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

[2024] SGHC 195

Companies Winding Up No 67 of 2023

In the matter of Section 125 of the
Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Group Lease Holdings Pte Ltd

Between

JTrust Asia Pte Ltd

… *Claimant*

And

Group Lease Holdings Pte Ltd

… *Defendant*

And

(1) Group Lease Public Company Limited
(2) Cosimo Borrelli

… *Non-parties*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Grounds for petition]
[Insolvency Law — Winding up — Liquidator]

TABLE OF CONTENTS

JTrust Asia Pte Ltd
v
Group Lease Holdings Pte Ltd
(Group Lease Public Co Ltd and another, non-parties)

[2024] SGHC 195

General Division of the High Court — Companies Winding Up No 67 of 2023
Vinodh Coomaraswamy J
4 March 2024

26 July 2024

Vinodh Coomaraswamy J:

Introduction

1 Group Lease Holdings Pte Ltd ("GLH") has owed a judgment debt to JTrust Asia Pte Ltd ("JTA") since April 2023. It has failed to pay any part of that judgment debt. JTA now presents this winding up application against GLH. The principal ground on which JTA rests its application is that GLH is unable to pay its debts within the meaning of s 125(1)(*e*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("the IRDA").[1]

---

[1] Notes of Evidence ("NE") dated 4 March 2024, p 2 lines 3–7.

2 JTA's winding up application is opposed, albeit in different respects, by GLH and by GLH's sole shareholder,[2] Group Lease Public Company Ltd ("GL Thailand").

3 GLH and GL Thailand submit that JTA has abused the process of the court by presenting this winding up application and that I should either dismiss it or, at the very least, adjourn it to allow GL Thailand an opportunity to extend to GLH the financial support necessary to permit GLH to pay the judgment debt in full.[3]

4 GL Thailand makes the further submission that, even if I order GLH to be wound up, I should not appoint the licensed insolvency practitioner that JTA has nominated under s 135(1) of the IRDA to be appointed as GLH's liquidator. JTA has nominated Mr Cosimo Borrelli of Kroll Pte Ltd for appointment. Mr Borrelli is now GLH's provisional liquidator ("PL"), having been appointed to that office on JTA's application in September 2023.[4] GL Thailand opposes Mr Borrelli's appointment as GLH's liquidator on the grounds that he has, since his appointment as PL, shown actual bias in favour of JTA or has conducted himself so as to give rise to a reasonable suspicion of bias in favour of JTA.[5]

5 I have rejected GLH's and GL Thailand's submission in their entirety. I have accordingly ordered that GLH be wound up and that Mr Borrelli be appointed as its liquidator. I have done so for four principal reasons. First, I find

---

2 First Affidavit of Nobiru Adachi filed on 13 April 2023 ("1NA67"), p 21 at p 26; First Affidavit of Tatsuya Konoshita dated 7 December 2023 ("1TK67") at para 1.

3 GLH's Written Submissions dated 26 February 2024 at paras 3 and 81; NE dated 4 March 2024, p 8 line 27 to p 9, line 6; GL Thailand's Written Submissions dated 26 February 2024 at para 2.

4 HC/ORC 4227/2023 dated 6 September 2023, extracted 11 September 2023.

5 GL Thailand's Written Submissions at para 16; 1TK67 at para 4.

that GLH is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA. Second, I find that JTA's conduct in presenting and pursuing this winding up application does not amount to an abuse of process. Third, I do not consider that there are any circumstances to warrant exercising my residual discretion under s 125(1) of the IRDA to dismiss this winding up application despite finding that GLH is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA. Finally, while I accept that Mr Borrelli has taken a robust view of his powers as PL, and perhaps even on one view an overly robust view of those powers, I do not accept that his conduct is any grounds even for an allegation of a reasonable suspicion of bias, let alone for an allegation of actual bias.

6 GL Thailand has appealed against the whole of my decision,[6] *ie*, both my decision to wind up GLH and my decision to appoint Mr Borrelli as liquidator. I therefore now set out the grounds for both these decisions.

Facts

The parties

7 JTA is an investment holding company incorporated in Singapore. It is a member of a group of companies whose ultimate holding company is a company incorporated in Japan and listed on the Tokyo Stock Exchange.[7]

8 GLH is an investment holding company incorporated in Singapore.[8] GLH's sole shareholder, as I have mentioned, is GL Thailand. GL Thailand is

---

6 Notice of Appeal dated 25 March 2024 in CA/CA 20/2024, para 2.

7 First Affidavit of Nobiru Adachi dated 3 August 2021 filed in HC/OS 780/2021 ("1NA780") at para 5.

8 1TK67, para 11.

a public company incorporated in Thailand and listed on the stock exchange of Thailand.[9]

9 GLH has six subsidiaries ("the Subsidiaries") that are relevant to this application.[10] The names and business of these six Subsidiaries are immaterial for present purposes. It suffices to note that the Subsidiaries are incorporated in several countries in South Asia and Southeast Asia including Sri Lanka, Indonesia, Singapore, Cambodia, Laos, Myanmar and Thailand.[11]

10 GLH has no business operations. Its sole function is to be the financing node through which GL Thailand extends financial support to the Subsidiaries by way of intercompany loans.[12]

11 Mr Mitsuji Konoshita ("MK") is a director of GLH.[13] He was also the Chairman and chief executive officer of GL Thailand until October 2017.[14] He relinquished his roles in GL Thailand at that time because the Securities and Exchange Commission of Thailand ("SECT") banned him from being a director of any company listed on the Stock Exchange of Thailand.[15] The SECT at the same time filed a complaint with the Thai criminal authorities accusing MK of having caused GL Thailand to enter into sham loan agreements as part of a

---

9 1NA780 at para 6.

10 First Affidavit of Cosimo Borrelli filed on 15 November 2023 ("1CB") at para 46; 1TK67, para 10 and p 23.

11 1CB at CB-12 at p 461.

12 1TK67, para 11; NE dated 4 March 2024, p 17 lines 25–26; GL Thailand's Written Submissions at para 3.

13 1NA67, p 21 at p 24; Second Affidavit of Nobiru Adachi filed on 17 May 2023 ("2NA67"), para 9.

14 2NA67, p 31 at para 9.

15 1NA67, p 31 at para 9.

fraudulent scheme to inflate GL Thailand's operating profits.[16] GL Thailand's shares are currently suspended from trading on the Stock Exchange of Thailand.[17]

12 Mr Tatsuya Konoshita ("TK") is MK's brother. He has been the Chairman and CEO of GL Thailand from October 2017, when MK relinquished those roles, to date.[18] TK is a director of GLH.[19]

Relevant proceedings

13 This winding up application is the latest instalment in a multiplicity of proceedings in a multiplicity of jurisdictions involving, in various combinations, JTA, GLH, GL Thailand, MK and corporate vehicles associated with one or more of them. These jurisdictions include the British Virgin Islands, Switzerland, Thailand, Cyprus, Cambodia, Japan and of course Singapore.[20]

---

16 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [8] and [18].

17 Third Affidavit of Nobiru Adachi filed on 18 July 2023 ("3NA67"), para 10(h).

18 *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2020] 2 SLR 1256 at [8] and [18].

19 1NA67, p 21 at p 24.

20 1TK67 at para 5; 3NA67 at para 20.

14 In Singapore alone, these proceedings encompass five suits,[21] six originating summonses and applications,[22] one winding up application,[23] one appeal to the Appellate Division[24] and two appeals to the Court of Appeal.[25]

15 There is now to be yet another appeal to the Court of Appeal.[26]

16 Only four proceedings out of this multiplicity of proceedings are relevant for present purposes. All four of these proceedings were commenced in Singapore. These four proceedings are:

(a) a suit commenced by JTA against GLH (amongst others) on 26 December 2017 ("*JTA v GLH (1)*");[27]

(b) an originating application issued by JTA against GLH (amongst others) on 3 August 2021 ("*JTA v GLH (2)*");[28]

(c) a suit commenced by GL Thailand against GLH on 13 January 2022 ("*GL Thailand v GLH*");[29]

(d) this winding up application.

---

21 HC/S 1212/2017, HC/S 899/2018, HC/S 1000/2020, HC/S 23/2022 and HC/OC 233/2023.

22 HC/OS 1226/2020, AD/OS 42/2021, HC/OS 780/2021, CA/OA 25/2023, CA/OA 29/2023, CA/OA 35/2023.

23 HC/CWU 217/2020.

24 AD/CA 42/2023.

25 CA/CA 46/2018 and CA/CA 21/2020.

26 CA/CA 20/2024.

27 HC/S 1212/2017.

28 HC/OS 780/2021.

29 HC/S 23/2022.

17 I now summarise the procedural history of these proceedings.

JTA v GLH (1)

18 *JTA v GLH (1)* culminated in the decision of the Court of Appeal on 6 October 2020[30] in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd* [2020] 2 SLR 1256. The Court of Appeal held that GLH had conspired with GL Thailand and MK (amongst others) to use sham loan agreements and other fraudulent and deceptive means to induce JTA to enter into three investment agreements with GL Thailand between March 2015 and September 2017. The Court of Appeal quantified JTA's losses arising from the first and third of these three investment agreements in the principal sum of US$70.01m and entered judgment against GLH accordingly (*JTA v GLH (1)* at [257]). I shall refer to the judgment debt arising from *JTA v GLH (1)* as "Judgment Debt (1)".

19 GLH has paid Judgment Debt (1) in full. It did so by several instalments, with the last instalment paid in July 2021.[31] GLH was able to pay Judgment Debt (1) in full only because GL Thailand extended loans amounting to US$17.1m to GLH for that purpose.[32]

JTA v GLH (2)

20 *JTA v GLH (2)* culminated in the decision of Lee Seiu Kin J on 10 April 2023 in *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2023] SGHC 167. In *JTA v GLH (2)*, JTA sought to recover from GLH and MK (amongst others) damages in the torts of conspiracy and deceit for the losses it

---

30 CA/CA 21/2020.

31 1TK67, pp 12–13 at rows 29, 30, 31, 32, 34 and 35; para 13 at row (b).

32 GL Thailand's Written Submissions at para 11(b); 1TK67 at pp 12 – 14.

had suffered from having been induced by fraudulent and deceptive means to enter into the second of the three investment agreements. JTA quantified those losses at US$124.47m. JTA did not include its claim for these losses in *JTA v GLH (1)* because JTA's cause of action arising from the second investment agreement crystallised only on 1 August 2021. That was well after *JTA v GLH (1)* had been commenced and indeed even after it had concluded in the Court of Appeal.

21 JTA commenced *JTA v GLH (2)* on 3 August 2021, two days after its cause of action crystallised. On the same day, JTA applied for a *mareva* injunction against GLH freezing its assets worldwide up to a limit of US$130m.[33] On the next day, 4 August 2021, Andrew Ang SJ granted the *mareva* injunction on the usual undertakings and subject to the usual exceptions.[34] The *mareva* injunction expressly prohibited GLH from disposing of, dealing with or diminishing the value of its shares in the Subsidiaries. Each Subsidiary was enumerated in the injunction by name. The *mareva* injunction was to last from the date the injunction was granted, 4 August 2021, until the final determination of *JTA v GLH (2)*.

22 On 10 April 2023, Lee Seiu Kin J handed down his decision in *JTA v GLH (2)*. He held (at [40] and [48]) that the Court of Appeal's decision in *JTA v GLH (1)* raised an issue estoppel precluding GLH and MK from relitigating whether they were jointly and severally liable to JTA in the torts of deceit and conspiracy for having induced JTA to enter into the second investment agreement. The only issue that GLH was not estopped from litigating in *JTA v GLH (2)* was the quantum of JTA's losses arising from having entered into the

---

33 HC/SUM 3637/2021

34 HC/ORC 4388/2021 at para 1(b).

second investment agreement (at [49]). Lee Seiu Kin J accepted JTA's quantification of its losses and entered judgment against GLH in the principal sum of US$124.74m (at [56]).[35] I shall refer to GLH's debt to JTA arising from *JTA v GLH (2)* as "Judgment Debt (2)".

23 GLH has failed to pay Judgment Debt (2) or any part of it to JTA. It is this failure that JTA relies on in this winding up application to argue that GLH is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA.

24 On, 10 April 2023, as part of the judgment entered against GLH, Lee Seiu Kin J also ordered that the pre-judgment *mareva* injunction against GLH that Andrew Ang SJ had granted on 4 August 2021 (see [21] above) should continue in force as a post-judgment *mareva* injunction until GLH satisfied Judgment Debt (2).[36]

GL Thailand v GLH

25 I summarise *GL Thailand v GLH* from the pleadings and other documents as they appear on their face, without expressing any opinion about the underlying assertions of fact or law by either GL Thailand or GLH.

26 On 13 January 2022, GL Thailand commenced suit against GLH seeking to recover the principal sum of US$147.5m being the total sum due to GL Thailand under 28 loan agreements entered into between 16 July 2015 and 21 March 2017 and a further seven loan agreements entered into between 20 April 2021 and 7 July 2021.[37] Six of the seven loan agreements entered into in 2021

---

35 HC/JUD 144/2023.

36 HC/JUD 144/2023 para 5.

37 HC/S 23/2022.

cover the amount of US$17.1m that GL Thailand lent GLH to enable it to pay Judgment Debt (1) in part (see [19] above). It is also GL Thailand's case that the debts due under these 35 loan agreements are secured by pledges of GLH's shares in the Subsidiaries and by charges over GLH's bank accounts.

27 GLH entered an appearance in *GL Thailand v GLH* on 20 January 2022 and filed a defence on 14 February 2022. In its defence, GLH accepted both that had entered into the 35 loan agreements with GL Thailand and that it had received the sums that GLH Thailand claimed to have lent it under those agreements. GLH pleaded a defence only in respect of the 28 loans extended before 2021. Its defence was that GL Thailand and GLH had agreed that these loans were "equity loans" and that GL Thailand would not recall them "in the foreseeable future".[38] GLH pleaded no defence in respect of the seven loan agreements entered into in 2021.

28 GL Thailand applied to enter summary judgment against GLH on 14 March 2022.[39] On 12 April 2022, after hearing counsel for both parties, the court entered summary judgment against GLH for the full amount of GL Thailand's claim under all 35 loan agreements, *ie,* US$147.5m, plus contractual interest and costs.[40]

29 GL Thailand relies on these 35 loan agreements and the judgment in *GL Thailand v GLH* to assert its status as a creditor of GLH in the principal sum of US$147.5m. It relies on that status for its right to nominate another licensed

---

38 Defence filed on 14 February 2022 in HC/S 23/2022 at para 5(c).

39 HC/SUM 1006/2022 in HC/S 23/2022.

40 HC/ORC 1994/2022 in HC/S 23/2022.

insolvency practitioner to be appointed as GLH's liquidator in place of Mr Borrelli.[41]

This winding up application

(1) JTA demands payment of Judgment Debt (2)

30 On 11 April 2023, one day after Lee Seiu Kin J entered judgment against GLH in *JTA v GLH (2)* (see [22] above), JTA served a written demand on GLH requiring it to pay Judgment Debt (2) within three weeks ("the SD").[42] The SD was expressly issued pursuant to s 125 of the IRDA. It therefore contained the usual paragraph putting GLH on notice that, if GLH failed to pay Judgment Debt (2) plus all accrued interest, or to secure or compound for it to the reasonable satisfaction of JTA, within three weeks from the date of the demand, *ie*, by 2 May 2023, GLH would be deemed to be unable to pay its debts pursuant to section 125(2)(*a*) of the IRDA and would be liable to be wound up by the Court under section 125(1)(*e*) of the IRDA.

31 JTA did not wait until 2 May 2023 before presenting a winding up application against GLH. Instead, it presented this application against GLH on 12 April 2023, just one day after serving the SD on GLH.[43]

(2) GLH appeals against *JTA v GLH (2)* and seeks a stay of execution

32 On 19 April 2023, GLH filed an appeal to the Appellate Division against the whole of Lee Seiu Kin J's judgment in *JTA v GLH (2)*.[44] On 26 April 2023,

---

41 GL Thailand's Written Submissions, para 17.

42 Nobiru Adachi's First Affidavit at para 20.

43 Originating Application filed in HC/CWU 67/2023 dated 12 April 2023 at para 1.

44 AD/CA 42/2023.

GLH applied for execution on Judgment Debt (2) to be stayed until the Appellate Division had disposed of the appeal.

33 On 3 July 2023, Lee Seiu Kin J heard GLH's stay application. He ordered expressly that there should be *no* stay of execution on Judgment Debt (2). He did, however, stay this winding up application pending JTA's application to appoint a PL over GLH.[45]

(3) JTA seeks the appointment of Mr Borrelli as provisional liquidator

34 On 17 July 2023, JTA filed an application to appoint a PL in respect of GLH.[46] On 6 September 2023, Lee Seiu Kin J allowed JTA's application and appointed Mr Borrelli as GLH's PL until the making of a winding up order or until further order.[47] He did so because, in brief, JTA satisfied him that the assets and records of GLH were in jeopardy and needed immediately to be secured and that the financial and other affairs of GLH required immediately to be investigated. More specifically, Lee Seiu Kin J accepted the five principal grounds that JTA advanced for a PL to be appointed over GLH:[48]

(a) First, there was a good *prima facie* case that JTrust would succeed in this winding up application.

(b) Second, the Court of Appeal[49] had found in *JTA v GHL (1)* that GLH had conspired with GLH Thailand and MK (amongst others) to

---

45 HC/ORC 3190/2023 dated 3 July 2023 in *JTA v GLH (2)*, extracted 17 July 2023.

46 HC/SUM 2156/2023 filed 17 July 2023.

47 HC/ORC 4227/2023 at para 1.

48 JTrust's Written Submissions dated 31 August 2023, paras 2, 3 and 53; Minute Sheet dated 6 September 2023, page 2.

49 CA/CA 21/2020.

use fraudulent and deceptive means, including sham loan agreements, to induce JTA to enter into the three investment agreements.

(c) Third, there was a serious risk that GLH and GL Thailand had entered into sham loan and security agreements (including the 35 loan agreements and the associated security agreements that were the subject-matter of *GL Thailand v GLH* (see [26] above)) and had engaged in collusive litigation in *GL Thailand v GLH* in order to dissipate GLH's assets or otherwise to put those assets beyond the reach of GLH's legitimate creditors, including JTA.

(d) Fourth, there was an urgent need to investigate not only these alleged sham agreements and alleged collusive litigation but also the role that GLH's management had played in all of this.

(e) Finally, both GLH and GL Thailand had been delinquent in their corporate record keeping and in the timely preparation of their financial statements, causing the auditors of each company to disclaim each company's latest available financial statements, which were in any event out of date, being complete only up to the financial year ended 31 December 2021.

35 Lee Seiu Kin J was mindful, however, that the appointment of a PL should not create any risk of rendering nugatory GLH's appeal against his decision that was then pending. The concern, no doubt, was that a PL could take steps which could not be reversed if the appeal succeeded or could even cause GLH to withdraw the appeal entirely.

36 To address these concerns, Lee Seiu Kin J included four express safeguards for GLH in the PL order. First, he limited Mr Borrelli's duties,

broadly, to maintaining the *status quo*. He therefore authorised Mr Borrelli to carry out only three specified duties: (a) to take into his possession GLH's assets and records; (b) to take steps to preserve GLH's assets and records; and (c) to review and, where appropriate, investigate transactions that GLH had entered into. Second, he ordered that GLH's directors and not Mr Borrelli should have conduct of GLH's appeal. Third, he ordered Mr Borrelli not to make changes to the board of directors of any of the Subsidiaries without the leave of court. Finally, as the price of Mr Borrelli's appointment, he required JTA to give an undertaking as to damages similar in effect to the undertaking usually given to support the grant of a *mareva* injunction.

37 In addition to these safeguards, Lee Seiu Kin J extended his stay of this winding up application until after GLH's appeal to the Appellate Division against his judgment in *JTA v GLH (1)* (see [32] above) had been determined.[50]

(4) Mr Borrelli applies for leave to appoint directors for the Subsidiaries

38 On 15 November 2023, Mr Borrelli applied for, amongst other things, the court's permission to appoint himself or his nominee as a director of six named Subsidiaries.[51] Mr Borrelli's stated reason for seeking this permission was that he was facing difficulties in his efforts to understand the affairs of GLH and the six Subsidiaries.[52] On 18 December 2023, Lee Seiu Kin J granted Mr Borrelli the permission he sought.[53]

---

50 Minute Sheet dated 6 September 2023, at p 3.

51 Summons of Provisional Liquidator in HC/SUM 3568/2023 dated 15 November 2023 at para 3.

52 First Affidavit of Cosimo Borrelli dated 15 November 2023 ("Borrelli's First Affidavit") at para 4.

53 HC/ORC 6009/2023 at para 3.

39 In late December 2023 and early January 2024, Mr Borrelli learned that GL Thailand had taken steps to enforce a security interest that it claimed over GLH's shares in certain Subsidiaries. GL Thailand had taken these steps even though these shares were then expressly subject to Lee Seiu Kin J's post judgment *mareva* injunction granted on 3 July 2023.

(5) GLH's appeal is dismissed

40 Meanwhile, on 22 November 2023, the Appellate Division heard and dismissed GLH's appeal against Lee Seiu Kin J's judgment in *JTA v GLH (2)* with costs (see *Group Lease Holdings Pte Ltd and another v JTrust Asia Pte Ltd* [2023] SGHC(A) 37).[54] That dismissal meant that Lee Seiu Kin J's stay of this winding up application ordered in July 2023 (see [33] above) and extended in September 2023 (see [37] above) was automatically lifted.

41 On 11 January 2024, GLH was refused leave to appeal the AD's dismissal of its appeal to the Court of Appeal.[55] With that, JTA's rights of appeal against *JTA v GLH (2)* were exhausted.

(6) This winding up application is fixed for hearing

42 This winding up application was then fixed for hearing on 4 March 2024, almost a year after JTA had presented it.

---

54 AD/ORC 92/2023 at para 1.

55 Minute Sheet in CA/OA 35/2023 dated 11 January 2024 at para 2.

The parties' cases

JTA's case

43 JTA makes four principal submissions in support of its winding up application.

44 First, GLH ought to be wound up because it is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA. JTA submits that GLH is deemed to be unable to pay its debts under s 125(2)(*a*) of the IRDA by reason of its failure to satisfy the SD within three weeks of its service. Alternatively, JTA submits that it has adduced sufficient evidence to establish that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA.[56]

45 Second, GLH ought to be wound up because its directors have acted in its affairs in their own interests or in some other manner that appears to be unfair or unjust within the meaning of s 125(1)(*f*) of the IRDA.[57]

46 Third, GLH ought to be wound up because it is just and equitable to do so within the meaning of s 125(1)(*i*) of the IRDA.[58]

47 Finally, Mr Borrelli ought to be appointed GLH's liquidator[59] because GL Thailand's allegations of bias are misconceived.[60]

---

56 JTA's Written Submissions at paras 28–53.

57 JTA's Written Submissions at paras 54–62.

58 JTA's Written Submissions at para 63–66.

59 JTA's Written Submissions at para 67–87.

60 JTA's Written Submissions at pp 27–34.

GLH's and GL Thailand's case

48 GLH and GL Thailand together make five principal submissions in opposition to JTA's winding up application.[61]

49 First, JTA cannot rely on the presumption of insolvency in s 125(2)(*a*) of the IRDA because JTA presented this winding up application without allowing GLH the statutory period of three weeks after service of the SD to pay Judgment Debt (2) (see [31] above).[62]

50 Second, JTA: (a) has acted precipitously in presenting and pursuing this winding up application; (b) has actively prevented GL Thailand from extending the necessary financial support to GLH to enable it to pay Judgment Debt (2) by commencing parallel rehabilitation proceedings against GL Thailand; and (c) is motivated by a collateral purpose, which is to take control of GLH and the Subsidiaries to enhance its own business.[63] In these circumstances, this winding up application ought to be dismissed either: (a) because JTA has failed to prove that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA; or (b) because JTA has abused the process of the court warranting the exercise of my residual discretion under s 125(1) of the IRDA not to make a winding up order even if I am satisfied that GLH is unable to pay its debts for the purposes of s125(2)(*c*) of the IRDA.

---

61 GLH's Written Submissions dated 26 February 2024 ("GLH's WS") at para 3.

62 GLH's WS at para 3(a).

63 GLH's WS at para 3(a); GLH's WS at paras 32–33; NE dated 4 March 2024 at p 18 lines 11–32 and p 19 lines 1–5.

51 Third, JTA cannot rely on s 125(1)(*f*) of the IRDA because it is not a member of GLH.[64]

52 Fourth, JTA cannot rely on s 125(1)(*i*) of the IRDA because it has not shown how its interest as a creditor had been adversely affected; in any event, it is not just and equitable to wind up GLH.[65]

53 Finally, Mr Borrelli should not be appointed GLH's liquidator because he has shown actual bias in favour of JTA or has conducted himself so as to give rise to a reasonable suspicion of bias in favour of JTA.[66]

Mr Borrelli's submissions

54 Mr Borrelli takes no position on JTA's winding up application.[67] But he rejects GL Thailand's allegation that he has either shown actual bias in favour of JTA or has conducted himself so as to give rise to a reasonable suspicion of bias in favour of JTA.[68]

---

64 GLH's WS at para 3(b).

65 GLH's WS at para 3(c).

66 GL Thailand's Written Submissions at para 16; 1TK67 at para 4.

67 Provisional Liquidator's Written Submissions dated 26 February 2024 ("PL's WS") at para 4.

68 PL's WS at pp 25–31.

Issues to be determined

55 The parties' submissions raise five issues for determination:

(a) First, has JTA established the ground for making a winding up order set out in s 125(1)(*e*) of the IRDA? This raises three subsidiary questions:

(i) Is GLH deemed to be unable to pay its debts under s 125(2)(*a*) of the IRDA?

(ii) Has JTA proven that GLH is unable to pay its debts for the purposes of s 125(2)(c) of the IRDA?

(b) Second, has JTA established the ground for making a winding up order set out in s 125(1)(*f*) of the IRDA?

(c) Third, has JTA established the ground for making a winding up order set out in s 125(1)(*i*) of the IRDA?

(d) Fourth, if I find that JTA has established any one of these three grounds for making a winding up order, should I exercise my residual discretion under s 125(1) of the IRDA *not* to make a winding up order and to dismiss JTA's application despite that finding?

(e) Finally, if I make a winding up order against GLH, should I decline to appoint Mr Borrelli as GLH's liquidator because he has shown actual bias in favour of JTA or has conducted himself so as to give rise to a reasonable suspicion of bias in favour of JTA?

56 I have found that JTA has proven to my satisfaction that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA and has therefore

established the ground for making a winding up order set out in s 125(1)(*e*) of the IRDA. It is therefore unnecessary for me to deal with the issues at [55(a)(i)], [55(b)] and [55(c)] above.

57 I take the remaining issues in turn.

GLH is unable to pay its debts

58 Whether a company is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA is determined by s 125(2) of the IRDA:

> **Circumstances in which company may be wound up by Court**
>
> **125.** — (1) …
>
> (2) A company is deemed to be unable to pay its debts if —
>
> (a) a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding $15,000 then due has served on the company, by leaving at the registered office of the company, a written demand by the creditor or the creditor's lawfully authorised agent requiring the company to pay the sum so due, and the company has for 3 weeks after the service of the demand neglected to pay the sum, or to secure or compound for it to the reasonable satisfaction of the creditor;
>
> (b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or
>
> (c) 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 and prospective liabilities of the company.

Three preliminary observations on s 125(2)(c) of the IRDA

59 I begin by making three preliminary observations about the nature of s 125(2)(*c*) of the IRDA.

60 First, the words "as they fall due" are to be imported into s 125(2)(*c*) of the IRDA even though they appear nowhere in that subsection's enacting words (see *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 ("*Sun Electric*") at [65]). Ascertaining whether a company is "unable to pay its debts" under s 125(2)(*c*) of the IRDA for the purposes of s 125(1)(*e*) of the IRDA therefore requires the court to ascertain whether the company is unable to pay its debts *as they fall due* (*Sun Electric* at [59]).

61 This is consistent not only with the concept of commercial insolvency (as established by *Sun Electric* at [59]) but also with history of s 125(2)(*c*). The enacting words of s 125(2)(*c*) appearing up to the semicolon trace their origin back to s 80(4) of the Companies Act 1862 (c 89) (UK) (*BNY Corporate Trustee Services Ltd v Eurosail-UK 2007-3BL plc and others* [2013] Bus LR 715 ("*BNY*") at [27]). The enacting words appearing after the semicolon trace their origin back to s 28 of the Companies Act 1907 (c 50) (UK). This English provision was re-enacted as s 130(iv) of the Companies (Consolidation) Act 1908 (c 69) (UK) (*BNY* at [29]) and eventually as s 223(d) of the Companies Act 1948 (c 38) (UK). None of these precursors of s 125(2)(*c*) included the words "as they fall due". Those words were included in the English equivalent of s 125(2)(*c*) for the first time in the Insolvency Act 1985 (*BNY* at [26]). Despite this, the Privy Council held in *BNY* that the phrase "as they fall due" should be understood to have been implicit in the test prescribed by the English equivalent of s 125(2)(*c*) from its legislative outset (*BNY* at [26], [30], [32] and [37]). Section 223(*d*) of the Companies Act 1948 was enacted in identical words as s 218(2)(*c*) of the Malaysian Companies Act 1965 and eventually as s 254(2)(*c*) of our Companies Act 1967. The only difference between s 125(2)(*c*) and these provisions is the substitution of "must" for "shall".

62 Second, s 125(2)(*c*) is quite different in character from ss 125(2)(*a*) and s 125(2)(*b*) in several fundamental respects. Unlike those two other limbs of s 125(2) – and despite the impression created by the introductory words of s 125(2) itself – s 125(*c*) is not in truth a deeming provision (see *BNY* at [25] and [35]). That is because s 125(2)(*c*) "does not treat proof of a single specific default by a company as conclusive of the general issue of its inability to pay its debts" and instead "goes to the very issue itself" (*BNY* at [25]). Further, s 125(2)(*c*) is a test of general application. It does not focus on a single debt that has fallen due to a creditor in the context of either a winding up application to be presented by that creditor (s 125(2)(*a*)) or of civil proceedings concluded in favour of that creditor (s 125(2)(*b*)). Finally, s 125(2)(*c*) expressly directs the court to look beyond the company's present debts, *ie*, the debts that have already fallen due, in ascertaining whether a company *is* (*ie*, presently) unable to pay its debts. The court is required to take into account, in addition, the company's ability to pay debts that will fall due in the future, regardless of whether those debts spring from a present obligations that will fall due in the future only upon the happening of a stipulated event contractually embedded in the obligation itself (contingent debts (see *Founder Group (Hong Kong) Limited (in liquidation) v Singapore JHC Co Pte Ltd* [2023] 2 SLR 554 at [42]) or whether those debts spring from present obligations that will fall due in the future with contractual certainty (prospective debts).

63 Third, the sole test to be used in Singapore law to determine whether a company is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA is the cash flow test (*Sun Electric* at [56] and [65]). The cash flow test "assesses whether the company's current assets exceed its current liabilities such that it is able to meet all its debts as and when they fall due" (*Sun Electric* at [65]). In accordance with the standard accounting definition for the term "current", the

terms "current assets" and "current liabilities" for the purpose of the cash flow test mean assets that can be realised and debts that will fall due within the next twelve months, (*Sun Electric* at [65]). The element of futurity that is thereby incorporated into the cash flow test is necessary for the law to be consistent with commercial reality and to avoid absurd and uncommercial outcomes (*Sun Electric* at [67]).

GLH is unable to pay its debts

64 I find that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA and is therefore cash flow insolvent. I make that finding for two reasons.

65 First, GLH has failed to pay any part of Judgment Debt (2).[69] Indeed, it is common ground that GLH is unable to pay any part of Judgment Debt (2) out of its own financial resources.[70] That is simply because, as an investment holding company and as GL Thailand's financing node for the Subsidiaries, GLH does not itself trade, carry on business or generate cash flow.[71]

66 Second, there is no prospect of GLH paying its debts, including but not limited to Judgment Debt (2), in full by realising current assets. GLH admits that its current liabilities exceed its current assets by close to US$100m.[72]

---

69 JTA's Written Submissions, para 48.

70 GL Thailand's Written Submissions, para 3; NE dated 4 March 2024, p 7 lines 6–15.

71 NE dated 4 March 2024, p 14 lines 9–11.

72 JTA's Written Submissions at para 49–51.

(a) First, the latest available audited accounts for GLH show that GLH had current assets of US$79.2m and current liabilities of US$151.4m as at 31 December 2021.[73]

(b) Second, an affidavit filed with the authority of the management of both GLH and GL Thailand[74] shows that GLH had current assets of US$80.7m[75] and current liabilities of US$181.1m[76] as at 31 March 2023.

(c) Finally, GLH's statement of affairs submitted to Mr Borrelli in his capacity as PL on 22 September 2023[77] shows that GLH had current assets of US$80.6m[78] and current liabilities of US$189.2m[79] as at 31 August 2023.

67 Although these figures are not up to date, GLH has produced no evidence that its financial position has improved since the latest of these figures, *ie*, 31 August 2023. Indeed, the available evidence suggests that GLH's financial position is, if anything, worse today than it was on 31 August 2023. I say that for two reasons.

68 First, GLH's own auditors included a serious and extensive disclaimer in the audited accounts for the financial years ended 31 December 2020 and 31 December 2021.[80] In relation to the 2021 accounts, the auditors disclaimed the

---

73 Third Affidavit of Nobiru Adachi filed on 20 July 2023 at p 42.

74 First Affidavit of Brian William Banes on 19 May 2023 at para 1.

75 First Affidavit of Brian William Banes on 19 May 2023 at p 7.

76 First Affidavit of Brian William Banes on 19 May 2023 at p 9.

77 First Affidavit of Cosimo Borrelli filed on 15 November 2023, p 731.

78 First Affidavit of Cosimo Borrelli filed on 15 November 2023, p 731 at p 743.

79 First Affidavit of Cosimo Borrelli filed on 15 November 2023, p 731 at p 745.

80 JTA's Written Submissions, para 51 and 52(c).

accounts because GLH's management had not restated its accounts to reverse the effects of the sham loans and round tripping scheme investigated by the SECT and found by the Court of Appeal in *JTA v GLH (1)*. The auditors therefore recorded that they were not able to ascertain independently the nature of GLH's loans receivables, the interest income on those loans, confirmation from the alleged borrowers, the value of the Subsidiaries, and the value of GLH's investments. As a result, the auditors declined to express any opinion on whether these accounts presented a true and fair view of GLH's financial position as at 31 December 2021.[81] The auditors also recorded that GLH's financial position meant that "a material uncertainty exists that may cast significant doubt on [GLH's] ability to continue as a going concern".[82]

69 Second, these statements of GLH's assets and liabilities exclude Judgment Debt (2). The stated reason for excluding this debt is that GLH had not yet, when these statements were drawn up, exhausted its rights of appeal against *JTA v GLH (2)*.[83] That is not a valid reason for omitting Judgment Debt (2) as a current liability. Judgment Debt (2) was, from 10 April 2023, a present obligation due to JTA regardless of the avenues of appeal against the judgment in *JTA v GLH (2)*. In any event, from 11 January 2024, GLH has exhausted its avenues of appeal. If anything, therefore, GLH's deficit of current assets over current liabilities is understated in these financial statements by at least the principal value of Judgment Debt (2), *ie*, US$124.74m.

70 In response to this positive evidence that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA, GLH relies on three factors out of

---

81 Third Affidavit of Nobiru Adachi filed on 20 July 2023 at p 38.

82 Third Affidavit of Nobiru Adachi filed on 20 July 2023 at p 38–41.

83 First Affidavit of Brian William Banes on 19 May 2023

the non-exhaustive multifactorial approach set out in *Sun Electric* (at [69]) to submit that JTA has failed to prove that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA:[84]

(a) the length of time that GLH has failed to pay Judgment Debt (2) (*Sun Electric* at [69(c)];

(b) the length of time that has passed since JTA presented this winding up application (*Sun Electric* at [69(d)]; and

(c) the prospect of GLH reaching an arrangement with GL Thailand, as GLH's sole shareholder and a past and prospective lender, under which GL Thailand will extend financial support to GLH to allow GLH to pay Judgment Debt (2) in full (*Sun Electric* at [69(h)]).

71 For the reasons that follow, GLH's reliance on these three factors is misconceived. These three factors, whether taken alone or together, do not have the result that JTA has failed to prove that GLH is unable to pay its debts for the purposes of s 125(2)(*c*).

Length of time that GLH has failed to pay Judgment Debt (2)

72 GLH submits that it has failed to pay Judgment Debt (2) for less than two months. It calculates that length of time from 11 January 2024, when it exhausted its avenues of appeal against *JTA v GLH (2)* (see [41] above), to 4 March 2024, the date on which I heard this winding up application.[85]

73 This submission is misconceived on two levels.

---

84 GLH's WS at para 18.

85 GLH's WS at para 21.

74 The first level on which this submission is misconceived is that it is axiomatic that an order of a court is effective and enforceable in accordance with its terms as soon as the court pronounces the order. This is so even if the party upon whom the order imposes an obligation exercises its right of appeal against the order. An appeal does not operate as a stay of enforcement unless the court orders otherwise (see O 18 r 6(1) of the Rules of Court 2021).

75 A judgment is simply an order of court that adjudicates on the substantive rights of the parties before the court in a manner that effects a merger of the court's order with the underlying cause of action and gives rise to a *res judicata*. A judgment imposing on obligation on party towards another gives rise not merely to an undisputed obligation but to an indisputable obligation. The obligation arising from a judgment is indisputable simply because the state's coercive power compels the parties to accept the judgment as final and binding on them. They must accept it as final and binding regardless of the avenues of appeal available to the obligor under the judgment. That is so even if the obligor actually pursues one or more of those avenues. The judgment is final and binding unless and until the appellate court reverses the judgment. Further, the obligor comes under an immediate and present obligation to discharge the obligation as soon as judgment is pronounced and entered. That obligation is a present obligation unless and until the court grants a stay on enforcement of the obligation.

76 I therefore find that the length of time that GLH has failed to pay Judgment Debt (2) is almost 11 months, and not just under two months as GLH claims. GLH came under a present obligation to pay Judgment Debt (2) on 10 April 2023, the date judgment was entered in *JTA v GLH (2)*. The present nature of its obligation to pay Judgment Debt (2) was at no time suspended by a stay

of enforcement in *JTA v GLH (2)*.[86] GLH's effort to secure such a stay (see [33] above) was dismissed. GLH therefore continued to be under a present obligation to pay Judgment Debt (2) without interruption from 10 April 2023 until this winding up application was heard on 4 March 2024. The fact that this winding up application was stayed during much of that 11-month period is irrelevant to this factor (see [94] below).

77 To put this finding in terms relevant to s 125(2)(*c*) of the IRDA, the weight to be attached to GLH's failure to pay Judgment Debt (2) for almost 11 months as evidence that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) is wholly undiminished by the fact that GLH was pursuing its avenues of appeal during much of this 11 month period, given that GLH's present obligation to pay Judgment Debt (2) was at no time suspended by a stay of enforcement.

78 The second level on which GLH's submission is misconceived is that, even if I take GLH's argument at its highest and count the length of time that it failed to pay Judgment Debt (2) only from 11 January 2024 to 4 March 2024, that still means that GLH has had just under two months to pay Judgment Debt (2) in full. GLH's failure to pay Judgment Debt (2) during even this shorter period of time is strong evidence that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA.

79 That is because the period from 11 January 2024 to 4 March 2024 is more than sufficient time for GLH to effect the mechanics of payment necessary to pay Judgment Debt (2) in full.

---

[86] NE dated 4 March 2024, p 2, lines 8–10; p 11, lines 8–9.

80 It is well-established that a debtor does not breach a contractual payment obligation to its creditor if the debtor takes only the additional time necessary to effect the mechanics of payment of its debt to its creditor after the debt has fallen contractually due, whether by demand or by effluxion of time (*Bank of Baroda v Panessar and others* [1985] 1 Ch 335 ("*Bank of Baroda*") at 348B to 348H; followed in *Roberto Building Materials Pte Ltd and others v Oversea-Chinese Banking Corp and another* [2003] 3 SLR(R) 217 at [36] and [42]–[44]; followed in *Anwar Siraj and Another v The Tai Ping Insurance Co Ltd (Teo Hee Lai Building Construction Pte Ltd, Third Party)* [2005] SGDC 3 at [64]–[67]).

81 In my view, the same principle applies to a judgment debt such as Judgment Debt (2). Indeed, a judgment debt has significantly greater legal force than a mere contractual debt. A contractual debt derives its legal force only from the consent of the creditor and the debtor. That consent is given binding effect as a matter of private law in accordance with the law of contract. A judgment debt, on the other hand, derives its legal force directly from the court's coercive power to impose upon litigants, regardless of the litigants' consent, a final and binding adjudication of the merits of their private rights. That coercive power of the court is how the state fulfils its public function of sublimating conflict by diverting parties in dispute to a peaceful, orderly, final and binding resolution of their dispute through litigation in accordance with law, both substantive and procedural. What is true about the legal force of a contractual debt is therefore, in my view, *a fortiori* true about the legal force of a judgment debt. Accordingly, in my view, a judgment debtor does not breach its payment obligation arising from a judgment debt only if the debtor takes no more time to satisfy the judgment after it has been entered than the time necessary to effect the mechanics of payment to the judgment creditor.

82 The length of time that GLH allowed to elapse from 11 January 2024 to 4 March 2024 is well beyond the time needed to effect the mechanics of payment, even for a sum as large as that due to JTA under Judgment Debt (2). The weight to be attached to GLH's failure to pay Judgment Debt (2) for almost two months as evidence that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA is undiminished by the fact that that length of time can be characterised, on one view, as relatively short. It suffices for a finding under s 125(2)(*c*) that that length of time exceeds the time that GLH needed to effect the mechanics of payment.

83 Under this same factor, GLH submits that JTA's conduct in presenting this winding up application just two days after Judgment Debt (2) arose (see [30]–[31] above) is in "stark contrast"[87] to JTA's conduct in allowing GLH over nine months from October 2020 to July 2021 to pay Judgment Debt (1) in full (see [18]–[19] above). With that additional time, and with financial support from GL Thailand, GLH was able to pay Judgment Debt (1) in full.[88] GLH therefore submits that, in respect of Judgment Debt (2) too, JTA "should give GLH an opportunity to discharge" its payment obligation.[89]

84 This submission is misconceived. Even if I were to assume, in GLH's favour, that JTA took a positive decision between October 2020 and July 2021 to withhold enforcement of Judgment Debt (1) for the sole purpose of giving GLH a lengthy opportunity to pay Judgment Debt (1) in full, that does not assist GLH in resisting this winding up application. The mere fact that a judgment creditor allows a judgment debtor a lengthy opportunity to pay one judgment

---

87 GLH's WS at para 23.

88 GLH's WS at paras 22–23.

89 GLH's WS at para 23.

debt does not in any way prevent the judgment creditor from relying on the judgment debtor's failure to pay a later judgment debt as evidence that the judgment debtor is unable to pay its debts at that later time for the purposes of s 125(2)(*c*) of the IRDA.

85 In the same vein, GLH submits that "JTA is well aware that GLH could very well have the means to make payment of [Judgment Debt (2)] given its previous conduct"[90] in *JTA v GLH (1)*.

86 This submission is misconceived. A debtor who is contractually obliged to pay a debt upon demand or at a particular time is not entitled to additional time to raise the money if the debtor does not otherwise have the money available to pay the creditor (*Bank of Baroda* at 347F and 348D). In my view, once again and for the same reasons, the position is *a fortiori* with respect to a judgment debt (see [81] above). The only opportunity that GLH may take is an opportunity to effect the mechanics of paying Judgment Debt (2) in full, nothing more. That time has passed.

87 The final point that GLH makes under this head is that winding up GLH would be "disproportionate", given that GLH has demonstrated its ability and commitment to pay Judgment Debt (1) to JTA.[91]

88 This submission is misconceived. A winding up order granted under s 125(1)(*e*) of the IRDA is not a penalty that the court imposes upon a debtor company. It is instead a class remedy granted upon a creditor proving that the company is unable to pay its debts. It is a class remedy because it brings no

---

90 GLH's WS at para 23.

91 GLH's WS at para 24.

direct and individual benefit to the creditor applying for it. It instead merely sets in motion a collective proceeding under the immediate supervision of the Ofiical Receiver or an insolvency practitioner and the ultimate supervision of the court to ensure the equal treatment of all of the company's creditors in accordance with law by preventing individual creditor action from effecting a disorderly dismemberment of the company to the detriment of the class as a whole.

89 A court that makes a winding up order under s 125(2)(*e*) of the IRDA is therefore not required to consider whether a winding up order would be "proportionate", whether that proportionality is measured against the debt of the creditor applying for the winding up order, against all of the debts that the debtor owes to all of its creditors or even against the debtor's good faith in paying other debts to this or other creditors in the past.

90 Considerations of "proportionality" may go to the residual discretion under s 125(1) of the IRDA not to make a winding up order even if one of the grounds under that subsection has been established. But these considerations do not go to whether the debtor's failure to pay an indisputable debt is evidence that it is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA.

Length of time that JTA's winding up application has been pending

91 GLH next submission is that this winding up application has been pending for less than two months. Again, it calculates that length of time from 11 January 2024, when it exhausted its avenues of appeal against *JTA v GLH (2)* (see [41] above), to 4 March 2024, the date on which I heard this winding up application.[92]

---

92 GLH's WS at para 21.

92 This submission is misconceived. The length of time that this winding up application has been pending is almost 11 months. It is only two days shorter than the length of time for which GLH has failed to pay the debt on which it is based, *ie*, Judgment Debt (2). I reject GLH's reliance on this factor for the same reasons I rejected GLH's reliance on the length of time for which it had failed to pay Judgment Debt (2).

93 It is true, however, that Lee Seiu Kin J ordered a stay of this winding up application. That stay was in effect from 3 July 2023 (see [33] above) to 22 November 2023 (see [40] above). But that does not affect my analysis of this factor for three reasons.

94 First, the stay of this winding up application is quite irrelevant given that there was never any stay on enforcement of Judgment Debt (2). It is only the latter type of stay which could have suspended GLH's present obligation to pay Judgment Debt (2). A stay of this winding up application suspended only JTA's ability to seek the class remedy of a winding up order against GLH by reason of its failure to pay Judgment Debt (2). A stay of this winding up application therefore could not and did not change the fact that GLH has been under a present obligation to pay Judgment Debt (2) at all times and without interruption since 10 April 2023.

95 Second, the purpose of this factor in the multifactorial list set out in *Sun Electric* (at [69(d)] is to direct the court to examine the debtor's failure to pay the debt due to the creditor after the point at which the debtor can no longer be in any doubt about the seriousness of the creditors' intent and the consequences of continuing to fail to pay the debt. Until a creditor presents a winding up application, there are several possible reasons for a debtor's failure to pay an undisputed or indisputable debt that has not been the subject of a statutory

demand under s 125(2)(*a*) of the IRDA. One possible reason is, of course, that the debtor is unable to pay the debt. But it remains possible that the debtor's failure is due to recalcitrance, nonchalance, indolence, apathy or even inadvertence. Once a creditor presents a winding up application based on the debtor's failure to pay that debt, the debtor's mind will or ought to be intensely focused on the consequences of continuing to fail to pay the debt. That makes it far more likely that the true reason for the debtor continuing to fail to pay the debt is an abiding inability to pay the debt rather than any other reason.

96 GLH was aware from 12 April 2023 that JTA was seeking a winding up order against GLH if GLH failed to pay Judgment Debt (2) and failed to secure a reversal on appeal of *JTA v GLH (2)*. In the absence of any stay of enforcement of Judgment Debt (2), GLH's failure to pay Judgment Debt (2) from 12 April 2023 to 4 March 2024 – knowing full well that JTA was applying for a winding up order by reason of that failure – is undiminished by the fact that this winding up application was stayed from 3 July 2023 to 22 November 2023.

97 Finally, even if I take GLH's submission at its highest and count the length of time that this winding up application has been pending only from 22 November 2023 (when the Appellate Division dismissed GLH's appeal) or even 11 January 2024 (when the Court of Appeal dismissed GLH's application for leave to appeal from the Appellate Division to the Court of Appeal), to 4 March 2024, GLH's failure to pay Judgment Debt (2) has nevertheless extended well beyond the time to effect the mechanics of payment. GLH's failure to pay Judgment Debt (2) during even this shorter period of time despite knowing that this winding up application was pending is strong evidence that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA.

98 The evidential value of GLH's failure to pay Judgment Debt (2) is therefore undiminished by the time for which this winding up application has been pending, however that is calculated, and by the time for which this winding up application was stayed.

Prospect of financial support from GL Thailand

99 GLH's final submission is that I should consider the prospect of GL Thailand extending financial support to GLH to allow it to pay Judgment Debt (2) in full within the next 12 months.[93] GL Thailand says that it intends to formulate a proposal to extend financial support to GLH to enable it to pay Judgment Debt (2) in full[94] but has been prevented from doing so only because of the Thai rehabilitation proceedings that JTA commenced on 20 April 2023 against GL Thailand. That was just eight days after JTA presented this winding up application against GLH in Singapore.[95]

100 I reject this submission for two reasons.

101 First, GL Thailand makes no concrete proposal as to how it intends to extend financial support to GLH, in what quantum, on what terms and within what time frame. It has been almost 11 months since GLH came under a present obligation to pay Judgment Debt (2) to JTA. It has also been almost 11 months since both GL Thailand and GLH have been aware that a failure to pay Judgment Debt (2) in full is likely to lead to a finding that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA and a winding up order

---

93 GLH's WS at para 29.

94 NE dated 4 March 2024 at p 12 lines 22–25.

95 GLH's WS at paras 32–33; NE dated 4 March 2024 at p 18 lines 11–32 and p 19 lines 1–5; NE at p 23 lines 3–4.

under s 125(1)(*e*) of the IRDA. Despite knowing all this, GL Thailand's failure to formulate and present to me any concrete proposal for extending financial support to GLH during those almost 11 months deprives their submission of any credibility.

102 It is no answer for GL Thailand to say (as it does) that the rehabilitation proceedings against GL Thailand in prevent it even from formulating a proposal for extending financial support to GLH. I say that for four reasons.

103 First, as I have pointed out, a debtor cannot point to the prospect of its raising funds in the future to avoid a finding that it is unable to pay its debts within the meaning of s 125(2)(*c*) of the IRDA (*Bank of Baroda* at 347F and 348D). I do not read anything in *Sun Electric* as detracting from this proposition. GLH appears to take *Sun Electric* as authority for the proposition that a debtor is not unable to pay its debts for the purposes of s 125(2)(*c*) if there is a possibility that it will raise the necessary funds to pay its debts in full within the next 12 months.[96] *Sun Electric* is most emphatically not authority for any such proposition. Any such proposition is commercially absurd. If GLH's submission were correct, it would destroy the important legal and commercial distinction between insolvency proceedings and rehabilitation or restructuring proceedings. Of course, it would be different if GLH was able to establish by credible evidence that a third-party – not necessarily GL Thailand – had undertaken a binding legal commitment to inject sufficient funds into GLH within a few days to allow GLH to pay Judgment Debt (2) in full. In those circumstances, it may well be commercially absurd to reach a finding that GLH

[96] NE dated 4 March 2024, p 14, lines 17–22; p 15 lines 9–20.

is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA. But that is not even remotely the position before me.[97]

104 Second, it is not GL Thailand's position that it has the funds in hand to lend GLH to allow GLH to pay Judgment Debt (2) in full and that the only reason GL Thailand has been unable to do so is because of the Thai rehabilitation proceedings. If GL Thailand had the funds in hand, it had ten days to effect the mechanics of payment necessary to lend those funds to GLH between GLH coming under a present obligation to pay Judgment Debt 2 on 10 April 2023 and JTA commencing the Thai rehabilitation proceedings against GLH on 20 April 2023. That is more than enough time to effect the mechanics of payment.

105 GL Thailand's position instead is that GL Thailand *itself* needs time to raise the necessary funds to lend GLH.[98] If a debtor cannot avoid a finding that it is unable to pay its debts for the purpose of s 125(2)(*c*) by pointing to the prospect of its raising the necessary funds to pay the creditor (see [86] above), the debtor cannot *a fortiori* avoid such a finding by pointing to a potential lender who itself needs time to raise the necessary funds.

106 Third, there is no evidence before me that the Thai rehabilitation proceedings prevent GL Thailand from even formulating and putting forward a proposal as to how GL Thailand intends to extend the necessary financial support to GLH that can be put into effect once the rehabilitation proceedings conclude. GL Thailand knows its financial position, both in terms of cash flow and in terms of assets and liabilities. It appears to me that there is nothing

---

97 NE dated 4 March 2024, p 12, lines 5–8.

98 NE dated 4 March 2024, p 11, line 28–29; p 22, lines 2–10.

preventing GL Thailand from formulating and putting forward now a concrete proposal as to how it intends to raise the funds once it is free of the constraints of the Thai rehabilitation proceedings, incorporating specific figures, specific dates and specific assets to be realised. GL Thailand has done none of that.

107 Fourth, while it is true that GL Thailand is the sole shareholder of GLH, there is no reason for GLH to look only to GL Thailand for financial support. GLH can attempt to seek that support from any source, even one entirely unrelated to GL Thailand or its group of companies. There is no evidence that GLH has made any such attempt.[99] Even within the group, there is no evidence of GLH seeking the necessary support from another subsidiary of GL Thailand or even from one of the Subsidiaries. GLH could even have sought the necessary support from shareholders with a substantial beneficial shareholding in GL Thailand. Again, there is no evidence of any such attempt. There is no reason why a debtor should avoid a finding that it is unable to pay its debts simply because it has fixated on one particular potential lender even though: (a) that lender does not have the necessary funds itself to lend the debtor; and (b) is not in a position – for whatever reason – to formulate a concrete proposal for raising the necessary funds and on-lending them to the debtor.[100]

Conclusion

108 For all of the foregoing reasons, I am satisfied that JTA has proved that GLH is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA. As a result, JTA succeeded in establishing the ground for making a winding up order set out in s 125(1)(*e*) of the IRDA.

---

99 NE dated 4 March 2024, p 15, lines 5–8.

100 NE dated 4 March 2024, p 12 line 5 to p 13 line 9.

109 I now turn to consider whether I should nevertheless exercise my discretion not to make a winding up order and whether JTA is abusing the process of the court by presenting and pursuing this winding up application.

The residual discretion

The source of the residual discretion

110 In *Sun Electric*, the Court of Appeal reaffirmed two fundamental propositions in the very same paragraph. The first proposition is that a creditor of a company that is deemed to be unable to pay its debts under s 125(2) of the IRDA is entitled, *prima facie* and *ex debito justitiae*, to an order that the company be wound up. The second proposition is that s 125(1)(*e*) of the IRDA confers a residual discretion upon the court *not* to make a winding up order even if a company is deemed to be unable to pay its debts (*Sun Electric* at [84]; *BNP Paribas v Jurong Shipyard Pte Ltd* ("*BNP*") [2009] 2 SLR(R) 949 at [15]–[16]).

111 The case law on the second proposition has established that the residual discretion is to be exercised judicially, having regard in the usual way to all the circumstances of each case. Those circumstances will include "the utility and effect of a winding-up order and the overall fairness and justice of the case" (*Perennial (Capitol) Pte Ltd and another v Capitol Investment Holdings Pte Ltd* [2018] 1 SLR 763 at [82], citing *Lai Shit Har v Lau Yu Man* [2008] 4 SLR(R) 348 ("*Lai Shit Har*") at [33]) as well as "the viability of the company, and the economic and social interests of the company's employees, suppliers, shareholders, non-petitioning creditors, customers and other companies in the group" (*Sun Electric* at [84], citing *BNP* at [16]–[20]). Another inevitable consideration is whether the creditor is abusing of process of the court by presenting or pursuing the winding up application (*Lai Shit Har* at [34(a)]).

112 Neither of the two propositions reaffirmed in *Sun Electric* is a mere bromide. Both propositions have been fundamental and enduring aspects of the court's power to wind up a company that is unable to pay its debts from the creation of that power in the English insolvency legislation in 1865 to the present day (*BNP* at [15]–[16]). And most importantly, of course, both propositions carry the authority of the Court of Appeal and therefore bind a judge at first instance.

The limited scope of the residual discretion in this class of cases

113 Having said that, however, it is my view that the weight to be attached to the first of these two propositions (see [110] above) is amplified and the weight to be attached to the second proposition correspondingly attenuated in a winding up application that falls into the same class as the one before me. The class in question is a winding up application arising from an undisputed (or indisputable (see [75] above) debt presented against a private limited company on the ground that the company is unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA. Indeed, the vast majority of winding up applications that come before the courts fall into this class.

114 I have formed this view because the relevance of many of the factors identified in the case law as going to the exercise of the residual discretion (see [111] above) are very likely to be attenuated in this class of winding up applications. I say that for three reasons.

115 First, a company with a viable business that is or expects to be unable to pay its debts has readily available avenues to rehabilitate or restructure its business or debts. It can and ought to have recourse to these avenues – with the benefit of advice and assistance from legal and insolvency practitioners to the

extent necessary – long before a creditor presents a winding up application let alone before: (a) the court hears the winding up application; (b) the court finds that the company is unable to pay its debts; and (c) the court considers exercising the residual discretion.

116 If the company's management has earned and retained the confidence of its creditors, it can carry out a rehabilitation or restructuring by a scheme of arrangement under Part VII of the Companies Act 1967 (Cap 50) or under Part 5 of the IRDA. If the company's management has lost the confidence of its creditors, it can initiate a rehabilitation or restructuring under the oversight of an external administrator in the form of a judicial manager under Part 7 of the IRDA. Both alternatives allow the company to seek and secure protection from creditors. This protection includes protection against a winding up application being presented and, if one has already been presented, against a winding up order being made on it. If the company has chosen not to take advantage of either of these avenues for a rehabilitation or a restructuring, it lies ill in the company's mouth to resist the consequences of failing to pay its undisputed debts purely by appealing to the court's residual discretion at the hearing of a winding up application.

117 Second, when a private company is unable to pay its debts, the interests and wishes of its shareholders recede into the background, their share capital having been wiped out. The court has predominant regard to the private interests of its creditors and to the public interest in initiating a compulsory, collective proceeding to ensure an orderly realisation and distribution of the company's assets to its creditors *pari passu* in accordance with law. Further, it is likely that the interests of the non-petitioning, unrelated and unsecured creditors of the company will be aligned in favour of the court initiating this collective proceeding. In contrast, considering whether to exercise the residual discretion

on a winding up application on the just and equitable ground under s 125(1)(*i*) of the IRDA will necessarily involve consideration of shareholders' views. So too, shareholders' and bondholders' views are relevant when considering whether to exercise the residual discretion in favour of a public company in a winding up application brought on grounds of insolvency. Many of a public company's shareholders and bondholders are likely to be unsophisticated members of the public who have made individual decisions to invest in its equity or debt instruments. There is therefore far more likely to be a divergence of interests and views on whether to initiate the collective proceeding that the court may wish to hear and take into consideration. Even then, the point I have made at [115]–[116] is a weighty one.

118 Third, a winding up order against a private company is far less likely to carry systemic effects warranting the court taking into account the interests of stakeholders such as employees, suppliers, customers and group companies in exercising the residual discretion. Of course, it is possible that even a private company may be a substantial business with systemic importance and substantial numbers of employees, suppliers and customers warranting a consideration of these stakeholder interests. Examples include an airline whose passengers may be stranded by a winding up order or a payment processor whose winding up carries systemic risks for broader commerce. But on the whole, these considerations are far more likely to arise in a winding up application against a public company that finds itself unable to pay its debts than in relation to a private company in the same situation.

119 The only one of the considerations listed at [111] above which is likely to be of relevance in this class of winding up application (*ie*, one involving a private company, an undisputed debt and a company that is unable to pay its debts) is whether the creditor is abusing the process of the court. But that

consideration is capable of being a freestanding procedural ground for dismissing a winning application *in limine*.

GLH's submissions on the residual discretion

120 With those preliminary points in mind, I now turn to the specific points made by GLH on the residual discretion.

121 GLH submits that I should exercise my residual discretion in its favour for two reasons:

(a) Because it may be able to pay its debts with financial support from affiliated companies.[101]

(b) Second, because JTA is abusing the process of the court by presenting and pursuing this winding up application.

122 I analyse these submissions in turn.

Affiliated companies

123 For its first submission, GLH relies on *Seah Chee Wan and Anor v Connectus Group Pte Ltd* [2019] SGHC 28 ("*Connectus*") to submit that a court may exercise its discretion not to wind up a company on the ground that it may be able to pay its debts with support from affiliated companies.

124 *Connectus* is distinguishable from the case before me.

125 *Connectus* arose from a winding up application presented by a creditor of a company who was also one of its shareholders. He presented the winding

---

101 GLH's WS at para 66.

up application as a result of a dispute with the company's other shareholders. Ang Cheng Hock J found that the company was unable to pay its debts within the meaning of s 125(1)(*e*) of the IRDA (at [106]). He also found that the consequences of the shareholders' dispute made it just and equitable to wind up the company under s 125(1)(*i*) of the IRDA (at [141] and [150]).

126 Ang Cheng Hock J nevertheless exercised his residual discretion not to wind up the company for three reasons. First, the company's subsidiary in China had a thriving business that could generate cash that could be repatriated to Singapore to enable it to pay its debts. Second, a shareholder had declared an intention to inject more capital into the company and its subsidiaries and to take steps to remedy the company's cash flow issues in order to allow it to pay its debts. Finally, there was insufficient evidence to prove that the company was balance sheet insolvent (at [111]). I should note that this last factor was relevant because *Connectus* was decided before the Court of Appeal held in *Sun Electric* that the cash flow test was the sole test for determining whether a company is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA.

127 It is not surprising that, in these circumstances, Ang Cheng Hock J exercised his discretion not to wind up the company and instead ordered that the petitioning shareholder be bought out under what is now s 125(3) of the IRDA.

128 The case before me is quite different from *Connectus*. GLH is hopelessly cash flow insolvent.[102] It is equally hopelessly balance sheet insolvent.[103] It is wholly unable to pay its debts out of its own resources. The only source of external financial support that it has approached, GL Thailand, does not have

---

102 NE dated 4 March 2024 at p 14 lines 9–11.

103 NE dated 4 March 2024 at p 17 lines 7–15.

the necessary funds to extend financial support. GL Thailand itself needs time to raise the funds. There is no evidence that the Subsidiaries can generate sufficient cash from their operations to flow up GLH to enable it to pay its debts. Indeed, the auditors' heavy disclaimers of GLH's accounts suggests that the Subsidiaries are not in any position to do so. For all these reasons, *Connectus* does not assist GLH.

129 The prospect of financial support, such as it is, is not a consideration justifying exercising the residual discretion in favour of GLH, bearing in mind the preliminary points I have made at [113]–[119] above.

Abuse of process

130 GLH second submission is that JTA has presented this winding up application for an ulterior purpose, *ie*, to gain control of GLH and the Subsidiaries, and it is therefore an abuse of the process of the court.[104] GLH makes the following subsidiary submissions to support its second submission:

(a) JTA presented the winding up application just two days after judgment was entered in *JTA v GLH (2)* and well before the expiry of the three-week period specified in the SD for GLH to pay Judgment Debt (2).[105]

(b) JTA has commenced multiple Thai rehabilitation proceedings, the most recent one on 20 April 2023, deliberately to restrict GL

104 GLH's WS at para 71.

105 GLH's WS at para 71(a).

Thailand's ability to extend financial support to GLH, and thereby to prevent GLH from paying Judgment Debt (2).[106]

(c) JTA repeatedly and unreasonably refused to hold this winding up application in abeyance while GLH pursued its right of appeal against *JTA v GLH (2)* even though a winding up order against GLH would have rendered its appeal nugatory.[107]

131 I reject GLH's submission.

132 For this submission, GLH relies on *Adcrop Pte Ltd v Gokul Vegetarian Restaurant and Café Pte Ltd (Rajeswary d/o Sinan and another, non-parties)* [2023] 5 SLR 1435 ("*Gokul*"). In *Gokul*, Andrew Ang SJ dismissed a winding-up application on two grounds. First, he dismissed it *in limine* on the procedural ground that it was an abuse of the process of the court. He found that the applicant was complicit with a shareholder in a scheme to use the winding up procedure to wrest sole control of the company's underlying business from the company, to the exclusion and detriment of the company's other shareholder (at [50]–[64]). Second, he held that the company disputed the debt underlying the winding up application on *bona fide* and substantial grounds (at [65]–[70]).

133 JTA's winding up application is quite different from *Gokul*.

134 First, JTA's debt is undisputed; indeed, it is indisputable. A creditor with an undisputed debt is entitled *ex debito justitiae* to a winding up order (*Sun Electric* at [84]).

---

106 GLH's WS at para 71(b).

107 GLH's WS at para 71(e).

135 Second, nothing that JTA has done in the conduct of this winding up application leads me even close to the inference that JTA is engaging in an abuse of the process of the court in presenting and pursuing this winding up application. That is so whether I consider GLH's submission on abuse of process as a procedural ground for dismissing the winding up application *in limine* or as a substantive factor going to the residual discretion under s 125(1) of the IRDA.

136 In my view, JTA's conduct in presenting and pursuing this winding up application has been entirely consistent with the manner in which sophisticated litigants represented by sophisticated counsel conduct complex commercial litigation fought on multiple fronts in multiple jurisdictions over very high stakes. That is precisely the position that JTA, GLH and GL Thailand find themselves in.

137 Thus, in commercial litigation of this nature, none of the matters set out it in this paragraph is an abuse of process whether in itself or taken together. It is not an abuse of process for a claimant to commence civil proceedings to vindicate a cause of action two days after the cause of action arises. It is not an abuse of process for a claimant to press on to judgment knowing that a defendant has no resources of its own out of which to pay a judgment. It is not an abuse of process for a judgment creditor to resist a stay of execution of a judgment in a civil suit and, if the stay is refused, actually to levy execution on the judgment. That is so even if an appeal against the judgment is pending. It is not an abuse of process for a judgment creditor to refuse a judgment debtor time to raise the money to pay the judgment debt. It is not an abuse of process for a judgment creditor to make it difficult, or even impossible, for a judgment debtor's sole shareholder to raise the money necessary to extend the financial support to the judgment debtor necessary to enable it to pay the judgment debt. That is so

whether the judgment creditor uses insolvency law, restructuring law or other law and whether the judgment creditor does so repeatedly or otherwise. It is not an abuse of process for a judgment creditor to use the same means to make it difficult, or even impossible, for a judgment debtor's sole shareholder even to formulate a proposal for extending the financial support to the judgment debtor to enable it to pay the judgment debt.

138 Further, in a winding up application founded on an undisputed debt such as a judgment debt, none of the matters set out it in this paragraph or the following paragraph is an abuse of process whether in itself or taken together. It is not an abuse of process to serve a statutory demand only one day after the debt falls due. It is not an abuse of process to present a winding up application only one day after serving a statutory demand for the underlying debt. To hold otherwise would amount, in effect, to holding that Parliament intended s 125(2)(*a*) of the IRDA to impose a three-week moratorium preventing a creditor who serves a statutory demand from presenting a winding up application for the same debt. That would put a creditor who serves a statutory demand for a debt in a worse position than one who serves an ordinary demand for that debt. That is absurd and not the law. If GLH wanted a moratorium against JTA presenting a winding up application based on Judgment Debt (2), it was incumbent on GLH to seek the moratorium by availing itself of the scheme of arrangement or judicial management procedure, both created for that very purpose.

139 Likewise, it is not an abuse of process for a judgment creditor to present and pursue a winding up application even though an appeal against the judgment debt underlying the application is pending. It is not an abuse of process for a creditor to present a winding up application against a company – whether it is solvent or insolvent – to put commercial pressure on the company to pay a debt,

so long as the debt is undisputed (*Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 at 118B-E; *Re Hong Huat Development Co (Pte) Ltd* [2000] 3 SLR(R) 431 at [5]). Of course, if the company is solvent, the creditor takes the risk that the winding up application will be stayed or even dismissed with costs. And if the company is insolvent, the creditor must be prepared to pursue the winding up application to a conclusion in accordance with the court's case management practices – either by pressing on and securing a winding up order or withdrawing the application and, if necessary, paying costs – and cannot keep adjourning it repeatedly so that it continues to hang over the company's head *in terrorem*. But all of these consequences are the creditor's risk to take. None of them make presenting or pursuing the application an abuse of process in itself.

140 GLH submits that JTA's ulterior purpose in presenting this winding up application is to "usurp control of GLH" and its Subsidiaries,[108] presumably by purchasing the Subsidiaries from a liquidator in GLH's liquidation at forced-sale prices. I reject this submission. There is no evidence before me that that is indeed JTA's ulterior purpose. Indeed, I am prepared to draw the inference that JTA's predominant purpose in presenting and pursuing this winding up application is to secure the class remedy of a winding up order against GLH for the following reasons: (a) JTA's debt is undisputed; (b) GLH has failed to pay the debt for almost 11 months; (c) GLH and GL Thailand have failed to establish even a remote prospect of GLH being able to pay that debt in the near future; (d) GLH has made no attempt to offer security or composition for the debt; (e) GLH has made no attempt to secure protection from creditors in order to formulate and present a proposal to rehabilitate or restructure its business or its debts; and (d) JTA has demonstrated that is fully prepared to secure a winding

[108] GL Thailand's Written Submissions, para 2.

up order at the earliest opportunity. It is not the case that only a creditor who feels goodwill to its debtor is entitled to a winding up order (*IOC Australia Pte Ltd v Mobil Oil Australia Ltd* (1975) 11 ALR 417 at 427).

141 JTA may have, as a subsidiary purpose, an intention to purchase one or more of the Subsidiaries in GLH's liquidation.[109] JTA and the Group are, after all, competitors in the same field of business. As there is no evidence of any such subsidiary purpose, the most I can say is that it is not impossible. But even that subsidiary purpose would not be an ulterior purpose. JTA has an undisputed debt. It has pressed on with the application to its conclusion in a winding up order. Further, as I pointed out to counsel for GLH in the course of argument, there is nothing wrong in itself with a creditor purchasing an asset from the liquidator of a company that the creditor has itself put into liquidation, so long as the purchase takes place at arm's length, under a transparent and fair process conducted for the overall benefit of all of the company's creditors as a class in accordance with the liquidator's statutory, common law and professional duties.[110] Any deviation from those procedures and duties can be challenged if and when it happens.

142 I therefore find that JTA has not abused the process of this court in presenting and pursuing this winding up application. None of the factors raised by GLH is a basis for refusing JTA a winding up order to which it is entitled *ex debito justitiae*. I thus decline to dismiss this application on that ground in the exercise of my residual discretion under s 125(1) of the IRDA.

---

109 NE dated 4 March 2024 at p 18 line 9.

110 NE dated 4 March 2024 at p 18 lines 25–32 and p 19 lines 1–2.

143 I should also record that I decline, for the same reasons, to dismiss this winding up application *in limine* on the procedural ground that it is an abuse of process.

144 I have therefore made an order winding up GLH under s 125(1)(*e*) of the IRDA.

145 I now turn to consider whether Mr Borrelli should be appointed GLH's liquidator.

Mr Borrelli is appointed GLH's liquidator

146 Subject to exceptions that are not material for present purposes, s 135(1) of the IRDA requires a creditor who presents a winding up application to nominate, at the same time, a licensed insolvency practitioner to be appointed liquidator. But if the court makes a winding up order, it is not obliged to accept the creditor's nomination. The court has an independent discretion under s 134(*a*) to appoint a licensed insolvency practitioner as the liquidator.

147 In compliance with s 135(1) of the IRDA, JTA has nominated Mr Borrelli to be GLH's liquidator. GL Thailand opposes the appointment of Mr Borrelli. It submits that Mr Borrelli has shown actual bias in favour of JTA or has conducted himself so as to give rise to a perception of bias in favour of JTA.[111] GL Thailand therefore urges me to exercise my discretion under s 134(a) of the IRDA to appoint a neutral, independent and impartial liquidator instead of Mr Borrelli.[112]

---

111 GL Thailand's Written Submissions, para 16.

112 GL Thailand's Written Submissions, para 15.

148 Both Mr Borrelli and JTA reject any allegation of bias, whether actual or perceived.[113]

The applicable test

149 Impartiality is of course a cardinal prerequisite for a liquidator properly to fulfil his duties (*Petroships Investment Pte Ltd v Wealthplus Pte Ltd (in members' voluntary liquidation) (Koh Brothers Building & Civil Engineering Contractor (Pte) Ltd and another, interveners) and another matter* [2018] 3 SLR 687 ("*Petroships*") at [149]). The test that the court applies when it is asked to remove a liquidator already in office for cause, whether under ss 139(1) or s 174 of the IRDA, is whether the liquidator is motivated by actual bias or has conducted himself so as to give rise to a perception of bias (*Petroships* at [109(c)], *Liquidators of Ace Class Precision Engineering Pte Ltd (in members' voluntary liquidation) v Tan Boon Hwa and others and other matters* [2022] 3 SLR 539 at [102], *DB International Trust (Singapore) Ltd v Medora Xerxes Jamshid* [2023] 5 SLR 773). Further, the court "will give significant weight to an applicant's perception of bias if the applicant can demonstrate: (i) a subjective belief that the liquidator is biased; (ii) that the belief is reasonable, and (iii) that as a result, the applicant has lost confidence in the ability of the liquidator to carry out the liquidation without fear or favour" (*Petroships* at [109(d)].

150 GL Thailand submits that the test for a court to exercise its discretion under s 134(a) of the IRDA to appoint as liquidator an insolvency practitioner other than the one nominated by the creditor under s 135(1) of the IRDA is less strict than the test for removal of a liquidator for cause under s 139(1) and s 174

---

113 JTA's Written Submissions at pp 27–34; PL's Written Submissions at pp 25–31.

of the IRDA. That less strict test is whether there is a reasonable apprehension by any creditor of a lack of impartiality on the part of the insolvency practitioner nominated under s 135(1).[114]

151 I do not accept this submission for two reasons. First, the distinction that GL Thailand draws between the two tests is a distinction without a difference. A liquidator will be removed for cause if he is motivated by actual bias *or* has conducted himself in a manner that gives rise to a perception of bias. A liquidator can be removed for cause, therefore, even if he has merely conducted himself in a manner giving rise to a perception of bias. There are two principal differences between this limb of the test for removal for cause and GL Thailand's formulation.

152 The first difference is that GL Thailand's formulation makes no mention of "conduct". It is true that in most cases of the kind before me, there will be no conduct by the nominated insolvency practitioner in the liquidation for the court to consider in applying the test. That is simply because the liquidation has not even begun. In that context, the perception of bias will have to arise from the insolvency practitioner's conduct outside the liquidation. The principal such conduct will be the nominated insolvency practitioner's conduct outside the liquidation with the company, its shareholders, stakeholders and creditors giving rise to a perception of bias from a prior association. Further, in a situation like the present, there will also be conduct by the nominated insolvency practitioner in the context of the provisional liquidation for the court to examine.

153 The second difference between the test for removal for cause and GL Thailand's formulation is that GL Thailand's test incorporates the element of

---

114 GL Thailand's Written Submissions, para 25.

reasonableness *ie*, whether there is a *reasonable* apprehension by any creditor of lack of impartiality. But when the court assesses whether a liquidator should be removed for cause because he has conducted himself in a manner giving rise to a perception of bias, the court must also consider whether the perception of bias is reasonable (*Petroships* at [109(d) and [154]).

154 The second reason I do not accept GL Thailand's submission is because, as a matter of principle, there is no difference in the *desiderata* when a court considers whether to appoint an insolvency practitioner nominated under s 135(1) of the IRDA as liquidator and when a court considers whether to remove a liquidator for cause under s 139(1) or s 174 of the IRDA. A liquidator must be impartial and must not have conducted himself so as to give rise to a reasonable perception of bias. This is so both when seeking appointment and when seeking removal for cause. The test on both occasions must therefore be the same.

155 In this case, there is no allegation that Mr Borrelli should not be appointed GLH's liquidator because of a prior association. Thus, the test that I apply in considering whether Mr Borrelli should be appointed GLH's liquidator is whether Mr Borrelli has, in his capacity as GLH's PL, either been motivated by actual bias in favour of JTA or has conducted himself so as to give rise to a perception of bias in favour of JTA. Further, I will give significant weight to GL Thailand's perception of bias only if I am satisfied: (a) that GL Thailand holds a subjective belief that Mr Borrelli is biased; (b) that the belief it holds is reasonable; and (c) that as a result, GL Thailand does not have confidence in Mr Borrelli's ability to carry out his duties without fear or favour if he is appointed GLH's liquidator (*Petroships* at [109(d)]).

156 I now apply this test to the facts of this case. Although GL Thailand relies on both actual bias and perceived bias, it has no direct evidence of any actual bias on Mr Borrelli's part. It therefore relies on certain aspects of Mr Borrelli's conduct as PL as both being circumstantial evidence of actual bias and as giving rise to a perception of bias.

157 I consider these aspects of his conduct in turn.

GL Thailand v GLH

158 GL Thailand first points to Mr Borrelli's conduct in in relation to *GL Thailand v GLH*. JTA has commenced a separate action by way of HC/OC 233/2023 ("OC 233") challenging the judgment entered in favour of GL Thailand in *GL Thailand v GLH*. The first defendant in OC 233 is GL Thailand. The second defendant is GLH.

159 GL Thailand submits that any liquidator of GLH will have to take a position for GLH in OC 233. GL Thailand's fear is that Mr Borrelli will cause GLH to consent to JTA's challenge in OC 233.

160 I do not accept that this gives rise to a perception of bias. The issue of whether GL Thailand's judgment should be set aside, whether in OC 233 or otherwise, is a matter for the court to decide as a judicial act, not merely as an administrative act. JTA will advocate setting aside the judgment. GL Thailand will oppose setting it aside. GLH's consent or otherwise is not dispositive.

161 Further, even if JTA secures a setting aside of the judgment in *GL Thailand v GLH*, that will not extinguish any cause of action that GL Thailand may have against GLH forming the subject-matter of that suit. The only effect of setting aside that judgment will be to reverse the merger of GL Thailand's

cause of action into that judgment. GL Thailand will be free to commence fresh proceedings on the cause of action that it asserted in *GL Thailand v GLH* or even to file a proof of debt in GLH's liquidation without judgment, for the liquidator to adjudicate upon in the usual way. This is not a case where JTA and GL Thailand each have a claim against GLH that are mutually exclusive, such that if one of their proofs of debt is admitted, the other's must of necessity be rejected. Therefore, there is nothing in the nature of GL Thailand's and JTA's respective claims against GLH which, in itself, makes it desirable that an insolvency practitioner with no prior association with either of them be appointed liquidator.

Mr Borrelli's affidavits

162 GL Thailand's next, and broader submission, is that Mr Borrelli has, since his appointment as PL, "uncritically aligned himself" with JTA's position challenging not only GL Thailand's judgment in *GL Thailand v GLH* but also the 35 loan agreements that form the subject-matter of *GL Thailand v GLH* and the security agreements between GL Thailand and GLH in respect of those loans.

163 In support of this submission, GL Thailand points to Mr Borrelli's affidavit in support of his application, authorising him in his capacity as PL, to: (a) appoint solicitors; (b) commence proceedings in GLH's name; and (c) to appoint a nominee director to the board of each Subsidiary. GL Thailand submits that Mr Borrelli said in this affidavit that his role as PL is to "investigate GL Thailand's purported security interests over GLH's assets, and to guard against the risk that JTA and other legitimate creditors of GLH would be prejudiced if GL Thailand subsequently takes steps to improperly seize these

assets pursuant to its purported security interests (leaving the other creditors with virtually nothing)".[115]

164 GL Thailand submits that in this passage Mr Borrelli expresses scepticism about GL Thailand's status as a creditor and a secured creditor of GLH while accepting that JTA is a "legitimate" creditor of GLH.[116] But this quotes Mr Borrelli out of context. This passage is found in the section of Mr Borrelli's affidavit under the heading "Grounds put forward in JTA's PL application" and under the subheading "Questionable documentation".[117] I set out the relevant paragraphs of Mr Borrelli's affidavit in full: [118]

> 41. In the course of [*JTA v GLH (1)*] and [*JTA v GLH (2)*], GLH and GL Thailand disclosed different executed versions of what is supposedly the same loan agreement. These different executed versions contain material discrepancies including (i) the date on which they were entered into; (ii) the date on which they are to take effect; and (iii) the manner in which…they were executed. This further underscored the urgent need for investigation by an objective third party. …
>
> 42. Following this discovery, among other reasons, JTA filed the PL Application against GLH to investigate [GL Thailand's] purported security interest over [GLH's] assets, and to guard against the risk that [JTA] and other legitimate creditors of the of [GLH] would be prejudiced if [GL Thailand] subsequently takes steps to improperly seize these documents pursuant to its purported security interests (leaving the other creditors with virtually nothing).
>
> 43. The PL Order was made by the Honourable Justice Lee Seiu Kin on 6 September 2023 and, pursuant to that PL Order, as mentioned above, the provisional liquidator shall not make changes to the board of directors of GLH's subsidiaries without leave of Court.

---

115 GL Thailand's Written Submissions at para 38.

116 GL Thailand's Written Submissions at para 40.

117 First Affidavit of Cosimo Borrelli at pp 11 and 14.

118 First Affidavit of Cosimo Borrelli at paras 41–42.

165 Mr Borrelli was, under this heading, merely summarising the grounds advanced by JTA for Mr Borrelli's appointment as GLH's PL. Further, this is an accurate summary of this particular ground. And Lee Seiu Kin J accepted this ground as one of the reasons for appointing Mr Borrelli as PL. Mr Borrelli's language in these paragraphs is not, on any view, circumstantial evidence of actual bias or conduct that gives rise to a perception of bias.

166 GL Thailand further complains that Mr Borrelli in this affidavit simply adopts as the "background facts" the allegations of fact set out in JTA's affidavit in support of its application to appoint him as PL without independently verifying those allegations.[119] This, GL Thailand submits, is evidence that Mr Borrelli has adopted JTA's position and viewpoint in carrying out his duties as PL. But that is quite simply not what Mr Borrelli is doing in this passage in his affidavit. The relevant paragraph from Mr Borrelli's affidavit makes it clear that he is summarising the facts that Lee Seiu Kin J considered when he appointed Mr Borrelli as PL:[120]

> 6. The facts which were considered by the Honourable Court in the Winding Up Application and the PL Application are set out in the 3rd Affidavit of Mr Nobiru Adachi…filed in the PL Application (on behalf of JTA) on 18 July 2023. For present purposes, I will highlight the salient facts and issues from NA to the extent that they are relevant for this application.

167 Further, Lee Seiu Kin J accepted JTA's allegations of fact when he allowed its application and appointed Mr Borrelli as GLH's PL. That would justify Mr Borrelli in taking these facts, at the very least, as a starting point in his appointment, while of course maintaining an independent and impartial mind about their ultimate veracity. There is no evidence that Mr Borrelli has

---

119 GL Thailand's Written Submissions at paras 42–43; NE dated 4 March 2024 at p 43 lines 21–25.

120 First Affidavit of Cosimo Borrelli, para 6.

done anything other than this. Counsel for GL Thailand accepts that if all Mr Borrelli was doing in this passage was summarising the facts that Lee Seiu Kin J considered and accepted when appointing Mr Borrelli as PL, then this passage would not be evidence of actual bias or conduct giving rise to a perception of bias.[121]

Litigation against the Cambodian Subsidiary

168 GL Thailand's next submission is that Mr Borrelli, in his capacity as PL, has abused the process of the Cambodian court, has provided misleading information to the Cambodian court, has overstepped his powers under the orders of court delimiting his powers as PL and has procured his nominee to the board of the Cambodian subsidiary to engage in strong-arm tactics.

169 This allegation comes about in the following circumstances. On 18 January 2024, Mr Borrelli secured *ex parte* an order from the Cambodian court for preservative relief: (a) appointing Mr Borrelli to the board of the Cambodian Subsidiary; (b) appointing Mr Borrelli as GLH's shareholder representative in the Cambodian Subsidiary in place of MK; (c) preventing the board of the Cambodian Subsidiary from taking any steps outside the ordinary course of its business to alter its *status quo*; and (d) requiring the directors of the Cambodian Subsidiary to produce a large number of documents including contractual, corporate and accounting records.

170 GL Thailand makes four complaints about Mr Borrelli's conduct in securing the order for preservative relief:

---

121 NE dated 4 March 2024 at p 44 lines 6–7.

(a) Mr Borrelli obtained the order surreptitiously, without notice to the Cambodian Subsidiary or to GL Thailand;

(b) Mr Borrelli abused the process of the Cambodian court by applying for the order even though there were no circumstances of urgency or emergency to justify it as required by Cambodian law;

(c) Mr Borrelli took no steps to correct the Cambodian court's misimpression that Lee Seiu Kin J had authorised Mr Borrelli to manage and liquidate GLH (when Lee Seiu Kin J merely appointed Mr Borrelli as PL, and subject to limits on his powers) and that GLH was "bankrupt" (when no winding up order had yet been made against GLH); and

(d) Mr Borrelli sought preservative relief orders from the Cambodian court which go beyond the limits imposed by Lee Seiu Kin J on his powers as PL.

171 I reject all of GL Thailand's complaints. First, insofar as the Cambodian court acceded to Mr Borrelli's application for preservative relief *ex parte*, I can assume only that the Cambodian court was satisfied that the procedural and substantive prerequisites both for ordering preservative relief and for doing so *ex parte* were satisfied. The Cambodian court is the best guardian of the integrity of its own process and is, no doubt, astute to ensure that no litigant abuses that process. Second, GLH does not allege that the misstatements by the Cambodian court as to Mr Borrelli's role and GLH's status originated from Mr Borrelli. GL Thailand's only complaint is that he failed to correct the misimpression that the Cambodian court laboured under. But it appears that the Cambodian Subsidiary has applied to the Cambodian court to have the orders for preservative relief set aside. No doubt the misimpression will be corrected there and, if thought material by the Cambodian court, will have the necessary

adverse consequences. In any event, I take the word "bankrupt" as a synonym for "insolvency" and not as a synonym for a winding up order. It is objectively true that GLH has been insolvent at least from January 2024. Insolvency is an objectively ascertainable state of affairs. A company can be insolvent with or without a finding of the court to that effect and with or without the making of a winding up order. Further, I am satisfied that the preservative relief that Mr Borrelli sought and secured is within the limits imposed by Lee Seiu Kin J on his powers as PL. In any event, if Mr Borrelli has strayed beyond those limits, I am also satisfied that the deviation is minor and that he did so *bona fide* out of a robustness in fulfilling the purposes for which Lee Seiu Kin J appointed him.

172 I do not consider that any of this conduct is circumstantial evidence of actual bias in favour of JTA or conduct giving rise to a perception of bias in favour of JTA.

Dealings with Subsidiaries

173 GL Thailand's next submission is that Mr Borrelli disrupted the Cambodian Subsidiary's business by engaging in strong-arm tactics and in deceptive and harassing behaviour.[122] GL Thailand refers me to the correspondence between the Cambodian Subsidiary and Mr Borrelli's representatives in Cambodia. But this correspondence does not reveal any harassing or deceptive behaviour.[123] GL Thailand also asserts that Mr Borrelli has no power as a director of the Cambodian Subsidiary to delegate to members of his professional team his personal right to visit the Cambodian Subsidiary's

---

122 GL Thailand's Written Submissions at para 47; Supplementary Affidavit of Yusuke Kozuma dated 19 February 2024 at para 26.

123 GL Thailand's 2BOD at pp 918–959.

premises and to inspect documents.[124] But GL Thailand has adduced no evidence to show that Mr Borrelli has no such power under Cambodian law. GL Thailand further points to Mr Borrelli's refusal to disclose correspondence between himself and JTA.[125] But there is no obligation on Mr Borrelli to do so. I do not accept any of this conduct this is circumstantial evidence of actual bias in favour of JTA or conduct giving rise to a perception of bias in favour of JTA.

174 GL Thailand also complains that, in a letter to another Subsidiary, Mr Borrelli incorrectly asserted that he had a right to manage the affairs, business and property of the Subsidiaries.[126] This was undoubtedly an incorrect of fact. But once again, I do not accept this conduct as circumstantial evidence of actual bias in favour of JTA or conduct giving rise to a perception of bias in favour of JTA.

175 To be sure, Mr Borrelli has taken a robust view of the purposes for which Lee Seiu Kin J appointed him as PL. The court's overall purpose in appointing a PL is to preserve the *status quo* in the company (*Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd* [2000] 2 SLR(R) 689 at [36], *Re Carpark Industries Pty. Ltd. (in liquidation) and Companies Act 161 (No 1)* [1967] 1 NSWR 337 at 341). Preserving the *status quo* requires the provisional liquidator to: (a) prevent the shareholders and directors making irreversible changes to company's rights and liabilities outside the ordinary course of its business; (b) to prevent the company's financial position from deteriorating within the ordinary course of its business; and (c) to prevent any apprehended risk to the

---

124 NE dated 4 March 2024 at p 56 lines 3–5.

125 NE dated 4 March 2024 at p 58 lines 20–26; Provisional Liquidator's Bundle of Correspondence dated 26 February 2024 at pp 337–341.

126 Provisional Liquidator's Bundle of Documents (vol 2) dated 26 February 2024 ("PL's 2BOD") at p 1024.

company's corporate, accounting and other books and records from eventuating.

176 For all the foregoing reasons, I conclude that there is no aspect of Mr Borrelli's conduct as PL that is circumstantial evidence that he is actually biased in favour of JTA or that gives rise to a perception of bias in favour of JTA. Further, even if GL Thailand holds a subjective belief that Mr Borrelli is biased, it is my view that this belief is not reasonably held in that it arises from the hard-fought nature of this broad-ranging commercial litigation between GL Thailand and JTA and not from any conduct by Mr Borrelli.

177 In the circumstances, I consider that there would be a significant savings of time and cost and a significant advantage in the efficient conduct of the liquidation in terms of continuity to have Mr Borrelli continue in office as liquidator (see *Petroships* at [174(a)] and [174(c)]).

178 I have thus appointed Mr Borrelli as the liquidator of GLH.

Conclusion

179 I therefore order that GLH ought to be wound up because it is unable to pay its debts for the purposes of s 125(2)(*c*) of the IRDA, thereby establishing the ground set out in s 125(1)(*e*) of the IRDA.

180 I therefore also order that Mr Borrelli be appointed as GLH's liquidator. None of his conduct as PL is circumstantial evidence of actual bias in favour of JTA or give rise to a perception of bias in favour of JTA. Further, his appointment as liquidator will result in a substantial saving of time and costs and the benefit of continuity, given his current appointment as PL.

181 I have also ordered that JTA's costs of and incidental to this winding up application be paid to JTA out of GLH's assets. As Mr Borrelli's appointment as PL has come to an end with this winding up order, I have also discharged the undertaking as to damages that JTA gave to GLH as the price of Mr Borrelli's appointment.

Vinodh Coomaraswamy J
Judge of the High Court

Celeste Ang, Emmanuel Chua, Yiu Kai Tai, Yap Yong Li and Tan Jia Xin (Wong & Leow LLC) for the claimant;
Debby Lim, Chia Huai Yuan, Melvin See, V Santhosh and Philip Teh (Dentons Rodyk & Davidson LLP) for the defendant;
Suresh Nair, Bryan Tan and Brendan Cheow (PK Wong & Nair LLC) for the provisional liquidator;
Chelva Rajah, SC, Moiz Haider Sithawalla, Thaddeus Tan and Clara Ng (Tan Rajah & Cheah) (instructed), Clement Tan, Luis Duhart, Colin Tan and Dupinderjeet Kaur (Selvam LLC) for the holding company.