IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 29

Court of Appeal / Civil Appeal No 39 of 2024

Between

Natixis, Singapore Branch

… *Appellant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd
(Judicial Managers Appointed)

… *Respondents*

In the matter of Originating Summons No 902 of 2021

Between

Natixis, Singapore Branch

… *Applicant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd
(Judicial Managers Appointed)

… *Respondents*

Court of Appeal / Civil Appeal No 40 of 2024

Between

Societe Generale, Singapore Branch

… *Appellant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd (Judicial Managers Appointed)

… *Respondents*

In the matter of Originating Summons No 903 of 2021

Between

Societe Generale, Singapore Branch

… *Applicant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd (Judicial Managers Appointed)

… *Respondents*

Court of Appeal / Civil Appeal No 41 of 2024

Between

The Hongkong and Shanghai Banking Corporation Ltd

… *Appellant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia

(3) Nan Chiau Maritime (Pte) Ltd
(Judicial Managers Appointed)

… *Respondents*

In the matter of Originating Summons No 23 of 2022

Between

The Hongkong and Shanghai
Banking Corporation Ltd

… *Applicant*

And

(1) Seshadri Rajagopalan
(2) Paresh Tribhovan Jotangia
(3) Nan Chiau Maritime (Pte) Ltd
(Judicial Managers Appointed)

… *Respondents*

JUDGMENT

[Admiralty and Shipping — Admiralty jurisdiction and arrest — Action in rem — Statutory liens]
[Insolvency Law — Administration of insolvent estates — Judicial management — Disposal of charged property — Section 100(2) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed)]
[Insolvency Law — Administration of insolvent estates — Judicial management — *Ex parte James* principle]

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Natixis, Singapore Branch
v
Seshadri Rajagopalan and others and other appeals

[2025] SGCA 29

Court of Appeal — Civil Appeal Nos 39, 40 and 41 of 2024
Sundaresh Menon CJ, Steven Chong JCA and Kannan Ramesh JAD
8 April 2025

24 June 2025 Judgment reserved.

Steven Chong JCA (delivering the judgment of the court):

Introduction

1 These appeals are the latest episode in a number of cases that have come before this court arising from the collapse of Hin Leong Trading (Pte) Ltd ("HLT") and its related companies (the "HLT Group"). The common thread running through these cases is that they have typically raised important but also intractable questions of law spanning a wide spectrum of topics: see, for example, *Winson Oil Trading Pte Ltd v Oversea-Chinese Banking Corp Ltd and another appeal* [2024] 1 SLR 1054; *DGJ v Ocean Tankers (Pte) Ltd (in liquidation) and another appeal* [2024] 2 SLR 790 ("*DGJ*"). These have included, unsurprisingly, insolvency law as well as the law relating to admiralty and shipping.

2 The striking feature of these appeals, however, is that they do not reside comfortably within one area of law but lie at the perilous strait between the laws of insolvency and admiralty. The difficulty in navigating these waters stems from how the two areas of law pull in seemingly opposite directions as to the administration of an insolvent company's property: *The Owners and/or Demise Charterers of the Ship or Vessel 'Edzard Schulte' v The Owners and/or Demise Charterers of the Ship or Vessel 'Setia Budi'* [2023] 12 MLJ 53 at [3]. On the one hand, the law of admiralty prioritises the rights of admiralty and maritime claimants by creating a regime – the action *in rem* – that effectively ringfences ships and other maritime property for the priority satisfaction of their claims over those of other creditors and claimants. But, on the other hand, the law of insolvency places a premium on collectivism and equality amongst the insolvent's creditors, a focus which finds its clearest expression in the *pari passu* principle that functions as a sort of default rule in insolvency proceedings: *Park Hotel CQ Pte Ltd (in liquidation) and others v Law Ching Hung and another suit* [2024] 5 SLR 138 ("*Park Hotel*") at [49]. These contrasting paradigms led one commentator to observe, close to fifty years ago, that (see D R Thomas, *Maritime Liens* (Stevens & Sons, 1980) ("*Maritime Liens*") at para 99):

> The law of corporate liquidation and bankruptcy seems to have developed with little regard to the Admiralty proceeding *in rem*. Certainly it is difficult to fit the Admiralty proceeding into the legislative language of the relevant statutes which regulate the winding up of companies and bankruptcy. Yet the need for the latter to accommodate the action *in rem* and the potential conflict between the two processes is plain. A *res* may concurrently be the subject of an arrest in the Admiralty Court and an asset capable of liquidation in a company winding up or personal bankruptcy. In such a circumstance it is important for a maritime claimant to be able to ascertain whether it is the jurisdiction of the Admiralty Court or some other court which

> prevails and which mode of legal process is available for the satisfaction of the claim. …

3 The clash between these two discrete areas of law appears to lie at the heart of the overarching question in these appeals, which is whether the judicial managers of an insolvent shipowning company acted wrongfully by procuring the offshore arrest and judicial sale of a vessel which the appellants had issued admiralty *in rem* writs against in Singapore. In a nutshell, the appellants claim that they acquired statutory liens in the vessel upon issuance of their writs *in rem* which constituted security interests. If the judicial managers were desirous of taking a course of action that resulted in the extinction of the appellants' security, it was incumbent on them to apply to court under s 100(2) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA") for permission to dispose of the vessel as if she was not subject to the appellants' security. However, the judicial managers did not do so, and by having the vessel arrested by a mortgagee in a foreign jurisdiction and subsequently sold by the foreign court through a judicial sale which had the effect of extinguishing the appellants' statutory liens, the judicial managers wrongfully disposed of the vessel as if she was not subject to the appellants' security. As the net proceeds of sale returned to the company free of any security of the appellants', the appellants claim that the company has been unjustly enriched at their expense, and this injustice should be righted by having the net proceeds in the company's hands applied subject to their security interests in the vessel, in priority to the company's other creditors.

4 In the court below, a judge of the General Division of the High Court (the "Judge") dismissed the appellants' claims: see *Natixis, Singapore Branch v Seshadri Rajagopalan and others and other matters* [2024] SGHC 113 (the "Judgment"). The Judge held that the judicial managers did not act wrongfully as (a) the appellants did not hold security in the vessel merely by issuing writs

in rem against her; (b) the judicial managers did not dispose of the vessel as she was disposed of via a foreign judicial sale; and (c) in any event, the judicial managers did not act unfairly. The appellants have appealed to this court, contending that the Judge was wrong on all counts.

5 Having considered the parties' submissions as well as the helpful submissions of the Independent Counsel, Mr Ng Jern-Fei KC ("Mr Ng"), we generally agree with the Judge's decision and his reasons. In our view, the vessel was not disposed of by the judicial managers and, accordingly, s 100(2) of the IRDA was not engaged to begin with. That would suffice to dispose of the appeals and, in that light, the much-anticipated collision between admiralty and insolvency law on the issue of whether statutory liens constitute a security interest under the IRDA strictly does not arise. However, as that issue assumed centre stage both before the Judge and in the submissions before us, we take the opportunity to explain our view that statutory liens do not constitute security under the IRDA. Either way, the appellants' underlying complaint that the judicial managers have acted unfairly in that they should have sought the court's sanction under s 100(2) of the IRDA is without foundation. Accordingly, we dismiss the appeals and elaborate on our reasons below.

Background facts

6 The material facts have been set out by the Judge in the Judgment, and we think that for the purposes of the appeal, they can be shortly stated.

7 The appellants across the three appeals are three banks: (a) Natixis, Singapore Branch ("Natixis") is the appellant in CA/CA 39/2024; (b) Societe Generale, Singapore Branch ("Societe Generale") is the appellant in CA/CA 40/2024; and (c) The Hongkong and Shanghai Banking Corporation Ltd ("HSBC") is the appellant in CA/CA 41/2024. The appellants are part of a

wider group of banks and financial institutions who extended financing to HLT against the security of pledges of bills of lading which purportedly related to cargo shipped on board the *Chang Bai San* (the "Vessel"). The bills of lading were issued by Ocean Tankers (Pte) Ltd ("OTPL"), which is also part of the HLT Group, in its capacity as the demise charterer of the Vessel at the time.

8 The third respondent, Nan Chiau Maritime (Pte) Ltd ("Nan Chiau"), is the owner of the Vessel and one of several shipowning companies that are held by Xihe Holdings (Pte) Ltd (the "Xihe Group"). The Xihe Group, along with HLT and OTPL, form part of the HLT Group founded by Mr Lim Oon Kuin.

9 The first and second respondents, Mr Seshadri Rajagopalan and Mr Paresh Tribhovan Jotangia (the "JMs"), are presently two of Nan Chiau's joint and several liquidators, having been appointed on 26 July 2022. Before their current appointment as liquidators, the JMs had previously had control of Nan Chiau as joint and several interim judicial managers (appointed on 9 October 2020), joint and several judicial managers (appointed on 6 November 2020), and provisional liquidators (appointed on 4 July 2022). The events which are material to the present case took place, in the main, during the JMs' role as judicial managers of Nan Chiau.

10 The Vessel was mortgaged to Standard Chartered Bank (Hong Kong) Ltd (the "Mortgagee").

11 The appellants commenced various admiralty actions *in rem* in Singapore against the Vessel between 24 April 2020 and 24 June 2020 in respect of claims for misdelivery and/or loss of cargo that were the subject of the bills of lading supposedly pledged to them:

(a) Natixis commenced HC/ADM 148/2020 against the Vessel on 22 June 2020;

(b) Societe Generale commenced HC/ADM 153/2020 and HC/ADM 154/2020 against the Vessel on 24 June 2020; and

(c) HSBC commenced HC/ADM 93/2020 against the Vessel on 24 April 2020.

Natixis and Societe Generale subsequently served their writs on the Vessel on 1 October 2020. HSBC, however, did not serve its writ on the Vessel.

12 From the time of the JMs' appointment as Nan Chiau's interim judicial managers until 16 June 2021, the Vessel was generally lying off the southern coast of West Malaysia, with occasional calls into Singapore for short periods of time (see [146] below). During this period, although the Vessel was initially on charter to OTPL, it was redelivered to Nan Chiau on 10 May 2021. The effect of this was that no further writs could be filed against the Vessel forthwith in respect of claims against OTPL under s 4(4) of the High Court (Admiralty Jurisdiction) Act 1961 (2020 Rev Ed) ("HCAJA").

13 On 16 June 2021, after earlier discussions and negotiations between the JMs and admiralty claimants who had issued writs against the Vessel (the "Writ Claimants") – including the appellants – on how the Vessel could be dealt with in a manner conducive to all parties' interests had turned out unproductive, the Vessel departed for the Cape of Good Hope, apparently on a voyage to Cape Town, South Africa, with an estimated arrival on 7 August 2021.

14 Sometime between 29 July 2021 to early August 2021, the appellants discovered the Vessel's movement and wrote to the JMs requesting for

information on the Vessel's voyage and final destination. The JMs generally declined to respond and deflected the appellants' inquiries to the Mortgagee, who also did not respond to the appellants' queries.

15 It subsequently transpired that the Vessel was not in fact on a voyage to Cape Town but Gibraltar. The Vessel arrived in Gibraltar on or around 28 August 2021, upon which she was immediately arrested by the Mortgagee who had commenced admiralty proceedings in the Gibraltar court against the Vessel in anticipation of her arrival. Crucially, the appellants were unable to participate in the Gibraltar proceedings as (a) they had not issued writs in Gibraltar prior to the Vessel's arrival; and (b) it was not possible for them to issue writs after her arrival in Gibraltar as OTPL had ceased to be the demise charterer of the Vessel (see [12] above). In this latter respect, the position under Gibraltar law is materially similar to that under s 4(4) of the HCAJA.

16 Just under a month later, on 20 September 2021, the Vessel was ordered by the Gibraltar court to be sold by way of a judicial sale to Genial Marine SA ("Genial Marine"). It is undisputed that the effect of the judicial sale in Gibraltar was to extinguish all liens and encumbrances existing against the Vessel at the time of the sale, including any rights that had accrued to the appellants pursuant to the issuance of their writs in Singapore.

17 In the course of the proceedings below, it emerged from specific discovery ordered by the Judge against the respondents that, shortly before the Vessel's arrival in Gibraltar, Nan Chiau had on 20 August 2021 entered into a Memorandum of Agreement with Genial Marine under which the parties agreed that the Vessel would be sold to Genial Marine free of encumbrances through a judicial sale. Other documents that were disclosed included correspondence between (a) the JMs and their advisors; (b) the JMs and the Mortgagee; and

(c) the JMs' and the Mortgagee's respective solicitors. In general, these communications revealed that the Vessel's journey to Gibraltar and the arrest and judicial sale by the Mortgagee had been discussed and agreed upon between the JMs and the Mortgagee.

18 On 21 December 2021, the Gibraltar court ordered, among other things, that the Mortgagee's claim along with relevant costs claims be paid out of the sale proceeds of the Vessel, and for the net proceeds (if any) to be paid to Nan Chiau.

19 In the applications from which these appeals arise, the appellants sought various reliefs against the respondents. Broadly, these encompassed:

(a) declarations that (i) the appellants held security in the Vessel within the meaning of s 100(2)(*a*) of the IRDA by virtue of the filing of their admiralty writs against her; and (ii) the JMs had, by selling the Vessel to Genial Marine through the Memorandum of Agreement or procuring the arrest and judicial sale of the Vessel in Gibraltar, acted in breach of s 100(2) and/or s 115 of the IRDA; and

(b) orders that the net proceeds of the Vessel be held in a separate fund and/or applied subject to the appellants' security in the Vessel, in accordance with ss 100(5) and 100(6) of the IRDA or any other manner the court thought fit.

Decision below

20 The Judge dismissed the appellants' applications: Judgment at [89].

21 The Judge began with the question of whether the Vessel had become subject to a security within the meaning of s 100(2)(*a*) of the IRDA by virtue of

the appellants issuing writs against her. In this regard, he held that the issuance of a writ *in rem* did not in and of itself create security in the vessel for a claimant. Although the issuance of a writ caused a statutory lien to accrue in favour of the claimant and entitled the claimant to arrest the vessel in Singapore, the statutory lien by itself did not amount to a security interest. Instead, it was merely a right to obtain security over the vessel by arrest. The JMs therefore did not have to seek the court's authorisation under s 100(2) of the IRDA to dispose of the Vessel: Judgment at [31], [33], [37] and [49]–[50].

22 Notwithstanding his conclusion that the JMs did not require the court's authorisation under s 100(2) of the IRDA, the Judge went on to express the view that, in any event, it was "doubtful" that the JMs could be said to have disposed of the Vessel through the arrest and judicial sale in Gibraltar. Although he accepted that the Memorandum of Agreement between Nan Chiau and Genial Marine was "a legally binding agreement" and "an instrumental part of the process of sale", the Judge ultimately considered that the Vessel had not been disposed under the Memorandum of Agreement as the "operative act of disposal" was not any act of the JMs but the judicial sale by the Gibraltar court: Judgment at [51]–[56].

23 Next, the Judge held that s 115 of the IRDA, which provides a statutory remedy to any creditor or member of a company against unfairly prejudicial conduct by a judicial manager, did not assist the appellants. In the first place, the appellants were not entitled to rely on s 115 of the IRDA as they were not creditors of Nan Chiau. As the *in personam* defendant on the appellants' claims was not Nan Chiau but OTPL, the appellants had no standing to seek remedies as creditors of Nan Chiau: Judgment at [69], [72] and [73]. Even if the appellants had standing to seek remedies under s 115 of the IRDA, the Judge did not think that the JMs could be said to have acted in an unfairly prejudicial manner to the

appellants. The Judge emphasised, on this front, that the appellants were not creditors of Nan Chiau and stood in an adversarial position *vis-à-vis* Nan Chiau. It was for the appellants to protect their own interests, and the JMs were entitled to act strategically against the appellants in the interests of Nan Chiau's creditors: Judgment at [75]–[78].

24 Finally, the Judge addressed the appellants' reliance on the principle in *Ex parte James, In re Condon* (1874) LR 9 Ch App 609 ("*Ex parte James*"), which he understood as allowing the court to intervene to restrain its officers from acting in a way which, although lawful and in accordance with enforceable rights, did not accord with what a right-thinking person would regard as appropriate conduct for an officer of the court: Judgment at [79]. Here, the Judge held that the JMs' conduct did not engage the *Ex parte James* principle as, among other things, the appellants were not creditors of Nan Chiau and the JMs were thus entitled to make strategic decisions about the Vessel without taking into account the appellants' interests: Judgment at [85]–[86].

The parties' cases on appeal

25 Save for the Judge's dismissal of the appellants' reliance on s 115 of the IRDA, which the appellants do not pursue before us, the appellants dispute the entirety of the Judge's decision. Their grounds of appeal are threefold.

26 First, the appellants submit that the Judge was wrong in concluding that they did not hold security in the Vessel from the filing of their writs as well as his underlying view that an admiralty *in rem* claimant only obtained security in a vessel upon arrest. The appellants cite a myriad of authorities which have referred to claimants in their position as secured creditors and contend that the Judge's decision is not in keeping with the position recognised at law.

27 Second, the appellants criticise the Judge's finding that the JMs did not dispose of the Vessel as it was sold by the Gibraltar court in a judicial sale. The appellants submit that the Judge adopted an overly narrow approach in defining a "disposal" by focusing only on the final act (*ie*, the judicial sale) in a sequence of events that led to the extinguishment of the appellants' rights in the Vessel. According to the appellants, the correct approach is for the court to consider the conduct of the judicial managers in all the circumstances of the case, focusing in particular on factors such as whether the judicial managers had an intention to dispose of the asset and the nature and extent of the judicial managers' involvement in the disposal. Applying this approach, the appellants suggest that the correspondence exchanged between the JMs and the Mortgagee, as well as the internal communications between the JMs and their advisors, reveal that the JMs were the "architects and masterminds" of the Vessel's arrest and judicial sale in Gibraltar. Given that the Mortgagee's role was comparatively limited to arresting the Vessel and setting into motion the judicial sale, the appellants submit that the sale of the Vessel to Genial Marine should be construed as a disposal by the JMs.

28 Third, the appellants submit that they should be granted relief under the *Ex parte James* principle. Given that the proceeds of the Vessel have come into Nan Chiau's hands from the judicial sale by the Gibraltar court free of the appellants' security interests in the Vessel, Nan Chiau has been enriched at the appellants' expense. This enrichment is unjust and should be reversed in light of the JMs having undertaken a "concerted effort" to extinguish the appellants' rights to the Vessel by orchestrating the arrest and judicial sale in Gibraltar.

29 Turning to the respondents, it suffices to say that they generally align themselves with the Judge's decision on the grounds of complaint raised by the appellants.

The Independent Counsel's submissions

30 In view of the Judge's observation that the present case raised novel issues on the interface between admiralty law and insolvency law, we appointed Mr Ng as Independent Counsel to assist us in navigating these issues.

31 In the main, we invited Mr Ng to address us on (a) whether an action *in rem* against a vessel commenced by the issuance of a writ *in rem* results in the creation of a security within the meaning of s 100(2) of the IRDA; and (b) what reliefs may be available to a holder of security where property subject to its security is disposed of by a judicial manager as if it is not subject to the security without obtaining court authorisation under s 100(2) of the IRDA.

32 Mr Ng's views on these questions, in summary, were as follows:

(a) a security interest within the meaning of s 100(2) of the IRDA is created upon the issuance of an admiralty writ *in rem*; and

(b) where property subject to a security is disposed of by a judicial manager as if it is not subject to that security without authorisation under s 100(2) of the IRDA, the holder of the security may seek relief under either (i) s 115 of the IRDA, if it is a creditor of the company in judicial management and demonstrates that the conduct of the judicial manager is unfairly prejudicial to its interests; or (ii) the *Ex parte James* principle (regardless of whether it is a creditor of the company) if it can demonstrate that the judicial manager's conduct is unfair by the standards of a right-thinking person representing the current view of society.

33 In addition, Mr Ng also addressed us on other points of interest arising from the Judge's decision. In particular, he submitted that the concept of "disposal" under s 100 of the IRDA should not be limited to cases of a direct sale of the property by the judicial manager, as the defining characteristic of a "disposal" is the company's permanent loss of custody or control over the property and not how the property is disposed of.

Issues to be determined

34 Based on the submissions of the parties and Mr Ng, the following three issues arise for our determination in these appeals:

(a) whether the Vessel became subject to a security within the meaning of s 100(2) of the IRDA by virtue of the appellants issuing writs *in rem* against her;

(b) if the Vessel was subject to a security within the meaning of s 100(2) of the IRDA, whether the JMs disposed of the Vessel as if she was not subject to such security through the Gibraltar arrest and judicial sale; and

(c) whether the appellants should be granted relief under the principle in *Ex parte James*.

Our decision

35 The gravamen of the appellants' complaint is that the JMs should have made an application under s 100(2) of the IRDA for authorisation to proceed with the planned arrest and judicial sale of the Vessel in Gibraltar and, by failing to do so, the JMs have acted unfairly so as to warrant the court's intervention under the *Ex parte James* principle. The appellants' case can be summarised as layering the following propositions in sequence:

(a) The appellants held security in the Vessel upon issuing their writs *in rem* against her.

(b) The security interest held by the appellants upon issuing their writs *in rem* against the Vessel fell within the scope of s 100(2) of the IRDA.

(c) The arrest and judicial sale in Gibraltar constituted a disposal of the Vessel by the JMs.

(d) Finally, the JMs have acted unfairly such as to attract the operation of the *Ex parte James* principle.

36 The appellants' case thus falls apart if any of these propositions do not hold. For the reasons explained below, despite the forceful arguments advanced by the appellants' counsel, Mr Collin Seah ("Mr Seah") (who appeared for Natixis and Societe Generale) and Mr Moses Lin (who appeared for HSBC), we are of the view that the appellants fail at every step of the analysis above.

The legislative scheme under s 100 of the IRDA

37 Before turning to the issues in this case specifically, we begin with some preliminary observations on the legislative scheme under s 100 of the IRDA given its background importance to the appellants' case.

38 To begin, s 100 of the IRDA provides as follows:

> **Power to deal with charged property, etc.**
>
> **100.**—(1) The judicial manager of a company may dispose of or otherwise exercise the judicial manager's powers in relation to any property of the company, which is subject to a security to which this subsection applies, as if the property were not subject to the security.

(2) Where, on application by the judicial manager of a company, the Court is satisfied that the disposal (with or without other assets or property) —

> (*a*) of any property of the company subject to a security to which this subsection applies; or
>
> (*b*) of any goods under a hire-purchase agreement, chattels leasing agreement or retention of title agreement,

would be likely to promote one or more of the purposes of judicial management under section 89(1), the Court may by order authorise the judicial manager to dispose of the property, as if the property were not subject to the security, or to dispose of the goods, as if all rights of the owner of the goods under the hire-purchase agreement, chattels leasing agreement or retention of title agreement were vested in the company.

(3) Subsection (1) applies to any security that, as created, was a floating charge, and subsection (2) applies to any other security.

(4) Where any property is disposed of under subsection (1), the holder of the security has the same priority, in respect of any property of the company directly or indirectly representing the property disposed of, as the holder would have had in respect of the property subject to the security.

(5) It is a condition of an order made under subsection (2) that —

> (*a*) the net proceeds of the disposal must be applied towards discharging the sums secured by the security or payable under the hire-purchase agreement, chattels leasing agreement or retention of title agreement; and
>
> (*b*) where the net proceeds of the disposal are less than the sums secured by the security or payable under any of those agreements, the holder of the security or the owner of the goods (as the case may be) may prove on a winding up for any balance due to the holder or the owner.

(6) Where a condition imposed under subsection (5) relates to 2 or more securities, that condition requires the net proceeds of the disposal to be applied towards discharging the sums secured by those securities in the order of their priorities.

(7) The judicial manager must give 7 days' notice, of an application by the judicial manager to the Court to dispose of property subject to a security under subsection (2), to the holder of the security or to the owner of the goods which are

> subject to any of the agreements mentioned in that subsection, and the holder or the owner (as the case may be) may oppose the disposal of the property.
>
> (8) Where the Court makes an order under subsection (2), the judicial manager must lodge a copy of the order, within 14 days after the making of the order, with the Registrar of Companies.
>
> (9) If the judicial manager, without reasonable excuse, fails to comply with subsection (7) or (8), the judicial manager shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $5,000 and also to a default penalty.
>
> (10) Nothing in this section affects an application to the Court under section 115.

At the outset, we should mention that it has not been suggested by any of the parties that the issuance of a writ *in rem* creates a security in the nature of a "floating charge" so as to come within the scope of ss 100(1) and 100(3) of the IRDA (which permits disposal of the property without the need for prior authorisation from the court). Thus, our focus is on s 100(2) of the IRDA specifically.

39 To understand the context of s 100 of the IRDA and what it is intended to achieve, it is first important to understand the perspective under general law. A golden rule of property law is the principle of *nemo dat non quod habet*, *ie*, that nobody can transfer what they do not have. The import of this principle is that, if a company's title to property is subject to some limitation, such as a security interest, the starting position is that the company (and the judicial manager acting through it) cannot give a disponee a superior title to that which the company currently has. The disponee that is the successor-in-title to the company would, in principle, be bound by the security interest to the same extent: *Fitzroy Street Capital Inc and another v Manning and others* [2023] 2 BCLC 457 ("*Fitzroy Street Capital*") at [153].

40 A holder of security is, in general, free to decide whether, when and how it wishes to enforce its security. But when insolvency supervenes, the emphasis is on collectivism and the rights of individual creditors may be curtailed to some extent. This is manifested in the imposition of the moratorium arising from a judicial management order under s 96(4) of the IRDA, which restrains the taking of any step in the enforcement of security subject to the security holder obtaining either the consent of the judicial manager or the leave of court. This apparatus supports the overarching aim of judicial management, which is to provide "a legal framework that would, in a suitable case, enable the rescue of a potentially viable business and thus prevent a premature liquidation": see Singapore Parl Debates; Vol 48, Sitting No 1; Col 48 [5 May 1986] (Hu Tsu Tau, Minister for Finance) ("*Hansard*"). This general objective, in turn, finds legislative expression in the three purposes of judicial management set out in s 89(1) of the IRDA: (a) the survival of the company, or the whole or part of its undertaking, as a going concern; (b) the approval of a scheme of arrangement; and (c) a more advantageous realisation of the company's assets or property than on a winding up.

41 It is well-established that moratoria in the context of corporate rescue regimes such as judicial management serve the purpose of providing the ailing company with "breathing space" so that a proposal for rescue can be worked out and implemented: see *Sapura Fabrication Sdn Bhd and others v GAS and another appeal* [2025] 1 SLR 492 at [59]–[60]; *Re Zipmex Co Ltd and other matters* [2024] 4 SLR 896 at [27]–[28]. As Millett J (as he then was) explained in *Re Olympia & York Canary Wharf Ltd* [1993] BCLC 453, in respect of the administration regime under the English Insolvency Act 1986 (c 45) (UK) (upon which our judicial management regime was modelled), a moratorium is imposed (at 457):

> … in order to assist the administrator in his attempts to achieve the statutory purpose for which he was appointed. [The provisions for a moratorium] are couched in procedural terms and are designed to prevent creditors from depriving the administrator of the possession of property which may be required by him for the purpose of the administration.

42 But a stay of proceedings that prevents the dismemberment of the company's assets and property may not suffice by itself to achieve the aims of judicial management. In practice, it is not uncommon that a judicial manager may seek to realise the value of the company's assets through a disposal or sale. However, the existence of security interests in the company's property may impede this process in so far as they may affect the judicial manager's ability to obtain good value, or worse, to find a willing buyer at all: *Fitzroy Street Capital* at [154]. It is here that s 100 of the IRDA steps in to provide a way out of this quandary, and thereby enhance the success in realising the aims of judicial management. This synergy between the moratorium and a power of disposal, and the impetus for making both a feature of the English administration regime, was clearly explained in the *Report of the Review Committee on Insolvency Law and Practice* (Cmnd 8558, 1982) ("*Cork Report*"), whose recommendations led to the introduction of the administration regime into English insolvency law (at paras 1501–1502 and 1511):

> 1501. The fragmentation of security, however, occasioned by the creation of a number of charges over different assets of the debtor in favour of several different creditors, makes it difficult and sometimes impossible for an insolvent's assets to be realised to their best advantage. If, for example, the factory or other business premises or some other asset essential to the carrying on of the business, is the subject-matter of a fixed charge, it cannot be included in a rescue scheme or sold with the other assets as part of a going concern without the consent of the owner of the charge. There is no power under the present law for those propounding a rescue scheme or seeking to sell the undertaking as a going concern to stay the enforcement of the rights of secured creditors or to include the mortgaged assets in the sale without the consent of such creditors, who

> may demand to be redeemed or impose unreasonable terms as the price of their co-operation.
>
> 1502. We regard the absence of such a power as a serious defect in our insolvency laws, and one which requires urgent attention. It has been a constant object of our deliberations to devise an insolvency code which will facilitate rescues rather than accelerate failures. The introduction of the necessary powers to stay and, if required, override the rights of certain secured creditors in appropriate circumstances and for a strictly limited period, is essential if our objective is to be attained.
>
> …
>
> 1511. The imposition of a temporary stay on the enforcement of the security, however, is not by itself sufficient to achieve our purposes. *By remaining passive, and refusing to allow the mortgaged assets to be disposed of without his consent unless his security is redeemed by payment in full, a secured creditor can effectively inhibit a rescue scheme or an advantageous sale.* Many foreign systems provide for the secured creditor to be required to give up some of his rights in these circumstances.
>
> [emphasis added]

43 It would be apparent that what s 100 of the IRDA does is to create a statutory exception to the *nemo dat* rule by allowing a judicial manager to obtain the court's permission to dispose of a property subject to a security "as if the property were not subject to the security", thereby allowing the purchaser or disponee to take free of the security interest. As the *Cork Report* explains, this represents a compromise between the interests of the many (the general body of creditors) and the interests of the individual (the holder of the security). However, because this entails "a significant interference with the rights of the holders of [security] to realise their security at a time and in a manner of their own choosing", the exercise of the court's power is "subject to a number of safeguards and conditions": see *Re Capitol Films Ltd (in administration)* [2011] 2 BCLC 359 ("*Capitol Films*") at [35]; *Re Boonann Construction Pte Ltd* [2000] 2 SLR(R) 399 ("*Boonann Construction*") at [10]. These safeguards include the following:

(a) First, the judicial manager cannot unilaterally invoke the power under s 100(2) of the IRDA but must apply to the court for an order under that section: *Fitzroy Street Capital* at [156]; *Boonann Construction* at [9].

(b) Second, the judicial manager must satisfy the court that the disposal would be likely to promote one or more of the purposes of judicial management under s 89(1) of the IRDA: see s 100(2) of the IRDA.

(c) Third, the judicial manager must give seven days' notice of an application under s 100(2) of the IRDA to the holder of the security, who may oppose the disposal of the property. A failure to give such notice without reasonable excuse is a criminal offence: see ss 100(7)–100(9) of the IRDA.

(d) Fourth, it is a condition of an order made by the court sanctioning a disposal under s 100(2) that the net proceeds of the disposal must be applied towards discharging the sums secured by the security and, to the extent that the net proceeds are less than the sums secured by the security, the holder of the security may prove on a winding up for any balance due: see s 100(5) of the IRDA.

44 It seems to us that, where a court is called upon to make an order under s 100(2) of the IRDA, there are essentially four requirements that must be satisfied:

(a) The judicial manager must show that it has given the required notice under s 100(7) of the IRDA to the holder of the security whose security will be affected by the order applied for.

(b) The court must be satisfied that the disposal would be likely to promote one or more of the purposes of judicial management under s 89(1) of the IRDA.

(c) The court must be satisfied that the condition under s 100(5) of the IRDA as to the application of the proceeds of the disposal to the discharge of the security can be met.

(d) The court must be satisfied in the circumstances that the case is one in which it is appropriate to make an order under s 100(2) of the IRDA.

45 The first three requirements are self-explanatory and arise out of the various subsections of s 100 itself. They can, in a sense, be viewed as jurisdictional requirements that enliven the court's power to make an order under s 100(2) of the IRDA. The fourth requirement, on the other hand, relates to the exercise of the court's discretion to make an order. In our view, the fact that the making of an order will advance one or more of the purposes of judicial management under s 89(1) of the IRDA is a necessary but insufficient condition to justify an order being made, because the court must still weigh the interest of pursuing the aims of judicial management against the competing interest of the holder of the security. The nature of the exercise was elucidated in *Capitol Films* by Richard Snowden QC (as he then was), sitting as a deputy judge of the English High Court, in these terms (at [36]):

> In a typical case, an application might be made by an administrator under para 71 in order to achieve a sale of a company's business as a going concern, thereby fulfilling the purpose of achieving a better result for creditors as a whole than would be likely if the company was wound up. If, for example, a company operates from premises which are subject to a fixed charge, the administrator may wish to sell the business as a going concern and in situ, and will need to be able to convey the premises free of the fixed charge in order to

> do so. In such a case, an order of the court necessarily involves a balancing exercise. On the one side are the interests of the holder of the fixed charge, who has rights to seek a sale of the charged property for himself and may, for example, prefer a deferred sale with vacant possession. On the other side are the interests of the holders of floating security and the unsecured creditors, who are likely to benefit from an immediate sale of the business as a going concern. The administrator seeking an order under para 71, and the court in considering whether to make it, will be required to balance the prejudice that will be felt by the secured creditor if the order is made, against the prejudice that will be felt by those interested in the promotion of the purposes specified in the administration order if it is not: see *Re ARV Aviation Ltd* [1989] BCLC 664 at 668 per Knox J.

46 If the four requirements above are met, the court may make an order under s 100(2) of the IRDA. However, there are a few uncertainties surrounding the operation of s 100(2) of the IRDA that will require ironing out in future cases. As we will return to below, the existence of such uncertainties is of some significance in the present case when it comes to understanding the JMs' decision to embark on the course of action which they did. But, for present purposes, we will highlight two points of interest.

47 First, we observe that it is not entirely clear if s 100(2) of the IRDA has any extraterritorial effect. An underlying assumption of the appellants' case that the JMs should have applied for leave under s 100(2) to proceed with the arrest and judicial sale of the Vessel in Gibraltar is that s 100(2) operates extraterritorially in that it requires a judicial manager to apply to the Singapore court for authorisation even if the contemplated disposal of property is to occur outside of Singapore. We would only observe, at this juncture, that the point appears contestable, not least because it is generally presumed that Parliament does not intend to regulate activity outside of Singapore: see *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [102]. Indeed, our courts have taken the view that the statutory moratoria arising in winding up, judicial management and schemes of arrangement do not have extraterritorial

effect: *DGJ* at [94]; *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party)* [2014] 2 SLR 815 at [90]; *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125 at [17]. Given the somewhat symbiotic relationship between the moratorium and the power of disposal under s 100(2) of the IRDA, the argument that s 100(2) should likewise not operate extraterritorially cannot be ruled out.

48 Second, the precise nature and effect of an order under s 100(2) of the IRDA is unclear. For one, it is not certain if s 100(2) of the IRDA operates on a targeted basis in relation to specific security interests, such that the disponee only obtains the property free of those specific security interests, or if it has the more wide-ranging effect of cleaning off any and all security interests that currently exist in the property, such that the purchaser obtains what is in principle a completely clean title.

49 Bearing in mind the requirement of notice to the holder of security under s 100(7) of the IRDA and the condition of the proceeds of the disposal being applied to the discharge of the security under s 100(5) of the IRDA, it appears to us to be at least arguable that s 100(2) of the IRDA may have the more limited effect of extinguishing only *specific* security interests. We will, however, not comment further and reserve the determination of this issue to a future case with the benefit of submissions from the parties.

50 Having regard to this brief introduction into the legislative scheme under s 100 of the IRDA, we turn to consider the specific issues and arguments raised by the parties.

Whether the JMs disposed of the Vessel as if she was not subject to security

51 Although the question of whether the JMs disposed of the Vessel as if she was not subject to the appellants' security under s 100(2) of the IRDA necessarily presupposes that the appellants did hold security in the Vessel within the meaning of s 100(2) at the material time, we prefer to deal first with the question of disposal because we consider this issue to be dispositive of the appeals.

52 In our judgment, the Judge was correct in finding that the JMs did not dispose of the Vessel.

53 The appellants' primary argument is that the Judge erred in construing the concept of "disposal" under s 100(2) of the IRDA as referring only to the last act in a sequence of events that resulted in Nan Chiau parting with ownership in the Vessel. We will refer to this argument as the "Final Step Interpretation". The appellants say that the Final Step Interpretation is implicit in the Judge's conclusion that the JMs did not dispose of the Vessel because the "operative act of disposal" was the judicial sale by the Gibraltar court: see Judgment at [53]. Instead of focusing on the fact of the judicial sale, the Judge should have considered the wider context, which would have revealed that the JMs had orchestrated the arrest and judicial sale of the Vessel by the Mortgagee. In these circumstances, the JMs should be taken as having disposed of the Vessel, as adopting the Judge's Final Step Interpretation would allow judicial managers to outflank the protection afforded to security holders under s 100(2) by ensuring that the final step in a sequence of events that results in the extinguishment of existing security interests is an act of a person other than themselves. Mr Ng's submission that the court should focus on whether the company suffered a "permanent loss of custody or control" over the property,

rather than how exactly this occurred, and that a "disposal" under s 100 therefore constitutes "some action to part with the custody or control of the property permanently", has elements of the appellants' criticism of the Final Step Interpretation.

54 Although there is merit in the appellants' and Mr Ng's submission that the Final Step Interpretation is too narrow an approach to the concept of "disposal" under s 100(2) of the IRDA, we do not think that this assists them as we do not understand the Judge as having adopted the Final Step Interpretation as characterised by the appellants. In our view, the Judge did not venture into making any statement of general principle as to what constituted a "disposal" under s 100(2) of the IRDA, and his decision was very much based on the particular facts of this case. There is thus no merit in the appellants' suggestion that the Judge committed an error of law.

55 In our view, there are two compelling reasons why the JMs cannot be said to have disposed of the Vessel in the present case.

The judicial sale by the Gibraltar court was not a disposal by the JMs

56 The first reason is that it was legally impossible for *the JMs* to have disposed of the Vessel free of the appellants' statutory liens. It is trite that, once a statutory lien has accrued by issuance of a writ *in rem* against a vessel, it would be protected from any subsequent change of ownership, even in the hands of a *bona fide* purchaser for value: *The Monica S* [1968] P 741 ("*The Monica S*") at 771; *The "Bolbina"* [1993] 3 SLR(R) 894 ("*The Bolbina*") at [14]; *The "Ocean Winner" and other matters* [2021] 4 SLR 526 ("*The Ocean Winner*") at [34]. In principle, the only way in which a purchaser can acquire the vessel free of existing statutory liens is by a judicial sale. In contrast with a private sale, a judicial sale gives the purchaser clean title to the vessel that is free from all liens

and encumbrances, as all subsisting rights of action are then transferred into the proceeds of sale: *The "Tremont"* (1841) 166 ER 534; *The "Acrux"* [1962] 1 Lloyd's Rep 405 at 409; *The "Turtle Bay"* [2013] 4 SLR 615 at [10], [11] and [15]. Given this, if the appellants are correct that the JMs had disposed of the Vessel, the Vessel would have remained subject to the appellants' statutory liens, and on that hypothesis the JMs would not have disposed of the Vessel "as if [she] were not subject to [the appellants'] security" within the scope of s 100(2) of the IRDA. It would follow that there would be no breach of s 100(2) of the IRDA to begin with.

57 The critical difference between a judicial sale and a private sale is that an order for judicial sale does not merely entail a sale of the vessel from *A* to *B* but is a judgment *in rem* which decides title to the *res* as against the entire world. In *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389, this court defined a judgment *in rem* as "a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it)" (at [64], citing the decision of the Privy Council in *Pattni v Ali and another* [2007] 2 AC 85 at [21]).

58 The leading case in the context of a judicial sale is the House of Lords' decision in *Louis Castrique v William Imrie and W J Tomlinson* (1870) LR 4 HL 414 ("*Castrique*"). In *Castrique*, the central issue before the court was the effect that a French judicial sale of a vessel had in England. An English company had taken a mortgage over a vessel, which was later arrested by a French company while the vessel was in France and ordered by a French court to be sold to the respondent. When the vessel arrived in England, the mortgagee demanded possession of it and brought a suit to recover it. Blackburn J held that the English courts should recognise the respondent's title as valid as the French

judicial sale took effect as a judgment *in rem* "transferring the ship itself, and not merely the interest, if any, of [any person] in the ship" (at 429). Even though it was apparent that the French court had laboured under a mistake on English law, that was not a sufficient basis for the English court not to give effect to the French judicial sale (at 433–434). The House of Lords, consisting of Lord Hatherley LC, Lord Chelmsford and Lord Colonsay, agreed with Blackburn J (at 439–449).

59 By contrast, in *The Charles Amelia* (1868) LR 2 A & E 330, a vessel was arrested in England based on a maritime lien (arising from an earlier collision) after the vessel had been sold in France by the trustees-in-bankruptcy of the previous owner. The issue before the court was whether the maritime lien had been extinguished by the earlier sale. Sir Robert Phillimore answered in the negative, noting that "[t]he proceedings in the French court were certainly not proceedings '*in rem*', but apparently resembled those which would be taken in bankruptcy in [England], which would not extinguish a maritime lien" (at 335).

60 The subsequent case of *The Goulandris* [1927] P 182 is perhaps more on point. In that case, a ship was arrested in England after it had been sold by a syndic (*ie,* the trustee-in-bankruptcy) who had obtained the permission of the Egyptian court. The issue was whether this sale had defeated a maritime lien that had accrued prior to it. Bateson J held that it had not. The learned judge emphasised the difference between a judicial sale by the Egyptian court and a sale by the trustee-in-bankruptcy with the approval of the Egyptian court, and on this basis, considered the French judicial sale in *Castrique* to be distinguishable (at 194):

> The next contention was that the sale by the syndic under the authority of the Court in Egypt was as good as a sale in an action in rem. The action of the syndic, however, had nothing whatever to do with an action in rem, and ***the sale does not***

> ***purport to be by the Court****; it is a sale by the syndic with the approval of the Court.* It transfers property no doubt, i.e., such interests in the property as the debtor may have had, but ***it does not purport to decide the rights in the property***. It was also argued that according to [*Castrique*] a sale by the Court in France is the same as a sale in rem. I do not think that is the right conclusion to be drawn from [*Castrique*]. I think the decision in that case was that what had happened was the same as a sale in an action in rem. Here the facts are quite different, and *I do not think the sale in this case has any resemblance to a sale in an action in rem.* [emphasis added in italics and bold italics]

61 In our view, the distinction drawn by Bateson J as between a sale "by the Court" and a sale "by the syndic with the approval of the Court" makes clear that a judicial sale by a foreign court is of a fundamentally different character to a sale by the judicial managers of a company. Since no sale by the JMs to Genial Marine could have achieved the effect of wiping the Vessel clean off all prior encumbrances including the appellants' statutory liens, the inexorable conclusion that must be drawn is that the judicial sale of the Vessel in Gibraltar was not a disposal of the Vessel by the JMs. To put the point in a different way, the true cause of the extinction of the appellants' statutory liens is not the sale of the Vessel to Genial Marine *per se* but the character of the order of the Gibraltar court as a judgment *in rem* that is binding on the entire world as regards title and property in the Vessel. For this reason, we agree with the Judge that the JMs did not dispose of the Vessel: see Judgment at [54] and [56].

The Mortgagee's enforcement of its security in the Vessel was not a disposal by the JMs

62 The second reason for our conclusion is a broader point. Leaving aside the nature of a judicial sale, we do not think that the JMs can be said to have disposed of the Vessel as the arrest and judicial sale of the Vessel in Gibraltar formed part of the Mortgagee's enforcement of its security in the Vessel. It seems to us that, under the legislative scheme of the IRDA, a clear distinction

is drawn between the enforcement of security in the company's property and a disposal of the company's property by its judicial managers. These two categories do not overlap. Thus, as we indicated to the parties at the hearing, howsoever the JMs' roles in the arrest and judicial sale of the Vessel are characterised by the appellants, it cannot change the fact that it was the Mortgagee's enforcement of its security by way of an arrest and a judicial sale, and not a disposal by the JMs, that caused the extinguishment of the appellants' statutory liens in the Vessel.

63 The starting point of our analysis is that a judicial manager of a company is, under s 96(4)(*e*)(i) of the IRDA, vested with the authority to consent to a carve-out from the judicial management moratorium for the enforcement of security in the company's property. The judicial manager's authority exists in parallel with the court's power to grant leave for the same (under s 96(4)(*e*)(ii) of the IRDA). A holder of security desirous of enforcing its security may thus obtain a carve-out from the moratorium from *either* the judicial manager *or* the court.

64 Following on from this, we consider that the enforcement of security in the company's property is inherently incapable of constituting a disposal of the company's property by the judicial manager that would require the judicial manager to apply to court for permission under s 100(2) of the IRDA. The existence of such an overlap would render s 96(4)(*e*)(i) of the IRDA otiose in so far as, despite having been vested with the authority to consent to the enforcement of security by that provision, it would nonetheless be incumbent on the judicial manager to apply to the court under s 100(2) of the IRDA for permission for the enforcement of the security to proceed. This would defeat the purpose of creating two distinct avenues for obtaining a carve-out from the moratorium. It is well-established that such a construction should be avoided as

Parliament is presumed not to legislate in vain: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 ("*Tan Cheng Bock*") at [38], citing *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484 at [43]. A construction of the scope of s 100(2) that does not reduce s 96(4)(*e*)(i) to a dead letter, and which achieves a harmonious construction of both provisions within the IRDA as a coherent whole, should be preferred: *Tan Huixian Ellyn (in her capacity as judicial manager of Logistics Construction Pte Ltd (under judicial management)) v Logistics Construction Pte Ltd (under judicial management) (Official Receiver, non-party) and another matter* [2025] 3 SLR 868 at [25].

65 Indeed, Mr Seah conceded during his oral submissions that, if the same sequence of events had transpired save for an added step at the start of the Mortgagee formally requesting the JMs' consent to enforce its security under s 96(4)(*e*)(i) of the IRDA, the appellants could have no complaint that the JMs should have applied for the court's permission under s 100(2) of the IRDA as it would be "very clear" that the Mortgagee was enforcing its security after having been given "formal consent" to do so by the JMs. In other words, the appellants accept that the enforcement of security by the Mortgagee would not have constituted a disposal by the JMs, but disagree that what occurred can be characterised as an enforcement of security as there was ostensibly no 'formal request' by the Mortgagee to the JMs under s 96(4)(*e*)(i) of the IRDA.

66 With respect, Mr Seah's attempt at confining the scope of s 96(4)(*e*)(i) by reading in a requirement of a "formal request" by the holder of security for permission to enforce its security would risk a triumph of form over substance. The essential colour and the nature of a sequence of events should not turn on the happenstance of whether a *formal* request (whatever that may mean) was made by the holder of security to the judicial manager for permission to enforce its security. If there is a *consensus ad idem* between the parties and the judicial

manager allows the enforcement of security to proceed (or even provides assistance to it), there can be no doubt that the judicial manager has effectively given his consent under s 96(4)(*e*)(i) of the IRDA.

67 There is a further dimension. More than merely not being inconsistent, there is a synergistic relationship between ss 96(4)(*e*)(i) and 100(2) of the IRDA. As we have noted at [42] above, it is not uncommon that a judicial manager may seek to dispose of the company's property to better achieve the aims of judicial management, and the existence of security interests in the company's property may impede such pursuits. In this regard, ss 96(4)(*e*)(i) and 100(2) of the IRDA provide two avenues for a judicial manager to overcome this impediment, by procuring, either consensually or non-consensually, the enforcement of a security interest if he considers it to be in the interests of the judicial management to do so:

(a) In the first instance, the judicial manager is empowered under s 96(4)(*e*)(i) of the IRDA to consent to the holder of security enforcing its security. We do not see any reason why this authority should not include, for example, proposals as to how the enforcement can be done in a way that is mutually beneficial to both the holder of security and the company. This is a natural extension of the authority under s 96(4)(*e*)(i) which is intended to assist the judicial manager in realising the aims of judicial management under s 89(1) of the IRDA.

(b) However, if the holder of security is not prepared to enforce its security for whatever reason, the judicial manager is not left out in the cold as he can apply to the court under s 100(2) of the IRDA to dispose of the property as if it is not subject to that security by establishing that this would promote one or more of the aims of judicial management. In

> a sense, an order by the court under s 100(2) of the IRDA constitutes a forced enforcement of security as the interest of the holder of security is transferred into the proceeds of disposal which are required by s 100(5) of the IRDA to be applied to the discharge of the secured debt.

Seen in this light, ss 96(4)(*e*)(i) and 100(2) of the IRDA rest on a continuum, and s 100(2) picks up exactly where s 96(4)(*e*)(i) leaves off by giving the judicial manager the ability to override the consent of the holder of security if doing so would be consistent with the aims of judicial management.

68 In the present case, it is plainly indisputable that the arrest and judicial sale of the Vessel in Gibraltar by the Mortgagee constituted the enforcement of its security. If the arrest had occurred in Singapore, it would have been within the JMs' authority under s 96(4)(*e*)(i) of the IRDA to consent to it. By parity of reasoning, it must follow that the JMs' authority under s 96(4)(*e*)(i) extended to cover any preparatory acts taken by them within the jurisdiction, including their decision to have the Vessel sail to Gibraltar. Additionally, to the extent that the initiation of a judicial sale of the Vessel could have constituted the levying of "execution" against Nan Chiau's property under s 96(4)(*d*) of the IRDA (*The "Constellation"* [1965] 2 Lloyd's Rep 538 at 543; *The "Saint Christopher"* [1968–1970] SLR(R) 312 at [7]–[8] and [12]), this, too, the JMs were entitled to authorise; in any event, the judicial sale in Gibraltar was not caught by the moratorium in the first place given that the moratorium does not appear to have extraterritorial effect (see [47] above). For all of these reasons, the facts of this case cannot constitute a disposal of the Vessel by the JMs and fall outside of s 100(2) of the IRDA. The Judge was eminently correct in his observation that, regardless of the relative involvements of the JMs on the one hand and the Mortgagee on the other in the process, and whether the Mortgagee did so "reluctantly or with trepidation", "[t]he fact remains that the Mortgagee had to

arrest the Vessel (and agree to do it) in order for any part of the process leading to the judicial sale of the Vessel to go forward". But for the Mortgagee deciding *for itself* to enforce its security by arresting the Vessel in Gibraltar, the subsequent judicial sale which extinguished the appellants' statutory liens in the Vessel would not have been possible: Judgment at [55]. This simple fact means that we also agree with the Judge that, at least on the question of disposal, it is "unnecessary for the court to be saddled with the *minutiae* of the factual evidence" and to embark on a deep-dive into the correspondence exchanged between the JMs, their advisors, and the Mortgagee: Judgment at [27]–[28].

69 Accordingly, we hold that the arrest and judicial sale of the Vessel in Gibraltar did not constitute a disposal of the Vessel *by the JMs*. The appellants' submission that it was incumbent on the JMs to apply to the court under s 100(2) of the IRDA to take this course of action fails on this basis.

***Whether the appellants held security in the Vessel by issuing writs* in rem**

70 Our finding that the JMs did not dispose of the Vessel suffices to dispose of the appeals as it cuts through the central premise of the appellants' case – *ie*, that the JMs should have applied for permission to dispose of the Vessel under s 100(2) of the IRDA. In the circumstances, the anterior question of whether the appellants even held security in the Vessel within the meaning of s 100(2) of the IRDA at the time of the arrest and judicial sale of the Vessel in Gibraltar through the issuance of their writs *in rem* is strictly academic. However, as the parties and the IC have submitted at length on the issue, we shall go on to express our views as to why it should be answered in the negative.

71 We begin with three preliminary points that guide the correct approach to examining this issue.

72 First, what matters is the substance rather than the form. The upshot of this is that labels should not be taken as conclusive. Hence, while Mr Ng submitted that a straightforward answer was to hold that the reference to "lien" in the definition of "security" under s 61(1) of the IRDA (which is, in principle, applicable to s 100 of the IRDA as part of Part 7 of the IRDA) includes a statutory lien created by the issuance of a writ *in rem* under the HCAJA, we respectfully consider this to be too simplistic an approach. It is important not to lose sight of the fact that the terminology of "statutory lien", while having passed into common usage, is ultimately a convenient expression to recognise an admiralty claimant's rights after the issuance of a writ *in rem* against the vessel, chief among which is the right to arrest the vessel. To give a broad overview, s 3(1) of the HCAJA sets out certain types of claims which do not carry a maritime lien but can by dint of statute be commenced *in rem* against a vessel (*ie*, "statutory rights of action *in rem*"), and upon issuance of a writ *in rem* for such a claim (provided the statutory requirements are satisfied), a statutory lien would accrue to the claimant and survive any subsequent change of ownership: *Kuvera Resources Pte Ltd v JPMorgan Chase Bank, NA* [2023] 2 SLR 389 at [58]; *The Ocean Winner* at [33]–[34]. Thus, in *The Monica S*, Brandon J (as he then was) had cautioned that "the expression 'statutory lien' is a convenient one if it is used to mean no more than an irrevocably accrued statutory right of action in rem" (at 768). Given this, it would be wrong, in our view, to proceed on the assumption that a statutory lien in the context of admiralty jurisdiction should be treated as though it bears the characteristics of other liens in the general law of credit and security which, it might be added, are not altogether clear in the first place: see Richard Calnan, Rebecca Oliver & Magda Raczynska, *Calnan on Taking Security* (LexisNexis, 5th Ed, 2024) at paras 11.1–11.2. Indeed, a clear example of laying emphasis on the substance rather than the form can be found in this court's decision in *Diablo Fortune Inc*

v Duncan, Cameron Lindsay and another [2018] 2 SLR 129 ("*Diablo Fortune*"), where we held that a shipowner's lien on sub-freights was properly characterised as a floating charge (at [58]).

73 For a similar reason, the argument is not advanced very far by debates on whether an admiralty *in rem* claimant holding a statutory lien over a vessel has a "proprietary interest" or "proprietary right" in the same. As this court noted in *Diablo Fortune*, the phrase "proprietary interest" carries different meanings in different contexts, and it would be "delusive exactness" to come up with a universal definition (at [45], citing *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* [2017] WASC 152 at [317]–[318]). We subsequently repeated this caution in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2019] 1 SLR 680 ("*SCK Serijadi*"), where the point was made that "care must be used in employing terms such as *property*, proprietary *interests* and proprietary *remedies or consequences*" due to the multifaceted and context-dependent nature of the concept of a "proprietary interest" [emphasis in original] (at [16]). Like with our caution above against placing too much weight on the terminology of "statutory lien", the focus should not be on whether the label of "proprietary interest" is apposite, but directed towards examining the bundle of rights afforded by the law to the holder of a statutory lien upon issuance of the writ *in rem* and assessing if that, without more, constitutes a security interest.

74 The second point relates to the use of authorities. Mr Seah opened his oral submissions by stating that, in contrast to Mr Ng, the appellants were not focusing on the reference to "lien" in s 61(1) of the IRDA, but were placing reliance on the fact that case law had referred to an admiralty *in rem* claimant as a "secured creditor" after issuance of the writ *in rem*. Although we agree that the existing jurisprudence is relevant and merits consideration, having regard to the manner of the parties' submissions before us, we think that it is important to

stress that "words and phrases in judgments should not be analysed as if they bear the same textual authority as the words of a statute": *Re Fullerton Capital Ltd (in liquidation)* [2025] 1 SLR 432 at [51], citing *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 3 WLR 659 at [38]; *V V Technology Pte Ltd v Twitter, Inc* [2023] 5 SLR 513 at [108]. As our analysis below will demonstrate, the *context* in which terms like "secured creditor" have been used in the case law is important. The fact that courts may have referred to an admiralty *in rem* claimant as a "secured creditor" in a certain context and for a certain purpose does not mean that an admiralty *in rem* claimant is a secured creditor in the present context: *Quinn v Leathem* [1901] AC 495 at 506; *Tsolis v Health Care Complaints Commission* [2024] NSWCA 284 at [33]. As Lord Leggatt JSC helpfully reminded in the recent decision of the Privy Council in *Finzi v Jamaican Redevelopment Foundation Inc and others* [2024] 1 WLR 541 (at [60]):

> It is important not to lose sight of the basic tenets of common law reasoning that every judgment must be read in context, by reference to what was in issue in the case, and that it is only the ratio of the decision which establishes a precedent and not obiter dicta. All too often advocates treat the analysis of cases as if it were simply an exercise in looking at the language used by judges, forgetting that it is not particular verbal formulations that make the common law but the principles on which the actual decisions in cases are based. …

75 The third point, which is a corollary of the second, is to make clear, at the outset, that our decision on the present question of whether an admiralty *in rem* claimant holds security in a vessel within the meaning of s 100 of the IRDA by virtue of having issued a writ *in rem* against the vessel is necessarily limited to this context, and should not be understood as calling into question any of the established effects of the issuance of a writ *in rem* or the rights which accrue to the claimant thereof. To put a point which we have just made above in the converse, the fact that we do not regard the issuance of an *in rem* writ as

constituting a claimant as a "secured creditor" for the purposes of s 100 of the IRDA does not mean that this characterisation would hereafter be inapposite in other contexts.

76 Having regard to these three general points, we come to the issue at hand. As we have noted at [35] above, the appellants' case that they held security in the Vessel by issuing their writs *in rem* requires them to establish two things:

(a) that the statutory lien created by the issuance of a writ *in rem* constitutes a security interest in the Vessel; and

(b) that the security interest so created falls within the scope of "security" under s 100(2) of the IRDA.

77 In our judgment, neither of these propositions are sound. To state our conclusion upfront, we think that the statutory lien is not a security interest but an antecedent right to obtain security which is enforceable by arrest. It is thus only upon arrest that the claimant can properly be said to hold a security interest in the vessel. We develop our reasons for this view below along the lines of (a) the historical development of the action *in rem*; (b) principle; (c) precedent; and (d) policy.

Historical development of the action in rem

78 We begin with a brief examination of the historical development of the action *in rem*, with a focus on how courts of the past viewed the time when an admiralty claimant came to acquire security in the vessel.

79 The action *in rem*, as the defining feature of admiralty jurisdiction, can be broadly described as a legal process that enables property – usually a vessel

– to be arrested to compel the provision of security and, if security is not forthcoming, to be sold by the Admiralty Court free of all encumbrances for the proceeds to be applied to the satisfaction of claims against the ship: Sarah C Derrington & James M Turner QC, *The Law and Practice of Admiralty Matters* (Oxford University Press, 2nd Ed, 2016) ("*Derrington & Turner*") at para 1.11; *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS (The "Stolt Kestrel" and The "Niyazi S")* [2016] 1 Lloyd's Rep 125 ("*The Stolt Kestrel*") at [12]; *LD Commodities Rice Merchandising LLC and another v The Owners and/or Demise Charterers of the Vessel "Styliani Z"* [2016] 1 Lloyd's Rep 395 at [20]. It is unsurprising, therefore, that the right to arrest has been referred to as the "unique feature" of the action *in rem*: *The Stolt Kestrel* at [21].

80 In our view, the historical perspective bears out the proposition that it is only upon the arrest of the vessel that a claimant acquires security. To explain this, however, it is necessary for us to first outline how the modern action *in rem* has developed more generally. Since the historical tracing of the action *in rem* has been conducted in more minute detail elsewhere (see, for example, F L Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice Since 1800* (Cambridge University Press, 1970) at pp 155–208), we shall approach the matter on a more targeted basis.

81 The action *in rem* was initially a procedure to enforce claims giving rise to a maritime lien: John A Kimbell KC, *Admiralty Jurisdiction and Practice* (Informa Law, 6th Ed, 2025) ("*Kimbell*") at para 1.55. The enlargement of admiralty jurisdiction with the introduction of statutory rights of action *in rem* only occurred in 1840 with the passing of the Admiralty Court Act 1840 (3 & 4 Vict c 65): *The Monica S* at 749D; *Kimbell* at para 1.66. There then followed further extensions of *in rem* jurisdiction through subsequent legislation, culminating in the heads of claims now set out, in our local context, under

ss 4(2)–(4) of the HCAJA: *The "Halcyon Isle"* [1979–1980] SLR(R) 538 ("*The Halcyon Isle"*) at [11]; *The "Vinalines Pioneer"* [2016] 1 SLR 448 ("*The Vinalines Pioneer*") at [14]–[16].

82 The true progenitor of the modern action *in rem* is therefore the maritime lien, since the right to arrest a vessel in the enforcement of a maritime claim existed before statutory rights of action *in rem* were introduced when admiralty jurisdiction was put on a statutory footing in 1840. Indeed, the historical linkage between the maritime lien and the action *in rem* is so close that it was thought for some time that the right to arrest was coterminous with the existence of a maritime lien: *Harmer v Bell (The "Bold Buccleugh")* (1851) 7 Moo PC 267 ("*The Bold Buccleugh"*) at 284; *The Beldis* [1936] P 51 at 85; *The Vinalines Pioneer* at [11]), until it was finally clarified late in the 19th century that the statutory enlargement of admiralty jurisdiction did not have the effect of creating new classes of maritime liens: *C & C J Northcote v The Owners of the Henrich Björn (The Henrich Björn)* (1886) 11 App Cas 270; *The Vinalines Pioneer* at [13]. That said, given that the statutory lien was essentially developed by analogy from maritime liens, it remains true that the position on maritime liens is an instructive point of reference when considering the question of whether a statutory lien is a security interest.

83 In this regard, we consider the position with maritime liens to be that the claimant only acquires security in the vessel upon the enforcement of the maritime lien *by arrest*. At the hearing, Mr Seah advanced a different view that an admiralty claimant holding a maritime lien acquired security in the vessel upon the issuance of a writ *in rem*. To make good this argument, he referred us to the decision of the Privy Council (on appeal from Singapore) in *The Halcyon Isle*, and pointed specifically to Lord Diplock's description of the maritime lien as "initially inchoate", "creat[ing] no immediate right of property", and "devoid

of any legal consequences unless and until it is 'carried into effect by legal process, by a proceeding *in rem*'" (at [23]). According to Mr Seah, the "proceeding *in rem*" that Lord Diplock was referring to was the issuance of a writ *in rem*.

84 In our view, the interpretation adopted by Mr Seah is incorrect. In the first place, Lord Diplock was not articulating a fresh proposition but quoting *verbatim* from the 1851 decision of the Privy Council in *The Bold Buccleugh*. This critical piece of context disposes of Mr Seah's argument for the simple reason that an action *in rem* was not commenced by writ in 1851. That procedural development only came about after 1875 with the passing of the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) and the Supreme Court of Judicature Act 1875 (38 & 39 Vict c 77): *The Bolbina* at [11]–[12]; *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [125]; *Derrington & Turner* at para 2.42. Instead, admiralty proceedings were commenced by the arrest of the vessel after the filing of a praecipe to institute and the obtaining of a warrant to arrest: *Monte Ulia (Owners) v Banco and Others (Owners) (The Banco)* [1971] P 137 ("*The Banco*"); *Kimbell* at para 4.30. The introduction of the writ saw the functions of the unitary warrant of arrest being divided across two separate documents, namely, the writ of summons *in rem* and the warrant of arrest: *Maritime Liens* at para 64. Seen in its relevant historical context, the "proceeding *in rem*" referred to in *The Bold Buccleugh* (and, in turn, by Lord Diplock in *The Halcyon Isle*) was thus the *arrest* of the vessel: see Andrew Tettenborn, "The Maritime Lien: An Outdated Curiosity" [2023] LMCLQ 405 ("*An Outdated Curiosity*") at 407. As Sheen J stated in *The "Silia"* [1981] 2 Lloyd's Rep 534, "[t]he inchoate right which attaches to a ship in favour of the [maritime] lienor … is not perfected *until the moment of arrest*" [emphasis added] (at 537). Thus, contrary to Mr Seah's submission, the historical

perspective reveals that the legal event that transforms a maritime lien into a choate security interest is not the issuance of the writ but the arrest of the vessel.

85 To elaborate, prior to the introduction of the writ action, the use of the unitary warrant of arrest meant that the warrant of arrest was itself the originating process in Admiralty. Within this paradigm, the arrest of the vessel served two purposes: (a) establishing the Admiralty Court's jurisdiction to hear and determine the claim; and (b) constituting the arrested vessel as security for the claimant's claim in the event that it was adjudged to be successful: *NatWest Markets plc (formerly known as the Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The "MV Alkyon")* [2018] 2 Lloyd's Rep 601 ("*The Alkyon (HC)*") at [14]. The former function may be referred to as the "Jurisdictional Function" and the latter as the "Security Function". It was not possible to obtain one of the functions without the other as both were tied to the warrant of arrest and the arrest of the vessel. The effect of the subsequent introduction of the writ action was to decouple the Jurisdictional Function from the warrant of arrest and the arrest process, and to instead tie it to the writ of summons *in rem*, such that the admiralty jurisdiction of the court could thereafter be invoked through either service of the writ or arrest: *The Nautik* [1895] P 121 at 124; *The "Nord Sea" and "Freccia del Nord" (The "Freccia del Nord")* [1989] 1 Lloyd's Rep 388 at 392; *The "Fierbinti"* [1994] 3 SLR(R) 574 ("*The Fierbinti*") at [39]. However, the Security Function remained tied to the warrant of arrest and arrest process: *The Fierbinti* at [34], citing *John Carlbom & Co Ltd v Zafiro (Owners) (The Zafiro)* [1960] P 1 ("*The Zafiro*") at 15; *The "Jeil Crystal"* [2022] 2 SLR 1385 ("*The Jeil Crystal*") at [25] and [29]. At a more general level, this is supported by case law following in the wake of the introduction of the writ action which made clear that no change of substance to the action *in rem* was intended by this procedural development: *The Longford* (1889) 14 PD 34 at 37–38; *The Burns* [1907] P 137 at 149–150; *The Alkyon (HC)* at [25]. More

specifically, the position after the introduction of the writ action was stated in *The Cella* (1888) 13 PD 82 ("*The Cella*") to be that a maritime lien was "enforce[d] … in an action in rem by *seizing the ship*" [emphasis added] (at 86).

Principle

86 It is also consistent with principle that it is only at the time of arrest that a claimant comes to hold a security interest in the vessel.

87 The crux of the appellants' case is that the statutory lien which accrues upon the issuance of a writ *in rem* constitutes a security interest in its own right. However, an insurmountable difficulty that the appellants face in advancing this characterisation is that it was made clear in the *locus classicus* on statutory liens, *The Monica S*, that the statutory lien is merely an antecedent *right to obtain security* rather than a security interest in and of itself. Indeed, the appellants' submission flies in the face of Brandon J's caution against conflating the right to arrest a vessel to obtain security with the security that accrues upon the arrest of the vessel (see *The Monica S* at 754F–G):

> … It is, I think, important … to keep clearly in mind the distinction between having a right to arrest a ship in order to obtain security for a claim, and the actual exercise of that right by arrest. *It is the arrest which actually gives the claimant security*; but a necessary preliminary to arrest is the acquisition, by the institution of a cause in rem, of the right to arrest. [emphasis added]

88 Brandon J's view is also consistent with two earlier cases which held that a claimant acquired security in the vessel upon arrest. In *The Cella*, the plaintiff issued a writ *in rem* against the vessel in respect of a statutory right of action *in rem* – *viz*, a necessaries claim – at the time when it was already under arrest by a different plaintiff. The vessel was later released on the undertaking by the mortgagee of the vessel, who paid into court a sum of money representing

the value of the vessel. Between the release of the vessel and the plaintiff's application for payment out of the moneys in court, the owner of the vessel was wound up, and its liquidator opposed the payment out to the plaintiff.

89 The English Court of Appeal unanimously held that the plaintiff was entitled to its share of the money paid into court. Lord Esher MR found that "the moment that the arrest takes place, the ship is held by the Court as a security for whatever may be adjudged by it to be due to the claimant" (at 87). Fry LJ stated that he was "of the same opinion", as "[t]he arrest enables the Court to keep the property as security to answer the judgment, and unaffected by chance events which may happen between the arrest and the judgment". This was "in conformity with … the uniform practice of the Admiralty Court" that "the effect of the arrest is to provide security for the plaintiff for the sum which he claims" (at 88). The final member of the court, Lopes LJ, articulated the principle that "[f]rom the moment of the arrest the ship is held by the Court to abide the result of the action, and the rights of parties must be determined by the state of things at the time of the institution of the action, and cannot be altered by anything which takes place subsequently" (at 88).

90 Similarly, in *The Zafiro*, the plaintiffs issued a writ *in rem* in respect of a necessaries claim and arrested the vessel shortly before the owner of the vessel was wound up in a creditors' voluntary liquidation. After the winding up, the vessel was sold by judicial sale and the proceeds paid into court. The issue before the court was whether the plaintiffs were entitled to be paid out the proceeds for the sum due to them.

91 The court answered this in the affirmative. Hewson J stated that "arrest is the means, given by law, whereby security is obtained for a debt of a special character, and, by so arresting, the necessaries man becomes a secured creditor"

(at 15). The plaintiffs' arrest of the vessel meant that they became secured creditors, and they were therefore entitled to payment out of the proceeds of the vessel (at 16).

92 Against these authorities, Mr Seah sought to persuade us that the statutory lien accruing upon the issuance of the writ is itself a security interest as it is analogous to a charge. For this, we were referred to the following judicial definition of a "charge" set out by Atkin LJ (as he then was) in the English Court of Appeal decision of *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 (at 449–450):

> … It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and through the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge.

Mr Seah sought to impress upon us that a statutory lien is, in substance, no more and no less than a charge as defined above. He emphasised, in particular, that if the need for a chargee to resort to the judicial process to enforce the charge does not detract from it being security, so too the fact that a holder of a statutory lien has to resort to judicial process to arrest the vessel does not detract from it being security.

93 Although we acknowledge the force in this argument, we are unable to accept it. As we pointed out to Mr Seah, his argument was based on the supposition that arrest constituted the *enforcement* rather than the *creation* of a security interest. However, a closer comparison reveals that the similarities

between a statutory lien and a charge are more apparent than real as the rights of a holder of a statutory lien are more limited than those of a chargee. This pulls away from the conclusion that the two should be treated alike.

94 To begin with, Mr Seah's analogy overlooks the critical aspect of a charge as a *consensual* form of security: *SCK Serijadi* at [27]. The significance of this is that the time when a charge *attaches* to an asset – *ie*, the time when the security interest is created – is *a matter of agreement* between the chargor and chargee: *Goode and Gullifer on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 7th Ed, 2022) at para 2-03. Given this, when a chargee applies to the court for an order that the asset be made available to it, no question of the existence of a security interest arises, and that act can be readily characterised as the enforcement of an existing security interest; the court is simply being called upon to *enforce the parties' agreement* and the chargor's obligation to make available the asset for the satisfaction of its debt.

95 By contrast, in the context of a statutory lien, a defendant in an action *in rem* has no obligation, whether voluntarily undertaken or imposed by law, to provide the vessel to satisfy the claimant's claim. Although the law has by statute granted the claimant the right to proceed *in rem* against the vessel, it does not impose any correlative obligation on the part of the defendant to make available the vessel for the claimant to proceed against. Even if a statutory lien has been created by the issuance of a writ *in rem*, the defendant remains entitled to sail the vessel to any jurisdiction around the world, and to deal with the vessel as it thinks fit, even if its express intention and purpose is to avoid arrest by the claimant. Instead, the claimant is given a right to invoke a procedure which, if followed through to completion, would allow it to obtain security for its claim. Put in a different way, the analogy drawn by Mr Seah between a statutory lien and a charge fractures because, unlike a chargee, an admiralty *in rem* claimant

has no right to apply to the court for an order that the defendant make available the vessel for the claimant to arrest. This suggests that, while a charge constitutes a security interest, a statutory lien does not and merely constitutes an inferior right to obtain a security interest.

96 The second point which follows from this is that we do not agree that arrest constitutes the enforcement of an existing security interest. It seems to us that it is more akin to an attachment of a security interest. In Michael Bridge, Louise Gullifer & Eva Lomnicka, *The Law of Security and Title-Based Financing* (Oxford University Press, 4th Ed, 2024), the learned authors observe, in the context of a charge, that one of the effects of attachment is that "the charge can be enforced on [the charged asset] *without any further act on the part of the chargee*" [emphasis added] (at para 6.72). If this is used as a broad litmus test, the flaw in Mr Seah's analogy becomes apparent. In contrast to a chargee who may immediately enforce its charge by applying for an order of sale, the holder of a statutory lien has no immediate right to apply for a judicial sale of the vessel, as arrest is a necessary precursor for the court to order a judicial sale: *The Wexford* (1887) 13 PD 10; *Kimbell* at para 4.133; *Derrington & Turner* at para 7.55. In our view, this is consistent with the characterisation of arrest as the attachment, rather than the enforcement, of a security interest, because it is only after arrest that a holder of a statutory lien stands on the same footing as a chargee.

97 This point is implicit in the following passage from Ewan McKendrick, *Goode and McKendrick on Commercial Law* (LexisNexis, 6th Ed, 2020), which the appellants relied on (albeit taken from an earlier edition of the text) before the Judge (at paras 22.73–22.74):

> 22.73 A party whose claim is purely personal may nevertheless be able to invoke court procedures by which moneys or other

> assets of his opponent are *taken into the custody of the law*, either to abide the outcome of the action or for the purpose of enforcing a judgment or order in favour of the claimant. The effect of the attachment is to make the assets in question a security for the clamant to which he can have recourse for satisfaction of his judgment even if the other party has meanwhile become bankrupt or gone into liquidation.
>
> 22.74 Among the acts giving rise to a procedural security are: the issue of an Admiralty writ *in rem*; the payment of money into court, whether in fulfilment of a condition of leave to defend or in satisfaction of the claimant's claim or in compliance with an order for security for costs; the payment into court of a fund, or surrender into legal custody of other property, the subject of the action pursuant to an interim order for detention, custody or preservation of the fund or property; the appointment of a receiver of property by the court at the behest of the claimant; and the attachment of an asset by way of execution.
>
> [emphasis added]

Although the second paragraph of this passage does when listing various "acts giving rise to a procedural security" refer to "the issuance of an Admiralty writ *in rem*", we respectfully disagree. In our judgment, the more significant point is the general principle identified in the first paragraph that a procedural security attaches to an asset when it is "taken into the custody of the law". We agree with the Judge who observed, with reference to the above, that in the context of an action *in rem*, the attachment of the claimant's security occurs at the time of the arrest of the vessel: Judgment at [42].

98 Thus, the true position is that "it is only the claimant who actually carries out the arrest that is vested with a security interest", as "the arrest *crystallises* the security interest, but does not *constitute* the security interest" [emphasis in original]: see Mohammud Jaamae Hafeez-Baig, "The Interaction of the Statutory Right of Action In Rem and the Cross-Border Insolvency Act 2008 (Cth)" (2018) 26 Insolv LJ 22 at 31 ("*Hafeez-Baig*"). With respect, the appellants' submissions tend to overlook this nuance. For instance, Mr Seah tendered the High Court decision of *The "Daien Maru No 18"* [1983–

1984] SLR(R) 787 ("*The Daien Maru*") and invited us to construe it as authority for the proposition that the arrest of a vessel constituted the enforcement of an existing security interest. But, on a close reading of the case, Mr Seah's interpretation ignores the distinction drawn in *The Monica S* between the enforcement of a right to obtain security and the enforcement of a security interest. In the following passage that Mr Seah took us to, L P Thean J (as he then was) was quite precise in referring – correctly – to arrest as the former and not the latter (see *The Daien Maru* at [16]):

> … I do not see why such *right to security*, which is *enforced by arrest of the ship*, should be lost merely because the claim or cause of action has merged in such judgment. Arrest of a ship in an action *in rem* is a mere procedure and its object is *to obtain security* that the judgment should be satisfied … it seems to me extremely odd that the *right to security in a ship* which arises from an action *in rem* against the ship and the arrest thereof which is *a remedy to provide for such security* should be lost or extinguished once final judgment is pronounced or obtained in that action. [emphasis added]

Indeed, quite apart from the distinction between "security" and a "right to security", Mr Seah's submission that arrest is the enforcement of a security interest is also contradicted by Thean J's characterisation of arrest as "a remedy to provide for such security".

99 Finally, the fact that the statutory lien is not a security interest in and of itself is reinforced by the differences between the rights accorded to the holder of a statutory lien and other non-possessory security interests like mortgages and charges:

(a) First, as the Judge pointed out, a statutory lien arising from the issuance of a writ *in rem* in Singapore has no extraterritorial effect, as it does not permit the claimant to arrest the vessel in any jurisdiction other than Singapore: Judgment at [44]. Although the appellants and Mr Ng

downplay the significance of this point by arguing that enforceability in every jurisdiction is not a necessary element of a security interest as even certain undisputed types of security (such as a floating charge) are not recognised in all jurisdictions, this riposte misses the point. There is a world of a difference between a right that is unenforceable in *all but one* jurisdiction and a right that is enforceable in *some* jurisdictions but not all. The difference between these two categories is not merely one of degree but kind. A statutory lien is not merely an inferior, or less enforceable, security interest than a mortgage or charge; it is simply not a security interest at all.

(b) Second, the rights associated with a statutory lien are exigible solely against the vessel(s) named in the writ. Thus, while a statutory lien possesses a unique resilience as it remains enforceable against a vessel notwithstanding a subsequent change of ownership (other than by way of judicial sale), it cannot, unlike other non-possessory security interests such as mortgages and charges, be traced or followed into the proceeds of sale in the hands of a previous owner: *The Optima* (1905) 93 LT 638 at 640; *Bank of Tokyo-Mitsubishi UFJ Ltd v Owners of the MV Sanko Mineral (The "Sanko Mineral")* [2015] 1 Lloyd's Rep 247 ("*The Sanko Mineral*") at [41].

Precedent

100 As a matter of precedent, we accept that, apart from the authorities we have referred to above, it is not uncommon for the courts to refer to the statutory lien as "security" or the holder of a statutory lien as a "secured creditor". As we observed to Mr Ng during his oral submissions, these references have typically arisen in two situations:

(a) First, in what we will refer to as the "Change of Ownership Cases", the statutory lien has been referred to as "security" or an "encumbrance" over the vessel as a means of describing the claimant's right to proceed *in rem* against the vessel notwithstanding a change of ownership or even the dissolution of the shipowning entity after the issuance of the writ: see, for example, *The Monica S*; *ED & F Man Ship Ltd v Heng Holdings SEA (Pte) Ltd* [1998] 2 SLR(R) 630; *Kuo Fen Ching and another v Dauphin Offshore Engineering & Trading Pte Ltd* [1999] 2 SLR(R) 793.

(b) Second, in what we will refer to as the "Insolvency Cases", the holder of the statutory lien has been referred to as a "secured creditor" as a means of justifying the grant of leave to it to proceed *in rem* against the vessel notwithstanding the existence of an insolvency law moratorium over the shipowner: see, for example, *In re Aro Co Ltd* [1980] Ch 196 ("*Re Aro*"); *Lim Bok Lai v Selco (Singapore) Pte Ltd* [1987] SLR(R) 466 ("*Lim Bok Lai*"); *The "Hull 308"* [1991] 2 SLR(R) 643 ("*The Hull 308*"); *The "Oriental Baltic"* [2011] 3 SLR 487; *Kim v Daebo International Shipping Company Ltd* (2015) 232 FCR 275.

101 However, as we have prefaced at [74] above, it is important to read these cases in their context. It is unsurprising that the courts were not assiduous in observing the distinction between a "security interest" and a "right to obtain security" because the issue of the time of the accrual of a security interest within the action *in rem* did not strictly arise. We deal with each of these two situations in turn.

(1) The Change of Ownership Cases

102 In the Change of Ownership Cases, the claimant is loosely said to hold "security" over a vessel because it can proceed *in rem* against the vessel in the hands of even a *bona fide* purchaser for value to obtain security. The focus is on the general ability to obtain security over the vessel by legal process, rather than the specific stage in the legal process when the security accrues. We agree with the perceptive observations of one commentator that (*Hafeez-Baig* at 31):

> … the 'security' spoken of must refer to the right (conferred by the issue of the writ *in rem*) to continue proceedings against the vessel regardless of ownership, and to have it arrested. Doing so perfects the 'security', in the same way that the arrest of a ship in support of a claim based on a maritime lien perfects the otherwise inchoate lien attached to that ship.

103 The commentator goes on to hypothesise that the courts have seen no difficulty in referring to the statutory lien as "security" on the basis that upon the issuance of the writ, arrest is typically available to the claimant as of right. But, as he also rightly points out, a lack of substantive obstacle in the claimant's path to arrest is not a justification for "conflat[ing] the right to arrest with the actual arrest itself": *Hafeez-Baig* at 31. In our local context, the position would be *a fortiori* since the warrant of arrest does not issue as of right but is subject to the court's discretion (*The "Rainbow Spring"* [2003] 3 SLR(R) 362 at [32]; *The Jeil Crystal* at [30]), in contrast with the position in a number of other jurisdictions such as England & Wales (*The "Varna"* [1993] 2 Lloyd's Rep 253 at 257; *NatWest Markets plc (formerly known as the Royal Bank of Scotland plc) v Stallion Eight Shipping Co SA (The "MV Alkyon")* [2019] 1 Lloyd's Rep 406 at [43]), Australia (*Atlasnavios Navegacao LDA v The Ship Xin Tai Hai (No 2)* (2012) 215 FCR 265 at [90]) and Malaysia (*Premium Vegetable Oils Sdn Bhd v The Owners and/or Demise Charterers of The Ship or Vessel 'Ever Concord' of The Port of Zanzibar, Tanzania* [2021] 9 MLJ 936 at [32]–[34]).

(2) The Insolvency Cases

104 Turning to the Insolvency Cases, the holder of a statutory lien has been referred to as a "secured creditor" in an insolvency proceeding in the context of the court granting it permission to proceed with its action *in rem* notwithstanding the subsistence of the stay of proceedings in an insolvent winding up: see s 133(1) of the IRDA. In this setting, the use of "secured creditor" to describe the holder of a statutory lien is not literal but analogical. The point is that, based on a rule of general application that secured creditors should be given permission to proceed while unsecured creditors are bound by the moratorium and directed into the proof of debt regime, a holder of a statutory lien is sufficiently dissimilar to the latter category such that it can be given the same treatment as the former category. It does not follow from this that a holder of a statutory lien is *actually* a secured creditor or to be treated as one for other purposes. As the appellants have placed great weight on this line of cases, we shall address them in some detail below.

105 The line of authority can be traced to the decision of the English Court of Appeal in *Re Aro*, which has been followed by our courts in cases such as *Lim Bok Lai* and *The Hull 308*. The simplified facts were that the plaintiffs had issued a writ *in rem* against the vessel *Aro*, but did not serve the writ or arrest the vessel before a winding-up petition was successfully presented against the vessel's owner. After a winding-up order was made, the plaintiffs applied for leave to continue their action against the vessel and the owner pursuant to s 231 of the Companies Act 1948 (c 38) (UK), a provision that is *in pari materia* to s 133(1) of the IRDA.

106 The English Court of Appeal resolved that leave should be granted. The proposition that the plaintiffs had become "secured creditors" upon issuing the writ was front and centre in its reasoning (see *Re Aro* at 209B–E):

> … It seems more logical to test the position of the plaintiffs by asking whether, immediately before the presentation of the winding up petition, they could properly assert as against all the world that the vessel *Aro* was security for their claim … If it is correct to say, as was not challenged in the court below and is not challenged in this court, that after the issue of the writ in rem the plaintiffs could serve the writ on the *Aro*, and arrest the *Aro*, in the hands of a transferee from the liquidator and all subsequent transferees, it seems to us difficult to argue that the *Aro* was not effectively encumbered with the plaintiffs' claim. In our judgment the plaintiffs ought to be considered as secured creditors *for the purpose of deciding whether or not the discretion of the court should be exercised in their favour under section 231*. [emphasis added]

107 We make three observations about the reasoning in *Re Aro*.

108 A critical piece of context which the appellants have overlooked in their reliance on *Re Aro* is that the English Court of Appeal *expressly* affirmed Brandon J's observation in *The Monica S* that "[i]t is the arrest which actually gives the claimant security" (see [87] above). Indeed, the court went as far as to comment that it "[did] not think that anyone could quarrel with that analysis of the status of the plaintiff in an action in rem": *Re Aro* at 208C–D. It is also worth adding that one of the members of the English Court of Appeal who decided *Re Aro* was none other than Brandon J himself. Given this, the court's reference to the plaintiffs as "secured creditors" must be read on the understanding that it was fully cognisant, despite that usage, that the plaintiffs did not actually hold security in the vessel as they had not arrested the vessel. As we have stated at [104] above, the court did not use the label of "secured creditor" in the literal sense.

109 Although the court stated that the plaintiffs "could properly assert as against all the world that the vessel *Aro* was security for their claim" as the basis for granting the plaintiffs leave to proceed, it could not have meant by this that the plaintiffs already held a security interest in the vessel given its acceptance of the proposition in *The Monica S* that actual security only accrues on arrest. Instead, the court was referring to the vessel being "security" for the plaintiffs' claim in the loose sense as in the Change of Ownership Cases – *ie*, that the plaintiffs had a *right to obtain security* by legal process (see [102]–[103] above). We explain this further at [111]–[113] below.

110 Finally, the court expressly limited its reference to the plaintiffs as "secured creditors" to "the purpose of deciding whether or not the discretion of the court should be exercised in their favour" to give them leave to proceed and not for *any* other purpose. The appellants' reliance on *Re Aro* and the Insolvency Cases in the present context is thus in the nature of extrapolation rather than direct application.

111 In our judgment, that extrapolation is unsound. It becomes clear when one unpacks the legal context to the question which the court in *Re Aro* was considering – *ie*, whether a holder of a statutory lien should be granted leave to proceed with its claim *in rem* against the vessel and the shipowner in an insolvent liquidation – that the use of "secured creditors" to describe the plaintiffs was a reference to the plaintiffs' accrued pre-liquidation rights to *obtain security by arrest*, and not to any accrued security interest.

112 In deciding whether a particular claimant should be given leave to proceed with its claim, the default rule in an insolvent liquidation is that the individual rights of pursuit of unsecured creditors with purely personal claims against the company are substituted for a mode of collective enforcement of

claims in the form of the proof of debt mechanism: *Park Hotel* at [21]; *Kyen Resources Pte Ltd (in compulsory liquidation) and others v Feima International (Hongkong) Ltd (in liquidation) and another matter* [2024] 1 SLR 266 at [32]; *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode on Insolvency*") at para 2-08. An unsecured creditor's claim should be resolved within the proof of debt regime unless the court considers it necessary or expedient to make an exception: *Re Medora Xerxes Jamshid (in his capacity as the private trustee in bankruptcy of Tan Han Meng) (Planar One & Associates Pte Ltd (in liquidation), non-party)* [2024] 5 SLR 1006 at [83]. The position of secured creditors is however different; they are generally said to stand outside the liquidation on the premise that, to the extent of their security interests and/or proprietary rights, they are not enforcing rights against the company but to their own property: *Re Aro* at 204, citing *In re David Lloyd & Co* (1877) 6 Ch D 339 at 344; *Park Hotel* at [50].

113 Although this binary distinction is clear at the level of principle, there will inevitably be cases where it is not so clear which side of the fence a claimant falls into. This is especially so where the rights held by a claimant are of an unusual nature and do not fall into established categories of security interests. The plaintiffs in *Re Aro*, as holders of statutory liens, were one such example, and accordingly, the English Court of Appeal approached the question before it in terms of whether the plaintiffs should be treated as unsecured creditors or secured creditors within this conventional dichotomy. Given that the plaintiffs' statutory lien had accrued by the issuance of the writ before the commencement of the winding up, these rights would be respected by insolvency law upon the onset of an insolvent liquidation: *In re Smith, Knight, & Co, Ex parte Ashbury* (1868) LR 5 Eq 223. It is clear, in our view, that the chain of reasoning underpinning the court's decision that the plaintiffs were "secured creditors"

was that the plaintiffs' accrued rights at the time of liquidation differentiated them from the general run of unsecured creditors with purely personal claims against the company. Nothing in this approach entailed the court accepting that the plaintiffs had accrued security interests, or required the court to accept, if it chose to classify them in one category or the other, that the plaintiffs fell into that category for any purpose other than the resolution of the specific issue before it.

114 Accordingly, we do not think that the Insolvency Cases assist the appellants. The same can be said for other decisions and commentaries which have described the holder of a statutory lien as a "secured creditor" outside of the context of the Insolvency Cases and articulated this as a general proposition: see, for example, Francis Rose & Andrew Tettenborn, *Admiralty Claims* (Sweet & Maxwell, 2nd Ed, 2024) at paras 10-028–10-031; D C Jackson, *Enforcement of Maritime Claims* (Informa Law, 4th Ed, 2005) at paras 17.35–17.36 and 19.10–19.11; *Derrington & Turner* at para 2.52; *Kimbell* at paras 3.91–3.94. For example, Mr Ng brought to our attention the recent decision of the UK Supreme Court in *Argentum Exploration Ltd v The Silver and all Persons Claiming to be Interested in, and/or Have Rights in Respect of, the Silver* [2025] AC 555 and emphasised the court's statement that "the mere issue of a claim in rem gives the claimant the status of a secured creditor and encumbers the property with that claim" (at [80]). That statement was made with reference to *Re Aro*, and for the reasons explained above, we do not think that *Re Aro* can sustain a claimant's claim to be a "secured creditor" in the literal sense upon issuing a writ *in rem* against a vessel.

Policy

115 Finally, regardless of whether the appellants are correct that a statutory lien created by the issuance of a writ is a security interest under the general law, we are not persuaded in any event that it falls within the scope of s 100(2) of the IRDA specifically. The unique qualities of the statutory lien suggest that it is not the type of "security" contemplated under s 100(2).

116 The starting point is that it is both possible and prevalent for a writ *in rem* to be issued naming more than one vessel. However, the claimant may only invoke the admiralty jurisdiction of the court against one vessel for each cause of action, and upon doing so by service of the writ or arrest of a vessel, it should strike off the other vessels from the writ: *Kimbell* at para 4.2; Toh Kian Sing, *Admiralty Law and Practice* (LexisNexis, 3rd Ed, 2019) at pp 164–169. This hallowed principle, which has often been referred to colloquially as the "one claim, one ship" rule, was established in the decision of the English Court of Appeal in *The Banco* and later affirmed in numerous decisions of this court: *The "Permina Samudra XIV"* [1974–1976] SLR(R) 846 at [10]; *The "Brunei 602"* [1983–1984] SLR(R) 306 at [13]; *The "Damavand"* [1993] 2 SLR(R) 136 at [7]–[9].

117 Before us, Mr Ng and Mr Seah conceded that, if the appellants' case were to be taken to its logical conclusion, a claimant who issued a writ naming 50 vessels would hold a security interest – *ie*, a statutory lien – in respect of all 50 vessels for a single cause of action without having done anything other than simply listing them in the writ. As we indicated to them, and subsequently pressed home by the respondents' counsel, Mr Thio Shen Yi SC ("Mr Thio"), in his oral submissions, it is intuitively difficult to accept that the law could have intended to give the claimant such an extreme advantage. With respect, neither

Mr Ng nor Mr Seah could come up with a cogent reason as to why an admiralty claimant ought to be in such an advantageous position.

118 The appellants' submission also cuts against both general and specific policies underpinning insolvency law. At a macro level, insolvency law has a clear "dislike of the secret security interest, which leaves the debtor's property apparently unencumbered": *Goode on Insolvency* at para 13-118. This policy manifests most clearly in the requirement under s 131 of the Companies Act 1967 (2020 Rev Ed) (the "CA") that certain charges created by a debtor be registered and liable to avoidance in insolvency in the event of non-registration: *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [30]–[31]. As Lord Hoffmann observed in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2002] 1 AC 336, the rationale behind having a register of charges is "to give persons dealing with a company the opportunity to discover, by consulting the register, whether its assets [are] burdened by floating and certain fixed charges which would reduce the amount available for unsecured creditors in a liquidation" (at [19]). Companies in the business of owning and operating ships are not exempt from this policy of transparency, since s 131(3)(*i*) of the CA makes registrable "a charge on a ship or aircraft or any share in a ship or aircraft". Thus, although a statutory lien is not a registrable charge (and it has not been suggested by any of the parties that it is), we think that the general direction of the law is a useful frame of reference to test the appellants' case against. After all, the law should not be viewed in isolated or discrete parts but as a coherent whole; if the appellants are suggesting a departure from what would appear to be the general policy that has shaped the law, it is incumbent on them to give a satisfactory justification for doing so.

119 In this regard, while it is not strictly impossible to discover the existence of a statutory lien as writ searches may be conducted in some jurisdictions, it is at least difficult for a person dealing with a shipowner to obtain a complete picture as to whether a vessel is burdened by statutory liens arising from the issuance of writs in multiple jurisdictions. Moreover, given that a writ can name multiple vessels, it is not inconceivable that a writ could be issued naming *the entire fleet* of vessels owned by a shipowner. A situation where the entire fleet of vessels owned by a shipowner can be subject to security interests in favour of numerous persons, without a person dealing with the shipowner having a clear way of apprising itself of this, does not sit comfortably with the premium that insolvency law places on transparency. Even though one can identify examples of insolvency law giving effect to security interests created by operation of law despite a similar problem of lack of transparency in their existence, it can be said with some confidence that none of them are so wide-ranging in scope as to be capable of extending to the entirety of a debtor's property rather than discrete assets. The statutory lien's cousin, the maritime lien, is one such example: despite its secrecy, it extends only to the vessel in connection with which the claim arose and does not enable the claimant to proceed against any other vessel: see s 4(3) of the HCAJA; *The Vinalines Pioneer* at [19]. But even this modest scope has not saved it from the criticism that, as "a long-term security that is secret, unregistrable and binds a thing in the hands of an entirely faultless purchaser", it is "uncommon and needs powerful justification", given that "[t]he assumption today is almost universal that the buyer of an asset should have the ability to know what third-party interests affect it": *An Outdated Curiosity* at 412.

120 The problem is compounded when one turns to the specific context of s 100(2) of the IRDA. At the hearing, Mr Ng conceded, quite fairly, that he was constrained to accept that the logical corollary of his submission that a statutory

lien was "security" under s 100(2) of the IRDA was that a judicial manager would be required to search every jurisdiction across the world to ensure that no statutory lien had been created in any jurisdiction by the issuance of a writ. However, as we indicated to him, this would clearly be an impossible, if not at least wholly impracticable, burden to impose on a judicial manager, and it is unlikely to have been what Parliament intended.

121 Mr Ng's answer, which Mr Seah was content to adopt, was to look at the issue back-to-front and focus on whether relief would be granted against a judicial manager. From this perspective, he submitted that the spectre of liability for failing to detect the issuance of a writ and the creation of a statutory lien in a foreign jurisdiction was more apparent than real because the threshold for relief to be granted against a judicial manager under s 115 of the IRDA or the *Ex parte James* principle was a high one. A judicial manager who has acted in good faith and with sufficient prudence would not cross this threshold.

122 With respect, this amounts to the tail wagging the dog, and it is, in any event, an incomplete answer. That a judicial manager may ultimately be adjudged not liable for an alleged wrongdoing would be cold comfort to a judicial manager who has nonetheless been put through the stress and cost of litigation to vindicate himself. In our view, it is an inescapable reality that the appellants' approach would, if accepted, expose judicial managers to significant litigation risk that would incentivise defensive conduct which detracts from the pursuit of the aims of judicial management under s 89(1) of the IRDA. Put simply, the appellants' submission turns the purpose of s 100(2) of the IRDA on its head: far from being a tool that judicial managers have at their disposal to achieve the aims of judicial management, it becomes a significant source of liability that may discourage them from their duty. It is well-established that Parliament is presumed not to have intended an unworkable or impracticable

result, and therefore, an interpretation that leads to such a result would not be regarded as a possible one: *Tan Cheng Bock* at [38], citing *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40]. For the above reasons, the appellants' interpretation of "security" in s 100(2) of the IRDA as including a statutory lien created upon the issuance of a writ *in rem* is in the realm of unintended results that we are compelled to reject.

123 More generally, while it is not necessary to rest our decision on this, we are provisionally inclined to agree with the Judge's observation that "the kind of security that Parliament had in mind and the class of persons [s 100 of the IRDA] was intended to target" broadly encompassed "secured lenders" and not admiralty *in rem* claimants such as the appellants: Judgment at [47]–[48]. For this, the Judge referred to the speech of the then-Minister of Finance, Dr Hu Tsu Tau, at the second reading of the Companies (Amendment) Bill (Bill No. 9/1986), which introduced the predecessor provision to s 100 of the IRDA, s 227H of the Companies Act (Cap 50, 1988 Rev Ed), and noted specifically that the Minister had referred to s 227H as a "[s]pecial provision … to give recognition to the rights of secured lenders": see *Hansard*. To add to what the Judge observed, we make two points:

(a) First, s 100(2) of the IRDA arguably makes the tacit assumption that the company and its judicial managers would be *aware* of the existence of the security interest. As Mr Thio submitted, this is the import of s 100(7) of the IRDA, which requires a judicial manager desirous of applying for the court's authorisation to dispose of a property as if it is not subject to a security to give notice of the application to the holder of the security. In our view, this suggests that s 100(2) of the IRDA is intended to apply, at least for the most part, to consensual security interests that the debtor and its judicial managers can be

expected to be aware of. A statutory lien which can arise from the filing of an admiralty writ *in rem* in any jurisdiction across the world does not fit within this paradigm since it is not improbable that a judicial manager would be unaware of its existence.

(b) Second, the requirement under s 100(8) of the IRDA that an order made by the court under s 100(2) be lodged with the Registrar of Companies would, at the very least, suggest some sort of linkage between the "security" contemplated by s 100(2) and the regime for the registration of charges under s 131 of the CA. If so, this would only encompass consensual security created by the company and not rights arising by operation of law such as the statutory lien.

124 Finally, we see force in the respondents' submission that the appellants are effectively asserting that the onset of insolvency results in an improvement of their position by giving them advantages which they would not have otherwise enjoyed but for the insolvency. As we have noted at [95] above, a defendant to an action *in rem* has no obligation to sail a vessel into a jurisdiction in which a writ has been issued to facilitate a claimant's exercise of its right to proceed *in rem*; unless the vessel is arrested, the defendant remains free to deal with it as it thinks fit. However, as Mr Thio submitted, the upshot of the appellants' argument that a statutory lien is "security" within the meaning of s 100(2) of the IRDA is that, upon Nan Chiau's entry into judicial management, its erstwhile freedom to deal with the Vessel would be curtailed by the need to obtain permission from the court in the event that the JMs were to embark on a course of action which might negatively impact the appellants' statutory liens.

Whether the appellants are entitled to relief under the* Ex parte James *principle

125 As we have noted at [35] above, the appellants' case that the JMs' conduct engages the *Ex parte James* principle hinges on the assumption that the JMs should have applied to the court under s 100(2) of the IRDA for permission for the arrest and judicial sale of the Vessel in Gibraltar to proceed. That assumption has been disproved in the light of our conclusions above that (a) the JMs did not dispose of the Vessel; and (b) the appellants did not hold security in the Vessel to begin with. Although this leaves the appellants' case on the *Ex parte James* principle with no leg to stand on, we will nevertheless explain why, even at a more general level, we do not regard the JMs' conduct in this case as warranting the court's intervention under the *Ex parte James* principle.

The applicable law

126 It has sometimes been said that when a legal rule is described or known by reference to the case in which it was recognised, that is a sign of difficulty in understanding its rationale: *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1 at [205]; *China Life Trustees Ltd v China Energy Reserve and Chemicals Group Overseas Co Ltd* (2024) 27 HKCFAR 359 at [103]–[104]; *Harris Health Care Pty Ltd (receivers and managers appointed) (in liq) v Hayes* [2024] NSWCA 301 at [110]. That axiom is apt to describe the *Ex parte James* principle. Notwithstanding its longstanding vintage since the eponymous decision of the English Court of Appeal more than 150 years ago, the doctrine remains somewhat of a legal curiosity as a fog of uncertainty continues to linger on questions such as its scope and juridical basis: see, for example, *Re Swiber Holdings Ltd* [2018] 5 SLR 1358 at [95]. Indeed, the present case appears to be the first occasion in which the *Ex parte James* principle has arisen for consideration by this court. Thus, although not strictly necessary for our

decision, we take the opportunity to make some observations on the scope and application of the principle. However, before turning to these more contentious points, we begin with a brief introduction to the principle through the lenses of its historical development, starting with where it all began.

127 The facts of *Ex parte James* were simple. A creditor had successfully levied execution over a debtor's property and was paid out of the proceeds of sale shortly before the debtor's entry into bankruptcy. After the bankruptcy, the trustee in bankruptcy claimed an entitlement to the proceeds paid out and demanded the return of the same from the creditor, which demand the creditor complied with. After this emerged to have been a mistake of law as the trustee had no such entitlement, the creditor sought to recover the sums paid by mistake. The issue was thus whether the trustee was required to return the money. An important piece of context to this decision is that the law at that time did not recognise the recovery of moneys paid under a mistake of law; the abrogation of the mistake of law bar only came about more than a century later when it was ushered in at the turn of the new millennium by the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349: see the decision of this court in *Management Corporation Strata Title Plan No 473 v De Beers Jewellery Pte Ltd* [2002] 1 SLR(R) 418 at [18]–[24].

128 Nevertheless, the court held that the trustee was liable to repay the moneys. James LJ put the point as follows (*Ex parte James* at 614):

> … I think that the principle that money paid under a mistake of law cannot be recovered must not be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. I am of opinion that a trustee in bankruptcy is an officer of the Court. He has inquisitorial powers given him by the Court, and the Court regards him as its officer, and he is to hold money in his hands upon trust for its equitable distribution among the creditors. The Court, then, finding that he has in his hands money which in equity belongs

> to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people. …

The above reasoning can be distilled into two threads: see Tracey Evans Chan, "Revisiting *Ex parte James*" [2003] SJLS 557 at 558–559. First, a moralistic principle that, as an officer of the court, the trustee in bankruptcy "ought to be as honest as other people" and should resultingly be required to make restitution of the moneys. Second, by way of legal principle, there is a faint allusion to the concept of a trust by virtue of the reference to the trustee "ha[ving] in his hands money which in equity belongs to someone else".

129 The courts have gone down the former path. In the first place, although there have been occasional whispers that *Ex parte James* could be subsumed into the modern law of mistaken payments following the abrogation of the mistake of law bar (see, for example, *Hartogen Energy Ltd (in liq) and others v Australian Gas Light Co and others* (1992) 109 ALR 177 at 192), it has come into its own as a wider principle: *Lehman Bros Australia Ltd v MacNamara and others* [2021] Ch 1 ("*MacNamara*") at [43]. Moreover, despite James LJ's reference to equity and allusion to a trust as the means of grounding the creditor's recovery, the courts have come to prefer rationalising *Ex parte James* as not based "on any rule of law or equity, but on the principle that a court would order its officers to act in an exemplary manner and do the right and proper thing": see *Re PCChip Computer Manufacturer (S) Pte Ltd (in compulsory liquidation)* [2001] 2 SLR(R) 180 ("*PCChip*") at [10]; *In re Tyler, Ex parte The Official Receiver* [1907] 1 KB 865 at 869 and 873. Thus, in *MacNamara*, the English Court of Appeal articulated the governing principle as being that (at [35]):

> … the court will not permit its officers to act in a way which, although lawful and in accordance with enforceable rights, does not accord with the standards which right-thinking people or,

> as it may be put, society would think should govern the conduct of the court or its officers.

130 Having briefly traced its background, we come to two points of uncertainty surrounding the *Ex parte James* principle, with a view to laying down markers for refinement of the principle in future cases.

(1) Who does the principle apply to?

131 The first point relates to the scope of the principle's application. Here, the main question that has arisen concerns the categories of persons that the *Ex parte James* principle operates as a constraint upon. Given that the modern consensus is that the principle forms part of the court's supervisory jurisdiction to regulate the conduct of persons holding the station of officers of the court, it has been held to apply to court-appointed insolvency officeholders such as liquidators in compulsory winding up, and in other jurisdictions, beyond the insolvency context to other court officers such as the sheriff: see *Glasgow v ELS Law Ltd and others (Bar Council of England and Wales intervening)* [2018] 1 WLR 1564 at [80]–[82]; *Court Enforcement Services Ltd v Marston Legal Services Ltd (formerly Burlington Credit Ltd)* [2021] QB 129 at [122].

132 However, staying within the insolvency context, the primary ambiguity concerns the status of insolvency officeholders who are not appointed by the court but assume their position through a voluntary act of the debtor. The issue does not arise in the context of judicial management because s 89(4) of the IRDA designates a judicial manager or interim judicial manager as an officer of the court regardless of whether he or she is appointed by the court. But what about liquidators appointed in a voluntary winding up?

133 In earlier decisions of this court, we have recognised that the role of the court and the status of a liquidator would differ depending on whether the

winding up was a voluntary or compulsory liquidation. Specifically, in a compulsory winding up, the liquidator is appointed by the court and is an officer of the court, but in voluntary winding up, the liquidator is appointed by the members or creditors of the company, albeit the court remains in the background to be referred to if the need should arise: *Sinfeng Marine Services Pte Ltd v Taylor, Joshua James and another and other appeals* [2020] 2 SLR 1332 at [24]; *Superpark Oy v Super Park Asia Group Pte Ltd and others* [2021] 1 SLR 998 at [55]. Given that a liquidator in a voluntary winding up is *not* an officer of the court as his authority derives from the consent of the members or the creditors, it has been previously held that the *Ex parte James* principle would strictly not apply: *In re T H Knitwear (Wholesale) Ltd* [1988] 1 Ch 275 at 288–289; *Re Pinkroccade Educational Services Pte Ltd (formerly known as PDA Pink Elephant Pte Ltd) (in creditors' voluntary winding up)* [2002] 2 SLR(R) 789 at [12].

134 However, subsequent authorities have been less enthusiastic about drawing such a distinction and subjecting liquidators in voluntary winding up to an ostensibly lower standard of conduct: see *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 at [56]; *Lennon and another v Health Care Resourcing Group Ltd* [2025] 1 WLR 810 ("*Lennon*") at [34]. Indeed, we observe that, in a recent decision of the English High Court, the *Ex parte James* principle was essentially applied by analogy to a liquidator in a creditors' voluntary liquidation under the guise of fashioning a remedy for unjust enrichment of the company in liquidation: *Lennon* at [42]–[43]. As the issue does not arise in this case, we do not propose to express a definitive view on the matter, and will leave the question on the categories of persons to which the *Ex parte James* principle applies – either directly or indirectly – to be considered in future cases.

(2) What is the threshold for intervention by the court?

135 The second point which we address concerns the threshold that triggers the court's intervention under the *Ex parte James* principle.

136 In the respondents' written submissions, Mr Thio raised the concern that the principle in *Ex parte James* should not be allowed to outflank the statutory remedy for unfairly prejudicial conduct under s 115 of the IRDA, and that the standard for the court's intervention under *Ex parte James* should be no stricter than the test applicable under s 115 of the IRDA. In this connection, he referred to the decision of this court in *Yihua Lifestyle Technology Co, Ltd and another v HTL International Holdings Pte Ltd and others* [2021] 2 SLR 1141, in which the test for unfair prejudice was described as including (at [17(b)]):

> (a) conspicuously unfair or differential treatment to the disadvantage of the applicant (or applicant class) which cannot be justified by reference to the objective of the judicial management or the interests of the members or creditors as a whole; or
>
> (b) a lack of legal or commercial justification for a decision which causes harm to the members or creditors as a whole, which may occur where the judicial manager decides to sell the company's assets at an undervalue or take a course of action that is based on a wrong appreciation of the law. However, in such cases, the court will not interfere with the judicial manager's decision unless it is perverse (*ie*, unable to withstand logical analysis).

137 Although we do not think it necessary to resolve this issue in the present case given our view of the facts below, we would hesitate to say that the standards of conduct policed by the *Ex parte James* principle and the unfair

prejudice remedy should be treated in the same way that Mr Thio suggests. We agree with Mr Ng's submission that, even if there may be an overlap between the two concepts, they cannot be assumed to share the same juridical pith and rationale. For our part, in the absence of a compelling justification, we would prefer to keep the two constraints separate.

138 More generally, we note that the English Court of Appeal in *MacNamara* considered the issue of whether the touchstone for intervention under the *Ex parte James* principle was "unfairness" or "unconscionability" (at [60]–[69]). The different terms used in the case law have been comprehensively traced by the court there and, while a similar debate featured in the parties' submissions before us, we do not see the utility in engaging in a similar exercise. In our view, it would be delusive exactness to attempt articulating in definite terms what the threshold is or is not. To debate over words used in various authorities – whether it be "perverse", "dishonourable", "unfair" or "unconscionable" – in isolation from the factual matrix in which they were deployed, seems to us, with respect, to be a rather arid and meaningless exercise. These terms were not used as words of art but "words of ordinary English usage": see *Re Multi Guarantee Co Ltd* [1987] BCLC 257 at 270. None of the courts were attempting to exhaustively define the essence of the *Ex parte James* principle. It would be wrong to treat them as if they were.

139 Indeed, for all the spirited debate that raged in written submissions, it became clear at the hearing that the parties were not speaking at cross-purposes but had converged at the point of whether the JMs' conduct was unfair such that the court should not countenance them acting in that way. That test means what it says. We would only add, by way of clarification, that the applicability of the *Ex parte James* principle is not premised on an officer of the court acting in a subjectively dishonest manner or acting with conscious impropriety. The

standard of conduct against which an officer of the court is measured against is an objective one: *MacNamara* at [38].

The JMs' conduct in this case was not unfair so as to warrant the court's intervention

140 Turning to the facts of this case, we are of the view that the JMs' conduct does not engage the *Ex parte James* principle. While we have reviewed the evidence in depth, we think it suffices to collect the reasons for our decision and some pertinent pieces of evidence under three broad themes which we shall develop in turn.

(1) The appellants failed to take steps to protect their own positions

141 For a start, the appellants should be considered the architects of their own misfortune by failing to take steps to secure their own interests. In our judgment, where an allegation of unfair conduct is levelled against a judicial manager, it is both sensible and legitimate for the court to consider all the circumstances of the case, including whether the aggrieved party could have taken steps to safeguard its own position.

142 Rule one for an admiralty claimant must be that it, and it alone, is responsible for taking such steps to secure its right to proceed *in rem* against the vessel as may be necessary. This is done, in the first place, by issuing a writ against the vessel so as to crystallise the statutory lien. But that does not by itself suffice as complete protection of the claimant's position because it is hornbook law that a judicial sale of the vessel by a court of competent jurisdiction would extinguish the claimant's rights: *The Sanko Mineral* at [43]. The claimant must therefore know that the ironclad way to secure its position is to proceed with the arrest of the vessel. For so long as the steps taken by the claimant falls short of

this, there will remain an inevitable degree of risk that its right to proceed *in rem* might be defeated.

143 The appellants clearly appreciated this. As the respondents point out, the appellants secured the first layer of protection – the filing of a writ to crystallise their statutory liens – not only in Singapore but in some other jurisdictions:

(a) Natixis filed admiralty writs against the Vessel in both Malaysia and Hong Kong on 19 November 2020 and 22 October 2020 respectively.

(b) Societe Generale filed admiralty writs against the Vessel in Malaysia on 27 November 2020.

(c) HSBC filed an admiralty writ against the Vessel in Malaysia on 13 May 2020.

Indeed, all three of the appellants' representatives have given the identical explanation on affidavit that the appellants had issued these writs in foreign jurisdictions "generally to preserve [their] admiralty *in rem* rights in those jurisdictions, including in particular to preserve [their] right to arrest [the Vessel]". The corollary of this is that the appellants must have accepted that, to the extent that they did not file a writ in a particular jurisdiction, their rights were not protected or preserved there.

144 Ultimately, the choice of jurisdiction(s) to file writs so as to protect its position was a tactical decision for each of the appellants to determine for itself. The fact that Natixis chose to file writs in both Hong Kong and Malaysia, whereas Societe Generale and HSBC were content to file writs only in Malaysia, bears this out.

145 Moreover, the language of s 4(4) of the HCAJA makes clear that the right to issue a writ against a vessel where the person liable *in personam* is a demise charterer of the vessel only subsists for so long as that person remains the demise charterer of the vessel: *Taxidiotiki-Touristiki-Nautiliaki Ltd (trading as Aspida Travel) v The Owners and/or Demise Charterers of the Vessel 'Columbus'* [2021] EWHC 310 (Admlty) at [2]. Therefore, the appellants must accept the consequences in omitting to file protective writs in other jurisdictions including Gibraltar in this case.

146 However, what we find most confounding is that, despite having taken some steps to secure their position through the filing of the writs in Singapore and abroad, for reasons best known to themselves, the appellants did not proceed with the arrest of the Vessel despite having the opportunity to do so. The evidence before us in the form of a Lloyd's Report dated 30 July 2021 records that, from the time when the appellants issued their writs against the Vessel (between 24 April 2020 and 24 June 2020) until the Vessel's departure to Gibraltar (16 June 2021), the Vessel had called into Singapore on the following occasions and durations:

(a) from 1 October 2020 to 2 October 2020 (17 hours);

(b) from 7 December 2020 to 8 December 2020 (one day);

(c) from 14 January 2021 to 15 January 2021 (19 hours);

(d) from 4 February 2021 to 7 February 2021 (two days);

(e) from 27 February 2021 to 28 February 2021 (19 hours);

(f) from 3 April 2021 to 4 April 2021 (17 hours);

(g) from 3 May 2021 to 12 May 2021 (nine days); and

(h) from 6 June 2021 to 16 June 2021 (nine days).

147 Each of these periods represented a discrete occasion when the appellants could have procured the arrest of the Vessel. This is thus not a case where the appellants can claim that they were *unable* to secure their position by arresting the Vessel. Indeed, we find the omission on the part of Natixis and Societe Generale to be particularly striking because they, unlike HSBC, made an informed decision to only serve their writs on the Vessel on 1 October 2020 (*ie*, the first occasion above when the Vessel called into Singapore) (see [11] above). The arrest of the Vessel could have been conducted at the same time as the service of the writs. In the case of all of the appellants (including HSBC), even discounting the occasions where the Vessel was in Singapore port limits for less than two days, there were two periods of nine days each during which the appellants could have moved to arrest the Vessel.

148 At the hearing, Mr Seah could offer no compelling response to our question as to why Natixis and Societe Generale chose not to arrest the Vessel despite clearly having the opportunity to do so. Although Mr Seah alluded to the fact that there had been a moratorium in force over OTPL and Nan Chiau after they were placed under judicial management, he conceded that this did not take the appellants very far when we pointed out to him that the appellants could have sought leave from either the JMs or the court to proceed with arrest if they were desirous of doing so. Yet, there is no evidence of the appellants ever making a request to the JMs or contemplating an application to court for leave to arrest the Vessel so as to secure their position. In the circumstances, the appellants' reliance on the moratorium to explain their inaction strikes us as an afterthought.

149 In our judgment, this inference is strengthened when the similar situation which transpired in relation to a sister ship in the Xihe Group, the *Wu Yi San*, is taken into account. Briefly, the *Wu Yi San* was in a similar position to the Vessel as the transactions giving rise to admiralty claims against the two vessels were similar, and the pool of admiralty claimants, including the appellants, were, according to the JMs, "almost identical". Like the Vessel, there was also a mortgagee in play. Although the mortgagee had initially intended to have the *Wu Yi San* arrested and sold by a judicial sale in Hong Kong (a jurisdiction in which only Natixis had filed writs), an agreement was reached following negotiations between the *Wu Yi San* claimants and the mortgagee for the mortgagee to arrest the vessel in Singapore instead of Hong Kong. The terms of the agreement included, among other things, that the *Wu Yi San* claimants bear the costs of the arrest.

150 The respondents submit that the appellants' participation in the resolution between the *Wu Yi San* claimants and the mortgagee betrays their knowledge that the JMs were not required to apply to the court under s 100(2) of the IRDA before proceeding to allow the Mortgagee to enforce its security in the Vessel. We agree that the correspondence exchanged in the negotiations on the *Wu Yi San* is telling. The proverbial smoking gun is the following email sent by HSBC's representative, Mr Louis Han ("Mr Han"), to the JMs and their advisors on 2 June 2021, in which Mr Han sought the JMs' assistance to persuade the mortgagee to change its initial stance to have the vessel arrested in Hong Kong:

> Raja & Lian Hoon
>
> Thank you for your time to speak to [a representative of ICICI bank] and I on 1 Jun.
>
> While *we appreciate that it is the mortgagees' discretion as to where they wish to arrest the Vessel, could you assist to*

> *persuade the mortgagees to change their stand* so that they arrest the vessel in Singapore instead of Hong Kong.
>
> We have spoken to the other banks and they are all in favour that the vessel be arrested in Singapore.
>
> Your assistance will be much appreciated.
>
> Best regards,
>
> Louis Han
>
> [emphasis added]

151 Mr Han's concession that "it is the mortgagees' discretion as to where they wish to arrest the vessel" gives the game away for the appellants. Having sought the JMs' assistance in relation to the *Wu Yi San* on the premise that the mortgagee was free to decide the jurisdiction where it wished to arrest the *Wu Yi San*, the appellants' criticism of the JMs in these proceedings for failing to obtain their consent or apply to the court under s 100(2) of the IRDA before proceeding with the Mortgagee's arrest and subsequent judicial sale of the Vessel in Gibraltar rings hollow. With respect, it smacks of opportunism and a speculative attempt to lay their losses from their omission (for whatever reason) to secure their positions, or inability to obtain a similar advantageous resolution for the Vessel as the *Wu Yi San*, at the JMs' feet.

(2) The JMs' course of action was reasonable

152 Next, we consider that the course of action taken by the JMs in the lead up to the arrest and judicial sale of the Vessel in Gibraltar cannot be criticised as unreasonable.

153 To begin with, the underlying context is important. The evidence before us indicates that Nan Chiau was so insolvent that it did not even have sufficient funds to take redelivery of the Vessel from OTPL. Thus, on 3 March 2021, Dr Lim Lian Hoon ("Dr Lim") of AlixPartners, an advisor to the JMs, wrote to

the Mortgagee informing that the JMs intended to "negotiate on [the Vessel's] writs for 2 months" and were planning to take redelivery of the Vessel, but did not have sufficient funds to do so and were thus requesting funding from the Mortgagee.

154 This sparked off discussions between Dr Lim and the Mortgagee as well as between the JMs' and the Mortgagee's respective legal advisors. In response to a query from the Mortgagee's solicitors, Stephenson Hardwood LLP, on the "JMs' overall plan for [the Vessel]", the JMs' solicitors, WongPartnership LLP, reported the following in an email dated 16 March 2021:

> 11. Based on [Dr Lim's] email dated 3 March 2021, the USD 1.1 million funding is required to allow [the JMs] to negotiate on her writs for 2 months and carry out a private sale in 3 months. Is 2 months the cut-off period (should a settlement not be reached with the writ claimants by that time) before [the JMs] progress to an alternate plan?
>
> WP: Yes, a cut-off period of two months is our clients' initial view as they cannot be expected to negotiate indefinitely.
>
> 12. Will [the Mortgagee] be asked to assist with an arrest and judicial sale at that 2-month cut-off and fund the arrest costs and maintenance during the time of the arrest?
>
> WP: If little or no progress has been made in negotiations with the writ claimants after 2 months, our clients will update [the Mortgagee] and suggest further steps. Should an arrest take place, arrest costs are to be borne by the arresting party.
>
> 13. Are the JMs aware if any of the writ holders are keen to arrest the vessel?
>
> WP: The JMs are presently not aware of any writ claimants who are keen to arrest the Vessel. The JMs have already commenced discussions with one of the writ claimants.
>
> 14. We had understood that the JMs had planned to apply for a judicial sale themselves if the writs cannot be filed – is this not still the case?

> WP: *The JMs cannot apply for a judicial sale themselves*; that scenario would have involved one of the writ claimants initiating the arrest. …
>
> [emphasis added]

In short, the JMs made clear to the Mortgagee that they were requesting funding sufficient to sustain the operating expenses of the Vessel for a five-month timeline. This timeline was comprised of an initial two months to engage in negotiations with the Writ Claimants, followed by a three-month period for the sale of the Vessel. The JMs also foreshadowed that, in the event that the Vessel was to be dealt with by a judicial sale, the Mortgagee's assistance to arrest the Vessel may be required, given that "[t]he JMs cannot apply for a judicial sale themselves".

155 Subsequently, on 29 April 2021, the JMs entered into a funding agreement with the Mortgagee under which the Mortgagee agreed to provide, *inter alia*, funding for the redelivery of the Vessel and the Vessel's operating expenses after redelivery. It suffices to say that, in so far as funding for operating expenses was concerned, the funding agreement specifically stated that the amount was calculated to last for an estimated period of five months.

156 In our view, the context above forms the lens through which the JMs' conduct should be viewed. The JMs had no funds to even take redelivery of the Vessel and were only able to do so after negotiating an arrangement with the Mortgagee. The funding they received from the Mortgagee was pegged to an agreed timeline. Given this, the JMs could not put themselves in a situation of continuing to incur operating expenses and other costs arising from the Vessel past that timeline. Thus, when two months had elapsed and June 2021 came around, the JMs' decision to put into motion the arrest and judicial sale of the Vessel was a response to the cards which they had been dealt; specifically, the

amount of funds that the Mortgagee had provided. Indeed, we find it difficult to see how the JMs' conduct can be criticised by the appellants as unreasonable or involving bad faith, as the fact that the JMs had set aside two months for negotiations with the Writ Claimants when negotiating for funding from the Mortgagee indicates that they were acting in good faith and with regard to the Writ Claimants' interests.

157 Furthermore, even if the JMs did, as the appellants contend, express a preference for a judicial sale and prevail on the Mortgagee to go down that route, we do not see how that can be impugned as unreasonable.

158 In the first place, there are intrinsically good reasons why parties interested in a vessel may prefer a judicial sale. The ability to obtain a clean title that is in principle recognised across the world would, in the ordinary course, allow the vessel to fetch a higher price on the market. As one writer has put it, "[f]or the new owner of the ship, judicial sale and its conferral of clean title are supposed to provide a clean break, a fresh start and a safe *terminus a quo* from which the ship's new operations can commence": see Paul Myburgh, "The Anglo-Common Law Approach to Foreign Judicial Ship Sales and the Beijing Convention" in *The Beijing Convention on the Judicial Sale of Ships* (D Rhidian Thomas ed) (Informa Law, 2025) at paras 4.3 and 4.7. Even though a mortgagee may have a power of sale, it is not uncommon for mortgagees who are unwilling to give a warranty of the vessel being free of liens and encumbrances to prefer a judicial sale in order to secure a higher price based on the Admiralty Court's ability to confer a clean title: *The M/V "Union Gold"* [2014] 1 Lloyd's Rep 53 at [7].

159 In our judgment, the specific circumstances of the present case made the "clean break" and "fresh start" associated with a judicial sale not merely ideal

but an *imperative* for a potential buyer of the Vessel. Given the circumstances of the HLT Group's collapse, any prospective buyer of a vessel linked to the HLT Group would have been concerned of the risk of the vessel being subject to a panoply of claims from a long laundry list of claimants. Indeed, as part of the Writ Claimants who issued claims against the Vessel across various jurisdictions, the appellants cannot claim to be unaware that the Vessel would have faced enormous difficulties in attracting serious buyers in the absence of a guarantee of clean title. True to this, the terms of the Memorandum of Agreement between Nan Chiau and Genial Marine clearly reflect that an inability to obtain a clean title was considered by the latter to be a dealbreaker. For example, cl 9 of the Memorandum of Agreement provided that the Memorandum of Agreement would be "null and void and each party shall have no recourse against the other for any claims arising" from it in the event that Nan Chiau failed to procure a judicial sale or otherwise could not deliver the Vessel "free from all charters, encumbrances, mortgages and maritime liens or any other claims whatsoever".

160 In any event, we do not think that the JMs can be criticised for preferring to go with a judicial sale rather than the s 100(2) route. Before us, Mr Thio submitted that the fact that s 100(2) of the IRDA was an untested process was a factor that weighed on the JMs' minds. This is corroborated by an email sent by Dr Lim to a representative of the Mortgagee on 11 May 2021 relaying the JMs' view that s 100(2) of the IRDA was "not 'exactly' an option" for the Vessel because it was "an untested and new legal process".

161 We are satisfied that this is a sufficient basis for the JMs to have discounted the viability of proceeding under s 100(2) of the IRDA. As we have noted at [46]–[49] above, there are real uncertainties surrounding the operation of s 100(2) of the IRDA, particularly in relation to the nature and effect of an

order made under that section. These include whether an order under s 100(2) of the IRDA can extinguish all existing security interests in a property in the same way and to the same extent as a judicial sale. Given the importance of securing clean title for a buyer of the Vessel in the context of this case, we do not think that the JMs can be faulted for preferring a judicial sale.

(3) The appellants and the JMs stood in an adversarial position

162 Finally, taking a step back, we agree with the Judge that the JMs' conduct must be seen through the prism of the adversarial relationship between the JMs and the appellants: see Judgment at [77].

163 The starting point is that the JMs were, as the judicial managers of Nan Chiau, under a statutory duty to act in the interests of *Nan Chiau's* creditors: see s 89(2) of the IRDA. The party liable *in personam* with respect to the appellants' claims is OTPL *qua* demise charterer of the Vessel at the material time and not Nan Chiau *qua* owner. The upshot of this, as the Judge noted, is that the appellants are creditors of *OTPL* and not Nan Chiau. Although the appellants attempted to argue before the Judge that they should be considered creditors of Nan Chiau, this was rejected by the Judge: Judgment at [72]. There is no appeal against that finding and the appellants must thus accept the Judge's decision on this point.

164 Although it is true that Nan Chiau and OTPL can be considered related companies in so far as they both come under the umbrella of the HLT Group, they are nonetheless separate legal entities with their own assets and creditors: see, for example, *Goh Chan Peng and others v Beyonics Technology Ltd and another and another appeal* [2017] 2 SLR 592 at [71]. To the extent that Nan Chiau and OTPL are both currently in insolvent liquidation, the administration of their respective insolvent estates is nevertheless independent from each other.

165 The crux of the matter is that the appellants were seeking to have an asset of Nan Chiau – the Vessel – applied to the discharge of liabilities of OTPL. This would have been detrimental to the creditors of Nan Chiau as there would have been a diminution in the assets available for satisfaction of their claims. In stark terms, Nan Chiau had no obligation to serve the Vessel up on a silver platter to OTPL's creditors. As we have emphasised above, it was open to the appellants to take the necessary steps to protect their rights to proceed *in rem* against the Vessel. For reasons only known to the appellants, they chose not to arrest the Vessel when they had ample opportunities to do so.

166 In the final analysis, the *Ex parte James* principle focuses on conduct which is unfair by the standards of the right-thinking person representing the current view of society. In our judgment, no right-thinking person with a proper appreciation of the context and the realities of the JMs' position could sensibly come to the view that the JMs acted unfairly by taking the steps they did which were plainly in the interests of Nan Chiau's creditors.

Conclusion

167 For the foregoing reasons, we dismiss the appeals. The appellants fail at the fundamental hurdle that the judicial sale of the Vessel by the Gibraltar court did not constitute a disposal of the Vessel by the JMs. In any event, the appellants' claim to have held security in the Vessel simply by having issued writs *in rem* against her is mistaken, and their complaints of the JMs having engaged in foul play are plainly unfounded. There is accordingly no basis to grant them the relief sought.

168 In relation to costs, we fix the costs of these appeals in the aggregate sum of $120,000, to be paid by the appellants to the respondents. This is consistent with the respondents' submissions on costs, and we find it to be

commensurate to the novelty and complexity of the questions that have arisen in these appeals. There will be the usual consequential orders.

169 In closing, we express our gratitude to Mr Ng for his assistance and thoughtful submissions. Although we did not agree with him on all points, his submissions nevertheless assisted us by bringing a different perspective and sharper focus to the key issues.

Sundaresh Menon
Chief Justice

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

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