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# 18. INSOLVENCY LAW

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## I. Introduction[1]

18.1 Cases of note in 2021 include the Court of Appeal's decision on the test for insolvency[2] and on the United Nations Commission on International Trade Law ("UNCITRAL") Model Law for Cross-border Insolvency[3] ("Model Law"). The Singapore courts continue to shape the contours of the debt restructuring tools under Singapore law,[4] considered the ambit of the estate costs rule,[5] and had the opportunity to address the much-debated interplay between insolvency law and maritime law.[6]

1 The authors wish to thank Raelene Pereira (Partner, Rajah & Tann Singapore LLP) for preparing a part of this review.
2 *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478.
3 GA Res 52/158, adopted at the United Nations General Assembly, 52nd Session (30 January 1998). See *United Securities Sdn Bhd v United Overseas Bank Ltd* [2021] 2 SLR 950.
4 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209.
5 *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd* [2021] 4 SLR 556.
6 *The Ocean Winner* [2021] 4 SLR 526.

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## II. Winding up of companies

### A. *Test of insolvency and statutory demand*

18.2 The Court of Appeal in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd*[7] ("*Sun Electric*") provided guidance on three important points in insolvency law. The first issue was whether the directors of a debtor company who are controlling the conduct of an appeal against a winding-up order should be personally liable for the costs of the appeal. The second issue was on the test for insolvency, and the third issue related to partial payments in response to a statutory demand.

18.3 It is open to a company to appeal a winding-up order whether or not it is subject to a stay, and the Court of Appeal held that the directors retain the power to control the appeal. That is well established. For instance, the English High Court remarked in *Closegate Hotel Development v McClean*[8] that there was:[9]

> … long-standing authority to the effect that even after the appointment of a provisional liquidators [*sic*], the board of directors of a company retains a residuary power to instruct lawyers to challenge the appointment of the provisional liquidator, to oppose the petition and, if a winding up order is made, to appeal against the making of that order.

18.4 The Court of Appeal held that the directors or shareholders controlling the appeal should be personally responsible for the costs of appealing the winding-up order, including any party-to-party costs in favour of a successful respondent. The directors should not use the company's funds, which would be under the liquidator's control, for such costs. That is correct as a matter of principle. If the winding-up order is stayed, the directors may use the company's funds for such costs but must be prepared to pay it back to the company if the appeal fails.[10] If the appeal succeeds, the directors may seek reimbursement from the company.

18.5 This is the first reported decision by the Court of Appeal setting out clear rules on the cost consequences for directors who wish to appeal a winding-up order against the company. A successful respondent's efforts in enforcing a cost order against a wound-up company are usually futile, and security for costs does not adequately address the costs incurred in the appeal. The rules set by the Court of Appeal represent a fair allocation

7 [2021] 2 SLR 478.
8 [2014] Bus LR 405.
9 *Closegate Hotel Development v McClean* [2014] Bus LR 405 at [7].
10 The use of company's funds for an unmeritorious appeal would generally be void under s 259 of the Companies Act (Cap 50, 2006 Rev Ed) and would not be validated.

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of risks amongst the debtor company facing a winding-up order, the applicant for the order, and the directors of the company who control the appeal.

18.6 The next point dealt with was the test of insolvency. The respondent in *Sun Electric* argued that the company should be wound up under s 254(2)(*c*) of the Companies Act.[11] Section 254(1)(*e*) states that a company may be wound up if a company is unable to pay its debts. Section 254(2) then states how a company may be deemed to be unable to pay its debts. Each of ss 254(2)(*a*) and 254(2)(*b*) relies on a deeming event – failure to satisfy a statutory demand (s 254(2)(*a*)) and execution on a judgment being returned unsatisfied (s 254(2)(*b*)), which gives rise to a presumption of insolvency.

18.7 Section 254(2)(*c*) states that company shall be deemed unable to pay its debts "if it is proved to the satisfaction of the Court that the company is unable to pay its debts, and in determining whether a company is unable to pay its debts the Court must take into account the contingent debts and liabilities of the company". In other words, to rely on s 254(2)(*c*), the applicant needs to *prove* the debtor's inability to pay its debts.

18.8 In insolvency parlance, the cash flow and the balance sheet tests are commonly referred to as the tests of insolvency. Put simply, the cash flow test looks at whether the debtor is able to pay its debts when due, and the balance sheet test is a comparison of the debtor's assets and liabilities. The Court of Appeal held that, for purposes of s 254(2)(*c*), the cash flow test should be the "sole and determinative test".[12] The Court of Appeal's judgment is important in a number of aspects.

18.9 First, it ruled that the earlier oft-cited judgment in *Re Great Eastern Hotel (Pte) Ltd*[13] that either the cash flow test or the balance sheet test was applicable under s 254(2)(*c*) was incorrect.[14] Second, the Court of Appeal clarified the *content* of the cash flow test: It is not simply an assessment of the debtor's ability to pay its debts immediately when due. Instead:[15]

11 Cap 50, 2006 Rev Ed. Now s 125(2)(*c*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).
12 *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [56].
13 [1988] 2 SLR(R) 276.
14 See also *Chip Thye Enterprises Pte Ltd v Phay Gi Mo* [2004] 1 SLR(R) 434 at [19]–[20], where the High Court held that the inquiry could involve one or more of several tests.
15 *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [65].

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> … the cash flow test assesses whether the company's *current assets exceed its current liabilities* such that it is *able to meet all debts as and when they fall due*. We agree … that 'current assets' and 'current liabilities' refer to assets which will be realisable and debts which will fall due within a 12-month timeframe, as this is the standard accounting definition for those terms. [emphasis added].

The Court of Appeal then set out a list of non-exhaustive factors in applying the cash flow test:[16]

> (a) the quantum of all debts which are due or will be due in the reasonably near future;
>
> (b) whether payment is being demanded or is likely to be demanded for those debts;
>
> (c) whether the company has failed to pay any of its debts, the quantum of such debt, and for how long the company has failed to pay it;
>
> (d) the length of time which has passed since the commencement of the winding up proceedings;
>
> (e) the value of the company's current assets and assets which will be realisable in the reasonably near future;
>
> (f) the state of the company's business, in order to determine its expected net cash flow from the business by deducting from projected future sales the cash expenses which would be necessary to generate those sales;
>
> (g) any other income or payment which the company may receive in the reasonably near future; and
>
> (h) arrangements between the company and prospective lenders, such as its bankers and shareholders, in order to determine whether any shortfall in liquid and realisable assets and cash flow could be made up by borrowings which would be repayable at a time later than the debts.

The cash flow test, as set out by the Court of Appeal, is not a simple assessment of whether the debtor is able to pay its debts when due. It would be necessary to go beyond the fact of whether the company has failed to pay its debts in the face of a demand. The inquiry extends to factors including the realisable value of the debtor's assets, the state of its business and intercompany arrangements. It can be expected that it will be a fairly involved factual inquiry, and it may not be easy to determine the matter summarily when the factors are heavily disputed. As such, it seems likely that applicants for a winding-up order will seek to rely on a statutory demand or an unsatisfied execution to raise the presumption of insolvency.

16 *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [69].

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18.10 That segues to the point on partial payments in response to a statutory demand. Section 254(2)(*a*) of the Companies Act states that "where a creditor has served on the company a statutory demand for a debt exceeding $10,000, the company will be deemed as unable to pay its debts if it neglects to: (a) pay the sum; (b) secure the sum; *or* (c) compound the sum, within the period of three weeks from the service of the demand" [emphasis in original; other emphasis omitted].[17] On the facts, a day after the three-week period, the appellant paid part of the debt such that the outstanding sum fell below $10,000. This raised the question whether a company which pays the statutory demand in part such that the remaining sum falls below the stated limit can be considered to have "neglected to pay the sum". The court considered two situations: first, where the partial payment was made within the prescribed period; and second, where the partial payment was only made after that period. The Court of Appeal decided that a company which made partial payment to reduce the sum owed to below $10,000 within the three-week period should not be deemed unable to pay its debt under s 254(2)(*a*). The court, however, reserved its decision on the scenario where the debtor did so after the expiry of such period.

### *B. Statutory demands based on adjudication determinations*

18.11 In *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd*,[18] Diamond Glass Enterprise Pte Ltd ("DG"), a subcontractor of Zhong Kai Construction Co Pte Ltd ("ZK"), obtained an adjudication determination ("AD") against ZK under the Building and Construction Industry Security of Payment Act[19] ("SOPA") and entered judgment against ZK based on the AD. DG then served a statutory demand based on the adjudicated amount and, when ZK failed to meet the statutory demand, commenced a winding-up application against ZK.

18.12 ZK did not commence proceedings to invalidate the AD. Instead, ZK filed an application for the dismissal of the winding-up application or, alternatively, a stay or adjournment on the basis that it had cross-claims against DG arising out of two suits which it had initiated against DG, claiming liquidated damages and costs to complete the contract with DG. At first instance, ZK succeeded in its application for a stay of the winding-up application pending the disposal of the two suits and DG appealed. DG's appeal was dismissed by the Court of Appeal though the High Court's order was varied in part.

17 *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd* [2021] 2 SLR 478 at [91].
18 [2021] 2 SLR 510.
19 Cap 39B, 2006 Rev Ed.

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18.13 The Court of Appeal recognised that, under s 21(1) of the SOPA, adjudication determinations are temporarily final until resolved by the court or arbitral tribunal finally determining all the disputes between parties at the end of a project. Given that ZK had not commenced legal proceedings to invalidate the AD, it was open to DG to proceed with enforcement of the AD.

18.14 That said, the Court of Appeal also recognised that, in winding-up proceedings, a debtor was entitled to raise cross-claims against the creditor based on substantial grounds. The Court of Appeal held that:[20]

> … applying the *prima facie* standard of review represents a practical and workable solution to the apparent opposing considerations of the winding-up jurisdiction of the court and the temporary finality of [ADs], in situations where an [AD judgment debtor] raises a cross-claim against the [judgment creditor] in order to challenge a winding-up petition founded on the adjudication debt.

The requirement that the cross-claim could not constitute an abuse of the court's process provided a useful check on parties trying to game the system.

18.15 On the facts, the Court of Appeal held that ZK had successfully established such *prima facie* cross-claims, and accordingly ordered that DG's winding-up application against ZK be stayed pending the determination of ZK's two suits against DG. The Court of Appeal also ordered that, as a condition to the stay, ZK pay the adjudication amount into court. In ordering ZK to pay the adjudication amount into court as security, the Court of Appeal noted that, had ZK applied to set aside the adjudication determination, ZK would have been required to make such payment into court under s 27(6) of the SOPA. However, the Court of Appeal declined to lay down a general rule that parties in ZK's position should pay the adjudicated amounts into court pending the resolution of the arbitral tribunal or the court.

18.16 Notwithstanding the foregoing, the Court of Appeal noted that other avenues to recover the judgment debt still remained. For example, if the claimant was not paid, it could suspend work[21] or take a lien on goods supplied;[22] the claimant could also seek enforcement by the entry

20 *Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2021] 2 SLR 510 at [83].

21 See s 26(1)(*d*) of the Building and Construction Industry Security of Payment Act (Cap 39B, 2006 Rev Ed).

22 See s 25(2)(*d*) of the Building and Construction Industry Security of Payment Act (Cap 39B, 2006 Rev Ed).

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of a judgment under s 27(1) of the SOPA whereupon the usual execution processes like garnishee orders are available.

### *C. Setting aside a statutory demand*

18.17 In *Lakshmanan Shanmuganathan v L Manimuthu*,[23] the parties had entered into a compromise agreement to settle the distribution of their late parents' assets. Following the appellant's breach of the compromise agreement, the respondents obtained a judgment in a High Court suit under which the appellant was required to pay a sum of S$1.05m to the respondents and return 80% of the sale proceeds of their father's share in a property in Singapore. The High Court also ordered the respondents to transfer to the appellant six properties in India that had been allocated to the appellant under the compromise agreement.

18.18 Following the High Court's decision, the respondents offered to transfer the six properties to the appellant. The appellant, however, showed little interest in proceeding with the transfer of the six properties. He also failed to pay the judgment sum of S$1.05m to the respondents. This led the respondents to serve a statutory demand on the appellant ("SD 1"). The appellant successfully applied to set aside SD 1 on the ground that SD 1 should have disclosed, amongst others, that the respondents held the six properties on the appellant's behalf. The respondents' appeal against the decision setting aside SD 1 was dismissed.

18.19 The respondents subsequently served another statutory demand on the appellant ("SD 2"). SD 2 stated that the respondents held the six properties on the appellant's behalf. SD 2 also listed the values of the six properties as agreed in the compromise agreement. The appellant applied to set aside SD 2 on the ground that it did not state the current values of the six properties. The appellant contended that this meant that SD 2 did not comply with r 94(5) of the Bankruptcy Rules[24] and should be set aside under r 98(2)(*c*). The appellant also asserted that by virtue of his right to the six properties, he had a valid counterclaim exceeding the debt claimed such that SD 2 ought to be set aside under r 98(2)(*a*) of the Bankruptcy Rules.

18.20 The application was dismissed first by the assistant registrar and then by the learned judge below. The appellant appealed to the Court of Appeal.

23 [2021] 2 SLR 1340.
24 2002 Rev Ed.

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18.21 The Court of Appeal held that while a creditor was obliged under r 94(5) to disclose the value of any property of the debtor that he held, such value had to be that which he was entitled to deduct from the debt claimed in the statutory demand. As the respondents were bound by the judgment in the High Court suit to transfer the six properties to the appellant, the respondents were not entitled to realise the value of the six properties and to apply them towards payment of the debt claimed. As such, there was no need to state the current values of the six properties in SD 2.

18.22 The Court of Appeal further observed that the respondents were not obliged to apply to vary the judgment in the High Court suit to set off the debt owed by the appellant against the current values of the six properties. By issuing SD 2, the respondents were clearly evincing their intention to comply with terms of the judgment in the High Court suit and were not seeking to apply the six properties in reducing or in satisfaction of the debt underpinning SD 2. As such, there was no reason for SD 2 to state the current values of the six properties.

18.23 The Court of Appeal also considered that the appellant's counterclaim was not *bona fide*. There was no basis for the appellant to insist that he had a valid counterclaim when the intransigence in the transfer of the six properties was due entirely to him. There was also no evidence that the current value of the six properties exceeded the value of the debt claimed in SD 2. In the circumstances, the Court of Appeal declined to set aside SD 2. The Court of Appeal also ordered the respondents to file a bankruptcy application within three weeks from the dismissal of the appeal if they wished to proceed with the bankruptcy proceedings.

### *D. Standing to seek removal of liquidator*

18.24 In *Liquidators of Ace Class Precision Engineering Pte Ltd v Tan Boon Hwa*,[25] the High Court considered whether a creditor and a person claiming to be a beneficial shareholder had legal standing under s 174 of the Insolvency, Restructuring and Dissolution Act 2018[26] ("IRDA") to seek to remove a liquidator appointed in members' (that is, solvent) voluntary liquidation.

18.25 The High Court observed that in the prior case of *Petroships Investment Pte Ltd v Wealthplus Pte Ltd*[27] ("*Petroships*"), Vinodh

25 [2022] 3 SLR 539.
26 Act 40 of 2018.
27 [2018] 3 SLR 687.

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Coomaraswamy J held that a solvent company was liquidated primarily in the members' interests. Accordingly, creditors had no real interest in the liquidation as their debts would be paid before the final distribution of surplus to members.

18.26 Significantly, the High Court clarified that *Petroships* did not stand for the principle that *only* members could have an interest in a solvent company's liquidation or legal standing to remove liquidators. Section 174 of the IRDA was phrased expansively and simply provided that "[t]he Court may, on cause shown, remove a liquidator and appoint another liquidator". In every instance, the question was whether an applicant had a legitimate interest in removing a liquidator.

18.27 On this basis, the High Court held that creditors had sufficient legitimate interest to apply to remove a liquidator in members' voluntary liquidation if cause could be shown. Even though a solvent liquidation was run primarily on behalf of members, creditors still had a real interest in their debts being paid in full, and in the fair and proper administration of the estate up to that point.

18.28 Separately, one of the applicants also argued that he was a contributory or a person alleged to be a contributory, by virtue of his beneficial ownership of shares in the company. According to that applicant, this conferred legal standing to remove a liquidator in solvent liquidation.

18.29 The High Court rejected the argument. The applicant's beneficial ownership of the company was disputed and pending determination in separate proceedings. Further, even if the applicant could prove beneficial ownership at trial, this did not make him a contributory. It was still the registered shareholder/trustee who remained liable to contribute to the assets of the company in liquidation.

18.30 The High Court's decision is a useful illustration of the legal rights and obligations of contributories in liquidation, which are otherwise seldom discussed.

18.31 A contributory is defined in s 2(1) of the IRDA read with s 4(1) of the Companies Act as:

> … a person liable to contribute to the assets of the company in the event of its being wound up, and includes the holder of fully paid shares in the company and, prior to the final determination of the persons who are contributories, includes any person alleged to be a contributory.

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It does not follow that a beneficial owner of shares will, *ipso facto*, be liable to contribute to the assets of a company in liquidation. Beneficial ownership is not a monolithic concept; instead, beneficial ownership admits of many degrees of rights and obligations. Absent any express or implied rights or obligations to be registered as legal owner or registered shareholder, there is no reason for an alleged beneficial owner to be personally liable for a contribution to a company's capital. It is submitted that the outcome in this case may have been different if the applicant alleged that he had rights to the shares which were enforceable by specific performance (for example, an *in personam* contractual claim against the registered shareholders for the transfer of shares). If so, such an applicant would arguably fit better into the meaning of a person alleged to be a contributory.

18.32 In a different context, the Court of Appeal also previously explained that restrictions on transfers of shares of a company in liquidation only applied to changes in the legal title of shares. Section 259 of the Companies Act (now s 130 of the IRDA), which voids transfers of shares in a company after the commencement of liquidation, does not prevent transfers of the equitable interest in shares. The object of these restrictions was to prevent shareholders from evading liability as contributories by transferring their shares to a man of straw, after winding up has commenced. There was no prejudice to creditors in allowing such dealings because the persons reflected on the company's register continued, in so far as the company was concerned, to be liable to pay up on calls made in respect of those shares.[28]

### *E. Estate costs rule*

18.33 A company with a claim is wound up. The liquidator, having been appointed, has to decide whether to commence or continue legal action on the company's behalf to pursue the claim. The liquidator has to review the strengths and weaknesses of the claim. Another key factor is the possibility of adverse cost orders against the company. It is clear, at least since the Court of Appeal decision in *Ho Wing On Christopher v ECRC Land Pte Ltd*[29] ("*ECRC Land*"), that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator. That is the essence of the estate costs rule. An important consequence of the rule is that a liquidator who breaches

28 See *Seah Teong Kang v Seah Yong Chwan* [2015] 5 SLR 792 at [47]–[51].
29 [2006] 4 SLR(R) 817 at [9].

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it is personally liable for any shortfall in the opponent's costs recovery which is caused by the breach of the rule.[30]

18.34 The questions before the High Court in *Lim Siew Soo v Sembawang Engineers and Constructors Pte Ltd*,[31] as the judge succinctly stated, were whether the estate costs rule distinguished between a case where a liquidator *commenced* litigation and one where a liquidator merely *adopted* litigation already commenced. If there was such a distinction, the question was whether the estate costs rule accorded super priority only to the successful opponent's post-liquidation costs.

18.35 The court concluded that the estate costs rule encompassed both litigation which a liquidator commenced and litigation which she adopted. The court further held that the estate costs rule accorded priority to the company's entire liability under an adverse costs order (and not just post-liquidation costs) because that liability was incapable of being resolved in a legal sense into a pre-liquidation component and a post-liquidation component. The decision, which is consistent with and supported by high authority in the commonwealth, is not surprising. The court went further to helpfully expound on the rationale and principles which undergirded the estate costs rule.

18.36 The first was what the court termed the "risk/reward principle", which was that a party which stood to gain the benefits of litigation should bear the risk of failed litigation. Related to that was the reciprocity principle – just as a successful litigant was awarded costs, an unsuccessful litigant had to bear the costs of its opponent. In the court's view, the estate costs rule served a vital function of addressing asymmetry in the recoverability of costs. The asymmetry manifested in the opponent's inability to recover more than a small fraction of its claim and costs as a dividend in the company's liquidation, as compared with the company's ability to recover its substantive claim and costs in full in the usual way from the opponent. The onset of liquidation relieved the company of substantially all of its litigation risk and deprived its opponent of substantially all of its litigation reward.

18.37 With respect to the ancillary argument that a liquidator should only be liable for costs incurred post liquidation, the court rejected the liquidator's attempt to separate liability for costs into a pre-liquidation component and a post-liquidation component. This stemmed from the fact that a party's liability under a costs order arises only at the time the order is made and arises in the full quantum of the costs awarded.

30 *Ho Wing On Christopher v ECRC Land Pte Ltd* [2006] 4 SLR(R) 817 at [20]–[21].
31 [2021] 4 SLR 556.

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18.38 The liquidator also contended, on grounds of justice and fairness, that the estate costs rule should not extend to pre-liquidation costs, and such extension would have a chilling effect on liquidators' willingness to litigate on the company's behalf. The court disagreed and correctly emphasised that, in this context, the true concern was the liquidator's potential personal liability for costs. As the Court of Appeal held in *ECRC Land*,[32] a liquidator who breached the estate costs rule was personally liable for any shortfall in the opponent's costs recovery which was caused by the breach. The liquidator's personal liability was subject to two limits: (a) the amount of the receiving party's shortfall; and (b) the amount which the liquidator has paid to the company's creditors (including to the liquidator herself) in breach of the estate costs rule.[33] After all, it is in fact the intended and desired consequence of the estate costs rule (which draws no distinction whether the company is pursuing or defending a claim) that liquidators think carefully before litigating on behalf of the company, no matter how meritorious the litigation. A liquidator who wishes to bring or defend proceedings when the company's assets appear insufficient to satisfy an adverse costs order should seek an indemnity from the creditors for the costs of the litigation.

### *F. Commencement of voluntary liquidation*

18.39 In *Superpark Oy v Super Park Asia Group Pte Ltd*,[34] the Court of Appeal considered whether a voluntary liquidation could be said to have commenced where no special resolution had been passed by its members to wind up the company.

18.40 The directors had lodged the requisite statutory declarations stating that the company was unable to continue business by reason of its liabilities. The directors had also resolved to appoint the second and third respondents as the company's provisional liquidators. In that same resolution, the directors convened two meetings: an extraordinary general meeting to put the company into voluntary liquidation ("EGM 2"); and a creditors' meeting to confirm the appointment of the provisional liquidators. Both meetings were to be held one month after the provisional liquidators were appointed.

18.41 Before EGM 2 was held, the appellant, the company's majority shareholder, held an extraordinary general meeting pursuant to which resolutions were passed purporting to terminate the provisional liquidation and declaring that the company was not to be voluntarily

32 See para 18.33 above.
33 *Ho Wing On Christopher v ECRC Land Pte Ltd* [2006] 4 SLR(R) 817 at [81] and [91].
34 [2021] 1 SLR 998.

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wound up ("EGM 1"). By reason of various procedural irregularities in connection with the calling of EGM 1, the second and third respondents applied to court seeking a declaration that EGM 1 was invalid. They also sought and obtained an order restraining the appellant from taking any action inconsistent with the company being in provisional liquidation ("the Injunction Order").

18.42 In response, the appellant commenced an originating summons ("OS 671") for a declaration that the provisional liquidation and any voluntary winding up of the company would be terminated at EGM 2. The appellant also sought to set aside the injunction orders ("SUM 2859") and further orders restraining the second and third respondents from taking any further steps in the provisional liquidation of the company until EGM 2 was held or further order ("SUM 2791").

18.43 Before OS 671, SUM 2791 and SUM 2859 could be determined, EGM 2 was held on 16 July 2020. At EGM 2, the resolution proposed to put the company into voluntary liquidation was not carried. The creditors' meeting, on the other hand, purported to confirm the appointment of the provisional liquidators.

18.44 Following EGM 2 and the creditors' meeting, the learned judge below determined OS 671, SUM 2791 and SUM 2859, holding that the second and third respondents were permitted to continue disposing of the company's assets under a creditors' voluntary liquidation. The appellant was also given a deadline of 5 August 2020 to either put the company into judicial management or restructure the company, failing which the liquidation process of the company would be allowed to continue to its conclusion.

18.45 The appellant appealed. The parties agreed to dispense with any written grounds of decision. Leave to appeal against the judge's order was also entered by consent. The parties also agreed that the following three questions of law be referred to the Court of Appeal:[35]

> (i) In the event that a voluntary winding up [was] commenced pursuant to s 291(6)(*a*) of the [Companies Act], when and how [could] it be terminated ('Question 1')?
>
> (ii) [Did] s 291(6)(*a*) of the [Companies Act] mean that a voluntary winding commenced upon the directors passing a resolution to appoint provisional liquidators under s 291(1) of the [Companies Act], regardless of whether the members' resolution for voluntary winding up was passed pursuant to s 290 of the [Companies Act] ('Question 2')?

35 *Superpark Oy v Super Park Asia Group Pte Ltd* [2021] 1 SLR 998 at [45].

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> (iii) [Could] the creditors of a company voluntarily wind up a company (assuming the voluntary winding up [had] not already commenced pursuant to s 291(6)(*a*) of the [Companies Act]) and/or appoint liquidators in a voluntary winding up, if the members [had] not passed any resolutions to that effect pursuant to s 290(1)(*b*) of the Companies Act ('Question 3')

On appeal, the appellant, the company's majority shareholder, argued that no creditors' voluntary liquidation had commenced because no special resolution had been passed by its members to put the company into liquidation. The company and the provisional liquidators argued that a creditors' voluntary liquidation had commenced and could not be terminated without a court order specifically stipulating so.

18.46 In addressing the questions put by the parties, the Court of Appeal considered Question 3 to be the logically anterior question: Question 2 dealt with when the voluntary winding up could be said to commence, while Question 1 concerned when any such winding up could be terminated. As such, the Court of Appeal proceeded to address Question 3 first and answered it in the negative for three reasons.

18.47 First, a company could not be voluntarily wound up by its creditors if its members had not passed any special resolutions to that effect. This was evident from the fact that s 290 of the Companies Act plainly and unambiguously provided only two circumstances under which a company could be would up voluntarily. If s 290(1)(*a*) of the Companies Act was not satisfied, the only other stipulated route by which a voluntary winding up could be commenced was if "the company so resolves by special resolution", as stated in s 290(1)(*b*) of the Companies Act.

18.48 Second, it would be contrary to the very notion of voluntariness which underpins the entire distinction between a voluntary and court-ordered or compulsory winding up if a company could be "voluntarily" wound up by its creditors in the absence of a special resolution by its members.

18.49 Third, answering Question 3 affirmatively would effectively render s 290(1)(*b*) of the Companies Act redundant in the context of creditors' voluntary winding up. If the appointment of provisional liquidators and a determination by the provisional liquidators that the company was insolvent could cause a company to enter into liquidation, there would be no real need for a special resolution to be passed by the company's members.

18.50 Turning to Question 2, the Court of Appeal considered that Question 2 was inextricably linked to Question 3. Given that Question 3 was answered in the negative, it followed that a voluntary winding up

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could not be said to commence upon the directors passing a resolution appointing provisional liquidators if the members' special resolution for winding up had not been passed.

18.51 While s 291(6)(*a*) of the Companies Act provides that a voluntary winding up commences when the company's directors lodge the statutory declaration with the Registrar and meetings of the company and of its creditors have been summoned for a date within one month of the date of the declaration, the Court of Appeal held that the provision operated only "where a provisional liquidator has been appointed before the resolution for voluntary resolution was passed".[36]

18.52 As such, the Court of Appeal explained that s 291(6)(*a*) of the Companies Act should be best understood as a provision that retrospectively dated the commencement of the winding up as the time of the lodgement of the declaration (where this had taken place before the resolution for winding up the company was passed). In any other situation, a voluntary winding up commenced at the time the resolution for voluntary winding up is passed. The Court of Appeal reasoned that such an interpretation gave effect to the use of the word "was" in the text of s 291(6)(*a*) of the Companies Act. It would also reflect the fact that consent by the members was needed before a company could be voluntarily wound up.

18.53 In arriving at this conclusion, the Court of Appeal addressed an assortment of practical and policy-related arguments that the respondents had relied upon to support a contrary conclusion.

18.54 First, the respondent argued that if winding up did not commence until a members' voluntary resolution was passed, ss 292 and 299 of the Companies Act would not come into operation. This would allow the company to potentially continue trading, and/or creditors to commence proceeding against it. The Court of Appeal considered that the risk of the company engaging in insolvent trading was more imagined than real because the company could not continue trading unfettered once provisional liquidators had been appointed. Provisional liquidators had and could exercise all the functions and powers of a liquidator in a creditors' winding up subject to such limitation and restrictions as may be prescribed.

18.55 Second, the respondent argued that directors would have to deal with the competing wishes of shareholders and creditors and the company could thus be left "paralysed". The Court of Appeal considered

36 *Superpark Oy v Super Park Asia Group Pte Ltd* [2021] 1 SLR 998 at [73].

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this alleged difficulty to be a non-starter given that provisional liquidators would be appointed. Directors would thus not be placed in any of the alleged parlous situations postulated by the respondents.

18.56 Third, the respondent argued that if winding up were made subject to shareholder approval, creditors in support of liquidation could be incentivised to file concurrent applications to court of compulsory winding up. The Court of Appeal considered any such difficulty to be overstated given that there was nothing wrong with creditors filing concurrent applications for compulsory winding up. Not only was there extensive jurisprudence on this, but there was also nothing objectionable about creditors using the proper mechanism of a compulsory winding-up application to enforce their legal claims. This would accord with the structure of the Companies Act and the distinction between voluntary and compulsory winding up.

18.57 Finally, the respondent contended that if winding up did not commence until the passing of the members' resolution, uncertainty would arise because any transaction entered into between the lodging of the directors' statutory declaration and the shareholders' resolution risked being rendered void if the shareholders decided not to pass the resolution. The Court of Appeal considered the difficulty to be more apparent than real because any transaction between a third-party counterparty and the company would be made through the provisional liquidator and the frequency of such transactions would be considerably reduced with the appointment of the provisional liquidators. Further, if the members' resolution for winding up was passed, the third party's transactions with a provisional liquidator would not prove objectionable. If, on the other hand, the members' resolution was not passed, then there would be no difficulty with the transactions having been entered into because the company could not be said to have commenced voluntary winding up in the first place.

18.58 By reason of the Court of Appeal's decisions on Questions 2 and 3, Question 1 became irrelevant. Because a creditors' voluntary winding up did not exist on the facts due to a lack of a members' resolution for winding up having been passed, no issue of its termination arose on the facts. In the circumstances, the appeal was allowed.

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## III. Judicial management

### *A. Intervention in judicial manager's exercise of discretion*

18.59 *Re HTL International Holdings Pte Ltd*[37] is the first reported decision of the High Court where the court considered the question of when or under what circumstances the shareholders or creditors of a company could apply to court for relief under s 227R of the Companies Act[38] in respect of a decision made by the company's judicial managers in the exercise of their discretion. The High Court's decision was affirmed on appeal by the Court of Appeal in *Yihua Lifestyle Technology Co, Ltd v HTL International Holdings Pte Ltd*.[39]

18.60 The appellants were the shareholders of HTL International Holdings Pte Ltd ("HTL"), which had been placed under judicial management. The judicial managers of HTL sought to sell its interest in its subsidiaries ("the Asset") and competing offers were received from two parties – Golden Hill Capital Pte Ltd ("Golden Hill") and Man Wah Holdings Ltd ("Man Wah"). The judicial managers eventually sold the Asset to Golden Hill though the shareholders' preferred purchase was Man Wah. The shareholders thus filed an application under s 227R of the Companies Act to set aside the sale of the Asset to Golden Hill and to direct the judicial managers to accept Man Wah's offer.

18.61 The High Court dismissed the shareholders application, finding that the appellants had not shown that the judicial managers' decision to sell the Asset to Golden Hill instead of Man Wah was unfairly prejudicial to the interests of HTL's creditors or members.[40] The shareholders appealed against the decision of the High Court and the Court of Appeal upheld the High Court judge's decision. In reaching its decision, the Court of Appeal set out the relevant principles on the circumstances in which the court would intervene under s 227R of the Companies Act.

18.62 Section 227R of the Companies Act provides, *inter alia*, that the court may intervene in a judicial manager's management of the company if he has managed the company's affairs, business and property in a manner which is unfairly prejudicial to the interests of its creditors or members generally, or of some part of its creditors or members.

37 [2021] 5 SLR 586.
38 Re-enacted as s 115 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).
39 [2021] 2 SLR 1141.
40 *Re HTL International Holdings Pte Ltd* [2021] 5 SLR 586 at [21].

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18.63 The Court of Appeal agreed with the High Court's holding that Parliament had intended that judicial managers be given a wide discretion to employ their skills and expertise in performing their functions, and that judicial managers would be justified in weighing the interest of creditors over those of shareholders of the company. The court would only interfere with a decision of the judicial managers pursuant to s 227R of the Companies Act if it could be shown that their conduct had been plainly wrongful, conspicuously unfair or perverse.

18.64 The Court of Appeal held that a two-stage test ought to be applied to determine whether a judicial manager has acted or proposed to act in a manner which would unfairly harm the interests of the applicant:[41]

> (a) First, it must be shown that the action complained of has caused, or would cause, the complainant to suffer harm in his capacity as a member or creditor ….
>
> (b) Second, the harm caused by the action complained of must be unfair. In this regard, unfairness may stem from the following …:
>
> > (i) 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 interests of the members or creditors; or
> >
> > (ii) a lack of legal or commercial justification for a decision which causes harm to the members or creditors as a whole. This might include a decision to sell the company's assets at an undervalue, or … action … 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[, meaning it is] unable to withstand logical analysis.

Since the shareholders of HTL did not claim to be the subject of differential treatment, the Court of Appeal noted that the threshold for intervention in this case was that of perversity. On the facts, the Court of Appeal found that this threshold had not been crossed and dismissed the appeal.

18.65 First, the Court of Appeal held that the shareholders' assertion that the judicial managers had erred in concluding that Golden Hill's offer would yield higher shareholder returns than Man Wah's offer was entirely without merit. The Court of Appeal saw no reason to disagree with the High Court judge that the judicial managers had correctly assessed that Golden Hill's offer yielded a higher shareholder return than Man Wah's offer. Second, the Court of Appeal found the shareholders' assertion that

41 *Yihua Lifestyle Technology Co, Ltd v HTL International Holdings Pte Ltd* [2021] 2 SLR 1141 at [17].

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the judicial managers' refusal to provide Man Wah with HTL's financials prevented Man Wah from improving its offer to be speculative and without basis.

### *B. Directors' powers in interim judicial management and judicial management*

18.66 In *Ocean Tankers (Pte) Ltd v Rajah & Tann Singapore LLP*,[42] the High Court considered whether the directors of a company retained the legal standing to appoint solicitors and bring an action in the name of the company upon the appointment of interim judicial managers or judicial managers.

18.67 After interim judicial management orders ("IJM Orders") had been granted against Ocean Tankers (Pte) Ltd ("OTPL") and Hin Leong Trading (Pte) Ltd ("HLT"), the directors of OTPL and HLT, the Lims, procured OTPL and HLT to file applications for injunctions against Rajah & Tann Singapore LLP ("R&T"), to restrain R&T from advising and acting for (a) OTPL and HLT in applications for judicial management orders against the companies; and (b) advising and acting for the interim judicial managers and the judicial managers of OTPL and HLT, if they were appointed ("the Injunction actions"). Judicial management orders ("JM Orders") were subsequently also granted against the companies.

18.68 The Lims did not seek the interim judicial managers' consent to bring the Injunction actions either before or after they were filed. The Lims also did not seek the consent of the judicial managers to proceed with the Injunction actions following their appointment. Instead, the Lims purported to unilaterally act on behalf of OTPL and HLT in filing and thereafter proceeding with the Injunction actions.

18.69 Subsequently, R&T applied to strike out the Injunction actions. The applications were filed on the basis that, *inter alia*, the Lims, as directors of OTPL and HLT, did not have the standing, power or authority to cause the companies to commence and proceed with the Injunction actions.

18.70 The High Court held in favour of R&T, finding that upon the making of the IJM Orders, the Lims did not have the legal standing to procure OTPL and HLT to bring the Injunction actions. Further, upon the appointment of the judicial managers, the Lims did not have the legal standing to procure OTPL and HLT to bring (in the sense of proceeding

42 [2021] SGHC 47.

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with) the Injunction actions. The Lims' residuary powers did not extend to bringing the Injunction actions in both instances.

18.71 The key issue the court had to consider was whether the Lims had legal standing to bring and proceed with the Injunction actions. In answering this question, it was relevant that the Injunction actions were filed after the appointment of interim judicial managers over OTPL and HLT. The issue required consideration of the effect that the appointment of the interim judicial managers and the judicial managers over OTPL and HLT had on the powers of the Lims as directors.

18.72 The High Court held that, pursuant to the IJM Orders, the interim judicial managers of OTPL and HLT were, upon their appointment, vested with all the powers and entitlements of judicial managers under the Companies Act, which included the powers vested in the directors. At the same time, the powers of the directors were divested by s 227G(2) of the Companies Act read with the IJM Orders. The interim judicial managers of OTPL and HLT were therefore empowered by the IJM Orders to exercise all the powers of the judicial managers and directors of the companies to the exclusion of the latter. One of the powers that was vested in the interim judicial managers was the power to, *inter alia*, appoint solicitors and to bring proceedings on behalf of the company. Thus, the Lims' contention that they had the power as directors of OTPL and HLT to bring the Injunction actions in the name and on behalf of OTPL and HLT was a non-starter as long as the companies were under interim judicial management.

18.73 The High Court held that, in the same way the IJM Orders vested the powers of judicial managers and the directors on the interim judicial managers of OTPL and HLT and divested the powers of the directors in the process, the judicial managers of the companies were vested with the powers prescribed in ss 227G(2)–227G(4) of and the Eleventh Schedule to the Companies Act upon their appointment pursuant to the JM Orders. As noted above, s 227G(2) divested the directors' powers and vested them in the judicial managers instead. This was also reflected in the terms of the JM Orders. The powers of the judicial managers included the power to retain solicitors and to, *inter alia*, bring proceedings in the name and on behalf of the company. Thus, the Lims' contention that they had the power as directors of OTPL and HLT to bring (in this sense, to proceed with) the Injunction actions in the name and on behalf of OTPL and HLT was again a non-starter as long as the companies were under judicial management.

18.74 That left the question of whether, notwithstanding the appointment of the interim judicial managers and the judicial managers of OTPL and HLT, the Lims had residuary powers as directors and, if

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so, to what extent. From the cases relied upon by the Lims, the High Court found that the directors had at the very least residuary powers to, amongst other things, challenge the appointment of provisional liquidators, liquidators, interim judicial managers or judicial managers on behalf of the company. In the present case, however, the Lims were not seeking to challenge the IJM Orders or the JM Orders in the Injunction actions. They were exercising powers that had been divested from them and vested in the interim judicial managers and the judicial managers, namely, the power to commence proceedings in the name and on behalf of OTPL and HLT and to retain solicitors to advise them.

## IV. Scheme of arrangement

### *A. Scheme moratoria and admiralty writs* in rem

18.75 In *The Ocean Winner*,[43] the High Court was confronted with the question whether the filing of admiralty *in rem* writs ("Writs") fell within the automatic moratorium under s 211B(8) of the Companies Act.[44] The judicial managers of Ocean Tankers (Pte) Ltd ("OTPL") applied to set aside and/or strike out four Writs filed by PetroChina International (Singapore) Pte Ltd ("PetroChina") against four vessels which had been demise chartered by OTPL on the basis that there was a subsisting automatic moratorium under s 211B of the Companies Act in favour of OTPL at the time the Writs were filed. OTPL relied on ss 211B(8)(*c*) and 211B(8)(*d*) of the Companies Act to submit that the Writs could not be filed without leave of court. PetroChina did not obtain leave of court to file the Writs and, instead, took the position that leave of court was not required because the mere filing of the Writs was not prohibited by s 211B(8) of the Companies Act.

18.76 The High Court held that the filing of the Writs did not come within the meaning of ss 211B(8)(*c*) and 211B(8)(*d*) of the Companies Act. As such, no leave of court was required to file the Writs. With respect to whether s 211B(8)(*c*) of the Companies Act applied, the High Court considered the differences between the s 211B moratorium and the moratorium regime for winding up and judicial management. The honourable judge observed that a winding-up moratorium[45] was wider as compared to s 211B of the Companies Act because the primary object

43 [2021] 4 SLR 526.

44 Section 211B of the Companies Act (Cap 50, 2006 Rev Ed) has been re-enacted as s 64 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") while s 211C of the Companies Act has been re-enacted as s 65 of the IRDA.

45 See ss 258–262 of the Companies Act (Cap 50, 2006 Rev Ed), now ss 129–133 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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of the winding-up provisions was to treat all unsecured creditors on a *pari passu* basis. It was important to prevent an unsecured creditor from becoming a secured creditor after a provisional liquidator had been appointed or after the commencement of winding up. Unlike liquidation, judicial management was intended to minimise the depletion of economic resources and offer the unsecured creditor a platform to make his view heard. The judicial management moratorium[46] was to provide breathing space during which plans can be put together to achieve the purposes of judicial management.

18.77 In a proposed scheme of arrangement, the interest of a creditor was different from that of a creditor in liquidation. In a proposed scheme of arrangement, the creditor had an autonomous voting right which could be critical to the jurisdiction of the court to sanction the scheme. The s 211B moratorium served a similar purpose to the judicial management moratorium and was intended to give breathing space to the company to devise or refine a restructuring plan that had the highest chance of being approved by a vote from the creditors at the scheme meeting without distraction by any proceedings that could threaten the creditors' confidence in the success and viability of any scheme. The concern about preventing an unsecured creditor from "stealing a march" on his fellow unsecured creditors in a liquidation context was absent in the context of a proposed scheme of arrangement. The main effect of the "turning" of an unsecured creditor into a secured creditor during a s 211B moratorium was on the classification of creditors.

18.78 Bearing the foregoing in mind, the High Court held that the filing of the Writs only created a statutory lien in favour of the plaintiff. Therefore, it merely *created the security interest* for the plaintiff. The admiralty jurisdiction of the court was not yet invoked. In that limited sense, the action did not substantively "commence" until service of the Writs. The company was not denied any "breathing space" by the mere filing of the Writs. The s 211B moratorium was never intended by Parliament to prevent a claimant's security interest from even being created. Viewed in this context, the mere filing of the Writs, which were meant to create the statutory liens on the Vessels, could not be said to be the commencement of "proceedings" within the meaning of s 211B(8)(*c*) of the Companies Act.

18.79 Even if the filing of the Writs was the commencement of "proceedings" within the meaning of s 211B(8)(*c*) of the Companies Act, the next question was whether such "proceedings" had been commenced

46 See ss 227C and 227D of the Companies Act (Cap 50, 2006 Rev Ed), now ss 95 and 96 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed).

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"against the company", OTPL. The High Court found that, for the purposes of s 211B(8), the filing of the Writs was not "against the company" since it was an action against the *res*.

18.80 With respect to whether s 211B(8)(*d*) of the Companies Act applied, the High Court first considered whether the filing of the Writs was an "execution, distress or other legal process". In this regard, the honourable judge held that the mere filing of a writ was not "execution" because writs of execution are writs to enforce a judgment or order of court. Further, the mere filing of a writ was not "distress", which is the process of distraining movable property to realise an amount of unpaid rent.

18.81 In addition, the honourable judge held that "other legal process" under s 211B(8)(*d*) must mean enforcement processes similar in nature to "execution" and "distress" proceedings. In other words, it must refer to processes to seize the money or property of the company. The High Court found that this narrower interpretation furthered the specific purpose of s 211B of the Companies Act, that is, to provide "breathing space" for the company to develop its scheme proposal. The filing of the Writs merely created the statutory lien and thus the security interest in the ship.[47] There was no element of enforcement by such a step. Without filing the Writs, PetroChina's *in rem* claim did not even arise, and could potentially be permanently prevented from arising if the shipowner terminated the bareboat charter and had the vessel redelivered before any *in rem* writ was filed. Therefore, the filing of the Writs did not come within the meaning of "other legal process" in s 211B(8)(*d*) of the Companies Act.

18.82 The next question which the High Court considered was whether the vessels could be said to be OTPL's "property". The High Court held that, in view of the specific purpose of s 211B of the Companies Act, which was enacted to expand the scope of the moratorium under s 210(10) of the Companies Act, ss 211B(8)(*d*) and 211B(8)(*e*) of the Companies Act were meant to cover the types of property interest which were not previously covered under s 210(10) of the Companies Act. Since a leasehold interest was intended to be covered under the expanded scope of s 211B of the Companies Act, a bareboat charterer's interest in a vessel would be covered. Thus, OTPL's bareboat charter interest in the vessels would come within the meaning of "property" under s 211B(8)(*d*) of the Companies Act.

47 See para 18.18 above.

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18.83 The IRDA[48] now makes it clear that the IRDA's scheme moratoria do not prevent the commencement of any admiralty proceedings. However, the scheme moratoria would prevent the continuation of such proceedings.

### *B. Pre-packaged schemes*

18.84 A pre-pack scheme of arrangement is a pre-negotiated and agreed plan involving major creditors, which is intended to facilitate a quicker and less costly restructuring of a company's debts. Under the pre-pack mechanism, the usual two-stage process under s 210 of the Companies Act of obtaining leave to convene meetings and obtaining court sanction after the meetings is compressed into a single stage of obtaining sanction under s 71 of the IRDA. However, as a meeting is dispensed with, s 71 of the IRDA also builds in certain safeguards to ensure that creditors are not prejudiced by the expedited process.

18.85 *Re DSG Asia Holdings Pte Ltd*[49] is an important decision on the standards of disclosure required in pre-pack schemes under s 71 of the IRDA, and on classification of creditors who are concurrently potential investors in the distressed company.

18.86 The applicant was an entity in a group of companies that previously failed to obtain approval from creditors for a scheme of arrangement under s 210 of the Companies Act. The applicant subsequently solicited votes for a new scheme under the expedited mechanism in s 71 of the IRDA. In the new scheme, the applicant argued that there was no need to treat related creditors' claims differently for the purposes of voting as related creditors' claims had been assigned to a white knight investor for an undisclosed purchase price. Despite creditors' objections, the applicant also considered that the investor should be placed in the same voting class as all other unsecured creditors. This was even though the investor would be acquiring a major stake in the group if the scheme was successful. The High Court agreed with the objections raised by creditors and declined to sanction the pre-pack scheme.

18.87 The High Court prefaced its decision by noting that the expedition and procedural simplicity granted by the s 71 framework should generally be used only for clear cases of agreement to pre-arranged

48 See ss 64(12)(*b*) and 65(7)(*b*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") read with reg 4 of the Insolvency, Restructuring and Dissolution (Prescribed Arrangements and Proceedings) Regulations 2020. This carveout also applies to the judicial management moratoria under the IRDA.

49 [2021] SGHC 209.

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schemes. Where a major creditor objected or the scheme company had difficulty providing information, that was a strong signal that the s 71 process should not be utilised and was probably unavailable. In that situation, the company should use the normal procedure in s 210 of the *Companies Act*, and have matters resolved through actual meetings and voting by creditors.

18.88 The High Court then interpreted s 71 of the IRDA to require an applicant to show that there had been a clear case of proper disclosure to creditors, as well fulfilment of voting requirements, which in turn entailed proper classification of creditors. In this regard, the High Court agreed that the applicant should have disclosed the purchase price paid by the investor to acquire related companies' debt. This information was necessary to enable creditors to assess whether the allocation of loss and division of benefits in the scheme was fair and in their commercial interests.

18.89 The High Court also agreed that the investor and other unsecured creditors could not have sensibly consulted together in the same voting class, with a view to their common interests. It observed that a creditor's interest to support or oppose a scheme could arise out of a right that, though not conferred under the scheme itself, was part of the same restructuring transaction as a matter of commercial reality. Such an interest was a "non-private" interest, which was relevant to classification. If it were otherwise, creditors could enter into agreements that conferred preferential rights without being classed separately simply by making those agreements technically not conditional on the scheme being implemented.

18.90 In this case, the investor had certain rights to acquire the applicant's holding company, which were effectively conditional on the scheme being approved. This was a non-private interest that was significant enough to render the investor unable to consult with other unsecured creditors in the same class. If so, the applicant would not have obtained the requisite statutory majority for approval of the scheme.

18.91 Finally, the High Court also observed in *dicta* that the applicant's device of executing a deed to consolidate and pool the group's debt into one entity for a scheme could have been pushing the envelope but was not of itself a barrier to sanctioning a scheme. In the appropriate case, the court would consider the commercial necessity of such a structure and whether this would override creditors' legitimate interests.

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## V. Bankruptcy

### *A. Stay of bankruptcy proceedings – Relationship with stay of execution of underlying judgment debt*

18.92 In *Seto Wei Meng v Foo Chee Boon Edward*,[50] a judgment debtor applied to stay bankruptcy proceedings brought by a judgment creditor, pending the outcome of his appeal against the underlying judgment. Pertinently, the trial judge had previously allowed a conditional stay of execution of the judgment on which the bankruptcy proceedings were founded. However, the conditional stay was expunged as the judgment debtor failed to satisfy these conditions. This included a condition to file an affidavit listing his assets.

18.93 The High Court dealt with two issues which had not been directly considered in prior local authorities: (a) what standards should guide the court's discretion to stay bankruptcy proceedings, pending an appeal against a judgment debt; and (b) how this discretion should be exercised if the trial judge had earlier denied a stay of execution of the judgment or ordered a conditional stay of execution on conditions which were ultimately not satisfied.

18.94 In declining to stay the bankruptcy proceedings, the High Court rejected the contention that the merits of the appeal should be the only or predominant consideration. Instead, the High Court observed that ss 315(1) and 316(5)(*a*) of the IRDA conferred a broad discretion to grant a stay of bankruptcy proceedings. The mere fact of a pending appeal against the underlying judgment debt was insufficient to justify a stay. Instead, the court had to balance the judgment creditor's interest in obtaining a bankruptcy order against the prejudice occasioned to the judgment debtor if he was made bankrupt pending his appeal. All facts relevant to this inquiry had to be considered. The High Court noted that this standard was not significantly different from the principles governing a stay of execution of the judgment.

18.95 Notably, the High Court then went on to find that the stay application was a blatant collateral attack and backdoor appeal against the trial judge's earlier discharge of a conditional stay of execution. In doing so, the High Court opined that there was a clear relationship between bankruptcy proceedings and the enforcement process, such that there should be a reasonable degree of consistency between both judicial decisions.[51] It would therefore be inconsistent if the bankruptcy

50 [2021] SGHCR 5.
51 *Seto Wei Meng v Foo Chee Boon Edward* [2021] SGHCR 5 at [53].

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proceedings were stayed on the same factual grounds that the trial judge found insufficient for a stay of execution of the underlying judgment.

18.96 While the outcome is indubitably correct, this decision should not be read to suggest that the High Court will inevitably refuse to stay bankruptcy proceedings against a judgment debtor whenever the judgment debtor fails to stay execution of the underlying judgment. On the facts, the judgment debtor could not show that bankruptcy would irreversibly prejudice him prior to his appeal as he had chosen not to disclose any evidence on his assets. There was also a lack of candour in failing to account for the proceeds of a recent sale of property. Accordingly, there were insufficient independent grounds to justify staying the bankruptcy proceedings.

18.97 In the same vein, it is implicit in the High Court's reasoning that not all stay applications under ss 315(1) and 316(5)(*a*) of the IRDA would amount to a collateral attack on a prior decision declining a stay of execution. While the standard for a stay of execution of a judgment might not differ significantly from that of a stay of bankruptcy proceedings founded on that judgment, the two reliefs are distinct and the relevant considerations should not be conflated. The former relief merely suspends one judgment creditor's personal rights to satisfaction of its judgment, while the latter relief delays the onset of a collective statutory regime to manage the judgment debtor's assets for all creditors at large. While the party resisting a stay would normally be the same in both cases, its rights will be affected very differently under each application. The most obvious example is that if the judgment creditor's bankruptcy application were granted, execution of the underlying judgment would also be stayed.

18.98 With respect, the exact relationship between a stay of bankruptcy proceedings and a stay of execution of judgment also warrants further consideration. For instance, in denying a stay of the bankruptcy proceedings, the High Court noted that when the trial judge refused to grant an unconditional stay of execution of the judgment, the trial judge must have been cognisant of the possibility that the judgment debtor would be made bankrupt prior to his appeal.

18.99 However, it is respectfully submitted that this tends to unnecessarily conflate the considerations for the two reliefs. It also appears inconsistent with Quentin Loh J's *dicta* in *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd*[52] ("*Cathay Theatres*"), namely, that the fact that a judgment creditor was actively pursuing a winding up of the judgment debtor would be a special circumstance warranting a

52 [2000] 1 SLR(R) 15 at [13].

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stay of execution of a judgment. If the *dicta* in *Cathay Theatres* is correct, then another judgment debtor in the same situation may find it more productive to undercut a bankruptcy application by seeking a stay of execution of the underlying judgment once bankruptcy proceedings have commenced.

## VI. Avoidance of transactions

### *A. Undervalue transactions*

18.100 In *Rothstar Group Ltd v Chee Yoh Chuang*,[53] the High Court clarified, for the first time in a local decision, that creating a security over a property can amount to an undervalue transaction under s 98(1) of the Bankruptcy Act,[54] if the security was created to secure debts owed by a third party.

18.101 The bankrupt was a director and shareholder of the troubled Agritrade International (Pte) Ltd ("AIPL"). To secure a loan granted by a creditor to AIPL, the bankrupt and his wholly owned special purpose company granted a legal mortgage over their co-owned property in favour of the creditor. This was done shortly before the onset of bankruptcy.

18.102 The High Court was confronted with two ostensibly inconsistent authorities. In *Re MC Bacon Ltd*[55] ("*MC Bacon*"), Millett J held that a mortgage debenture could not be an undervalue transaction. According to Millett J, the grant of security merely appropriated the debtor's assets to meet liabilities due to the secured creditor but did not otherwise deplete the assets or diminish their value. All the debtor lost was the ability to apply the sale proceeds of the assets otherwise than in satisfaction of the secured debt. That loss was not capable of valuation in monetary terms for the purposes of the English equivalent of s 98(3)(*c*) of the Bankruptcy Act, which applied to transactions "for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided" by the counterparty.

18.103 In contrast, the English High Court in *Hill v Spread Trustee Co Ltd*[56] ("*Hill*") held that it was not the case that granting a security could never amount to a transaction for no consideration, for the purposes of

53 [2021] SGHC 176.
54 Cap 20, 2009 Rev Ed.
55 [1990] BCLC 324.
56 [2007] 1 WLR 2404.

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the English equivalent of s 98(3)(*a*) of the Bankruptcy Act (which voids gifts or transactions for no consideration).

18.104 The High Court considered that *MC Bacon* and *Hill* could be reconciled. This was because *MC Bacon* was premised on the value comparison limb in s 98(3)(*c*) of the Bankruptcy Act, while *Hill* dealt with a transaction for no consideration under s 98(3)(*a*) of the Bankruptcy Act.

18.105 On the facts, the High Court found that the legal mortgage granted by the bankrupt could constitute an undervalue transaction because the legal mortgage purported to secure the indebtedness of a *third-party* and not of the bankrupt's own debt. The decision in *MC Bacon* was inapplicable because *MC Bacon* concerned a mortgage granted to secure the insolvent person's own debt.

18.106 This decision provides welcome conceptual clarity to the mischiefs that undervalue transactions are intended to address. The statutory regime on undervalue transactions is intended to prevent the diminution of a bankrupt's estate. A mortgage or charge granted to secure the bankrupt's own debt may affect priorities amongst creditors and may therefore be vulnerable to a challenge as an unfair preference under s 99 of the Bankruptcy Act. However, that mortgage or charge is not an undervalue transaction as it does not result in a net loss to the estate. This is because the appropriation of an asset in favour of the secured creditor would bring about a corresponding reduction in the bankrupt's liabilities. In contrast, appropriating an asset to pay a third party's debt clearly diminishes the bankrupt's estate, as the asset is lost to the estate with no corresponding reduction of the bankrupt's liabilities.

18.107 In *Christie, Hamish Alexander v Tan Boon Kian*,[57] the bankrupt repaid certain loans he took from his siblings. The bankrupt also paid a sum to his daughter which was used for her wedding expenses. The private trustee claimed that the payments to the bankrupt's siblings were an unfair preference, and the payment to the daughter was a transaction at an undervalue.

18.108 For both the preference and undervalue claims, the first issue was whether the bankrupt was insolvent when the payments were made. The court considered both the cash flow and the balance sheet tests on this issue. Although these tests were typically used for companies, it was open to the court to apply them in substance in the context of individuals. In

57 [2021] 4 SLR 809.

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particular, the court should be able to consider the debtor's cash flow and his assets and liabilities in deciding whether he is unable to pay his debt.[58]

18.109 The siblings argued that the bankrupt was not cash flow insolvent at the material time. They claimed they were prepared to give the bankrupt time to repay the loans. On the evidence, the court correctly rejected these arguments. Around the time he made the impugned payments to the siblings, the bankrupt had received letters from his then solicitors demanding payment for their fees, and the siblings had also, through their solicitors, written to the bankrupt to demand repayment of the loans.

18.110 This would have sufficed to address the solvency issue using the cash flow test but the court proceeded to consider the balance sheet test. The siblings argued that the bankrupt was not balance sheet insolvent and was in fact asset rich (he apparently owned a number of properties including a hotel). The court rightly observed that a debtor who was asset rich could still be insolvent if he was unable to repay his debts as they fall due.[59] Nonetheless, the court carefully examined the evidence on the value of the various properties, the value of the bankrupt's interest in them after the necessary deductions, and compared that with the bankrupt's total liabilities, including his contingent liabilities. The bankrupt was ultimately balance sheet insolvent.

18.111 The next issue was whether the bankrupt was influenced by a desire to prefer his siblings. There was a rebuttable presumption of such a desire because the siblings were the bankrupt's associates[60]. In the court's view, to rebut this presumption, the siblings had to show, on a balance of probabilities, that the payments were not influenced *at all* by any desire by the bankrupt to place them in a preferential position.[61] They failed to do so. The evidence was that the bankrupt repaid his siblings to show his appreciation and gratitude to them. His siblings were the family members who had been the most financially supportive of him.

18.112 There was an argument that the bankrupt was not influenced by a desire to prefer because he did not know or believe he was insolvent or facing bankruptcy. The Court of Appeal in *Coöperatieve Centrale Raiffeisen-Boerenleenbank BA v Jurong Technologies Industrial Corp Ltd*[62] had remarked that the lack of such knowledge had nothing to do with the

58 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 61.
59 *Living the Link Pte Ltd v Tan Lay Tin Tina* [2016] 3 SLR 621 at [28].
60 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 99(5).
61 *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd* [2010] 4 SLR 1089 at [36].
62 [2011] 4 SLR 977 at [31]–[32].

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desire to prefer. That is correct as a matter of principle and statute. The court in the instant case did not as far as deciding that such knowledge is irrelevant in every case,[63] as it was sufficient to hold that the recipients failed to rebut the presumption of a desire to prefer.

18.113 With respect to the payment to the bankrupt's daughter, it was effectively a gift to her and used for her wedding expenses. As the daughter was an associate of the bankrupt, there was a rebuttable presumption that he was insolvent.[64] On the facts, the court rightly decided that the payment should be set aside as a transaction at an undervalue.

18.114 In light of the court's decision for the siblings and the daughter to transfer the impugned payments to the private trustee, the court was of the view that it was not necessary to make a declaration sought by the private trustee that the payments were void or voidable.[65] It is not apparent from the grounds of the decision why the private trustee sought such a declaration. For instance, it is not apparent from the facts that third-party interests have intervened such that it may be necessary to obtain such a declaration.

### *B. Disposition of assets after bankruptcy application*

18.115 The decision in *Ong Dan Tze Magdalene v Chee Yoh Chuang*[66] ("*Ong Dan Tze Magdalene*") is another illustration of how the personal bankruptcy regime interacts with the family law regime.

18.116 The applicant commenced divorce proceedings against her husband after becoming aware of a creditors' statutory demand against her husband, and of demand letters against her husband for debts of about US$1.9m. Shortly after the divorce proceedings commenced, a bank creditor commenced a bankruptcy application in the High Court against the applicant's husband.

18.117 Between the time of the bankruptcy application and the eventual bankruptcy order, the applicant obtained interim orders from the Family Justice Courts for the dissolution of her marriage. The interim orders included the following consent orders:

63 *Christie, Hamish Alexander v Tan Boon Kian* [2021] 4 SLR 809 at [72].
64 Bankruptcy Act (Cap 20, 2009 Rev Ed) s 100(3).
65 Under ss 98 and 99 of the Bankruptcy Act (Cap 20, 2009 Rev Ed).
66 [2021] SGHC 129.

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(a) A River Valley property was to be sold within six months of final judgment, with the balance proceeds to be paid to the applicant.

(b) Her husband's interests in a West Coast property would be transferred to her for no cash consideration.

18.118 Under ss 77(1) and 77(3) of the Bankruptcy Act (now retained in ss 328(1) and 328(3) of the IRDA), where a person is adjudged bankrupt, any disposition of property made by him during the period from the making of the bankruptcy application to the making of the bankruptcy order shall be void. This is so unless the disposition is made with the consent of, or subsequently ratified by, the court. This does not, however, give any remedy against a person in respect of property or payment which he received from the bankrupt before the commencement of the bankruptcy in good faith, for value and without notice of the bankruptcy application.

18.119 The High Court rejected the applicant's attempt under s 71 of the Bankruptcy Act to ratify the purported dispositions contemplated in the interim divorce orders. The key issue was that, unbeknownst to the Family Justice Courts, the River Valley property had already been sold at the time the interim divorce orders were granted and the balance proceeds already paid to the applicant. This meant that the interim divorce orders incorrectly contemplated that the River Valley property was still a matrimonial asset and did not contemplate that it had already been sold, or that the sale proceeds constituted a matrimonial asset available for distribution. Accordingly, the applicant could not establish that the interim orders gave rise to a "disposition" of sale proceeds within the meaning of s 77(1) of the Bankruptcy Act. Further, as the applicant had deceived the Family Justice Courts when she obtained the interim orders, ratification would be declined on the basis of lack of good faith.

18.120 The High Court similarly declined to ratify the bankrupt's purported disposition of his interest in the West Coast property. The applicant provided no evidence of how the bankrupt's creditors would have benefited from his disposal of his interests in the property for no cash consideration.

18.121 *Ong Dan Tze Magdalene* may be contrasted with that in in *Sutherland, Hugh David Brodie v Official Assignee*[67] ("*Sutherland*"). In *Sutherland*, the applicant paid part of the sum owed by the debtors to a bank holding a mortgage over the debtors' property. The bank did not

67 [2021] 4 SLR 752.

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enforce its mortgage because of such payment, and the debtors were then able to sell the property on the open market to obtain a higher price. In return, the debtors assigned to the applicant the surplus sale proceeds of the property after the bank was fully repaid, such that the applicant would be paid ahead of the debtors' other unsecured creditors. The debtors were thereafter made bankrupt. The Official Assignee argued that the assignment was void pursuant to s 77 of the Bankruptcy Act because it was entered into after bankruptcy applications were made against the debtors. The applicant sought to ratify the assignment. The court agreed to do so.

18.122 In the court's judgment, the objective of s 77 of the Bankruptcy Act was to preserve the debtor's assets for orderly and rateable distribution to the general body of creditors. In deciding whether to ratify an arrangement under s 77, the court would consider whether ratification promoted rather than undermines the objective of the legislative provision. The court would assess whether, at the time the disposition or arrangement was made, it was in the interests of and likely to benefit the general body of creditors. Good faith, notice and value given would also be relevant in the exercise of discretion by the court.

18.123 On the facts, the court was of the view that the applicant had acted in good faith, and the assignment benefited the debtors' general body of creditors. They benefited in not having to deduct from the sale proceeds of the amount of interest payable to the mortgagee bank on the sum paid by the applicant. It would be unfair for the unsecured creditors to benefit from this saving, and in addition share rateably in the sum paid by the applicant, if the assignment was void.

### *C. Voluntary arrangement*

18.124 A debtor who wishes to propose a voluntary arrangement may apply to court for interim moratorium protection, in the form of an interim order, against bankruptcy applications and other proceedings. This is intended to allow the debtor time to formulate a proposal for the creditors' consideration. It is easy to see how the interim order process may be abused by debtors who do not have any genuine intention or basis for the restructuring of his debts. The High Court in *Re Sifan Triyono*[68] gave a timely reminder on the requirements a debtor must satisfy in order to obtain an interim order.

68 [2021] 4 SLR 656.

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18.125 The High Court first set out the "gateway conditions" which must be satisfied for an interim order application under s 276(1) of the IRDA, including the debtor's intention to make a proposal for a voluntary arrangement, no previous interim order application having been made during the immediately preceding 12 months, and the appointment of a nominee who was qualified and willing to act.[69] As the court rightly noted, once the gateway conditions were satisfied, the court would then consider if it would be "appropriate" to make an interim order "for the purpose of facilitating the consideration and implementation of the debtor's proposal".[70] This was an exercise of discretion by the court.

18.126 On the meaning of "appropriate", the court referred to case law which held, among other things, that it would not be appropriate to make an interim order if the debtor's proposal was not "serious and viable".[71] An assessment of whether a proposal is serious and viable was fact sensitive. Examples of proposals which were not included those where there was no information on the debtor's assets, details of creditors were inaccurate, or there was no evidence of the substance of claims which the debtor wishes to pursue to fund his repayment proposal.[72]

18.127 The court in *Re Sifan Triyono* then emphasised that an interim order was a serious incursion into the rights of creditors. As such, the court would filter out proposals which were not serious and viable so as to avoid unnecessary and wasteful convening of creditors' meetings. In the court's view, a serious and viable proposal must contain sufficient details at the outset. If there was no apparent likelihood of benefit to the creditors or any real prospect of the proposal being productive, the court should as a matter of discretion dismiss an interim order application.

18.128 In this case, the source of funds for the debtor's proposal was primarily a debt owed by an Indonesian company ("KTP") to the debtor. The court was not persuaded there was a serious and viable proposal and dismissed the debtor's interim order application. Among other things, KTP itself was in financial distress and there was insufficient information and clarity on how KTP would be able to repay the debtor. Even more fundamentally, the legal basis of the debtor's claim against KTP was unclear. It was also uncertain if there was any effective way to enforce a claim against KTP.

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69 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 279(1).
70 Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) s 279(2).
71 *Hook v Jewson Ltd* [1997] BCC 752; *Cooper v Fearnley* [1997] BPIR 20.
72 Such were the facts in *Hook v Jewson* [1997] BCC 752, as noted by the court in *Re Sifan Triyono* [2021] 4 SLR 656 at [30].

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18.129 In arriving at its decision, the court rightly carried out a fairly detailed review[73] of the financial information of KTP, including its profits and losses, and projected revenues to assess whether the debtor's proposal based on KTP's ability to pay was serious and viable. The debtor chose not to respond or clarify the court's concerns on what seemed to be fundamental aspects of the proposal, but instead asserted there should not be such level of scrutiny.[74] In such circumstances, it was entirely justified for the court to decide that the debtor had failed to discharge his burden to demonstrate a serious and viable proposal. However, the burden is to present a serious and viable proposal, not one which is bound to succeed. In a hypothetical scenario where the debtor is able to put forth a credible explanation and basis for KTP's ability to pay under the proposal, the outcome of the interim order application may well be different.

## VII. Cross-border insolvency

18.130 Singapore adopted the Model Law in 2017. Whilst the Singapore High Court has considered the application of the Model Law on a number of occasions,[75] the Court of Appeal did so for the first time in *United Securities Sdn Bhd v United Overseas Bank Ltd*.[76] The key issue was whether legal proceedings in Singapore should be stayed following the recognition of a foreign main proceeding in Malaysia.

18.131 The first appellant ("USSB"), a company incorporated in Malaysia, was wound up by the Malaysian court ("the Malaysian Winding-up Proceeding"). The second appellant was USSB's liquidator. USSB was the beneficial owner of shares in another company ("CCSB") which had also been wound up by the Malaysian court.

18.132 As security for a loan granted by the respondent bank, USSB granted in favour of the respondent a fixed charge over the shares in CCSB. USSB defaulted on the loan. Both USSB and CCSB were subsequently wound up in Malaysia. CCSB's assets were sold and surplus funds remained after it paid its debts. Parallel proceedings were commenced in Malaysia and Singapore concerning USSB's and the respondent's rights and obligations under the loan and the fixed charge.

18.133 In the Malaysian writ action, USSB applied to the Malaysian court for, among other things, a declaration that the surplus funds were

73 See *Re Sifan Triyono* [2021] 4 SLR 656 at [51]–[53].
74 See *Re Sifan Triyono* [2021] 4 SLR 656 at [54].
75 *Re Zetta Jet Pte Ltd* [2018] 4 SLR 801; *Re Zetta Jet (No 2)* [2019] 4 SLR 1343; *Re Rooftop Group International Pte Ltd* [2020] 4 SLR 680.
76 [2021] 2 SLR 950.

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not subject to the fixed charge and that the respondent was not entitled to the surplus funds. The respondent applied to the Singapore courts for, among other things, a declaration that its rights under the fixed charge, including its security over the shares in CCSB and the surplus funds, were valid and exercisable ("the Singapore Proceeding").

18.134 The focus for present purposes is on the appellants' application seeking the Singapore court's recognition of the Malaysian Winding-up Proceeding and the Malaysian writ action as a foreign main proceeding or a foreign non-main proceeding under the Model Law. Consequent to such recognition, the appellants sought a stay of the Singapore Proceeding pursuant to Arts 20 and/or 21 of the Model Law.

18.135 The Court of Appeal declined to stay the Singapore Proceeding. In reaching its decision, the Court of Appeal set out some of the applicable principles regarding the Model Law. As an overarching objective, the Model Law allows a domestic court to stay domestic action or proceedings once foreign insolvency proceedings are commenced so as to facilitate the organised conduct of cross-border insolvency. However, the Model Law contains certain exceptions to such stay or restraining orders.

18.136 Article 20(1) of the Model Law states that upon recognition of a foreign proceeding as a foreign main proceeding, a stay of actions or proceedings concerning the debtor's property automatically arises. This is subject to Art 20(2), which delineates the ambit of the stay – the stay is the same as what would have been available under Singapore law had the debtor been wound up in Singapore. This means the stay would be subject to the same powers of the court and the same exceptions and conditions under Singapore law. Further, Art 20(3) provides that the stay does not affect the rights of the creditor to (among others) take any steps to enforce security over the debtor's property.

18.137 It was common ground that the Malaysian Winding-up Proceeding was a foreign main proceeding under the Model Law and an automatic stay arose under Art 20(1). However, this did not mean the Singapore Proceeding should be stayed. Under Singapore law, the court would generally allow secured creditors to enforce their security, notwithstanding any stay of proceedings that arose upon the winding up of the debtor.

18.138 The respondent was *prima facie* a secured creditor. The Singapore Proceeding was directed at allowing the respondent to establish its rights as a secured creditor against USSB. As such, notwithstanding the recognition of the Malaysian Winding-up Proceeding as a foreign main proceeding and the resulting automatic stay, the Court of Appeal allowed the respondent to proceed with the Singapore Proceeding.

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18.139 The Court of Appeal also considered the application of Art 21 of the Model Law, which provides that, upon recognition of a foreign (non-main) proceeding, the court may grant appropriate relief to protect the property of the debtor or the interests of the creditors, including a stay of proceedings. The Court of Appeal declined to grant a discretionary stay of the Singapore Proceeding pursuant to Art 21 as it was not necessary to protect the property of USSB or the interests of the creditors. The respondent was a secured creditor, and its security stood apart from the pool of assets available for distribution amongst unsecured creditors.

18.140 The decision to allow the Singapore Proceeding to proceed notwithstanding the recognition of the Malaysia Winding-up Proceeding was sufficient to dispose of the appeal. Nonetheless, the Court of Appeal set out its views on whether the Malaysian writ action could, in any event, be recognised as a foreign proceeding under the Model Law.

18.141 To constitute a foreign proceeding under the Model Law, (a) the proceeding must involve creditors collectively; (b) it must have its basis in a law relating to insolvency; (c) the court must exercise control or supervision of the property and affairs of the debtor in the proceeding; and (d) the purpose of the proceeding must be the debtor's re-organisation or liquidation. The Court of Appeal was of the view that the Malaysian writ action, which was in essence to establish and vindicate the appellants' private rights, bore none of these attributes, and was not a foreign proceeding under the Model Law.

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