IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2023] SGCA 38

Court of Appeal / Civil Appeal No 6 of 2023

Between

Rashmi Bothra

… *Appellant*

And

(1) SuntecCity Thirty Pte Ltd
(2) Jason Aleksander Kardachi
(3) Patrick Bance

… *Respondents*

In the matter of Companies Winding Up No 234 of 2022

Between

Rashmi Bothra

… *Claimant*

And

SuntecCity Thirty Pte Ltd

… *Respondent*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Appointment of liquidator]

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v
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Judith Prakash JCA, Belinda Ang Saw Ean JCA, Kannan Ramesh JAD
4 August 2023

8 November 2023

Kannan Ramesh JAD (delivering the grounds of decision of the court):

Introduction

1 The present appeal concerned two applications, HC/CWU 234/2022 ("CWU 234") and HC/CWU 244/2022 ("CWU 244"), brought to wind up the first respondent, SuntecCity Thirty Pte Ltd (the "Company"), under s 125(1)(*i*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA"). The applicants in CWU 234 and CWU 244 were Rashmi Bothra ("Rashmi") and Nimisha Pandey ("Nimisha") respectively. Nimisha was not a party to the present appeal, which was Rashmi's appeal against the Judge's decision in CWU 234.

2 On 18 January 2023, the Judge below (the "Judge") heard CWU 234 and CWU 244. On 19 January 2023, he dismissed CWU 244 and made a winding up order against the Company as regards CWU 234. The Judge, however, did

not accept Rashmi's nominees for appointment as liquidators, instead preferring and appointing the nominees of Jason Aleksander Kardachi and Patrick Bance ("Bance"), the second and third respondents in the appeal. The second and third respondents were the joint and several private trustees (the "PTs") of the estate of Rajesh Bothra ("Rajesh"), who had been adjudged a bankrupt on 25 February 2021. The PTs were not parties to CWU 234 and CWU 244. At the hearing on 18 January 2023, they opposed CWU 234 and the appointment of Rashmi's nominees as liquidators and put forward their own nominees for appointment as liquidators. The Judge provided his reasons in a detailed oral judgment (the "Judgment").

3 The sole issue in the present appeal was whether the Judge was correct in appointing the PTs' nominees as liquidators and rejecting Rashmi's nominees. It was pertinent that, on appeal, Rashmi did not seek the appointment of her nominees. Instead, she sought the appointment of liquidators of the court's choice. Notably, this was also the PTs' alternative position before the Judge. On 4 August 2023, after hearing oral submissions, we allowed Rashmi's appeal and set aside the Judge's appointment of the PTs' nominees as liquidators. We stayed the order pending the appointment of new liquidators and directed Rashmi and Nimisha to submit within two weeks: (a) a joint nomination of new liquidators to be appointed; and (b) in the event they could not agree, a list of three nominees each, with objections (if any) to the nominees proposed by the other. On 18 August 2023, Rashmi and Nimisha jointly nominated Tam Chee Chong ("Tam") of Kairos Corporate Advisory Pte Ltd. On 22 August 2023, we appointed Tam as the sole liquidator of the Company.

Background

4 Rajesh is Rashmi's husband. Rashmi and Rajesh were close friends of Nimisha and her husband, Deepak Mishra ("Deepak").

5 The Company was a special purpose vehicle incorporated on 12 February 2016 for the sole purpose of purchasing and holding Rashmi and Nimisha's investment in several office units at 9 Temasek Boulevard #30-01/02/03, Suntec Tower 2, Singapore 038989 (collectively, the "Property"). Rashmi and Nimisha were the registered shareholders of the Company at all material times, each with 50% shareholding.

6 Rajesh and Deepak were appointed the first directors of the Company. On 6 September 2019, Deepak stepped down as director. On the same day, Nimisha was appointed as director in his place. On 23 December 2020, Rajesh stepped down as director. Nimisha remained as the sole director. Rashmi did not hold office as a director at any time.

7 On 15 February 2016, the Company exercised the option to purchase the Property for approximately $29m. Rajesh and Deepak contributed in equal shares towards the purchase of the Property. We address Rajesh's contribution in greater detail at [9] below. Subsequently, on or about August or September 2022, the Property was sold by the Company for $38.75 million. The net sale proceeds were transferred to Rashmi's solicitors, Rajah & Tann Singapore LLP, to be held in escrow pending resolution of Rashmi and Nimisha's dispute over the distribution of the sale proceeds. In the event, Rashmi and Nimisha could not agree.

8 In view of the impasse, on 23 November 2022, Rashmi filed CWU 234. On 9 December 2022, Nimisha filed CWU 244. While Rashmi and Nimisha

agreed that the Company was solvent, they alleged that with the sale of the Property, the Company's substratum had been fulfilled and it no longer had a business purpose. It should therefore be wound up on the just and equitable ground stated in s 125(1)(*i*) of the IRDA.

9 An issue that arose in CWU 234 was whether the shares registered in Rashmi's name ("Rashmi's Shares") were beneficially hers. The issue arose because 50% of the purchase price for the Property, representing Rajesh's contribution, was funded by Fareast Distribution and Logistics Pte Ltd ("Fareast"), which was incorporated by Rajesh who was its sole director and shareholder then. The registered shareholder of Fareast subsequently changed from Rajesh to Fausta Limited ("Fausta"). Rajesh was also the sole registered shareholder of Fausta. Subsequently, on or about 1 July 2014, Ooi Ai Ling ("Ooi"), Rajesh's personal assistant, became a registered shareholder of Fareast following Fausta's transfer of 500,000 of its shares in Fareast to her. Finally, on or about 21 February 2018, Ooi become the sole shareholder of Fareast when Fausta transferred its remaining shares to Ooi. The PTs alleged that notwithstanding these transfers, Ooi held the Fareast shares that were transferred to her by Fausta on trust for Rajesh and he was the ultimate beneficial owner of Rashmi's Shares. As such, Rashmi's Shares were beneficially owned by Rajesh's estate in bankruptcy. Rashmi challenged the PTs' position, asserting that she and Rajesh shared a common intention that Rashmi's Shares would be hers. While Rashmi accepted that the funds for the purchase of the Property did come from Fareast, she asserted that she was the beneficial owner of the shares in Fareast and Fausta. In support of this contention, Rashmi relied on four declarations of trust which were allegedly executed by Rajesh and Ooi in favour of Rashmi (the "Declarations of Trusts"). Nimisha and the PTs alleged that the Declarations of Trusts were backdated.

10 The PTs' claim to the beneficial ownership of Rashmi's Shares was key to their challenge against the appointment of Rashmi's nominees. The PTs submitted that the liquidators had to distribute the net sale proceeds of the Property to the beneficial owner of Rashmi's Shares and in order to do so, the liquidators would have to first determine who the beneficial owner was. In view of Rashmi's claim to the beneficial ownership of Rashmi's Shares, her nominees were unsuitable for appointment as they would need to investigate that very issue. Notably, the PTs did not address whether the same argument might apply to their nominees. We consider this at [37] below. Nimisha aligned herself with the PTs' position on the beneficial ownership of Rashmi's Shares as well as their challenge against Rashmi's nominees. Nimisha also challenged CWU 234 asserting that Rashmi did not come to court with clean hands because she falsely claimed that she was the beneficial owner of Rashmi's shares.

11 The Judge accepted the PTs' argument that Rashmi's nominees were unsuitable for appointment. He cited two reasons for his conclusion. First, he was of the view that the liquidators had to determine the beneficial ownership of Rashmi's Shares as it was their duty to distribute the net sale proceeds of the Property to the beneficial owner of the shares. Second, he was of the view that the liquidators would "objectively need to investigate into Rashmi's (and Rajesh's) financial affairs … as part of their duties to realise the assets of the Company" and that it "appear[ed] problematic that Rashmi, Rajesh and [Ooi] [had] relied on documents that [had] been intentionally backdated…". This was a reference to the Declarations of Trusts. Rashmi's nominees were thus unsuitable for appointment. The Judge also found Nimisha's nominees to be unsuitable for appointment, as it was likely that her financial affairs had to also be investigated. In the circumstances, the Judge appointed the PTs' nominees as the liquidators.

Issue in the present appeal

12 As noted earlier, the sole issue in the present appeal was whether the Judge was correct in appointing the PTs' and rejecting Rashmi's nominees. This raised for consideration the following sub-issues:

(a) Did the PTs have *locus standi* to nominate liquidators?

(b) Was the Judge correct in rejecting Rashmi's nominees?

Our decision

Whether the PTs had* locus standi *to nominate liquidators

13 We began by considering whether the PTs had standing to nominate liquidators in CWU 234. This was a separate question from the weight that should be attributed to a nomination, a point which did not arise in the present appeal. If the correct answer to this question was no, the Judge would have erred in principle in exercising his discretion to appoint the PTs' nominees. With respect, we were of the view that the Judge had indeed erred in appointing the PTs' nominees as liquidators because the PTs did not have standing to make a nomination. We explain.

14 As highlighted at [1] above, CWU 234 was brought under s 125 of the IRDA. Section 125 falls under Division 2, Part 8 of the IRDA, which relates to winding up by the court. Section 135, which also falls within Division 2, is a useful starting point for the analysis. The section requires an applicant in a winding up application under s 125 of the IRDA to nominate in writing a licensed insolvency practitioner to be appointed as liquidator. As the applicant in CWU 234, Rashmi made her nomination. However, s 135 does not state that *only* the applicant may nominate and thus does not stand in the way of others making a nomination. The question then is *who* has standing to nominate.

15 We were of the view that any party who has standing to bring a winding up application under s 125 of the IRDA has the concomitant right to make a nomination. This is correct as a matter of principle. It is consistent with s 135 of the IRDA, which recognises that the applicant, who is necessarily a party who has standing to bring an application for a winding up order under s 125 of the IRDA, has the concomitant standing to nominate the liquidator.

16 This is also consistent with r 74 of the Insolvency, Restructuring and Dissolution (Corporate Insolvency and Restructuring) Rules 2020 (the "IRDR"). Rule 74(1) provides that the court may substitute an applicant in a winding up application under s 125 of the IRDA with any other person upon such terms as it thinks just. Rule 74(2)(*a*) further provides that the "substitute applicant" shall be a party who would have a right to make the winding up application. This brings the inquiry to the categories of entities/persons listed in s 124(1) of the IRDA who may bring a winding up application under s 125 of the IRDA. The "substitute applicant" will therefore have to be within one of the prescribed categories in s 124(1) and must make a nomination under s 135 upon substitution.

17 Section 124(1) of the IRDA lists the categories as follows:

> **Application for winding up**
>
> **124.**—(1) A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the application of one or more of the following:
>
> (*a*) the company;
>
> (*b*) any director of the company;
>
> (*c*) any creditor, including a contingent or prospective creditor, of the company;
>
> (*d*) a contributory, any person who is the personal representative of a deceased contributory, or the Official Assignee of the estate of a bankrupt contributory;

> (*e*) the liquidator of the company;
>
> …

18 Accordingly, unless a party falls within any of these categories, it does not have standing to make a nomination. Did the PTs qualify? The PTs relied on two bases for *locus standi*. First, that Rajesh was a contributory as he was the beneficial owner of Rashmi's Shares. Second, that Rajesh was a creditor of the Company. We address each in turn.

Rajesh was not a contributory under the IRDA

19 Even assuming Rajesh was the beneficial owner of Rashmi's Shares, were the PTs as representatives of his estate in bankruptcy entitled to make a nomination? We were of the view that they were not.

20 The inquiry starts with the question of whether a beneficial owner of shares is a "contributory" under the IRDA. Section 124(1)(*d*) states that a "contributory" may make an application for winding up. "Contributory" is defined in s 2(1) of the IRDA (which adopts the definition in s 4(1) of the Companies Act 1967 (2020 Rev Ed) (the "Companies Act")) as follows:

> "contributory", in relation to a company, means *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; …
>
> [emphasis added]

21 Section 121 of the IRDA states that "every present and past member" is liable to contribute to the assets of the company in a winding up. Section 2(1) of the IRDA defines "member" with reference to ss 19(6) and 19(6A) of the Companies Act, of which ss 19(6)(*b*) and 19(6A)(*b*) are pertinent, as the Company is a private company. These provisions state that "members" of a

company are those entered in the electronic register of members maintained by the Registrar under s 196A of the Companies Act. As regards the Company, Rashmi and Nimisha were "members".

22 Section 152 of the IRDA is also pertinent. For the purpose of s 121, s 152(1) requires the court to settle a list of contributories and cause the assets of the company to be collected and applied in discharge of liabilities of the company as soon as possible after making a winding up order. In this regard, s 152(2) allows the court to rectify the register of members. The court's duty under s 152 is delegated to the liquidator under rr 113 and 114 of the IRDR, which provide as follows:

> **Liquidator to settle list of contributories**
>
> **113.** The powers and duties of the Court under section 152 of the Act are to be exercised by the liquidator of a company as an officer of the Court and subject to the provisions of this Division.
>
> **Appointment of time and place for settlement of list**
>
> **114.**—(1) The liquidator must as soon as possible after his or her appointment settle a list of contributories of the company, and must appoint a time and place for that purpose.
>
> (2) The liquidator must —
>
> (*a*) give notice in writing of the time and place appointed for the settlement of the list of contributories to every person whom the liquidator proposes to include in the list; and
>
> (*b*) state in the notice to each person in what character and for what number of shares or extent of interest the liquidator proposes to include such person in the list.

23 Thus, it is evident that the scheme of ss 121 and 152 of the IRDA read with rr 113 and 114 of the IRDR is that the members, present and past, are contributories for the purpose of a winding up ordered by the court. Such members have to contribute to the assets of the company in the manner and to

the extent provided for in s 121. Accordingly, only a present or past member would be a contributory for the purposes of the IRDA. It was clear from the above that Rashmi was a member and therefore a contributory of the Company. She therefore had standing to bring an application to wind up the Company and to nominate liquidators as required by s 135. She would also have standing to nominate even if she was not the applicant. It was also equally clear that Rajesh was not a member and therefore not a contributory of the Company. He therefore did not have *locus standi* to nominate a liquidator. The PTs as representatives of Rajesh's estate in bankruptcy could not do more than he could.

24 The PTs submitted that s 152(4) of the IRDA and r 115(2) of the IRDR were pertinent to whether Rajesh was a contributory. Section 152(4) of the IRDA, referenced in r 115(2) of the IRDR, states as follows:

> (4) In settling the list of contributories, *the Court must distinguish between persons who are contributories in their own right and persons who are contributories by reason of being representatives of others*, or by reason of being liable for the debts of others.
>
> [emphasis added]

25 It is apparent from s 152(4) of the IRDA that the court is required to distinguish between persons who are "contributories in their own right" and those who are "contributories by reason of being representative of others". Rule 115(2) of the IRDR reinforces this by referring back to s 152(4). It states as follows:

> **Provisional list of contributories**
>
> **115.**—(1) The provisional list of contributories in Form CIR-33 must contain a statement of the address of, and the number of shares or extent of interest to be attributed to, each contributory, and must distinguish the several classes of contributories.

> (2) *In the case of representative contributories, the liquidator must, so far as practicable, observe the requirements of section 152(4) of the Act.*
>
> [emphasis added]

26 The PTs' argument was that Rajesh fell into the first category in s 152(4), *ie*, that he was a contributory in his own right by reason of being the beneficial owner of Rashmi's Shares. There were two fundamental problems with their argument. First, the PTs' case disregarded the definition of "contributory" as outlined at [20]–[21] above. In interpreting s 152(4) of the IRDA, regard must be had to the context of that provision within the written law as a whole: *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [37]. A plain reading of "contributories in their own right" and "persons who are contributories by reason of being representatives of others" in s 152(4) must mean that such person or entity fulfils the definition of "contributory" as *per* s 2(1) of the IRDA. To qualify as a contributory, the person or entity must be a "member", which Rajesh was not. Therefore, the distinction in s 152(4) of the IRDA and r 115(2) of the IRDR between persons who are contributories in their own right and persons who are not did not assist the PTs. In either situation, the relevant person on the list of contributories drawn up under s 152(1) of the IRDA is the member and the liquidators' interactions are with that person for the purpose of the section.

27 Second, the term "contributories by reason of being representatives of others" in s 152(4) of the IRDA is in fact a reference to s 123 of the IRDA. Notably, the language of "representative" is also used in s 123 of the IRDA. Section 123 states as follows:

> **Contributories in case of death or bankruptcy of member**
>
> **123.**—(1) If a contributory (called in this subsection the deceased contributory) dies, whether before or after being placed on the list of contributories —

> (*a*) the deceased contributory's personal representatives are liable in due course of administration to contribute to the assets of the company in discharge of the deceased contributory's liability, and are contributories accordingly; and
>
> (*b*) if the deceased contributory's personal representatives default in paying any money ordered to be paid by them, proceedings may be taken for administering the estate of the deceased contributory and for compelling payment out of the estate of the deceased contributory of the money due.
>
> (2) If a contributory (called in this subsection the bankrupt contributory) becomes bankrupt or assigns his or her estate for the benefit of his or her creditors, whether before or after being placed on the list of contributories —
>
> (*a*) the bankrupt contributory's trustee must represent the bankrupt contributory for all the purposes of the winding up and is a contributory accordingly; and
>
> (*b*) there may be proved against the bankrupt contributory's estate the estimated value of the bankrupt contributory's liability to future calls as well as calls already made.

28 The text of s 123 is clear. In a situation where the contributory has passed on or become a bankrupt, the personal representative, or the Official Receiver or trustee in bankruptcy, as the case may be, will step into the shoes of the contributory and be regarded as the contributory for the purpose of the winding up. However, in settling the list of contributories, the liquidator must recognise the fact that they are contributories in these representative capacities. Reading s 152(4) with s 123, a person who is a "contributory by reason of being [a representative] of [another]" must therefore be the personal representative of the estate, the Official Receiver or the trustee in bankruptcy of the contributory, as the case may be.

29 Read in this manner, the reference in s 152(4) to "persons who are contributories by reason of being representatives of others" could only apply to Rashmi's representatives in the applicable situation as she was the member of the Company. It did not apply to Rajesh or his representatives (the PTs), as he was never a member. The PTs were therefore not contributories by reason of this provision.

30 For the reasons above, it was clear that Rajesh was not a contributory under the IRDA. Neither Rajesh nor his representatives, the PTs, had standing to nominate a liquidator on the basis that Rajesh was a contributory.

Rajesh was not a creditor of the Company

31 The PTs also argued that Rajesh was a creditor and therefore qualified under s 124(1)(*c*) of the IRDA. The PTs' argument was premised on shareholder loans of over $5m made to the Company. They asserted that the loans were made by Rajesh to the Company, making him a creditor. On the other hand, Rashmi submitted that the loans were made by her as shareholder.

32 The issue of the shareholder loans was raised for the first time on appeal. There were no arguments before the Judge that Rajesh was a creditor of the Company let alone by reason of the loans. There was also nothing on the record that supported the allegation. At the hearing of the appeal, we questioned counsel for the PTs on whether there were any documents tendered before the Judge to support Rajesh's claim based on the shareholder loans. Unsurprisingly, Counsel conceded that there was no such evidence before the court. He clarified that the issue only arose after the Judge delivered the Judgment on 19 January 2023. About four months after the Judgment, at the first meeting of the Company's creditors on 11 May 2023, the Company's liquidators (*ie*, the PTs'

nominees) asserted that Rajesh was a creditor of the Company for shareholder loans of $5m that he had allegedly extended to the Company.

33 In the absence of any evidence, there was simply no basis for the PTs' submission that Rajesh was a creditor of the Company by reason of the shareholder loans, even assuming this was a point that the PTs could raise for the first time on appeal.

Whether the Judge was correct in rejecting Rashmi's nominees

34 Having concluded that the PTs did not have standing to make a nomination, it was not necessary for us to address the reasons given by the Judge for rejecting Rashmi's nominees. However, we do so for completeness.

35 The Judge rejected Rashmi's nominees for two reasons, that: (a) the liquidators would have to investigate and determine the beneficial ownership of Rashmi's Shares prior to distributing the net proceeds of sale of the Property; and (b) the liquidators would have to investigate the alleged backdating of the Declarations of Trusts by Rashmi, Rajesh and Ooi.

36 With respect, we disagreed with the Judge on both points. Before we explain, it is important that we make a point.

37 The Judge's rejection of Rashmi's nominees on the basis that the liquidators would have to investigate the issue of beneficial ownership would apply equally to the PTs' nominees. On this issue, it was evident that Rashmi and the PTs were counterparties. This made both their nominees unsuitable, assuming of course that it was relevant in the first place for the liquidators to examine the issue of the beneficial ownership of Rashmi's Shares. The relevant question was whether the PTs had an interest in the outcome of the

determination of the issue. They clearly did as one of the parties asserting beneficial ownership over Rashmi's Shares. As such, their nominees would be similarly impacted by any perception of conflict or bias. With that, we turn to our explanation on why we did not accept the Judge's points.

The liquidators did not have to determine the beneficial ownership of Rashmi's Shares

38 First, it is *not* the liquidator's duty to investigate the true ownership of the shares of members on the register of members. The liquidator's statutory duty is to settle the list of members, present and past, who are liable to contribute to the assets of the company under s 121 of the IRDA. They do that by settling the list of contributories pursuant to rr 113 and 115 of the IRDR (see [22] and [24] above). They then distribute the assets of the company pursuant to s 152(1) of the IRDA read with r 126(1) of the IRDR.

39 Therefore, whether Rashmi's Shares were beneficially hers or Rajesh's was not an issue that the liquidators had to determine. This was an issue between the PTs and Rashmi and should have been appropriately resolved in separate proceedings between them. We noted that this was also Rashmi's position before the Judge. To that extent, we disagreed with the Judge's conclusion that "the [PTs] can make use of the information gathered by the liquidator appointed in respect of the Company for their purposes in managing Rajesh's estate", as the liquidators *need not* investigate this matter in the first place. Indeed, it is not the duty of the liquidators to gather information in order to facilitate the PTs' administration of Rajesh's estate. A liquidator has powers of investigation into the affairs of the company and the dealings that it has engaged in. Such powers are *for the purpose of discharging his duties as an officer of the court to steward the estate in liquidation*. Section 244 of the IRDA, which is *in pari materia* with the since repealed s 285 of the Companies Act (Cap 50, 2006 Rev Ed) (the

"Companies Act 2006"), is an example of such a power. Section 244 of the IRDA enables, *inter alios*, a liquidator to apply to the court to examine persons on their dealings with the company or require production of documentary evidence relating to matters concerning the affairs of the company. The information gathered in such an exercise is to be used only for the purpose of assisting the liquidator to discharge his duties, and not for any purpose that does not afford a benefit to the company in liquidation (*Liquidator of W&P Piling Pte Ltd v Chew Yin What and others* [2004] 3 SLR(R) 164 at [27]; *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 at [41]). Accordingly, it would not be a legitimate exercise of the liquidators' powers to investigate the beneficial ownership of Rashmi's Shares as that had nothing to do with the administration of the estate of the Company in liquidation.

40 We should point out that, on appeal, Rashmi incorrectly accepted that the liquidators had to determine the beneficial ownership of Rashmi's Shares. She made this concession on the basis that s 152(4) of the IRDA required the liquidators to distinguish between "persons who are contributories in their own right (*ie*, beneficial owner) and persons who are contributories by reason of being representatives (*eg*, legal owner holding shares on trust for beneficial owner)". For the reasons explained at [25]–[29] above, her understanding of s 152(4), and accordingly her concession, was incorrect.

The liquidators did not have to investigate the backdating of the Declarations of Trusts

41 Second, as the liquidators did not have a duty to investigate the beneficial ownership of Rashmi's Shares, the liquidators similarly did not have a duty to investigate the alleged backdating of the Declarations of Trusts. In the Respondents' Case, the PTs detailed evidence which suggested that Rashmi's

Shares were not beneficially owned by her. However, as the liquidators ultimately did not have the responsibility of investigating the beneficial ownership of Rashmi's Shares, such evidence was not relevant to the issues before the Judge and on appeal.

42 For these reasons, with respect, we were of the view that the Judge was incorrect in rejecting Rashmi's nominees.

The PTs' arguments on appeal

43 In the Respondents' Case, the PTs made several other arguments in support of their case that their nominees were correctly appointed by the Judge. We were not persuaded by those arguments. For completeness, we shall address them in turn.

Rashmi ran a contrary case on appeal

44 First, the PTs argued that Rashmi had taken a position contrary to the case that she ran before the Judge. The contention was that before the Judge, Rashmi consistently sought the appointment of her nominees. However, after the Judge delivered his decision, she took the position that the court should appoint liquidators of its choice. The PTs relied on the decision in *Recovery Vehicle 1 Pte Ltd v Industries Chimiques Du Senegal and another appeal and another matter* [2021] 1 SLR 342 ("*Recovery Vehicle*") at [104], which referenced *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] 2 SLR 744 ("*JWR*") at [32] for the point that an appellant's reliance on a fresh allegation that was not raised and considered at trial would amount to an abuse of the appeal process.

45 We were of the view that *Recovery Vehicle* and *JWR* were not relevant. In *JWR*, the appellant had sought leave at the appeal stage to amend its Statement of Claim to plead a new allegation of negligence against the respondents. This was prejudicial to the respondents, who had defended a different case at trial. This court found that this amounted to an abuse of the appeal process as the appeal was not brought as a result of dissatisfaction with the trial court's decision. In the present case, Rashmi's position that the court should appoint new liquidators was not a new point. The same argument was raised in her request for further arguments before the Judge and was also the PTs' alternative argument before the Judge. As these arguments were raised in the proceedings below, it was not a point that was only raised on appeal.

The threshold required for appellate intervention was not met

46 Second, the PTs argued that the appellate court should be slow to interfere with an exercise of judicial discretion, and that Rashmi had not met the high threshold for appellate intervention, citing *The "Vishva Apurva"* [1992] 1 SLR(R) 912 ("*Vishva Apurva*"). Appellate intervention is permissible in three situations: where the Judge misdirected himself with regard to the principles in accordance with which his discretion had to be exercised; where the Judge took into account matters which he ought not to have; or where the decision was plainly wrong: *Vishva Apurva* at [16].

47 As explained above, the Judge had erred in principle in finding that Rashmi's nominees were not appropriate for appointment because he thought the liquidators had to determine the beneficial ownership of Rashmi's Shares. With respect, he had also erred in law by appointing the PTs' nominees despite the fact that the PTs had no standing to nominate liquidators in the winding up of the Company. Accordingly, all the three situations contemplated in *Vishva*

Apurva applied to the Judge's decision. Appellate intervention was therefore warranted.

Rashmi's case was based on a misstatement of the law

48 Third, the PTs argued that Rashmi's contention that the PTs' nominees were unsuitable because the PTs' objective was to "maximise their own claims" against the Company was premised on a misstatement of the law. Rashmi contended that if the PTs' proof of debt was accepted, that would increase their recovery. This was a reference to the adjudication of any proof of debt that the PTs might file for the shareholder loans of $5m. The PTs contended that if Rashmi was right, every nominee of a creditor would be unsuitable for appointment as liquidator, because their nominee, if appointed, would have to adjudicate that creditor's proof of debt.

49 To begin with, this point was moot, as the PTs produced no evidence that Rajesh had made the shareholder loans or filed any proof of debt to assert the claim. This situation therefore did not arise here.

50 Nonetheless, even if a proof of debt had been filed, the present scenario was distinguishable from the situation described by the PTs. The liquidators would not just be adjudicating the proof of debt of the creditor (the PTs) who had nominated them. The liquidators would also be adjudicating the proof of debt of another (Rashmi) who also asserted a claim against the Company on the same basis. This meant that the liquidator would have to adjudicate *competing* proofs of debt lodged by Rashmi and the PTs based on the same debt, *ie*, the shareholder loans. The issue was therefore between competing creditors, one of whom had nominated the liquidators. That raised a perception of conflict or bias as regards the PTs' nominees as well as Rashmi's, assuming the competing proofs were lodged.

51 In that sense, the concern was not dissimilar to a liquidator nominated by a party, such as a director or a shareholder, against whom the company has hostile or conflicting claims: *Fielding v Seery & Anor* [2004] BCC 315 at [33(5)]; *Green and another v SCL Group Ltd and other companies* [2019] All ER (D) 114 at [36]. In such a scenario, the proper inquiry should be whether the *character or nature of the issue* that the liquidator has to examine gives rise to a perception of bias. That would be the case where the PTs' nominees had to adjudicate competing proofs filed by the PTs and Rashmi for the same debt.

The PTs' nominees were not suspect

52 Fourth, the PTs argued that their nominees were not suspect because the PTs were officers of the court and did not personally stand to benefit from any recovery made in the liquidation. The Judge accepted this argument on the basis that the PTs were subject to supervision by the court under ss 42 to 46 of the IRDA. With respect, we disagreed. The PTs' *independence* as officers of the court should not be conflated with the PTs' *interest* in the issue that the liquidators would have to consider. The PTs' duty as trustees of Rajesh's estate in bankruptcy was to maximise recovery for the estate. It was that duty that raised the perception of bias. The PTs' independence as officers of the court did not dilute that duty in any way. Indeed, it reinforced the duty by requiring that they scrupulously discharge it as officers of the court. It was therefore irrelevant that the PTs were under the supervision of the court.

Substantial prejudice would be caused to the liquidation of the Company

53 Fifth, the PTs argued that there would be substantial prejudice to the liquidation should the liquidators be removed. In support of their submission, the PTs provided a letter dated 13 June 2023 from the liquidators, stating that a

total of 219.68hrs had already been spent by the liquidators on the liquidation. Even if this were the case, it was not relevant if the appointment by the Judge was wrong in principle. Further, if the liquidators remained in office, further work might be undertaken and more costs incurred to investigate issues that were not relevant. In this regard, we noted that the liquidators did not seek directions from the court on whether it was necessary to investigate and determine the beneficial ownership of Rashmi's Shares. They should have done so. Instead, they seemingly accepted the PTs' position that it was within their remit as liquidators to investigate this issue. We regarded this as significant.

54 The PTs suggested that the removal of the liquidators would "thwart any investigation into the conduct" of Rashmi. This was a reference to the alleged backdating of the Declarations of Trusts and the beneficial ownership of Rashmi's Shares. As we had concluded that these issues were not relevant to the liquidators' duty, the question of prejudice did not arise. Indeed, it was Rashmi who would be prejudiced if the liquidators remained in office unchecked.

The appeal was an inappropriate attempt to bypass s 139(1) of the IRDA

55 The PTs' final argument was that Rashmi's reliance on post-liquidation evidence, such as the liquidators' refusal to disclose their communications with the PTs when requested by Rashmi, to seek removal of the liquidators on appeal was an effort to bypass s 139(1) of the IRDA. Section 139, *inter alia*, permits the court to remove a liquidator upon cause being shown. That assumes that the liquidator's appointment was properly made and there was some event that gave cause for their removal. That was not the situation here. Here, the challenge was to the validity of the appointment of the liquidators. Section 139(1) did not apply to the present case as the liquidators were not being removed for cause. There

was no application made under the section. The challenge by Rashmi was instead made in an appellate process on the basis that the appointment by the Judge was wrong in principle. The liquidators were removed upon the appeal succeeding.

Rajesh was the "ultimate beneficial owner" of Rashmi's Shares

56 For completeness, the PTs' submission that Rajesh was the "ultimate beneficial owner" of Rashmi's Shares was also not correct as a matter of law. As posited by the parties themselves, it was *Fareast* which funded Rajesh's equity contribution to the Company (see [9] above). The PTs' submission appeared to be that because Rajesh was the *ultimate* beneficial owner of the shares in Fareast, he could lay claim to Rashmi's Shares. Accepting this argument would require the court to disregard the separate legal personality of Fareast. The PTs' submission was in effect that this court should engage in insider reverse piercing*, ie,* disregard Fareast's separate legal personality and enable Rajesh to pierce the corporate veil in order to facilitate a claim by Rajesh to Rashmi's Shares. Insider reverse piercing is impermissible as it is unsupported by legislation and contrary to the foundational principle of company law that a company is a separate legal entity from its shareholders: *Jhaveri Darsan Jitendra and others v Salgaocar Anil Vassudeva and others* [2018] 5 SLR 689 at [70]–[71]. In any event, this issue did not arise for consideration for the reasons set out above.

Conclusion

57 In the circumstances, we allowed the appeal. We directed that a new liquidator be appointed in place of the liquidators appointed by the Judge. As stated at [3] above, we appointed Tam on 22 August 2023.

58 In view of our conclusion that the issue of the beneficial ownership of Rashmi's Shares was not a matter for the liquidators to determine, the question arose as to whether any costs and disbursements incurred by the liquidators to investigate this issue, if that had been undertaken, ought to be properly regarded as costs of the liquidation. We were of the view that this question should be reviewed by the court on Tam's application, should he deem it appropriate.

59 On costs, Rashmi submitted that costs of between $50,000 and $60,000 should be ordered against the PTs. We were of the view that costs of $40,000 (all-in) to be paid by the PTs on a joint and several basis to Rashmi was reasonable in the circumstances. We noted that the third respondent, Bance, was in the process of resigning from his role as PT. This, however, had no bearing on the costs order. He remained liable to satisfy the costs on a joint and several basis notwithstanding his resignation.

Judith Prakash
Justice of the Court of Appeal

Belinda Ang Saw Ean
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Vikram Nair, Foo Xian Fong and Liew Min Yi Glenna (Rajah & Tann Singapore LLP) for the appellant;
the first respondent absent and unrepresented;

Yeo Alexander Lawrence Han Tiong, Ee Jia Min, Tan Yen Jee and Shjoneman Tan (Allen & Gledhill LLP) for the second and third respondents.
