrying out his duties by unjustifiably not

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undertaking any personal investigations into the affairs of KIPL and relying exclusively on KPMG's investigation without adequate oversight.

Conclusion

42 In view of my conclusion that the Liquidator has failed to display sufficient vigour in carrying out his duties by (a) unjustifiably allowing Mr Taylor to act for and on behalf of KIPL and therefore causing loss to KIPL, and (b) unjustifiably not personally undertaking any investigations into the affairs of KIPL, I find that the applicant has shown cause for the Liquidator's removal. Put another way, I am satisfied that the removal of the Liquidator would be in the "real, substantial and honest interest of the liquidation", bearing in mind that one purpose for which the Liquidator was appointed was to realise the value of KIPL's assets, which the Liquidator has failed to achieve in standing by while KIPL's primary asset was diluted. While this would be sufficient to enliven my discretion to remove the Liquidator, I will examine the other reasons advanced by the applicant for the removal of the Liquidator.

Whether the Liquidator failed to obtain the requisite approvals and comply with his statutory obligations

The general law

43 The applicant has cited three examples to show how the Liquidator failed to obtain the requisite approvals and comply with his statutory obligations. While the applicant has not cited a direct authority on this point, it is reasonable that there will be a justifiable loss of confidence by the creditors in the liquidator's ability "to realise the assets of the company to their best advantage and to pursue claims with due diligence" (see the decision of the English Court of Appeal in *Re Edennote* [1996] 2 BCLC 389 ("*Re Edennote*")

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at 398) if a liquidator does not even know the approvals and statutory obligations that he operates under. Of course, it is not so much that a *single* failure will result in a justifiable loss of confidence. Much will depend on the *nature* of the failure and the *cumulative* effect of multiple failures if there is more than one failure.

My decision: the Liquidator has in some respects failed to obtain the requisite approvals and comply with his statutory obligations

44 In my judgment, and for reasons that I will explain below, the Liquidator has not completely failed to obtain the requisite approvals. Nor has he failed to comply with his statutory obligations merely by adopting a different meaning of "creditor" from that which the applicant is contending for. However, I do find that the Liquidator was wrong not to have admitted the applicant's POD for the limited purpose of a creditors' meeting at this point of time.

(1) The Liquidator failed to seek the court's approval for his appointment of solicitors

45 First, as to the applicant's argument that the Liquidator had not sought the court's approval before appointing solicitors, I had dealt with this issue in *Re Kirkham International Pte Ltd (in compulsory liquidation)* [2023] SGHC 19 ("*Re Kirkham*"). In that case, I had to consider whether to grant approval to the Liquidator's appointment of solicitors. I accepted that the Liquidator had good reasons why he did not seek the court's approval before appointing solicitors. I was also satisfied that he was acting in good faith, even though on hindsight he should have sought approval prior to making the various appointments.

46 In my view, despite what I had said in *Re Kirkham*, the fact remains that the Liquidator had failed to do what was statutorily expected of him, even

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though this may not be a major lapse in the context where he had good reasons for not seeking the court's approval.

(2) The Liquidator did not need to seek the court's approval in entering into a funding agreement with Rasia FZE (Dubai)

47 Second, the applicant submits that it appears that KPMG's investigations, as well as the Liquidator and his solicitors' costs, are being indemnified or funded by Rasia FZE (Dubai). By the applicant's reading of the Liquidator's affidavit filed for this application, Rasia FZE (Dubai) appears to be an entity associated with or controlled by the directors of BPCI. In any event, the terms of the funding provided are currently unknown. In fact, that the Liquidator is being funded by Rasia FZE (Dubai) was only revealed in his communications with the Joint Official Liquidators of RF Investment and during the present application. More importantly, the applicant submits that neither the court nor the COI's approval has been obtained in respect of this funding agreement.

48 In my view, the Liquidator has certainly not sought the court or the COI's approval in entering into this funding agreement with Rasia FZE (Dubai). Neither has the Liquidator provided an explanation of this agreement save to say that he has procured an "indemnity" from Rasia FZE (Dubai) for the costs of the investigation so as to ensure that KIPL's assets would not be affected. In this regard, as I had the occasion to observe in *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2022] SGHC 312 (at [18]), ss 204(2) and 204(3) of the IRDA give the court a discretion to grant a creditor an advantage over other creditors with respect to the distribution of assets that may successfully be recovered, protected or preserved, if the creditor assumes risk by giving an indemnity or providing

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funding for the purposes of recovering, protecting or preserving assets, or by indemnifying a liquidator in respect of its expenses. However, the IRDA does *not* mandate that all funding agreements must be approved by the court or the COI. Thus, while it may have been ideal for the Liquidator seek the approval of the court or the COI, I find that the Liquidator did not fail to do something that was statutorily expected of him in relation to the funding agreement.

(3) The Liquidator adopted an erroneous position in relation to who a "creditor" is and unjustifiably chose not to admit the applicant's proof of debt for the limited purpose of voting

(A) THE PARTIES' POSITIONS

49 Finally, the applicant submits that the Liquidator has adopted an erroneous position in relation to who a "creditor" is. In this regard, the applicant says that the Liquidator is wrong to have refused to call any creditors' meeting on the basis that the PODs filed have not been adjudicated upon and cannot be admitted until KPMG releases its final report on the affairs of KIPL. In essence, the Liquidator is said to be mistaken that the applicant, as with others who have filed a POD, cannot be a "creditor" who can request for a creditors' meeting under s 150(1) of the IRDA until he can adjudicate on who the creditors of KIPL are. For completeness, s 150(1) provides as follows:

> **Meetings to determine whether committee of inspection to be appointed**
>
> **150.**—(1) The liquidator may, and must if requested by any creditor or contributory, summon separate meetings of the creditors and contributories for the purpose of determining —
>
> (*a*) whether or not the creditors or contributories require the appointment of a committee of inspection to act with the liquidator; and
>
> (*b*) if they so require, who are to be members of the committee.

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50 The applicant further argues that while the word "creditor" is not defined in the IRDA, it was defined in the now repealed s 2 of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act"), in relation to a debtor proposing a voluntary arrangement made under Part V, as "a creditor to whom the debtor owes a debt provable in bankruptcy". Applied to the corporate insolvency regime, the applicant submits that a creditor in the context of a winding up is a person who has a debt provable in the winding up of the company. As such, the debt need not be adjudicated and proved before a person can be considered a creditor for the purposes of s 150 of the IRDA. In any event, the applicant also argues that it is well established in Singapore that liquidators can admit PODs for the purpose of voting only at a creditors' meeting, without adjudicating the POD filed.

51 The Liquidator's response is simple. He has not admitted the applicant's POD. As such, the applicant is not entitled to vote as a creditor, nor can it request for a meeting pursuant to s 150(1) of the IRDA. In essence, the Liquidator's position is that a person is not a creditor for the purposes of s 150(1) of the IRDA unless that person has filed a POD that has been admitted by the liquidator. During the hearing before me, Mr Soo pressed this point by saying that Mr Han's reliance on the definition of "creditor" in the personal insolvency regime is misplaced as the definition does not carry over to the corporate insolvency space. Despite this, the Liquidator admits that he could have admitted the POD filed for the purposes of voting only at a creditors' meeting. However, he argues that he has justifiably chosen not to do this now as any vote at this point would not fairly reflect the value of the creditors' interest. Further, the Liquidator says that, given the circumstances of KIPL's winding up, it is unlikely that the liquidation would benefit from a COI.

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(B) MY DECISION

52 In my judgment, the Liquidator has adopted an erroneous position in relation to who is a "creditor", but this does not by itself amount to cause for his removal. To begin with, I understand the parties' positions to raise two different issues. First, who is a "creditor" for the purposes of s 150(1) of the IRDA? Second, assuming that the applicant is a "creditor" so as to be able to request for a creditors' meeting under that section, was the Liquidator justified in not admitting the applicant's POD for the limited purpose of voting at a creditors' meeting?

(I) THE MEANING OF A "CREDITOR" UNDER S 150(1) OF THE IRDA

53 I agree with the applicant's argument as to the meaning of a "creditor" under s 150 of the IRDA. In particular, I accept that, adapting the definition of a "creditor" under s 2 of the repealed Bankruptcy Act, a "creditor" in the context of a winding up is a person who has a debt provable in the winding up of the company. This definition is also supported by the High Court decision of *Pacrim Investment Pte Ltd v Tan Mui Keow Claire and another* [2010] SGHC 134, in which AR Peh Aik Hin held (at [27]) that the definition of "creditor" in the context of a scheme of arrangement is much broader than that in the context of winding up. The learned AR accepted that "creditor" in the former context should not be limited to those persons who would have a provable claim. This appears to suggest that a person who has a debt provable pursuant to s 218(2) of the IRDA will be considered as a "creditor" in the winding up of a company and for the purposes of s 150 of the IRDA.

54 Moreover, this definition of a "creditor" is also supported by other parts of the IRDA that contain the word "creditor". First, s 68 of the IRDA refers to

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a creditor in the context of the filing, inspection, and adjudication of PODs. Thus, as an example, s 68(6) refers to the entitlement of inspection that accrues to a "creditor who has filed a proof of debt under this section". Quite plainly, this contemplates that a creditor can be a person who has *not* filed a POD. This is because s 68(6) contemplates a creditor who has filed a POD as having certain entitlements of inspection. Correspondingly, it must also contemplate a creditor who has *not* filed a POD and who would not be entitled to such rights of inspection. This shows that the meaning of "creditor" in the broad scheme of the IRDA is not tied to the filing and admission of a POD. Accordingly, a "creditor" can mean a person who has a debt provable in the winding up of the company.

55 Second, this definition of a "creditor" is also supported in the more specific context of r 97 read with r 85(1)(*c*) of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 ("the Rules"). Rule 97 provides relevantly as follows:

> **Creditors entitled to vote**
>
> **97.**—(2) In the case of a Court-directed meeting or a meeting of creditors summoned by the liquidator or an adjournment of such meeting, a person is not entitled to vote as a creditor unless —
>
> (*a*) the person has duly filed with the liquidator a proof of the debt that the person claims to be due to the person from the company; and
>
> (*b*) the proof has been admitted wholly or in part before the date on which the meeting is held.

It is pertinent that r 97(2) concerns the creditors who are "entitled to vote" and not, more generally, creditors who can *request* for a creditors' meeting pursuant to s 150(1) of the IRDA. This means that it is possible for a creditor to *request*

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for a creditors' meeting under s 150(1) of the IRDA and yet *be not entitled to vote* at the said meeting pursuant to the terms of r 97(2).

56 It may of course be asked, as Mr Soo did at the hearing before me, why the IRDA would confer the right on a person to request for a creditors' meeting when that person would have no entitlement to vote at the resulting meeting. In my view, it is not necessary to interpret s 150(1) of the IRDA more narrowly than it has to be, much less in a manner that is inconsistent with the other provisions in the Act which also use the term "creditor". More specifically, since the other provisions of the IRDA contemplate a broader meaning of "creditor" that is not tied to the filing and admission of a POD, there is no reason why the definition of "creditor" for the purposes of s 150(1) of the IRDA should be construed more narrowly. Moreover, it must be remembered that the IRDA is the parent legislation. As such, the definition of "creditor" in the IRDA must take precedence over any other possible definition found within the Rules. Finally, this definition of a "creditor" avoids the situation where a liquidator can push off calling for a creditors' meeting indefinitely by refusing to adjudicate and admit the PODs filed. Instead, by the definition being advanced, a creditor who has a debt provable in the winding up of the company can request for a creditors' meeting despite not having his POD admitted by the liquidator. In my view, this strikes the appropriate balance between the liquidator and creditors in this specific context.

57 For all these reasons, I conclude that a "creditor" for the purposes of s 150 of the IRDA means a person who has a debt provable in the winding up of the company. Returning to the present application, I agree with the applicant that the Liquidator has adopted an erroneous position in relation to who is a "creditor". More specifically, I find that the applicant's POD filed on 5 May

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2022 is a debt provable in the winding up of KIPL under s 218(2) of the IRDA. The POD was lodged in respect of (a) a liquidated debt, (b) which arose because of an event of default on 15 March 2020, and (c) which KIPL is subject to at the commencement of the winding up. The applicant is therefore a "creditor" for the purposes of s 150 of the IRDA and it can request for a creditors' meeting under s 150(1).

(II) THE EXERCISE OF POWER TO ADMIT PODS FOR THE LIMITED PURPOSE OF VOTING AT A CREDITORS' MEETING

58 However, the applicant's argument raises a second question. This is whether the Liquidator has justifiably refused to exercise his power under r 101(1) of the Rules to admit the applicant's POD for the limited purpose of voting at a creditors' meeting. In this regard, the Liquidator's case is that a majority of KIPL's debts are questionable. This includes the debt allegedly owing to the applicant. As such, those debts cannot be fairly adjudicated upon until the Liquidator has received the findings from the KPMG investigation. Because he cannot ascertain who the true creditors are, there is a real risk that the parties who form the COI may make decisions that would have to be reversed later. This would not be sensible or cost-effective.

59 To begin with, I agree with the applicant that, as a practical matter, the examination and adjudication of the PODs will typically be left to the last stages of the liquidation after investigations are completed and assets are realised. This would be just prior to the distribution of the assets in the interests of time and costs. This is because if there are no assets available for distribution, then it would not be in the interest of the liquidation for costs and expenses to be spent on the unnecessary adjudication of debts. As such, in the Hong Kong Court of First Instance decision of *Re Pan Sino International Holding Limited* [2010]

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HKCU 1147, the court drew a distinction (at [8]) between the assessment of proof for the purposes of voting at the first meeting of creditors (under r 124 of the Companies (Winding-up) Rules (Cap 32H) (HK)), and the examination of proof with a view to admitting or rejecting the proof for the purposes of distribution of assets (under r 94 of the Companies (Winding-up) Rules (Cap 32H) (HK)). The court further held that the examination of proofs for the determination of assets will only take place if there are sufficient assets so that the time and costs of the process can be justified (at [8]). Similarly, in the (also) Hong Kong Court of First Instance decision of *Re Days International Ltd* [2013] HKCU 2621, the court held that a preliminary assessment is often undertaken for the purposes of voting without undertaking considerable work. Further, the court also observed that a broad, macroscopic assessment should be undertaken in assessing whether, on balance, the claim against the company can be established. It would thus not make sense in the early stages of a liquidation for considerable work to be done in determining if a proof should be admitted for voting principles.

60 The approach in these authorities find expression in r 101(1) of the Rules, which allows the chairman of the creditors' meeting to admit the POD for the limited purpose of voting at the meeting. Indeed, it would not be in the interest of the liquidation for costs and expenses to be ultimately wasted on the unnecessary adjudication of debts at such an early stage where there may not be any assets left for distribution. This is eminently sensible. Rule 101 in its entirety provides:

> **Admission and rejection of proofs for purpose of voting**
>
> **101.**—(1) The chairperson has power to admit or reject, in whole or in part, a proof for the purpose of voting, but the chairperson's decision is subject to appeal to the Court.

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> (2) If the chairperson is in doubt whether a proof is to be admitted or rejected, the chairperson must mark the proof as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained.

61 As the Liquidator himself admits, r 101(1) of the Rules gives the chairman of the creditors' meeting (who is typically the liquidator) the power to admit or reject, in whole or in part, a POD for the limited purpose of voting. In this regard, the Liquidator's understanding of r 101(1) appears to be independent of his interpretation of "creditor" for the purposes of s 150(1) of the IRDA. Indeed, the Liquidator seems to have taken the position that, even if a person is not a "creditor" under s 150(1), a person can still become a "creditor" by having his POD admitted under r 101(1) for the limited purpose of voting. Thus, by the Liquidator's own case, his decision whether to admit a POD under r 101(1) is not predicated on his interpretation of "creditor" for the purposes of s 150(1).

62 In my view, rr 101(1) and 101(2) apply to a situation where a creditor has filed a POD in respect of which the chairperson is unsure whether to admit or reject. In such circumstances, the chairperson must mark the POD as objected to and allow the creditor to vote, subject to the vote being declared invalid in the event of the objection being sustained. This would allow the POD to be regarded as "admitted" under the terms of r 97(2)(*b*) for the limited purpose of voting. If it were the case that r 97(2)(*b*) of the Rules only permits a creditor to vote when its POD is admitted without qualification, r 101(1) would be otiose. This is because the chairman would never need to exercise the power given to him since r 97(2)(*b*) would *always* require a creditor who is entitled to vote to have his POD admitted without qualification (in the sense that the creditor is entitled to receive a dividend). Put differently, the scheme of rr 97 and 101 must

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contemplate a situation where a creditor has requested a meeting pursuant to s 150(1) of the IRDA but whose POD has *not* been admitted without qualification pursuant to r 97(2)(*b*), whether in whole or in part. Such a creditor would still be entitled to vote if the chairman exercises his power under r 101(1) to admit the POD for the *limited* purpose of voting at the creditors' meeting.

63 However, despite the practical reason for why a liquidator may admit PODs for the limited purpose of voting at a creditors' meeting and defer the adjudication of debt to later in the liquidation process, it is a separate issue from whether the liquidator has justifiably exercised his power to admit (or not admit) the PODs for the limited purpose of voting. In this regard, I accept the Liquidator's point that it may not be sensible to exercise the power under r 101(1) when there may be another class of creditors who could not vote as their claims are, for instance, the subject of ongoing proceedings. Thus, in the English High Court decision of *Re Barings plc (No 6)* [2001] BCLC 159 ("*Re Barings*"), the court granted the liquidator's application for an order directing them not to comply with the request for a meeting made by one class of creditors who had met the minimum threshold needed. The court held as follows (at 173):

> If a meeting is held now it will be at the time, chosen by the 1986 trustee, when those opposed to the removal of the liquidators are at their weakest. I have no doubt that the interests of both the perpetual trustee and of the FSA claimants are of more than nominal value. But at this time the problems of estimating their respective minimum values for the purposes of r 4.67(3) are the greatest. *If a meeting is held now there is a real risk that the perpetual trustee and the FSA claimants will be unable to vote at all or will be denied a vote in an amount which fairly reflects the value of their respective interests.* At the conclusion of the trial of the auditors' action it should be possible fairly to value the interest of the perpetual trustee. If the recovery is sufficiently substantial to give rise to a surplus available for the perpetual trustee then it will also have generated a fund in which the FSA claimants can share

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> pari passu with the 1986 trustee if they establish their claims. Given the face value of the claims of the FSA claimants and the figures I have set out for illustrative purposes in para [37] above, even allowing for the avoidance of double proof, *it is by no means self-evident that the result of a resolution to remove the liquidators proposed at a meeting held in 9 months time would be the same if the meeting was held now.*
>
> [emphasis added]

64 While the facts of *Re Barings* are quite different from the present case, I accept the broader proposition that it would not be sensible to hold a meeting when there is likely to be a major change in the composition of the votes at a later stage. This may occur when it is likely that the creditors who would otherwise volunteer for the COI are involved in transactions that are the subject of the liquidator's investigation. More broadly, whether the power under r 101(1) of the Rules should be exercised needs to be considered against the purpose of a COI, which is to assist and supervise the liquidator in a constructive way that is conducive for the liquidation process (see the Hong Kong decisions of *Re Keen Lloyd Resources Ltd* [2004] HKCU 731 and *Re Joy Rich Development Ltd* [2016] HKCU 815).

65 In the present case, I have explained that the Liquidator is wrong in refusing to recognise the applicant as a creditor for the purpose of requesting a creditors' meeting pursuant to s 150(1) of the IRDA. However, although the applicant can request for a creditors' meeting, it nonetheless cannot vote at the resulting creditors' meeting pursuant to r 97(2) of the Rules because the Liquidator has not admitted the applicant's POD. Despite this, the Liquidator has the power under r 101(1) of the Rules to admit the applicant's POD for the limited purpose of voting at the creditors' meeting. In my judgment, since I had earlier found that the Liquidator has good reasons to commence the KPMG investigation on the basis of Mr Taylor's and his own assessment of KIPL's

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records, I agree with the Liquidator that it might have been sensible when he commenced the KPMG investigation to *not* exercise his power under r 101(1) to allow the applicant to vote at a creditors' meeting. This is because, at that time, until the true creditors of KIPL were ascertained, there remained the risk of new creditors emerging in the future, whose interests and views might differ from the creditors who are volunteering at this point for the COI.

66 However, the matter is quite different now. The *present* situation here is unlike that in *Re Barings*, where there was an *identifiable* class of putative creditors who could not yet join the liquidation proceedings due to other pending matters. In contrast, in the present case, despite the passage of two years, there has not been other identifiable classes of putative creditors. Neither has the Liquidator provided evidence why parties who have filed PODs, like the applicant, are not true creditors. Therefore, the concern in *Re Barings* that the interests and views of the true creditors might differ from the creditors who would volunteer for a COI would not apply as strongly. This is all to say that I do not absolve the Liquidator of the manner in which he has managed the said investigation. In other words, while I think that he had good reasons to *commence* the investigation, I do find, as I had indicated above, that the Liquidator has not *managed* the investigation in a satisfactory manner. For instance, he has unjustifiably not personally undertaken any investigations into the affairs of KIPL and has allowed KPMG's investigations to drag on without seemingly keeping on top of things. As such, at the very least, I would have ordered the Liquidator to commence the creditors' meeting prayed for by the applicant in the present case.

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(4) The effect of my findings in relation to the removal of the Liquidator

67 The effect of my conclusions in relation to the applicant's second reason for the removal of the Liquidator, *ie*, the Liquidator has failed to obtain the requisite approvals and comply with his statutory obligations, is that the applicant can only partially rely on this second reason as set out to show cause for the Liquidator's removal. I say this for the following reasons.

68 In my judgment, the first two examples raised by the applicant are insufficient in showing cause to justify the Liquidator's removal. First, while the Liquidator did fail to seek the court's approval for his appointment of solicitors, that is not a material breach in the overall scheme of things. Second, the Liquidator did not require the court's approval in respect of the funding agreement with Rasia FZE (Dubai).

69 I do find that the applicant succeeds in showing cause on the third example it raises, albeit on the limited ground that the Liquidator unjustifiably chose not to admit the applicant's proof of debt for the limited purpose of voting. In this regard, while the Liquidator did adopt an erroneous position in relation to who a "creditor" is for the purposes of s 150 of the IRDA, it cannot be that a liquidator is liable to be removed for cause merely because he takes a position of law that turns out to be incorrect. In the present case, although I disagree with him, the Liquidator did advance an arguable meaning of "creditor" that is not implausible.

70 However, I find that the Liquidator was not correct in refusing to exercise his powers under r 101(1) of the Rules to admit the applicant's POD for the limited purpose of voting at a creditors' meeting. As I have explained above, while the Liquidator's decision to not exercise such powers at the start

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of the liquidation proceedings might have been justified by his suspicions that KIPL's records were not true, those suspicions cannot extend indefinitely. I recognise that the Liquidator has engaged KPMG to commence an investigation to ascertain these records, but for reasons I have explained above, the way the Liquidator has managed the investigation is not satisfactory. As such, I find that the applicant has shown cause for the Liquidator's removal on the basis that the Liquidator has not exercised his powers to admit the applicant's POD for the limited purpose of voting at a creditors' meeting.

Whether there is a conflict of interest in the continued appointment of the Liquidator

The parties' positions

71 The applicant's third reason in support of the Liquidator's removal is that there is a real conflict of interest in the Liquidator carrying on his role. This is because, so the applicant submits, and as held in *City & Suburban* (at 337), "the natural inclination on the part of the liquidator to endeavour to justify his past conduct and demonstrate that it did not cause any loss, place[s] him in a position of potential conflict concerning the further investigation".

My decision: there is no conflict of interest in the continued appointment of the Liquidator

72 In my respectful view, I do not think that the reason founded on a "conflict of interest" succeeds here. To recapitulate the facts in *City & Suburban*, the applicants had sought the removal of the liquidator on the basis that he had failed to act in the best interests of the creditors in respect of a profit obtained by the directors of a company using the company's funds, and that he had incorrectly used funds of the company to make various payments to

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employees of a different company controlled by the directors. The Federal Court of Australia held that the liquidator's investigation into the directors was lacking. Further, the liquidator also erroneously failed to seek legal advice before making the payments concerned. As such, the court ordered that the liquidator be removed because, among others, of the potential conflict of interest mentioned above. However, the court had found the existence of such a conflict in the midst of several other reasons, including a finding that the liquidator likely acted in breach of his duty.

73 In the present case, there is no allegation that the Liquidator had acted in breach of any duty. Indeed, the applicant says in its submissions that it is not arguing that the Liquidator acting wrongly or improperly. At most, the allegation against the Liquidator is that he acted carelessly or not sufficiently vigorously. As such, I cannot see how a "conflict" would arise in that the Liquidator would have no interest in defending his past acts if those acts do not expose him to any serious liability.

Whether there has been a justifiable loss in the creditors' confidence in the Liquidator

The parties' positions

74 Finally, the applicant submits that there has been significant creditor objection against the Liquidator. In support of this submission, the applicant says that it reached out to three other creditors who all gave their support to the present application. As such, the applicant argues that the Liquidator should be removed so as not to affect the efficiency in carrying out his duties. In response, the Liquidator says that the views of the other creditors should not be determinative because (a) it is not apparent that these are really creditors of

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KIPL, and (b) these three parties do not have a clear basis for supporting the applicant.

My decision: there has been a justifiable loss in the creditors' confidence in the Liquidator

75 In general, it is clear that the presence of considerable creditor opposition would be a valid factor in determining if a liquidator should be removed as that would affect the efficiency of the liquidation process (see *Re Marseilles Extension Railway and Land Company* (1867) LR 4 Eq 692 at 694). However, it has been said that a mere loss of confidence, without more, does not justify the removal of a liquidator (see the decision of the New South Wales Supreme Court in *In the matter of St Gregory's Armenian School (in liq)* [2012] NSWSC 1215 at [29]). As Nourse LJ observed in *Re Edennote* (at 398), the court does not lightly remove its own officer and will, amongst other considerations, pay due regard to the impact of a removal on the liquidator's professional standing and reputation. Therefore, the loss of confidence by creditors in the liquidator must be *justified* (see *City & Suburban* at 338). In my view, this requirement guards against creditors acting in concert to remove a liquidator solely at their whim and fancy, and for no justifiable reason.

76 Nevertheless, this does not mean that the threshold for removing a liquidator on this basis is necessarily set so high. In my view, where the liquidator has conducted himself in a manner that, by itself, justifies the removal of the liquidator *on other grounds*, this would be a highly relevant factor in favour of concluding that any consequential loss of confidence from the creditors is justified. Indeed, if it has already been shown that the liquidator's conduct justifies his removal in the "real, substantial and honest interest of the liquidation", and such interest in the context of an insolvent liquidation is

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inextricably linked to the interests of the creditors, then it must follow that, having regard to their interests, creditors would justifiably lose confidence in the liquidator's continued appointment. The close relationship between the loss of confidence of creditors and the conduct that justifies the removal of the liquidator was alluded to by Nourse LJ in *Re Edennote*, where the learned Lord Justice opined that the removal of a liquidator due to his failure to display sufficient vigour in carrying out his duties can be explained on the general principle that a liquidator should not continue in office where the "creditors no longer had confidence in his ability to realise the assets of the company to their best advantage and to pursue claims with due diligence" (at 398).

77 This close relationship also finds implicit support in *City & Suburban*, the facts of which were already canvassed earlier (see [72] above), and which fell into one of the "obvious situations" where a liquidator ought not to continue to act (at 336–337). Alongside other matters which cumulatively gave the appearance of the liquidator favouring the interests of the directors and their entities rather than the interests of the creditors, the court was satisfied that the liquidator's conduct had led to a justifiable loss of confidence in him on the part of the committee of inspection and many of the creditors represented by the committee (at 338).

78 Returning to the present application, the applicant has shown that the creditors have lost confidence in the Liquidator. In this regard, support for this application from creditors whose claims amount to about US$37,332,157 has been tendered by the applicant. By way of comparison the total amount claimed against KIPL, based on the PODs filed, is about US$38,982,069 (according to the Liquidator). Viewing the two figures together, the percentage of creditor support by this measure is about 95%. This is a significant level of support for

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this application and, by extension, opposition to the Liquidator. Further, I find that the creditors' loss of confidence is justified by the first and second reason advanced by the applicant here, which is that the Liquidator had failed to show sufficient vigour in carrying out his duties and that he has in some respects failed to comply with his statutory obligations. The applicant has therefore established cause by virtue of this reason for the removal of the Liquidator. It would not be in the "real, substantial and honest interest of the liquidation" for the Liquidator to remain in his current role as the efficiency of the liquidation process would likely be affected by this loss of confidence in him by the creditors.

Whether the Liquidator should be removed pursuant to the discretion enlivened by cause being shown

79 For all of these reasons, I find that the applicant has shown cause for the removal of the Liquidator through three of the four reasons it advances. These are that: (a) the Liquidator has failed to display sufficient vigour in carrying out his duties; (b) the Liquidator has in some respects failed to comply with his statutory obligations; and (c) there has been a justifiable loss in the creditors' confidence in the Liquidator. Accordingly, the removal of the Liquidator is in the "real, substantial and honest interest of the liquidation". For completeness, I do not find that there is a "conflict of interest" in his continued appointment.

80 Given that the applicant has shown cause for the Liquidator's removal, my discretion to order such removal is enlivened. I exercise my discretion and order that the Liquidator be removed. This is because I do not find any reason against his removal. In particular, I disagree with the two reasons advanced by the Liquidator against his removal. First, while I can accept that the Liquidator has done substantial work in the liquidation, the *outcome* of that work is not evident, and the liquidation process has not really moved along. Thus, this may

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well be inefficient work that will be made efficient by a new liquidator. I say this also against the backdrop of a significant and justifiable loss of confidence by the creditors in the Liquidator. Second, while I can (again) agree with the Liquidator that the one of the liquidators proposed by the applicant, Mr Furler, *appears* to be in a position of potential conflict of interest as he had *previously* represented Maiora, he is no longer representing Maiora now. As such, I do not think that this warrants not appointing Mr Furler or his partners at Quantuma. Indeed, the Liquidator has not pointed me to any concrete way in which the interests of Mr Furler or his partners at Quantuma would diverge from the interests of the general body of creditors. In any event, any problem with the applicant's nominee as liquidator has nothing to do with whether the Liquidator should be removed.

Conclusion

81 In the premises, I allow prayer 1 of the applicant's application. I order that the Liquidator be removed as the liquidator of KIPL and for Mr Furler and Ms Tan of Quantuma to be appointed as the joint and several liquidators of the second respondent in his stead.

82 It follows that the Liquidator's application in Summons No 583 of 2023 to admit a further affidavit exhibiting the interim report from KPMG with the appropriate confidentiality undertaking from the applicant has become moot. I therefore make no order as to this summons.

83 In terms of costs, relying on the New South Wales Supreme Court decision of *SingTel Optus Pty Limited & Ors v Weston* [2012] NSWSC 1002, the applicant has asked for the Liquidator to personally bear the costs of this application as he has administered the affairs of KIPL unreasonably and

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improperly. Although I have found for the applicant in three of the four reasons advanced in support of its case, I do not order the Liquidator to bear costs personally. In this regard, I emphasise that I have not ordered the Liquidator's removal on the basis of any finding of impropriety or misconduct. Unless the parties are able to agree, they are to write in with their submissions on the appropriate costs order within 14 days of this decision.

84 In closing, I thank Mr Han and Mr Soo, as well as their teams, for all their very helpful submissions.

Goh Yihan
Judicial Commissioner

Han Guangyuan Keith and Ammani Mathivanan (Oon & Bazul LLP) for the applicant;
Soo Ziyang Daniel, Cumara Kamalacumar and Faustina Joyce Fernando (Selvam LLC) for the respondents.

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