IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2025] SGCA 11

Court of Appeal / Civil Appeal No 28 of 2024 and Summons No 31 of 2024

In the matter of Fullerton Capital Limited (in liquidation)

Between

Lau Yean Liang, Raymond

… *Appellant*

And

(1) Jason Aleksander Kardachi
(2) Elaine Hanrahan

… *Respondents*

GROUNDS OF DECISION

[Insolvency Law — Cross-border insolvency — Recognition of foreign insolvency proceedings — Presumption of COMI as place of registered office — Effect of presumption — Whether presumption rebutted on the balance of probabilities — Art 16(3) UNCITRAL Model Law on Cross-Border Insolvency]
[Insolvency Law — Cross-border insolvency — Allegation of bad faith and material non-disclosure against foreign representatives — Whether recognition would be contrary to public policy — Art 6 UNCITRAL Model Law on Cross-Border Insolvency]
[Insolvency Law — Cross-border insolvency — Disclosure and examination orders — Whether disclosure and examination orders unreasonable, oppressive or unnecessary]

TABLE OF CONTENTS

Re Fullerton Capital Ltd (in liquidation)

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Court of Appeal — Civil Appeal No 28 of 2024 and Summons No 31 of 2024
Steven Chong JCA, Kannan Ramesh JAD and Judith Prakash SJ
20 January 2025

13 March 2025

Steven Chong JCA (delivering the grounds of decision of the court):

Introduction

1 It is undeniable that the growth of international trade and investment has increased not only the number and incidence, but also the scale and complexity, of cross-border insolvency cases. Given the nature of such cases which will inevitably span various jurisdictions, it is imperative that they are managed in a uniform, orderly and consistent manner. As a leading scholar put it at the turn of the millennium, the significant challenge for insolvency law in our time is the search for a "global solution to multinational default": Jay L Westbrook, "A Global Solution to Multinational Default" (2000) 98 Mich L Rev 2276.

2 The UNCITRAL Model Law on Cross-Border Insolvency 1997 (the "Model Law"), which has the force of law in Singapore pursuant to s 252(1) read with the Third Schedule of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (the "IRDA" and the "SG Model Law"), was promulgated as one such solution. In its own terms as stated in the Preamble,

the purpose of the Model Law is to "provide effective mechanisms for dealing with cases of cross-border insolvency" so as to promote various objectives of importance: (a) international cooperation between the courts of various jurisdictions in cross-border insolvency cases; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies; (d) protection and maximisation of the value of a debtor's assets; and (e) facilitation of the rescue of financially troubled businesses.

3 A centrepiece of the Model Law architecture is the classification of foreign insolvency proceedings as "main" or "non-main" proceedings. The applicability of these categories in turn depends on whether the debtor has, respectively, its "centre of main interests" ("COMI") or an "establishment" in the jurisdiction originating the foreign proceeding for which recognition is sought. As only foreign proceedings that qualify as "main" or "non-main" proceedings are eligible for recognition under the Model Law, the concepts of "COMI" and "establishment" essentially function as jurisdictional gateways that establish a sufficient connection between the debtor and the place at which the foreign proceeding is on foot; and as the nomenclature of "main" and "non-main" would suggest, the difference between the debtor's COMI and a place at which it has a mere establishment is the *nature and strength of the jurisdictional connection*. While the COMI is the place at which the debtor conducts the administration of its interests on a regular basis, an establishment is any place where the debtor carries out a non-transitory economic activity. A debtor may have multiple establishments, but it can only have one COMI. The COMI, as the location of a foreign main proceeding, is therefore the "jurisdiction with the closest and most tangible or impactful connection to a company": *Re Zipmex Co Ltd and other matters* [2023] 3 SLR 1333 at [14].

4 Another significant aspect of the Model Law is the balance that it strikes between the competing interests of comity and cooperation on the one hand and the individual domestic interests of enacting States on the other. As much as the Model Law aspires towards the harmonisation of treatment of insolvencies at the supranational level, it recognises that the laws of different jurisdictions are shaped by differing social, political and economic mores, and some degree of divergence is therefore inevitable. It is for this reason that the Model Law embodies the principle of *modified*, as opposed to true, universalism – so far as it does not (unduly) compromise important policies and values of the forum, a court should recognise and assist foreign insolvency proceedings with a view to achieving a centralised resolution of the debtor's insolvency: *Re PT Garuda Indonesia (Persero) Tbk and another matter* [2024] 3 SLR 254 ("*Garuda*") at [67]–[69]. As an example, this finds expression in the Model Law in the form of a "public policy exception", commonly found in international instruments of this sort, which allows a court to refuse taking an action that would be contrary to the public policy of the forum.

5 The peculiarly simple facts of this case raised fundamental issues regarding the concept of COMI and the scope of the public policy exception under the SG Model Law. The respondents, the liquidators and foreign representatives of Fullerton Capital Ltd ("Fullerton"), applied to the General Division of the High Court ("General Division") seeking recognition of Fullerton's ongoing liquidation in the British Virgin Islands ("BVI" and the "BVI Liquidation") as a foreign main proceeding and relief in the form of disclosure and examination orders against certain persons whom they believed to have knowledge of Fullerton's affairs ("Relevant Persons"). The appellant, a former director and shareholder of Fullerton, was one of these Relevant Persons. He resisted the respondents' application on the grounds that the BVI Liquidation

was not a foreign main proceeding as Fullerton's COMI was not in the BVI and, in any event, that no disclosure and examination order should be made against him.

6 In the court below, a Judicial Commissioner (the "Judge") disagreed with the appellant's objections, recognised the BVI Liquidation as a foreign main proceeding, and made a disclosure and examination order against the appellant (the "Disclosure and Examination Order"). Dissatisfied with the Judge's decision, the appellant appealed to this court. The parties' arguments in the appeal before us raised three important issues pertaining to the concept of COMI and the public policy exception under the SG Model Law.

7 First, the straightforward facts of this case brought into sharp focus the presumption under the SG Model Law of a debtor's COMI corresponding to the place of its registered office. Save for a single transaction which was alleged in separate proceedings before our courts to be a fraudulent scheme, little to nothing was known about Fullerton's affairs prior to the BVI Liquidation. In these circumstances, the presumption came to the fore in the COMI analysis. The Judge held, contrary to the appellant's case, that the presumption operated and went unrebutted. Consequently, she found that the BVI, as the location of Fullerton's registered office, was also the location of Fullerton's COMI. The appellant submitted that this was premised on a misapprehension on the nature, effect and role of the presumption.

8 Second, the parties' arguments on the location of Fullerton's COMI revealed some lingering dissonance in the local jurisprudence on the relevant time for the COMI analysis. While the case law had consistently affirmed that the time for assessing a debtor's COMI was the time of the filing of the application for recognition, it was also said that the court's focus nonetheless

ought to be on the debtor's position prior to the commencement of the foreign proceeding and the appointment of the debtor's foreign representatives.

9 Third, the appellant invoked the public policy exception under the SG Model Law to argue, for the first time on appeal, that recognition of the BVI Liquidation should be denied on public policy grounds. The gravamen of the appellant's complaint was that the respondents were guilty of bad faith and/or material non-disclosure in a manner that contravened Singapore public policy.

10 We heard and dismissed the appeal on 20 January 2025. In our view, the Judge did not err in either her assessment of Fullerton's COMI or her decision to make the Disclosure and Examination Order against the appellant. The appellant's new public policy objection was also without foundation. In our detailed grounds below, we elaborate on our reasons and take the opportunity to examine the points of principle outlined above:

(a) First, we examine the nature of the COMI presumption in terms of burden and standard of proof. Although the legal effect of the presumption has been explored in a number of decisions across different jurisdictions, there has been a tendency for the courts to use expressions such as "starting point", "tipping the scale" or "absent sufficient contrary evidence" in analysing the presumption. As a result, the cases have not provided a *recognised standard of proof* to evaluate when and whether there is "proof to the contrary" to rebut the presumption.

(b) Second, we examine the existing jurisprudence on the relevant time for the COMI analysis and tie up loose ends on the issue of timing in so far as they bear on the coherence of the concept of COMI under our law.

(c) Third, we consider if and when bad faith and material non-disclosure by a foreign representative would engage the public policy exception.

The material facts

11 Fullerton is a company incorporated in the BVI. Its registered office is also located in the BVI. The appellant, Mr Lau Yean Liang Raymond, was formerly a shareholder and director of Fullerton from 11 March 2014 to 20 March 2018. The respondents, Mr Jason Aleksander Kardachi ("Mr Kardachi") and Ms Elaine Hanrahan ("Ms Hanrahan"), were the joint liquidators of Fullerton at the time the application below was filed and decided. Ms Hanrahan has since resigned and been replaced by Mr Colin Wilson by order of the Eastern Caribbean Supreme Court in the High Court of Justice in the territory of the Virgin Islands (the "BVI High Court").

12 On 26 April 2019, Discovery Key Investments Ltd ("DKI") commenced a suit *vide* HC/S 435/2019 ("Suit 435") against Fullerton, the appellant, and one Mr Morgan James Wilbur IV ("Mr Wilbur"). Mr Wilbur was an employee of Fullerton from August 2016 to December 2018.

13 The claims made by DKI in Suit 435 relate to a loan contract (the "Contract") between Fullerton and DKI that was entered into on or around 10 August 2017. Under the Contract, Fullerton agreed to loan a sum of CAD 110m to DKI against the security of shares held by DKI in a Canadian company (the "Pledged Stock"). In summary, DKI alleges in Suit 435 that: (a) DKI was induced to enter into the Contract by various misrepresentations; (b) Fullerton breached the Contract by selling the Pledged Stock and utilising

the proceeds to disburse the loan to DKI; and (c) Fullerton, the appellant and Mr Wilbur were parties to an unlawful means conspiracy to injure DKI.

14 DKI discontinued Suit 435 against Mr Wilbur on 27 February 2023, leaving Fullerton and the appellant as the remaining defendants.

15 On 28 March 2022, Fullerton's board and members initiated a voluntary solvent liquidation and appointed one Ms Zhang Yingxia ("Ms Zhang") as Fullerton's voluntary liquidator pursuant to a directors' resolution. At the time, Suit 435 was in progress and a Mareva injunction obtained by DKI was in force against Fullerton.

16 On 20 April 2022, Ms Zhang submitted a declaration to the Registrar of Corporate Affairs in the BVI confirming that Fullerton's liquidation had been completed and that Fullerton could be struck off the BVI Register of Companies. Fullerton was accordingly dissolved as of 20 April 2022. On 11 July 2022, Ms Zhang wrote to PDLegal LLC ("PDLegal"), the solicitors acting for Fullerton in Suit 435 at the time, informing PDLegal of Fullerton's dissolution and requesting that PDLegal "cease acting for [Fullerton] in Suit 435".

17 On 5 October 2022, DKI applied to the BVI High Court for an order that the dissolution of Fullerton be declared void and that Fullerton be restored to liquidation on the BVI Register of Companies (the "BVI Restoration Application"). DKI explained to the BVI High Court that, as at the time of the BVI Restoration Application, Suit 435 was in the pre-trial phase with the parties having completed general discovery and in the midst of specific discovery. Trial dates had also been fixed in April and May 2023. Given that Suit 435 could not be maintained against a dissolved company, restoration of Fullerton to the BVI

Register of Companies was necessary for DKI to continue Suit 435 against Fullerton. DKI also nominated Ms Hanrahan and one Mr Patrick Bance ("Mr Bance") to be the joint liquidators of Fullerton upon its restoration, and further sought an order for the costs of the BVI Restoration Application to be paid by Fullerton.

18 On 10 October 2022, the BVI High Court granted the BVI Restoration Application. The BVI High Court's order (the "BVI Restoration Order") provided, *inter alia*, that:

(a) Fullerton's dissolution was declared void;

(b) Fullerton was restored to the BVI Register of Companies and deemed to have never been dissolved or struck off the Register;

(c) Ms Hanrahan and Mr Bance were appointed as the joint liquidators of Fullerton upon its restoration to the BVI Register of Companies;

(d) Ms Hanrahan and Mr Bance were empowered to act for and on behalf of Fullerton, including investigating if Fullerton was insolvent and taking such steps as they thought fit in Suit 435; and

(e) DKI's claim for the costs of the BVI Restoration Application was "adjourned *sine die*".

19 On 28 November 2022, DKI's solicitors in the BVI wrote to Ms Hanrahan and Mr Bance, in which DKI offered that, to avoid incurring the costs of going before the BVI High Court for an assessment of costs, it was prepared to give a 15% discount off its actual costs of the BVI Restoration Application if Ms Hanrahan and Mr Bance agreed to accept DKI's claim for the

same. Counsel for the respondents explained at the hearing before the Judge that Ms Hanrahan and Mr Bance accepted DKI's offer of settlement and agreed that Fullerton would bear the costs of the BVI Restoration Application in the sum of US$67,303.29.

20 Subsequently, Ms Hanrahan and Mr Bance determined that Fullerton was insolvent based on its inability to pay the agreed sum of costs for the BVI Restoration Application. Accordingly, on 12 December 2022, Ms Hanrahan and Mr Bance notified the Official Receiver in the BVI that Fullerton was unable to pay its debts as they fell due, and that Fullerton's liquidation would thus continue as an insolvent liquidation.

21 On 25 July 2023, Mr Kardachi replaced Mr Bance as one of Fullerton's liquidators pursuant to a resolution of DKI as Fullerton's sole creditor.

22 In the course of the respondents' investigations into Fullerton's affairs, they wrote to several parties, including Fullerton's former and present directors, solicitors, and financial institutions. Most of these enquiries went unanswered. The respondents considered that further investigations were in order, including in Singapore, given the claim against Fullerton in Suit 435.

23 On 27 November 2023, Fullerton entered into a funding agreement with DKI, under which DKI agreed to provide funding to the respondents to investigate Fullerton's affairs and to commence necessary actions or applications in the relevant jurisdictions.

24 On 8 December 2023, the respondents applied to the BVI High Court for the court's sanction for them to commence and maintain proceedings before any court of competent jurisdiction as they considered appropriate to: (a) seek

recognition and enforcement of the BVI Restoration Order in such jurisdiction; and (b) request disclosure of relevant information or documents concerning Fullerton's actions or affairs (the "BVI Sanction Application"). The BVI Sanction Application was granted by the BVI High Court on 12 December 2023.

25 On 1 February 2024, the respondents commenced HC/OA 116/2024 ("OA 116") in the General Division seeking: (a) recognition of the BVI Liquidation as a foreign main proceeding and the respondents as Fullerton's foreign representatives; and (b) disclosure and examination orders against the Relevant Persons. In broad terms, the Relevant Persons consisted of: (a) current and former directors of Fullerton; (b) the appellant and Mr Wilbur; (c) financial institutions that had provided banking and financial services to Fullerton; and (d) Fullerton's former solicitors. Apart from the appellant, none of the Relevant Persons contested OA 116.

The decision below

26 Before the Judge, the respondents argued that the BVI was Fullerton's COMI, whereas the appellant submitted that Fullerton's COMI was in Hong Kong, China or Singapore. The Judge agreed with the respondents that Fullerton's COMI was in the BVI: see *Re Fullerton Capital Ltd (in liquidation)* [2024] SGHC 155 (the "GD") at [71]. Pursuant to Art 16(3) of the SG Model Law, the BVI, as the place of Fullerton's registered office, was presumed to also be the location of Fullerton's COMI: GD at [57]. None of the factors relied on by the appellant displaced this presumption:

(a) Location of Fullerton's control and direction: Even if Fullerton's controllers had been domiciled in China, this was irrelevant as it was not

clear that this would have been objectively ascertainable to third parties dealing with Fullerton: GD at [58]–[61].

(b) Location of Fullerton's creditors: Although DKI was Fullerton's sole creditor pursuant to the Contract, there was insufficient evidence to conclude that DKI was based in Hong Kong: GD at [62].

(c) Location of Fullerton's operations: There was insufficient evidence of Fullerton's operations as most of the indicators relied on by the appellant were disputed and, in any event, did not pull clearly towards any particular location: GD at [63]–[68].

(d) Governing law of Fullerton's transactions: Although the Contract was governed by English law, this was equivocal as it was unclear that this choice was made because Fullerton considered the UK to be its COMI: GD at [70].

27 As far as relief was concerned, the appellant submitted that a disclosure and examination order should not be issued against him as he was concerned that: (a) the respondents would share information obtained from him with DKI and thereby prejudice his defence to DKI's claim in Suit 435; and (b) the respondents would obtain an unfair advantage in any subsequent proceedings against him: GD at [31].

28 The Judge made disclosure and examination orders against the Relevant Persons, including the appellant, subject to an additional safeguard that the respondents provide an undertaking not to disclose to DKI any information or documents directly relevant to DKI's claim against the appellant in Suit 435 that were obtained from the appellant pursuant to the Disclosure and Examination

Order without first obtaining the permission of the Court (the "Undertaking"): GD at [76].

29 The Judge was satisfied that the disclosure and examination orders sought by the respondents covered documents and information on Fullerton's affairs that were reasonably necessary for the respondents to discharge their duties as Fullerton's liquidators, and there was a reasonable basis for supposing that the appellant, being a former director and shareholder of Fullerton, had such documents and information: GD at [88]–[90].

30 The Judge was unpersuaded by the appellant's fear that the respondents would deal improperly with the documents and information obtained from him through the Disclosure and Examination Order. The mere fact that the respondents had obtained funding from DKI did not mean that the respondents would not act properly and objectively. An insolvency officeholder's use of information obtained pursuant to a disclosure and examination order was already limited by law to the purpose of assisting the officeholder in his or her duties and for the benefit of the company in liquidation. There was no evidence that the respondents would not comply with their legal obligations and duties as regards the legitimate use of information obtained in OA 116. In any event, the appellant's concern of the respondents possibly leaking information obtained from him to DKI for use against him in Suit 435 was adequately addressed by the Undertaking. It was also not unfair for the respondents to examine the appellant before possibly commencing future proceedings against him as it was legitimate for insolvency officeholders to seek examination orders against potential wrongdoers with a view to investigating if the company had claims against them. The respondents had not yet taken or decided to take legal action against the appellant but were seeking to ascertain the possibility of such action. Finally, it could not be said that the appellant had been oppressively targeted

given that the respondents had sought similar orders against all of the Relevant Persons and not only the appellant: GD at [92]–[96].

The appellant's application to adduce further evidence

31 To bolster his position in the present appeal, the appellant also filed CA/SUM 31/2024 ("SUM 31") seeking permission to adduce further evidence at the hearing of and/or for the purpose of determining the appeal. The respondents did not object to SUM 31 but sought a consequential order that they be allowed to refer to a further affidavit of Mr Kardachi containing responses to the further evidence in the event that SUM 31 was allowed.

32 The appellant's further evidence could be delineated into three categories of documents:

(a) affidavits filed in HC/SUM 1902/2024 ("SUM 1902") in Suit 435, which was a successful application by DKI for a Mareva injunction against the appellant shortly after the Judge's decision in OA 116;

(b) a WhatsApp message sent by Mr Wilbur to the appellant on 20 August 2024 after the court's decision in SUM 1902; and

(c) an affidavit of Ms Lee Sum Yu Sally ("Ms Lee"), a former employee of Fullerton, dated 30 August 2024.

33 The appellant sought to introduce the first and second categories of documents for the purpose of showing that Mr Wilbur had changed his position in Suit 435 and was now supporting DKI in its claim in Suit 435. The appellant emphasised that Mr Wilbur had resiled from his earlier evidence in Suit 435 and had changed tack to paint the appellant as the controlling mind of Fullerton. The

purpose of adducing Ms Lee's evidence in the third category, on the other hand, was to strengthen the appellant's case on appeal that Fullerton's COMI was not in the BVI, as Ms Lee purported to provide details on Fullerton's activities in Hong Kong.

34 We dismissed SUM 31 at the hearing of the appeal. Notwithstanding the lack of objection by the respondents to SUM 31, the admission of fresh evidence for the purpose of appeal was a matter for the court to decide. It was accordingly incumbent on the appellant to satisfy the applicable legal thresholds laid down in *Ladd v Marshall* [1954] 1 WLR 1489 ("*Ladd v Marshall*") as received and further developed upon in decisions of this court in respect of all three categories of further evidence. In our judgment, the appellant failed to do so. As a starting point, since the Judge's decision engaged and dealt conclusively with the merits of the respondents' application for recognition and relief, the underlying policy of the *Ladd v Marshall* conditions applied in its full rigour: *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)* [2019] 2 SLR 341 at [57]. It suffices for us to say that the further evidence was either not material to the issues before us in the appeal (the first and second categories), or evidence that could have been adduced before the Judge below in respect of which the appellant had provided no explanation as to why he had not done so (the third category).

The parties' arguments

The appellant's arguments

35 The appellant appealed against the Judge's decision on three grounds.

36 First, the appellant submitted that the Judge erred in finding that Fullerton's COMI was in the BVI as opposed to China. According to the

appellant, the Judge erred in law by starting her analysis with the presumption under Art 16(3) of the SG Model Law as opposed to only using the presumption as a factor when a consideration of all relevant factors did not clearly tip towards any particular location. If the Judge had not begun with the presumption, a consideration of the factors of the location of Fullerton's control and direction, the location of Fullerton's creditors and the location of Fullerton's operations, would have led to the conclusion that Fullerton's COMI was in China.

37 Second, as a new argument not raised before the Judge, the appellant invoked the public policy exception under Art 6 of the SG Model Law and contended that regardless of the location of Fullerton's COMI, the respondents were guilty of bad faith and material non-disclosure before the Judge such that recognition of the BVI Liquidation would be contrary to Singapore public policy. The common thread running through the appellant's accusations against the respondents was his suspicion that the respondents were mere puppets of DKI and had brought OA 116 for the improper purpose of giving DKI an advantage against him in Suit 435.

38 Third, the appellant submitted that the Disclosure and Examination Order should not have been made against him. Although the respondents claimed that the order was to assist them in considering the position that Fullerton should take in Suit 435 and investigating if Fullerton had any claims against potential wrongdoers, these purposes would not be achieved by the making of the order against him. The Judge had also failed to give adequate weight to the risk of prejudice to or oppression of the appellant by the making of the order, and the Undertaking did not sufficiently protect the appellant's interests.

The respondents' arguments

39 The respondents submitted that the Judge's finding that the BVI was Fullerton's COMI and her decision to make the Disclosure and Examination Order against the appellant should be affirmed. The respondents also submitted that the appellant's newfound invocation of the public policy exception was either legally or factually unsustainable.

40 First, on the issue of COMI, the respondents' primary argument was that since the relevant time for the COMI analysis was the filing of the recognition application, the factors relied on by the appellant concerned Fullerton's "historical operations" that were of little to no relevance to Fullerton's COMI as of the date of the filing of OA 116 (*viz*, 1 February 2024). In contrast, post-liquidation events such as the acts of the respondents should be taken into account and given more weight in the assessment of Fullerton's COMI. Even if these were disregarded (as the Judge had done), the Judge's assessment that the factors were equivocal and did not rebut the presumption in favour of the BVI was correct.

41 Second, the respondents submitted that the public policy exception was not engaged. Even if the appellant's allegations against them were true, the alleged bad faith and material non-disclosure did not, as a matter of law, come within the scope of the public policy exception. The appellant's allegations were in any event unfounded on the facts of the case.

42 Third, on the issue of relief, the respondents submitted that, even if this court might take a different view on the weighing of the relevant considerations, the appellate threshold for intervening in the Judge's discretion to grant the Disclosure and Examination Order against the appellant had not been met. The

Judge had neither misdirected herself on the applicable law nor failed to consider the risk of prejudice or oppression that the Disclosure and Examination Order would have on the appellant. The Undertaking was also a sufficient safeguard of the appellant's interests, not least because it was proposed by the appellant himself at the hearing before the Judge. The appellant's argument of a lack of utility in making the Disclosure and Examination Order against him was based on an unfounded suspicion of the respondents' *bona fides* and conflating DKI's interests in Suit 435 with Fullerton's own interests.

Issues to be determined

43 There were three issues that arose for our determination in this appeal:

(a) whether the BVI was Fullerton's COMI such that the BVI Liquidation should be recognised as a foreign main proceeding under Art 17(2)(*a*) of the SG Model Law;

(b) whether the public policy exception under Art 6 of the SG Model Law was engaged to deny recognition of the BVI Liquidation; and

(c) whether the Disclosure and Examination Order granted by the Judge against the appellant should be set aside in any event.

Our decision

Whether the BVI was Fullerton's COMI

The legal effect of the presumption under Art 16(3) of the SG Model Law

44 The first string to the appellant's bow was that the Judge had erred in law by taking Art 16(3) of the SG Model Law as the starting point of her analysis. According to the appellant, the fact that Fullerton's registered office

was in the BVI was a factor to be used "only when the scale does not clearly tip in any other direction". This raised the question of the proper role and place of Art 16(3) in the COMI analysis.

45 We rejected the appellant's submission. In our judgment, it was clear from both the wording and purpose of Art 16(3) of the SG Model Law that it laid down a *rebuttable presumption* that the debtor's COMI was at the place of its registered office. This necessarily had to be the starting point of the analysis in a case where Art 16(3) was engaged.

46 Our analysis begins with the text of Art 16(3) of the SG Model Law itself. Art 16(3) provides that "[i]n the absence of *proof to the contrary*, the debtor's registered office is *presumed* to be the debtor's centre of main interests" [emphasis added]. In our view, the phrase "proof to the contrary" and the word "presumed" make plain that Art 16(3) creates a rebuttable presumption of the debtor's COMI being at the place of its registered office. Any suggestion that these words have an effect other than this would do violence to the clear and unambiguous language of the provision.

47 The effect of a rebuttable presumption as to the location of the debtor's COMI was explained by the English Court of Appeal in *In re Melars Group Ltd* [2023] Bus LR 260 ("*Melars Group*"). Although that was a case involving the Regulation on Insolvency Proceedings (Recast), EU Parliament and Council Regulation No 2015/848 (the "EU Insolvency Regulation (Recast)"), a comparison of the language of Art 3(1) of the EU Insolvency Regulation (Recast) – the material part of which reads "… the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary" – and Art 16(3) of the Model Law reveals no plausible distinction in interpretation and effect. In *Melars Group*, Snowden LJ said that the effect

of the presumption was that "the process of determination of a corporate debtor's COMI does not start from a blank sheet of paper" as "in every case the court must start its inquiry from the premise that the COMI of a corporate debtor is in the same place as the debtor's registered office". Given this starting point, the question for the court is whether the presumption has been rebutted by "proof to the contrary" (at [44]–[45]).

48 It is inherent in the structure of a rebuttable presumption that it would operate only if its underlying factual predicate is established. In the case of Art 16(3) of the SG Model Law, that factual predicate would be proof of the debtor's registered office, since that would be the basis for identifying a presumptive COMI for the debtor. Thus, in a rare or unusual case where the debtor has more than one registered office, Art 16(3) cannot apply as it would be unclear which registered office it would latch on to: see, for example, the decisions of the Supreme Court of Victoria in *Indian Farmers Fertiliser Cooperative Ltd and another v Legend International Holdings Inc (Arbn 120 855 352)* (2016) 113 ACSR 568 at [81] and the Supreme Court of New South Wales in *Re Hydrodec Group Plc (monitor apptd)* (2021) 152 ACSR 408 at [136]–[137].

49 However, in the ordinary case where the registered office is known, Art 16(3) of the SG Model Law would apply as the starting point. The use of the mandatory "is" in the language of the provision admits of no discretion in its application. At the hearing, counsel for the appellant, Mr N Sreenivasan SC ("Mr Sreenivasan"), emphasised that there was no evidence that Fullerton had carried on any activities in the BVI and appeared to suggest that Art 16(3) could be disapplied on this basis. As we indicated to Mr Sreenivasan, his argument ran counter to the following observations in *Melars Group*, which made clear that the court had no discretion to disapply the presumption (at [46]):

> … a lack of evidence that the debtor actually carries out any activities at the place of its registered office does not allow the court to ignore or disregard the legal presumption under article 3(1). … Rather, what the court is entitled to do … is to treat the presumption that the COMI is the same place as the place of the debtor company's registered office, as more easily rebutted if the evidence shows that no relevant acts of administration of the company's interests are actually carried out at the place of the registered office, i e that the registered office is, in reality, no more than a "letter box". But even in such a case, the presumption will still apply, and will not be displaced, unless there is sufficient contrary evidence of objective factors ascertainable by third parties to establish (prove) that the debtor actually conducts the administration of its interests on a regular basis in a different place from that of its registered office.

50 For the same reason, the appellant's submission that Art 16(3) was not the starting point but only entered the picture if "the scale does not clearly tip in any other direction" was completely unsustainable. First, this turned the entire concept of a rebuttable presumption on its head. Second, it contradicted the clear intention of the drafters of the Model Law to ascribe a special importance to the debtor's registered office as an indicium of the debtor's COMI relative to other factors. This intention is manifested in how the registered office is the only indicium of COMI that is expressly referenced in the Model Law and is also elevated to the status of a rebuttable presumption.

51 The appellant's employment of the motif of "tipping the scale" was a reference to the following passage in the decision of the High Court in *Re Zetta Jet Pte Ltd and others (Asia Aviation Holdings Pte Ltd, intervener)* [2019] 4 SLR 1343 ("*Zetta Jet (No 2)*") (at [81]):

> … where there are disputed facts, the court will have to make the best conclusions it can in the circumstances. *Where the scale does not clearly tip either way, the location of the registered office will be taken to be the COMI by default.* And, as is the case here, if there are background disputes between shareholders affecting questions of management and direction, that again

> may, on the facts lead to the conclusion that the presumption or default position should be upheld. [emphasis added]

The appellant's reliance on this extract – specifically, the sentence placed in emphasis – did not affect our conclusion. In the first place, words and phrases in judgments should not be analysed as if they bear the same textual authority as the words of a statute: *UniCredit Bank GmbH v RusChemAlliance LLC* [2024] 3 WLR 659 at [38]. Even if the High Court had held what the appellant claimed it did, this would have supplied no basis to override the clear language in Art 16(3) itself. In any event, we struggled to see how the appellant could draw support from *Zetta Jet (No 2)* given that the High Court had stated earlier in its judgment that "the presumption under Art 16 … operate[s] as a *starting point* subject to displacement by other factors depending on the circumstances of the specific case" [emphasis added] (at [31]).

52 In our judgment, the rationale for instituting a rebuttable presumption as the starting point of the COMI analysis was clear. In the decision of the Federal Court of Australia in *Akers (as a joint foreign representative of Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands)) and others v Saad Investments Co Ltd (in official liq) (a company registered in the Cayman Islands) and another* (2010) 276 ALR 508 ("*Akers*"), Rares J considered that the rebuttable presumption in Art 16(3) was linked to the court's obligation under Art 17(3) of the Model Law to decide upon an application for recognition of a foreign proceeding "at the earliest possible time" (at [46]). The learned judge elaborated as follows (at [50]–[52]):

> 50 The purpose of the presumption in Art 16(3) is to facilitate the decision of an application under the Model Law for recognition at the earliest possible time in accordance with Art 17(3). It will often be the case that the debtor's activities leading up to his, her or its insolvency, will have occurred in a variety of locations, and that more than one of these *might* be capable of being found to be the debtor's centre of main

> interests. The more complex the debtor's transnational dealings and the place or places from which the debtor engaged in them, the more difficult the task of the court would be in untangling where the debtor's COMI is, were it not for the facultative presumption in Art 16(3).
>
> 51 That presumption is intended, in the absence of proof of its displacement, to avoid the court having to spend, perhaps, years in trying to weigh the various transactions and commercial activities that the debtor undertook in various places throughout the world. There would be uncertainty, and indeed a great deal of potentially unnecessary distraction, created by that effort. Untangling the consequences of a cross-border insolvency in respect of a group of companies or a company that traded in many jurisdictions, is in itself, as experience has shown, a time-consuming and difficult exercise.
>
> 52 Delay in recognising a foreign main proceeding or foreign proceeding can prejudice the general body of creditors of a transnational insolvent. Experience of insolvencies over centuries has shown the reality of the threat that unscrupulous individual debtors, people associated with corporate debtors, and indeed ordinary creditors, may seek to deal with the assets of the debtor before the applicable insolvency law can ensure a fair and orderly administration of the insolvent's affairs. This threat is compounded in the case of a cross-border insolvency, particularly one involving many jurisdictions, where, previously, the administrations would occur according to a plethora of different domestic laws. In this context, it is obvious why the Model Law fixed on an easily ascertainable, prima facie position provided by the presumption in Art 16(3).
>
> [emphasis in original]

53 Rares J's linkage of the presumption to the importance of swift action in cross-border insolvency is echoed in the *travaux préparatoires* of the Model Law and the *Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency*, UN Doc A/CN.9/442 (1997) (the "*1997 Guide*"), which are relevant documents for the interpretation of the SG Model Law pursuant to s 252(2) of the IRDA read with s 9A(3)(*f*) of the Interpretation Act 1965 (2020 Rev Ed).

54 The *1997 Guide* contains the following commentary on Art 16 of the Model Law (at para 122):

> This article establishes presumptions that allow the court to *expedite the evidentiary process*; at the same time they do not prevent, in accordance with the applicable procedural law, calling for, or assessing, other evidence if the conclusion suggested by the presumption is called into question by the court or an interested party. [emphasis added]

This paragraph has been retained in the updated *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation*, UN Sales No E.14.V.2 (2014) (the "*2014 Guide*"), save for an added clause at the start of the paragraph that the presumptions in Art 16 "permit and encourage fast action in cases where speed may be essential" (at para 137). While the *2014 Guide* is not expressly referred to in s 252(2) of the IRDA, it is relevant extrinsic material in interpreting the SG Model Law, subject to the qualification that any conflict between the *1997 Guide* and the *2014 Guide* (collectively, the "*Guides*") is to be resolved in favour of the former: *Re Ascentra Holdings, Inc (in official liquidation) and others (SPGK Pte Ltd, non-party)* [2023] SGHC 82 ("*Ascentra (HC)*") at [33]–[37]; *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2023] 2 SLR 421 at [47], citing *Zetta Jet (No 2)* at [37]. No question of inconsistency between the *Guides* arises here given that both *Guides* speak in one voice on the need for fast action in cross-border insolvency.

55 The reports and working papers of the UNCITRAL Working Group on Insolvency Law (the "Working Group") are in a similar vein. In *Possible Issues Relating to Judicial Cooperation and Access and Recognition in Cases of Cross-Border Insolvency*, UN Doc A/CN.9/WG.V/WP.42 (1995), the Working Group observed that what became Art 16(3) of the Model Law represented a "compromise solution between the requirement for legal certainty and the possibility of taking into account specific circumstances of the case", as COMI

was "the decisive connecting factor with a flexible formula" whereas a presumption based on the registered office added certainty (at para 27). After deliberating on various formulations in the *Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session*, UN Doc A/CN.9/419 (1995) (at paras 23–25), the Working Group subsequently settled on the formulation in Art 16(3), explaining in the *Report of the Working Group on Insolvency Law on the Work of Its Nineteenth Session*, UN Doc A/CN.9/422 (1996) that while COMI was to be the touchstone, a decision had been taken "in order to add further specificity to the rule, to establish a rebuttable presumption that the registered seat of the debtor was the [COMI]" (at para 91). We did not see how the approach taken by the appellant to Art 16(3) was consistent with its intended purpose of injecting an element of "legal certainty" and "specificity" to counterbalance the flexibility of the COMI standard.

56 For the reasons above, having regard to both the text and legislative purpose of Art 16(3) of the SG Model Law, it was indisputable that it created a rebuttable presumption that had to be the starting point of the inquiry into a debtor's COMI. The Judge did not err in this respect.

57 However, as we indicated to both Mr Sreenivasan and the respondents' counsel, Mr Yam Wern Jhien ("Mr Yam"), identifying Art 16(3) as a rebuttable presumption or starting point could not be the end of the matter, as it naturally raised the question of when and how the presumption or starting point could be rebutted or displaced. Put simply, what amounts to "proof to the contrary" for the purposes of Art 16(3)?

58 We observed that this was an underdeveloped point in the existing case law. Although various courts had laid down a list of relevant factors, it had not been clearly articulated how and when those factors would rebut the

presumption. For example, while Snowden LJ stated in *Melars Group* that the presumption would be rebutted by "sufficient contrary evidence" (at [46]), nothing was said on when the evidence before the court would be sufficient. Before us, both parties agreed that a clear articulation of the effect of the presumption using orthodox concepts of burden and standard of proof would add clarity to the analysis. We develop our views on the presumption along these lines in the following paragraphs.

(1) The burden of proof of establishing the location of a debtor's COMI

59 The appellant submitted that since it was the respondents who sought recognition of the BVI Liquidation as a foreign main proceeding, the respondents bore the burden of proving that the BVI was Fullerton's COMI. In simple terms, the crux of the appellant's submission was the adage that "he who asserts must prove". The appellant also relied on decisions of the US courts on § 1516(c) of the Bankruptcy Code 11 USC (US) (the "US Bankruptcy Code"), which is the US enactment of Art 16(3) of the Model Law.

60 In a general and limited sense, we did not disagree with the appellant's submission. It is correct that a foreign representative who seeks recognition of a foreign proceeding as a foreign main proceeding bears the burden of proving that the foreign proceeding is taking place in the debtor's COMI. However, we think it useful and necessary to distinguish between: (a) the question of whether a foreign proceeding is taking place at the debtor's COMI; and (b) the question of where the debtor's COMI is. Although the answer to the latter question would determine the former, the two are distinct questions which can differ in terms of the burden of proof. The former question, as the appellant submitted, imposes a burden that is always borne by the foreign representative seeking recognition of the proceeding in which he was appointed as a foreign main proceeding. But the

incidence of the burden of proof for the latter question depends on whether and how Art 16(3) of the SG Model Law applies in any given case.

61 To elaborate, since Art 16(3) requires the court to hold that the debtor's COMI is at its registered office unless there is "proof to the contrary", it follows that the burden of establishing "proof to the contrary" must rest on the party who asserts that the debtor's COMI is at a place other than the registered office. Depending on whether the foreign proceeding for which recognition as a foreign main proceeding is sought is taking place at the debtor's registered office, this party may or may not be the foreign representative. In turn, based on who bears the burden of proving the location of the debtor's COMI and where the debtor's COMI is found to be, the foreign representative may or may not be successful in discharging his burden of proving that the foreign proceeding is a foreign main proceeding. This interplay between these two issues and the burdens of proof, as well as the effect of Art 16(3) of the SG Model Law, can be summarised as follows:

(a) In a case where the foreign proceeding for which recognition as a foreign main proceeding is sought is taking place at the debtor's registered office, the burden of proof lies on the party asserting that the debtor's COMI is at some *other* location to prove this:

(i) If this is done, "proof to the contrary" would have been established and the foreign representative would have failed to discharge his burden of proving that the foreign proceeding is taking place at the debtor's COMI.

(ii) If this is not done, there would have been no "proof to the contrary" and the foreign representative would be taken as

having discharged his burden of proving that the foreign proceeding is taking place at the debtor's COMI.

(b) In a case where the foreign proceeding for which recognition as a foreign main proceeding is sought is not taking place at the debtor's registered office, the burden of proof lies on the foreign representative to establish that the location where the foreign proceeding is taking place is the debtor's COMI notwithstanding the presumption:

(i) If the foreign representative is successful, the foreign representative would have discharged his burden of proving that the foreign proceeding is taking place at the debtor's COMI.

(ii) If the foreign representative is unsuccessful, the foreign representative would have failed to discharge his burden of proving that the foreign proceeding is taking place at the debtor's COMI.

62 To the extent that the US authorities relied on by the appellant suggested that § 1516(c) of the US Bankruptcy Code had no effect on the burden of proof as to the location of the debtor's COMI, we respectfully declined to follow them in respect of Art 16(3) of the SG Model Law. As the difference in opinion between us and the US courts also manifests in what is required to rebut the presumption, we defer consideration of the US position to our discussion below on the standard of proof to rebut the presumption (see [79]–[80] below). It suffices for us to say at this point that the US approach appeared to us to be informed by a different understanding of a rebuttable presumption as compared to that which permeates throughout our law. This was evident in the decision taken by the US legislature to substitute the word "proof" in the original text of Art 16(3) of the Model Law for "evidence" in § 1516(c) of the US Bankruptcy

Code such that it reads "[i]n the absence of *evidence* to the contrary, the debtor's registered office … is presumed to be the center of the debtor's main interests" [emphasis added].

63 In contrast, our interpretation that Art 16(3) of the Model Law places the burden of proof on any party asserting that the COMI is at a place other than the registered office to establish this is supported by both commentary and the jurisprudence of other Model Law jurisdictions.

64 Starting with the *Guides*, although the *1997 Guide* is silent on the issue of the burden of proof, the expanded commentary in the more recent *2014 Guide* addresses the point as follows (at paras 142–143):

> 142. The presumption in article 16, paragraph 3 has given rise to considerable discussion, most commonly in the context of corporate rather than individual debtors, with the focus upon the proof required for the presumption to be rebutted. The debtor's centre of main interests may be at the same location as its place of registration and in that situation no issue concerning rebuttal of the presumption will arise.
>
> 143. However, when a foreign representative seeks recognition of a foreign proceeding as a main proceeding and there appears to be a separation between the place of the debtor's registered office and its alleged centre of main interests, *the party alleging that the centre of main interests is not at the place of registration will be required to satisfy the court as to the location of the centre of main interests*. The court of the enacting State will be required to consider independently where the debtor's centre of main interests is located.
>
> [emphasis added]

65 This is an unequivocal statement that the effect of Art 16(3) of the Model Law is to place the burden of proving the location of a debtor's COMI on whichever party asserts that it is at a place which is different from the debtor's registered office. Furthermore, we think that the distinction that we have drawn at [60] above between the burden of proving that a foreign proceeding is a

foreign main proceeding and the burden of proving the location of a debtor's COMI is implicit in, or at least consistent with, the commentary in para 143 of the *2014 Guide* above, which contemplates that the foreign representative is not always the party who "will be required to satisfy the court as to the location of the [COMI]" despite being the party seeking recognition of a foreign proceeding as a foreign main proceeding. Since the question of inconsistency between the *Guides* only arises where the *Guides* "take positive and conflicting positions on the same issue" and not where the *2014 Guide* takes a positive position on an issue on which the *1997 Guide* is silent (as is the case here), we considered it permissible to place reliance on the *2014 Guide* to confirm our interpretation of Art 16(3) of the SG Model Law: *Ascentra (HC)* at [37].

66 Some academic commentary takes a similar view. The late Professor Ian Fletcher, a doyen of international insolvency law, wrote in respect of the similarly-worded presumption in the original Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings – the ancestor of the EU Insolvency Regulation (Recast) – that while "[n]o further indication is given as to the nature or degree of proof required to overcome this presumption, … it can be supposed that the burden of proof will rest upon any party wishing to displace the conclusion as to the whereabouts of the COMI of a company or legal person that would otherwise follow from its application": Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2005) at para 7.44; *Moss, Fletcher and Isaacs on The EU Regulation on Insolvency Proceedings* (Gabriel Moss QC, Ian Fletcher QC & Stuart Isaacs QC eds) (Oxford University Press, 3rd Ed, 2016) at para 3.13.

67 Finally, other leading Model Law jurisdictions have also held that the burden of proof to rebut the presumption in Art 16(3) of the Model Law rests on the party challenging the presumed fact. In England & Wales, it has been

held that "the location of a company's registered office is a true presumption, and the burden lies on the party seeking to rebut it": *Re Stanford International Bank Ltd* [2009] BPIR 1157 at [63]; see also, *Chen v Chung (Re Li Shu Chung and Cross-Border Insolvency Regulations 2006)* [2021] EWHC 3346 (Ch) ("*Chen v Chung*") at [84] and the lower court decision in *Melars Group Ltd (in liquidation) v East-West Logistics LLP* [2021] BPIR 1524 at [59], cited without adverse comment by the English Court of Appeal in *Melars Group* at [28]. In Australia, while the point was not explicitly addressed in *Akers*, one can surmise from Rares J's decision to prefer the English approach to Art 16(3) of the Model Law over the US approach that the learned judge must have taken the same view (at [49]).

68 Apart from the incidence of the burden of proof, we make one important observation on the *content* of the burden. Although a party bearing the burden of rebutting the presumption would in a sense be seeking to disprove that the registered office is the COMI, we think that the burden would be more accurately framed as requiring a party to establish that *some other location* is the COMI. Put differently, the party bearing the burden should not be setting out to prove a negative (*ie*, that the registered office is *not* the COMI) but a positive (*ie*, that a different jurisdiction *is* the COMI).

69 The reason for this is that COMI is a relative concept. A debtor may have connections to any number of jurisdictions, but it can only have one COMI as the COMI is the jurisdiction with the *strongest* connection to the debtor. It would be entirely impractical for a court to embark on the Sisyphean endeavour of identifying, in the abstract and without competing reference points, which jurisdiction is the one with the strongest connection to the debtor. In practice, the court would have to shortlist a few probable candidates to focus upon and determine which among them is the COMI. Because of this, a party bearing the

burden of rebutting the presumption should not merely seek to disprove or downplay the connection between the debtor and the registered office, but should advance a positive case by identifying a competing jurisdiction as the debtor's COMI and showing how the debtor has a stronger connection to that jurisdiction than the registered office. To illustrate the significance of the relativity of COMI and the consequent importance of advancing a positive case, it could well be that the debtor bears no connection to the registered office other than the fact of registration, but if there is no evidence of a connection to any other jurisdiction, the registered office would be the debtor's COMI even if the debtor's connection to it is, objectively speaking, tenuous. Indeed, we think that the relativity of COMI explains why Snowden LJ said in *Melars Group* that the presumption may be (at [46]):

> … more *easily* rebutted if the evidence shows that no relevant acts of administration of the company's interests are actually carried out at the place of the registered office … [but] *will not be displaced*, *unless* there is sufficient contrary evidence of objective factors ascertainable by third parties to establish (prove) that the debtor actually conducts the administration of its interests on a regular basis in a *different place* from that of its registered office. [emphasis added]

70 What we have just explained ought not to be unfamiliar as the same point on relativity has been made in the context of the doctrine of *forum non conveniens*: see Yeo Tiong Min, *Commercial Conflict of Laws* (Academy Publishing, 2023) at paras 04.027–04.033. Although the purpose of *forum non conveniens* is certainly different to COMI as it looks forward to the nature and shape of the parties' dispute to locate the proper forum for a trial (*Brownlie v FS Cairo (Nile Plaza) LLC* [2022] AC 995 at [198]), *forum non conveniens* is structurally similar to the search for a debtor's COMI. It is trite that *forum non conveniens* is concerned not with objective inappropriateness of the forum but *relative* inappropriateness *vis-à-vis* another forum. This means that it is not

enough for a party seeking a stay of Singapore proceedings on *forum non conveniens* grounds to show that Singapore is not the natural or appropriate forum; it must go further to identify and establish that there is *another available forum* that is more appropriate than Singapore: *CIMB Bank Bhd v Dresdner Kleinwort Ltd* [2008] 4 SLR(R) 543 at [26]; *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 at [53]. It was in this vein that Chao Hick Tin JA observed in the decision of this court in *Siemens AG v Holdrich Investment Ltd* [2010] 3 SLR 1007 that (at [4]):

> … The purpose of the *forum conveniens* analysis is to identify the most appropriate forum in which to try the substantive dispute. It is wrong to say to say that Singapore is *forum non conveniens* simply because the connecting factors which point to Singapore are outweighed by all the connecting factors which point away from Singapore. The connecting factors which point away from Singapore must point to a more appropriate forum than Singapore, and they might not do so if those connections are dispersed amongst several jurisdictions. Quite simply, Singapore is *forum non conveniens* only if there is a more appropriate forum than Singapore.

The learned judge's remarks dovetail with our point above on the comparative nature of the COMI inquiry. To put things simply, because it does not follow necessarily from a lack of connection between the debtor and the registered office that there would be another jurisdiction with a *stronger* connection, what is required to rebut the presumption is for the party bearing the burden of doing so to: (a) identify a jurisdiction other than the registered office as a competing COMI; and (b) demonstrate that it, and not the registered office, is the debtor's COMI.

71 As for how a party should go about showing that the debtor's connection to one jurisdiction is stronger than the other, the relevant factors for determining COMI have been identified and elucidated in the case law and commentaries. We shall not repeat them here. It suffices to say that, as a general principle, the

relevant factors are those which are objectively ascertainable to third parties so as to inform their perception on the location of the COMI: *In re Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508 ("*Eurofood*") at [33]–[34]; *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* (Case C-396/09) [2012] Bus LR 1582 at [49]–[53]. As the European Court of Justice explained in *MH and another v OJ and another* (Case C-253/19) [2021] 1 WLR 2498 (at [21]):

> … The use of objective criteria which can be ascertained by third parties in order to determine the centre of the debtor's main interests must make it possible to determine the jurisdiction with which the debtor has a genuine connection and thus meet the legitimate expectations of the creditors.

But beyond this well-established principle, we focus on a further point. It has often been emphasised in cases on *forum non conveniens* that the court is primarily concerned with the *quality* of the connecting factors rather than the quantity of factors on each side of the scale: *Rappo, Tania v Accent Delight International Ltd and another and another appeal* [2017] 2 SLR 265 at [70]–[71]; *Lakshmi Anil Salgaocar v Jhaveri Darsan Jitendra* [2019] 2 SLR 372 at [54]. The same caution should be observed in the approach to connecting factors in the context of COMI. A dispute on the location of a debtor's COMI should not devolve into a bean-counting exercise where each party seeks to lay claim to as many factors as possible in a quest to construct a tower of factors that is taller than the other(s). The analysis is a textured and nuanced one that requires the court to consider the weight that should be given to each factor based on the specific circumstances of the case: *British Steamship Protection and Indemnity Association Ltd and another v Thresh, Charles and another* [2024] 2 SLR 317 ("*British Steamship*") at [37].

(2) The standard of proof

72 It is axiomatic that any question of proof must be tied to and measured against a recognised standard of proof. Otherwise, how is the judge or arbiter of fact supposed to determine that a fact in issue exists or has been proven by the party bearing the burden to do so? In the context of Art 16(3) of the SG Model Law, how much evidence, or convincing, does the court require to establish "proof to the contrary", *ie*, that the debtor's COMI is at a place other than the registered office?

73 In our judgment, it was clear that this question only admitted of one answer: the party bearing the burden of proof to establish that the location of the debtor's COMI is at a place other than its registered office had to establish this on the balance of probabilities.

74 Approaching the question from first principles, it is incontrovertible that there are only two standards of proof under our law, namely, proof beyond reasonable doubt in criminal cases and on the balance of probabilities in civil matters: *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14]. These find expression under s 3(3) of the Evidence Act 1893 (2020 Rev Ed) (the "EA"), which defines a fact as "proved" if, "after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent person ought, under the circumstances of the particular case, to act upon the supposition that it exists". While the standards of beyond reasonable doubt and the balance of probabilities are not expressly referred to in s 3(3) of the EA, it has been settled by judicial interpretation that these are the standards which the "prudent person" referred to therein would apply depending on whether the proceeding is in the criminal or civil context: *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR

286 at [17], citing the decision of the Privy Council in *Public Prosecutor v Yuvaraj* [1970] AC 913 ("*Yuvaraj*"). Thus, in the decision of this court in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308, we stated unequivocally that "[t]he standard of proof that applies in *all* civil proceedings is the balance of probabilities" [emphasis in original] (at [159]).

75 Following on from this, it is equally well-established that the effect of the phrase "unless the contrary is proved" and similar expressions is to create a presumption that is rebuttable on the balance of probabilities. The fact that examples of where this interpretation has been applied are legion and span a wide range of contexts indicates that this construction is not dependent on the statutory context *per se* but simply the ordinary meaning of the language used: see, for example, *Yuvaraj* at 920–921; *Ng Kum Peng v Public Prosecutor* [1995] 2 SLR(R) 900 at [32]–[33]. Given this, we saw no reason why the same interpretation should not apply to the phrase "in the absence of proof to the contrary" in Art 16(3) of the SG Model Law. Indeed, while Mr Sreenivasan's primary submission was to dispute that the presumption was the starting point, he agreed that if we were not with him on that point, the applicable standard for rebutting the presumption would be on the balance of probabilities.

76 The respondents, on the other hand, were non-committal on adopting the balance of probabilities standard. When we put it to Mr Yam that the obvious candidate for the standard of proof for "proof to the contrary" under Art 16(3) was the balance of probabilities, his response was that it may not be apposite as a recognition application "may not necessarily be a two-party situation" or a "binary situation".

77 We did not quite follow this submission. A standard of proof is "the degree of epistemic probability required to justify a factual finding": Lord

Leggatt, "Black Marbles, Blue Buses and Yellow Submarines: An Essay on the Civil Standard and Burden of Proof" (2024) 140 LQR 570 at 594. In more straightforward terms, the balance of probabilities is a shorthand for saying that a court will treat a disputed fact as true if it is satisfied that its existence is more probable than not. There is nothing in either the general concept of a standard of proof or the balance of probabilities specifically that restricts its operation to a case where a dispute of fact is contested before the court between two parties. Indeed, in an interpleader summons, which is a classic example of a multi-party dispute, all persons claiming a proprietary interest in the subject-matter of the proceedings would have to establish their respective claims on the balance of probabilities: see, for example, *Antariksa Logistics Pte Ltd and others v McTrans Cargo (S) Pte Ltd* [2012] 4 SLR 250.

78 It appeared to us that Mr Yam's submission that the balance of probabilities standard should apply only in a "two-party situation" might have been based on an incorrect understanding that the balance of probabilities entailed the court choosing between two alternatives advanced by the parties, when it is in actuality open to the court to find that neither party's theory is more probable than not and decide the issue based on the incidence of the burden of proof: *Clarke Beryl Claire (personal representative of the estate of Eugene Francis Clarke, deceased) and others v SilkAir (Singapore) Pte Ltd* [2002] 1 SLR(R) 1136 at [63]; *Rhesa Shipping Company SA v Edmunds (The Popi M)* [1985] 1 WLR 948 at 955–956. To situate this in the facts of the present case, the court was not bound to the choice of making a *positive* finding that Fullerton's COMI was more likely than not to be located in China (as the appellant submitted) or the BVI (as the respondents submitted). It was open for the court to find that, by virtue of Art 16(3) of the SG Model Law, the appellant failed to prove on the balance of probabilities that Fullerton's COMI was in

China such that the COMI was presumed to be the BVI as the place of registration. The analysis would be no different in a three-party situation where a third party other than the appellant or the respondents advanced the theory that Fullerton's COMI was in a third location, say, Singapore. In this scenario, the court could find that neither the appellant nor the third party had proven on the balance of probabilities that Fullerton's COMI was in China or Singapore with the result that it was presumed to be the BVI by default.

79 This is a convenient juncture for us to address the US authorities relied on by the appellant which offer a different perspective on the nature of the presumption under Art 16(3) of the Model Law. In summary, the US courts have adopted a narrower view on the effect of the presumption by interpreting it as only imposing an *evidential* burden on the party asserting that the COMI is at a place other than the registered office. This comes across clearly in the following explanation of § 1516(c) of the US Bankruptcy Code in the decision of the US Bankruptcy Court for the Eastern District of California in *In re Tri-Continental Exchange Ltd* 349 BR 627 (Bankr ED Cal, 2006) at 635:

> Congress chose to substitute "evidence" for "proof" and otherwise to adopt the Model Law provision word-for-word. The explanation was that the substitution conformed to United States terminology and made clear that the burden of proof of "center of main interests" is on the foreign representative who is applying for recognition of a foreign proceeding as a main proceeding. This comports with the concept of a rebuttable presumption for purposes of Federal Rule of Evidence 301.
>
> In effect, the registered office (or place of incorporation) is evidence that is probative of, and that may in the absence of other evidence be accepted as a proxy for, the "center of main interests". The registered office, however, does not otherwise have special evidentiary value and does not shift the risk of nonpersuasion, i.e. the burden of proof, away from the foreign representative seeking recognition as a main proceeding.
>
> Thus, if the foreign proceeding is not in the country of the registered office, then the foreign representative has the burden of proof on the question of "center of main interests".

> Correlatively, if the foreign proceeding is in the country of the registered office, and if there is evidence that the center of main interests might be elsewhere, then the foreign representative must prove that the center of main interests is in the same country as the registered office.
>
> It follows that the burden of proof as to the "center of main interests" is never on the party opposing "main" status and that such an opponent has only a burden of going forward to adduce some evidence inconsistent with the registered office warranting a conclusion of "main" status.

80 It can be seen at once that while the US courts accept that § 1516(c) of the US Bankruptcy Code creates a "rebuttable presumption", they disagree that it imposes on a party disputing the presumed fact the legal burden of proving that the COMI is located in another jurisdiction on the balance of probabilities. This is premised on the definition of a presumption contained in Rule 301 of the Federal Rules of Evidence (US), which reads:

> In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

This provision confirms that the US approach is informed by a different understanding of the concept of a rebuttable presumption. Unlike the ordinary interpretation of a rebuttable presumption under our law, the US courts understand a rebuttable presumption in the more conservative terms of imposing an evidential burden rather than a legal burden of proof. Thus, the presumption under § 1516(c) of the US Bankruptcy Code is rebutted by adducing evidence that falls short of *proof* on the balance of probabilities and, if that is done, the burden of proof is on the foreign representative to establish that the debtor's COMI is at its registered office.

81 In our judgment, the use of the word "proof" in Art 16(3) of the SG Model Law foreclosed the possibility of the Singapore courts interpreting

Art 16(3) in the manner that the US courts have interpreted § 1516(c) of the US Bankruptcy Code. As we have discussed at [74]–[75] above, the ordinary meaning of the word "proof" under our law is clear: it refers to establishing the existence of a fact. This necessarily implicates a legal burden of proof that, in the civil context, is discharged on the balance of probabilities.

82 We were cognisant that our conclusion that the balance of probabilities is the applicable standard for rebutting the presumption under Art 16(3) of the SG Model Law was a departure from the position taken in earlier decisions of the Singapore courts. In *Zetta Jet (No 2)*, the High Court commented in *obiter* that "the usual rule generally requiring that rebuttal of a legal presumption is to be made out on the balance of probabilities" did not apply to Art 16(3) of the SG Model Law and effectively endorsed the US approach (at [30]–[31]). However, it did not appear that the High Court had the advantage of receiving specific argument from the parties there on the issue of the applicable standard of proof. Since then, neither the General Division nor this court had occasion to revisit this point until the present case. This included our recent decision in *British Steamship* where the point was similarly not raised in argument, and a passing reference to *Zetta Jet (No 2)* was made in our grounds of decision that Art 16(3) "does not raise a presumption in the sense that it shifted the burden to a party to rebut the presumption on a balance of probabilities" (at [36]).

83 The present case was therefore the first occasion on which the issue of the standard of proof to rebut the presumption came squarely before this court. For the reasons explained above, we respectfully arrived at a different view than the High Court in *Zetta Jet (No 2)*.

84 Save for decisions that have expressly held that the presumption under Art 16(3) was rebuttable on a different standard, we did not think that

articulating the applicable standard of proof as the balance of probabilities differed from what courts were already doing, albeit without saying so. For instance, although the English Court of Appeal in *Melars Group* had used the expression of "sufficient contrary evidence" (at [46]), the first instance judge had in fact referred to the balance of probabilities when stating his finding on the debtor's COMI: see *East-West Logistics LLP v Melars Group* [2020] EWHC 2090 (Ch) at [54]. It was not suggested in either the decision of the English Court of Appeal or the first-tier appellate judge, Miles J, that the application of the balance of probabilities standard was wrong in law. And while it has not been common for courts to expressly refer to the applicable standard of proof, the balance of probabilities standard has featured in the few cases where this has been done: see the decisions of the English High Court in *LFC Horkstow Ltd v Wallis* [2023] EWHC 2205 (Ch) at [1] and the Northern Ireland High Court in *Irish Bank Resolution Corporation Ltd v Quinn* [2012] NICh 1 at [33]. In our view, the lack of regularity of references to the balance of probabilities was not because courts had something else in mind but that that standard was so well-entrenched as the civil standard of proof that it was not always thought necessary to preface conclusions of fact with a recital of it.

85 Nor did we think that confirming the balance of probabilities as the standard of proof for rebutting the presumption under Art 16(3) of the SG Model Law would cause difficulty or any undesirable consequences in cross-border insolvency cases. On the contrary, the use of a clear and familiar standard of proof has the advantage of certainty over expressions such as "sufficient contrary evidence" or the nebulous imagery of "tipping the scales". As we observed in our recent decision in *Udenna Corp v Pertamina International Marketing & Distribution Pte Ltd* [2025] 1 SLR 19, where we made a similar point when preferring the balance of probabilities as the standard of proof for

rebutting a certificate of service as evidence of service over a test of "clear and convincing evidence", "[a]ny formula or description which involves departing from, or the appearance of departing from, the standard of proof of the balance of probabilities can create needless uncertainty" (at [20]). It bears emphasis that, since Art 16(3) of the Model Law was intended to introduce certainty and specificity in the COMI analysis (see [55] above), its purpose would be undermined if there is uncertainty as to what is required to rebut the presumption.

86 The possible objections to adopting the standard of the balance of probabilities over the conception of the presumption under the US approach seemed to us to be twofold. However, on closer examination, we did not think that either justified abandoning the balance of probabilities standard.

87 First, there was a concern that a more robust standard of proof would result in the courts identifying the place of registration as the COMI despite the debtor having only what has been termed a "letterbox" presence there. We accepted that, in terms of theoretical possibility, there was a greater likelihood of this if greater weight was attached to the presumption. After all, as Rares J recognised in *Akers*, the cost of greater certainty is a greater margin of error, and the use of a presumption accepts this trade-off as "where the position is left uncertain, [the presumption] authorises the court to proceed upon the deemed position, even if a more mature and thorough investigation eventually could determine it to be an erroneous, or indeed, fictitious position" (at [53]).

88 That said, we considered that the concern was ultimately more apparent than real as it was established amongst courts that adopted a stronger conception of the presumption that the presumption could be rebutted if the registered office was a mere letterbox: see, for example, the decision of the European Court of

Justice in *Eurofood* at [35]. Indeed, commentators have observed that the difference between the two approaches may be "overblown" as an application of either the strong or weak conception of the presumption would produce the same result in the vast majority of cases: Gerard McCormack, "US Exceptionalism and UK Localism? Cross-Border Insolvency Law in Comparative Perspective" (2016) 36 LS 136 at 145.

89 We agree that there is unlikely to be a difference in application. To illustrate, a quintessential example of a case where the registered office was a mere letterbox can be found in *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd* 374 BR 122 (Bankr SDNY, 2007) ("*Bear Stearns*"). The US Bankruptcy Court for the Southern District of New York held that the debtors' presumed COMI of the Cayman Islands was soundly rebutted by the evidence which established that their COMI was instead in the US. It is useful to consider the court's findings on the evidence before it (at 130):

> The only adhesive connection with the Cayman Islands that the Funds have is the fact that they are registered there. … [T]here are no employees or managers in the Cayman Islands, the investment manager for the Funds is located in New York, the Administrator that runs the back-office operations of the Funds is in the United States along with the Funds' books and records and prior to the commencement of the Foreign Proceeding, all of the Funds' liquid assets were located in United States. Although two of the three investors in the High Grade-Fund are also registered Cayman Islands companies, Mr Whicker, one of the [joint provisional liquidators], testified that both are Bear Stearns entities which appear to have the same minimum Cayman Islands profile as do the Funds. The sole investor in the Enhanced Fund is a U.K. entity. … The investor registries are maintained and located in the Republic of Ireland; accounts receivables are located throughout Europe and the United States; counterparties to master repurchase and swap agreements are based both inside and outside the United States but none are claimed to be in the Cayman Islands. …

In short, the only connection between the debtor and the registered office was the fact of registration itself and there were a myriad of factors pointing towards the US. In our view, it is clear that these facts would have more than sufficed to rebut the presumption of the debtors' COMI being the Cayman Islands even if the standard of the balance of probabilities had been applied.

90 The second concern was that placing the burden of proof on a party asserting that the COMI is at a place other than the registered office to establish this on the balance of probabilities would result in a recognition application being reduced to a "rubber stamp exercise", particularly in a case where the recognition application is unopposed. This issue was at the forefront of *In re Basis Yield Alpha Fund (Master)* 381 BR 37 (Bankr SDNY, 2008) ("*Basis Yield*"). Similar to *Bear Stearns*, *Basis Yield* involved an investment fund in liquidation which had its registered office in the Cayman Islands. The court was troubled by the foreign representatives' "conspicuous failure to try to establish, or even plead, facts supporting the existence of a main proceeding" (at 48), and rejected the suggestion that the court was bound by a lack of objection to recognise the debtor's Cayman Islands liquidation as a foreign main proceeding as "the section 1516 presumption need not be blindly followed" (at 50–51).

91 Despite our differing view on the nature of the presumption, we agreed with the decision in *Basis Yield*. We take this opportunity to make clear that our decision on the burden and standard of proof to rebut the presumption under Art 16(3) of the SG Model Law does not mean that the court should not undertake a holistic assessment of the evidence before it to satisfy itself on the location of the debtor's COMI simply because a recognition application is unopposed. The fact that the presumption under Art 16(3) is not a conclusive or irrebuttable presumption but a rebuttable one means that, *in every case*, the court must assess the evidence before it and determine if "proof to the contrary" as to

the debtor's COMI has been established. Indeed, the *1997 Guide* makes clear that the operation of the presumption does not prevent the court from "calling for, or assessing, other evidence if the conclusion suggested by the presumption is called into question *by the court* or an interested party" [emphasis added] (at para 122). The presence or absence of any objecting party before the court is thus of no significance as the court may raise inquiries on the correctness of the presumed COMI to the foreign representative to assess if the presumption is rebutted on the facts of a given case.

92 It also appeared to us that there already exist both practical and legal safeguards which sufficiently address any concern that the court may not be apprised of information that is relevant to the exercise of its discretion as to recognition and relief. In the first place, while applications for recognition may be commenced *ex parte*, the practice that our courts have typically followed is to direct that an application for recognition be brought to the attention of all interested parties, who are thereby given an opportunity to address the court on matters of concern which may not be brought up by the foreign representative. In any event, even if the application proceeds to be heard on an *ex parte* or uncontested basis, the foreign representative would in such circumstances be subject to a duty of full and frank disclosure: see the decision of the English High Court in *In re Dalnyaya Step LLC (in liquidation) (No 2)* [2018] Bus LR 789 ("*Dalnyaya Step*"). It is settled law that an applicant in an *ex parte* application owes to the court a duty of full and frank disclosure which requires it to disclose to the court all material facts in its knowledge even if they are prejudicial to the applicant's claim: *The "Vasiliy Golovnin"* [2008] 4 SLR(R) 994 at [83]; *Dalnyaya Step* at [84]. Pertinently, the duty is given additional bite by requiring an applicant to make proper inquiries before making the application, with the extent of necessary inquiry turning on all the circumstances

of the case including the nature of the case, the order being sought and the probable effect of the order on other parties: *JTrust Asia Pte Ltd v Group Lease Holdings Pte Ltd and others* [2018] 2 SLR 159 at [90(b)]; *Dalnyaya Step* at [85].

93 Thus, in the context of a recognition application where the foreign representative would at the very least be seeking an order for recognition, the minimum expectation is that the foreign representative would place before the court "any material of which he is aware which is relevant to the exercise of that discretion": *In re OGX Petróleo e Gás SA* [2016] Bus LR 121 ("*OGX Petróleo*") at [58]. As far as the location of the debtor's COMI is concerned, a foreign representative should undertake proper inquiries to equip himself with sufficient information on the debtor's operations and affairs such that this information can be put before the court. Certainly, it would not be acceptable for a foreign representative to plead a barren case that is premised solely on the presumption. If the duty of full and frank disclosure is complied with, the absence of objection ought not to make any difference, since the presumption may be rebutted by "proof to the contrary" arising from within the foreign representative's own case based on the evidence and facts disclosed to the court.

94 The doctrine of *forum non conveniens* once again serves as an instructive analogue. In *ex parte* applications by a claimant for permission to serve an originating process out of jurisdiction, it is well-established that the court must be satisfied, among other things, that Singapore is the proper forum for the trial or determination of the action: *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 at [26]; *Oro Negro Drilling Pte Ltd and others v Integradora de Servicios Petroleros Oro Negro SAPI de CV and others and another appeal (Jesus Angel Guerra Mendez, non-party)* [2020] 1 SLR 226 at [54]. This incorporation of *forum conveniens* makes service out applications

a prime and familiar example of the court having to assess relevant connecting factors and make an evaluative decision on whether there is no other available forum than Singapore or, if there is, that Singapore is the more appropriate forum, notwithstanding that there is only one party before it: *Kuswandi Sudarga v Sutatno Sudarga* [2022] SGHC 299 at [38]–[40]. In that context, the identification of factors which may suggest the existence of other available forums than Singapore is facilitated by the claimant's duty of full and frank disclosure, which encompasses facts that bear on the issue of whether Singapore is *forum conveniens*: *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [78]; *Shanghai Turbo Enterprises Ltd v Liu Ming* [2018] SGHC 172 at [81]–[86]. As far as this is concerned, we think that an *ex parte* or uncontested recognition application is materially indistinguishable from an *ex parte* service out application. If there are factors that may reasonably suggest that the debtor's COMI is at a place other than the registered office, they would in the ordinary course be brought to the attention of the court by the foreign representative discharging its duty of full and frank disclosure. And as with any order made *ex parte*, a recognition order is liable to be set aside or discharged if it is subsequently discovered to have been obtained based on material non-disclosure to the court: see Art 17(4) of the SG Model Law.

The relevant time for determining a debtor's COMI

95 It is settled law that the debtor's COMI should be assessed as at the date of the recognition application: *Zetta Jet (No 2)* at [61]; *British Steamship* at [37]. This was the basis on which the Judge proceeded and there was no suggestion from the parties that she had erred in doing so: GD at [55]. There are, however, two loose ends on the issue of timing that we take the opportunity to tie up in the present case.

96 Our first point concerns the relevance of the activities of the foreign representative in the COMI analysis. In *Zetta Jet (No 2)*, the High Court had expressed the view that although COMI should be assessed as at the time of the recognition application, the acts of the foreign representative should be disregarded as "[t]he work being done by the foreign representative would flow from the assumption of jurisdiction by the foreign court on whatever basis it considers appropriate" (at [102]). In other words, as the foreign court would not necessarily have exercised jurisdiction on the basis that the debtor's COMI was situated in that jurisdiction, it would be circular to treat the foreign representative's subsequent actions as an indicator of where the COMI was. In the subsequent decision of the General Division in *Re Tantleff, Alan* [2023] 3 SLR 250 ("*Tantleff*"), this view was affirmed and elaborated on as follows (at [50]):

> … Where the business activities of a company are subsequently managed in the jurisdiction where the foreign proceedings were commenced, I do not think that creditors would necessarily look to the actions of the foreign representative. The US approach appears to be a form of bootstrapping and will allow the parties to choose their COMI (so to speak) in an artificial manner. To my mind, it would be better to assess the COMI by looking at the activities of the company before the foreign restructuring takes place (even though the relevant date for determining the COMI is at the date of application for recognition). The location of the activities of the foreign representative is therefore irrelevant.

97 In our recent decision in *British Steamship*, we expressed the provisional view that an absolute bar against taking the actions of the foreign representative into account was not justified. It seemed to us that once it was accepted that the relevant date for assessing COMI was the date of the application for recognition, all factors had to come into play. In particular, if the foreign representative's activities had been undertaken over a long period of time, it was not clear why they should be artificially excluded from the COMI analysis (at [69]).

98 As our grounds of decision in *British Steamship* were handed down only after the Judge's decision, the Judge did not have the benefit of our remarks in *British Steamship* and instead followed the more restrictive approach in *Zetta Jet (No 2)*: GD at [69]. Before us, the respondents relied on *British Steamship* and submitted that their conduct as foreign representatives should not be excluded from consideration, and weighed in favour of the BVI being Fullerton's COMI. The appellant did not appear to dispute the permissibility of taking into account the actions of a foreign representative as a matter of principle but disagreed that this factor pointed in favour of the BVI on the facts.

99 Having further considered the point, we are persuaded to affirm our tentative view in *British Steamship*. Apart from the reasons already given there, we add one further reason for departing from the restrictive approach in *Zetta Jet (No 2)* and *Tantleff*. Although the court in *Tantleff* had cited the concern of the parties being able "to choose their COMI (so to speak) in an artificial manner" as a reason for disregarding the actions of the foreign representative (at [50]), we think that it may be more precise to focus on thwarting *abusive* forum shopping rather than forum shopping *per se*. It is now well-established that a distinction is drawn between "good" and "bad" forum shopping and, in line with this, manipulation of a debtor's COMI with a view to benefitting its creditors is legitimate and unobjectionable: *Re Pacific Andes Resources Development Ltd and other matters* [2018] 5 SLR 125 at [51]–[52]; *Re Codere Finance (UK) Ltd* [2015] EWHC 3778 (Ch) at [18]. Given this, a bright-line rule against allowing a foreign representative to rely on its own actions after commencement of the insolvency proceeding in a foreign jurisdiction to strengthen the debtor's connection to that jurisdiction would be overbroad. A more targeted approach that places emphasis on ascribing the proper weight to

the actions of the foreign representative based on the specific circumstances of each case ought to be preferred.

100 In this connection, we had in *British Steamship* commended the approach taken by the US courts in relation to Chapter 15 of the US Bankruptcy Code as "helpful … and more principled" (at [70]). In brief, the US approach focuses on the debtor's COMI as at the date of the recognition application, subject to a limited inquiry into the intervening period between the commencement of the foreign proceeding and the recognition application to ensure that the debtor has not manipulated its COMI in bad faith: *In re Fairfield Sentry Ltd* 714 F 3d 127 (2nd Cir, 2013) at 137. In *In re Ocean Rig UDW Inc* 570 BR 687 (Bankr SDNY, 2017), Judge Martin Glenn summarised the position thus (at 704):

> In assessing these factors, a chapter 15 debtor's COMI is determined as of the filing date of the Chapter 15 petition, *without regard to the debtor's historic operational activity*. … However, … to the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith. [emphasis added]

101 Save for one caveat, we broadly agree with this approach. The caveat is that while the US approach appears to *disregard* the debtor's "historic operational activity" except for the purpose of determining that there has been no abusive shift in COMI, we would prefer to adopt a more measured approach of placing historical facts on a sliding scale of relevance, such that their weight may be calibrated based on their relevance to the issue of the debtor's COMI at the relevant time. As a rule of thumb, the more far removed a factor or event is from the relevant time, the less relevant it would be such that little to no weight would be accorded to it.

102 The second point we make is a more general one. In *Tantleff*, the General Division had made the following comment on the "jurisprudential basis" of COMI (at [45]):

> … The jurisprudential basis of the COMI requirement is to determine the centre of gravity of the company's commercial activity, that is, where it was centred while it was *alive and flourishing* – in other words, a corporation's real home. A hospital bed, or a crypt, does not count. [emphasis added]

Despite affirming that the relevant time for the COMI analysis was the date of the recognition application, the Judge cited *Tantleff* for the proposition that the court was required to focus on the debtor's position "while it was alive and flourishing": GD at [63].

103 In our respectful view, the observation in *Tantleff* on the nature of COMI is doubtful for two reasons. First, once it is accepted that the date of the recognition application is the relevant time for the COMI analysis, we do not see how it can be simultaneously maintained that the focus should be on the debtor's situation when it was "alive and flourishing", since the latter is necessarily a different (and earlier) point in time than the former. In our view, it is not possible to undertake the COMI inquiry to identify a single COMI with reference to two different points in time. The debtor's COMI while it was "alive and flourishing" and at the time of the recognition application may well be different, not least because a debtor may choose to commence an insolvency proceeding in a different jurisdiction than its COMI while it was thriving due to the perceived advantages of a foreign insolvency regime. Following from this, it is quite possible that by the time steps are taken to obtain recognition of that insolvency proceeding elsewhere, the debtor's COMI may have shifted to the jurisdiction in which the insolvency proceeding was opened. Relatedly, given that the English and EU approach of taking the *time of the commencement* of

the foreign proceeding as the relevant time for COMI was rejected in *Zetta Jet (No 2)*, this appears to us to be difficult to reconcile with the proposition that the court should be focusing on when the debtor was "alive and flourishing" since the latter would almost certainly be an earlier point in time than the former.

104 Second, a purported focus on the debtor's position while it was "alive and flourishing" is problematic because it is difficult to apply. Unlike the three approaches considered by the court in *Zetta Jet (No 2)* which identify three distinct points in time – *viz*, the time of the commencement of the foreign proceeding (the English and EU approach), the time of the recognition application (the US and Singapore approach) and the time when the court hears the recognition application (the Australian approach) – the debtor may have been "alive and flourishing" over a *period* of time. In such a situation, where it may be possible for the debtor to have shifted its business interests across different jurisdictions while remaining "alive and flourishing" throughout, a court would have difficulty identifying when exactly it should be focusing upon for the purposes of determining the debtor's COMI. The choice of a specific point in time ensures certainty in the COMI analysis, whereas "alive and flourishing" is an amorphous moving target that is uncertain in its application.

The presumption that Fullerton's COMI was in the BVI was not rebutted

105 Turning to the facts of the present case, the starting point was that the BVI was Fullerton's COMI in the absence of proof to the contrary pursuant to Art 16(3) of the SG Model Law. The appellant bore the burden of rebutting this presumption by proving, on the balance of probabilities, that there was another jurisdiction with a stronger connection to Fullerton than the BVI which would be Fullerton's COMI. The relevant time for the COMI analysis was the date on which OA 116 was filed, namely, 1 February 2024.

106 In our judgment, there was simply no plausible basis for the appellant to impugn the Judge's conclusion that the BVI was Fullerton's COMI. As we stated at the outset of these grounds, the striking feature of this case was the sheer paucity of evidence on Fullerton's activities. It was not disputed that, as far as the evidence before the court went, Fullerton had only been involved in a *single* business transaction – *ie*, the Contract with DKI – which had spawned ongoing litigation as an alleged fraudulent scheme in Suit 435. As we indicated to Mr Sreenivasan at the hearing, most of the case law on COMI involved debtor companies with not insignificant prior commercial activity and transactions, which formed a sufficient evidential backdrop for the court to meaningfully weigh various connecting factors for the purpose of identifying the jurisdiction which the debtor had its strongest connection with. In a case like the present where there was a complete dearth of evidence and detail, the COMI inquiry was a rather meaningless exercise devoid of content. With respect, the appellant's efforts to even embark on an attempt to identify Fullerton's COMI in such circumstances, still less rebut the presumption, were somewhat misguided.

107 But before we come to the arguments and evidence, we make two preliminary observations. The first is that our role as an appellate court in reviewing the Judge's decision on COMI was not to consider all the evidence and make a *de novo* finding on Fullerton's COMI. As the exercise in identifying a debtor's COMI entails weighing various factors and coming to a judgment on where the centre of mass of these factors lies, the mere fact that we may have come to a different view than the Judge was not sufficient to attract appellate intervention. Instead, the appellant had to show that: (a) the Judge erred as a matter of legal principle; (b) the Judge considered matters which she should not have or failed to consider matters which she ought to have; or (c) the Judge's

decision was plainly wrong: *The "Vishva Apurva"* [1992] 1 SLR(R) 912 at [16]; *In re Stanford International Bank Ltd and another* [2011] Ch 33 at [58].

108 The second point is the confusion which arose from the appellant's vacillation in identifying the competing jurisdiction which he advanced to be Fullerton's COMI in place of the BVI. Before the Judge, the appellant's primary case seemed to be that Hong Kong was Fullerton's COMI, although this was by no means clear, as the appellant's written submissions below referred variously to "Hong Kong, China (or alternatively, Singapore …)", "Hong Kong (China)" or "Hong Kong (i.e. China)". Indeed, the Judge's impression was that the appellant was advancing Hong Kong as Fullerton's COMI: GD at [27]. In the appeal before us, the appellant seemed to change his position as he submitted in his Appellant's Case that Fullerton's COMI was in China (which we use to refer to Mainland China) while still relying for the most part on connecting factors relevant to Hong Kong. It was only in the Appellant's Reply, and subsequently through Mr Sreenivasan's responses to our questions at the hearing, that the appellant's position was clarified to be that Fullerton's COMI was in China, albeit he was entitled to rely on factors relating to Hong Kong to establish his case because Hong Kong cannot on its own be recognised as a debtor's COMI and instead functions as a part of China for purposes of COMI in the same way that Shanghai or Beijing do.

109 The appellant's submission that China and Hong Kong should be amalgamated into a single jurisdiction for the purposes of the COMI analysis was flawed for several fundamental reasons:

(a) First, the foundation of Mr Sreenivasan's oral argument was that a "foreign main proceeding" was defined under Art 2(*f*) of the SG Model Law as "a foreign proceeding taking place in the State where the debtor

has its centre of main interests" and "State" had been defined under Art 2(*m*) as "Singapore and any country other than Singapore". The focal point of his submission was that Hong Kong is not a "State" under Art 2(*m*). Indeed, Mr Sreenivasan went as far as to suggest at points that Hong Kong was not capable of adopting the Model Law as the UNCITRAL did not recognise it as a "State". We were not persuaded by this analysis. It suffices for us to say that Mr Sreenivasan's arguments were contradicted by the fact that "State" is also found in the UNCITRAL Model Law on International Commercial Arbitration which Hong Kong has adopted in its Arbitration Ordinance (Cap 609) (HK).

(b) Second, a survey of foreign case law revealed that the courts of other Model Law jurisdictions have found Hong Kong to be a debtor's COMI and consequently recognised Hong Kong bankruptcies (*Chen v Chung*; *Arbolt v Hung (Re Kei Kin Hung and Cross-Border Insolvency Regulations 2006)* [2024] EWHC 3399 (Ch)), liquidations (*In re Manley Toys Limited* 580 B.R. 632 (Bankr D New Jersey, 2018)) and schemes of arrangement (*In re Sunac China Holdings Limited* 656 BR 715 (Bankr SDNY, 2024)) as foreign main proceedings under their respective enactments of the Model Law. In Singapore, although there does not appear to have been a reported judgment, our courts have on at least one previous occasion granted recognition of a Hong Kong liquidation as a foreign main proceeding: see *DMZ v DNA* [2025] SGHC 31 at [2].

(c) Finally, even assuming that the appellant's submission that the Singapore courts could not recognise Hong Kong as a debtor's COMI was correct, it seemed to us that all that would have meant was that the Hong Kong-related factors should be disregarded altogether rather than

being taken together with China-related factors to support the appellant's case that China was Fullerton's COMI.

110 In our view, the reason for the appellant's attempt to amalgamate Hong Kong and China in the COMI analysis was plain and simple. The appellant evidently recognised that, if taken independently of one another, the Hong Kong and China factors came nowhere close to a basis for mounting even an arguable case that Hong Kong or China was Fullerton's COMI. Further complicating the appellant's position was that if he committed to either of these jurisdictions, his reliance on factors pointing to the one would be offset by factors pointing towards the other so as to weaken his position even more. As there was no prospect of succeeding if he committed to either Hong Kong or China, the appellant amalgamated the two jurisdictions in a misconceived attempt to buttress his case that Fullerton's COMI was located in China instead of in the BVI.

111 Even if we had accepted the appellant's invitation to proceed on the basis that Hong Kong and China should be taken together for the purposes of determining Fullerton's COMI, as we now go on to demonstrate, he would still have fallen woefully short of rebutting the presumption that Fullerton's COMI was in the BVI.

112 The first factor relied on by the appellant was the location of control and direction of Fullerton, which he submitted to be China. This was on the basis that Fullerton's sole director at the time of liquidation, Ms Zhou Li Hua ("Ms Zhou"), and a former director of Fullerton from March 2018 to February 2019, Mr Tan Zhenjian ("Mr Tan"), were resident in China. We found neither Ms Zhou's nor Mr Tan's directorships to be relevant. Mr Tan's time with Fullerton was so far removed from the date when OA 116 was filed that it could

not possibly be relevant to Fullerton's COMI at that time. While Ms Zhou remained a director of Fullerton, there was not only no evidence of her continued involvement in Fullerton's affairs at the relevant time but positive evidence to the contrary. The appellant's own evidence was that he had been told by Ms Zhou that she had placed Fullerton into voluntary liquidation in 2022 as "she had completed her project/transactions and had no further use for [Fullerton]". This was further backed up by the respondents' evidence that she had remained uncontactable despite two attempts at writing to her, which led to the respondents including her as one of the Relevant Persons against whom they sought disclosure and examination orders in OA 116.

113 In contrast, we considered the location of control and direction to be a factor that weighed in favour of the BVI as Fullerton's COMI. As we have explained above, there was no preclusion against taking into account the actions of a foreign representative after commencement of the foreign proceeding when assessing a debtor's COMI (see [99] above). The present case was one in which it was appropriate to look to the respondents rather than any of Fullerton's past directors as the persons having control and direction of Fullerton. As the US Bankruptcy Court for the Southern District of Florida observed in *In re British American Insurance Company Ltd* 425 BR 884 (Bankr SD Fla, 2010) at 914:

> There may be instances where a foreign representative remains in place for an extended period, and relocates all of the primary business activities of the debtor to his location (or brings business to a halt), thereby causing creditors and other parties to look to the judicial manager as the location of a debtor's business. This could lead to the conclusion that the center of its main interest has become lodged with the foreign representative.

114 It was not disputed, nor could it have been, that the respondents had been in control of Fullerton since the BVI Restoration Order on 10 October 2022 (see [18] above). There was also no evidence of Fullerton having engaged in any

business activities since then other than the ongoing administration of the BVI Liquidation under the respondents' direction. Given this, it was unrealistic to assess Fullerton's control and direction at the relevant time by considering any person other than the respondents: see also, *Re Quoine Pte Ltd and others* [2025] SGHC(I) 5 at [47].

115 Next, the appellant argued that the location of Fullerton's creditors was a factor pointing towards China as Fullerton's sole creditor, DKI, was based in Hong Kong. However, the only evidence that the appellant could marshal to support a finding that DKI was based in Hong Kong was that: (a) DKI had provided a Hong Kong address in the Contract; (b) DKI's signatory to the Contract was ostensibly Chinese; and (c) the representative who had been deposing to affidavits on DKI's behalf in Suit 435 worked out of an office in Hong Kong. We agreed with the Judge that there was insufficient evidence to find that DKI was indeed based in Hong Kong: GD at [62]. This factor thus did not assist the appellant.

116 Finally, the appellant submitted that Fullerton's operations had been in China as the Contract between Fullerton and DKI was a transaction connected to Hong Kong. We declined to place any weight on this factor. A single transaction with a counterparty ostensibly based in Hong Kong – which, as we have found above, was not even established – was nowhere near a sufficient sample size to establish any meaningful connection between Fullerton and Hong Kong. In fact, there was evidence linking the Contract to jurisdictions other than Hong Kong or China:

(a) the governing law of the Contract was English law;

(b) both the appellant and Mr Wilbur who were alleged to be the person(s) involved in the transaction on Fullerton's end were resident in Singapore;

(c) the Pledged Stock forming the collateral for the loan from Fullerton to DKI were shares in a Canadian company previously listed on US and Canadian stock exchanges; and

(d) the Pledged Stock was held in a brokerage account with UOB Kay Hian Pte Ltd, a Singapore stockbroker.

The Judge was both entitled and correct to find that there was insufficient evidence to conclude where Fullerton had conducted its business activities and operations: GD at [67].

117 For the above reasons, the appellant's case that China was Fullerton's COMI simply could not succeed. None of the factors he relied upon had a firm evidential substratum or came close to establishing anything resembling a meaningful connection with China. This was fatal to the appellant's ability to rebut the presumption. Although it was a consistent refrain in Mr Sreenivasan's oral argument that there was no evidence of Fullerton having undertaken any activity in the BVI, we have explained at [68]–[70] above that it is not enough for a party seeking to rebut the presumption to show that there were no factors other than the fact of registration pointing towards the registered office as it must be shown that there is *another* jurisdiction which has a *comparatively stronger* connection to the debtor than the registered office. Even if the appellant was able to show with some success that the connection between Fullerton and the BVI was weak, this weak connection was nonetheless stronger than the non-existent connection he sought to draw between Fullerton and China.

118 We thus affirmed the Judge's decision that the appellant failed to rebut the presumption under Art 16(3) of the SG Model Law and held that Fullerton's COMI was in the BVI.

Whether recognition of the BVI Liquidation would be contrary to public policy

119 As we have mentioned above, on appeal the appellant invoked the public policy exception for the first time in order to argue that recognition of the BVI Liquidation would be contrary to the public policy of Singapore. In fact, this new argument formed the bulk of the appellant's case before us, which was unsurprising given our finding above that his arguments on the location of Fullerton's COMI rested on very weak and tenuous grounds.

The contours of the public policy exception

120 The appellant relied on the decision of the Singapore International Commercial Court ("SICC") in *Garuda* for the proposition that the public policy exception under Art 6 of the SG Model Law could be engaged "where the foreign representatives acted in bad faith or failed to make full and frank disclosure of material facts to the receiving court" (at [96(c)]).

121 The respondents initially appeared to suggest in their Respondents' Case that *Garuda* had been wrong on this, as they submitted that the case cited by the SICC as authority – *viz*, the decision of the US Bankruptcy Court for the Southern District of New York in *In re Creative Finance Ltd* 543 BR 498 (Bankr SDNY, 2016) ("*Creative Finance*") – did not stand for the stated proposition. However, at the hearing, Mr Yam clarified that the respondents were only disputing the reference to *Creative Finance* as an authority for the proposition and not going as far as to challenge the correctness of the proposition itself.

122 We agreed with the respondents that the SICC's citation of *Creative Finance* in *Garuda* was perhaps infelicitous as *Creative Finance* did not actually support the proposition that bad faith and lack of full and frank disclosure would engage the public policy exception under the Model Law. In *Creative Finance*, the controller of a company had placed the company into voluntary liquidation in the BVI under a liquidator of his nomination after stripping the company's assets to frustrate the enforcement of a prospective judgment against it. The liquidator then applied for recognition of the company's liquidation in the BVI as a foreign main proceeding in the US. Although the court found that the controller and his associates were "guilty of bad faith in numerous respects" (at 513) and condemned the scheme as "the most blatant effort to hinder, delay and defraud a creditor [the] Court has ever seen" (at 502), it nonetheless held that these circumstances did not trigger the public policy exception under § 1506 of the US Bankruptcy Code (at 515–516). This narrow reading of the public policy exception under US law was confirmed more recently in *In re Black Gold SARL* 635 BR 517 (9th Cir BAP, 2022), where the court traced the line of relevant US authorities, including *Creative Finance*, before summarising the US position that "a party's misconduct, or 'bad faith,' standing alone, is not a proper basis for invoking the public policy exception" (at 531).

123 However, even if *Creative Finance* was not relevant authority, there was nothing that prevented us from affirming the proposition if we considered it to be sound. In our judgment, bad faith and material non-disclosure by a foreign representative were matters properly within the scope of the public policy exception under Art 6 of the SG Model Law. This was supported on the grounds of principle and precedent.

124 As a matter of principle, it is self-evident that a recognition court should be able to safeguard its processes from abuse and not countenance bad faith or underhanded conduct by a foreign representative who invokes its jurisdiction to recognise and assist a foreign proceeding. The concept of "abuse of process" connotes that the process of the court must be used *bona fide* and properly and, to this end, the court will prevent the improper use of its machinery: *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [22]; *BWG v BWF* [2020] 1 SLR 1296 at [52]–[54]. In *Chee Siok Chin and others v Minister for Home Affairs and another* [2006] 1 SLR(R) 582, the High Court observed that examples of abuse of process included "proceedings which involve a deception on the court" or "proceedings where the process of the court is not being fairly or honestly used but is employed for some ulterior purpose or in an improper way" (at [34]). In our view, material non-disclosure and bad faith by a foreign representative fall squarely into these well-established categories of abuse of process. Indeed, when we put the point in these terms to Mr Yam, he accepted that an abuse of process of this kind would be grounds to engage the public policy exception.

125 If a foreign proceeding and recognition application have been animated by an improper or collateral purpose, a recognition court ought to feel no diffidence in refusing to aid such purpose. The Model Law is intended to promote cooperation in cross-border insolvency in order to realise better outcomes for creditors based on the principle of modified universalism. A recognition court is thus justified in ensuring that it is to this purpose that the Model Law's apparatus is applied. As this court put it in no uncertain terms in *ED&F Man Capital Markets Ltd v Straits (Singapore) Pte Ltd* [2020] 2 SLR 695, "[a] party who commences proceedings for the predominant purpose of achieving something other than what the legal process was designed to achieve

(*ie*, a collateral purpose) is someone who has abused the process of the court" (at [39]).

126 Any attempt to invoke comity as a reason for tying a recognition court's hands in dealing with abuse of its processes would be misconceived. In the first place, the very existence of the public policy exception acknowledges the limits of comity because it creates a legitimate, albeit no doubt limited, sphere within which a recognition court is entitled to prioritise a competing interest over international cooperation. Put another way, comity, which pulls towards recognising and assisting foreign insolvency proceedings, cannot displace the imperative of safeguarding the court's process from abuse. A balance must be struck. This is recognised within the Model Law itself.

127 Our conclusion is consistent with the position taken by the English courts in respect of the public policy exception under Art 6 of the Cross-Border Insolvency Regulations 2006 (SI 2006 No 1030) (UK), which enacts the Model Law in England and Wales. The decision of the English High Court in *OGX Petróleo* is particularly instructive. In that case, the debtor had obtained an *ex parte* order from the English High Court recognising its Brazilian reorganisation proceeding as a foreign main proceeding, from which arose an automatic stay of proceedings against the debtor under Art 20(1) of the Model Law. The debtor did not disclose to the court that an English arbitration against the debtor which would be caught by the stay concerned claims that were not subject to the Brazilian restructuring plan for which recognition had been sought: *OGX Petróleo* at [26]. Although the matter was resolved by consent, Snowden J (as he then was) was sufficiently troubled that he published a judgment setting out his concerns on the debtor's conduct: *OGX Petróleo* at [43].

128 Snowden J highlighted two issues with the debtor's conduct. First, the debtor's aim for seeking recognition had nothing to do with protecting the integrity of the Brazilian reorganisation proceeding as the sole purpose of the recognition application was to obtain a stay to frustrate an arbitration with respect to claims that were not even subject to that proceeding. This purpose was "an abuse of the process for recognition of a foreign proceeding": *OGX Petróleo* at [54]. Second, apart from misusing the Model Law for a purpose which it had not been intended, the debtor's disclosure to the court had been "wholly inadequate": *OGX Petróleo* at [57]. Critically, Snowden J commented that the circumstances of the case may have justified invoking the public policy exception to refuse recognition as "it [was] strongly arguable that the court must have a residual discretion to refuse recognition if satisfied that the applicant [was] abusing that process for an illegitimate purpose": *OGX Petróleo* at [60].

129 The *dicta* in *OGX Petróleo* was subsequently affirmed and applied in *Dalnyaya Step*. There, the English High Court set aside a recognition order for a Russian liquidation on the basis that the foreign representative did not inform the court that the politically charged context of the matter meant that "political issues involving the Russian state might arise". This was especially because the foreign representative had intended to seek disclosure and examination orders under s 236 of the English Insolvency Act 1986 (c 45) (UK) against certain persons who the foreign representative knew would accuse his actions as being politically motivated: *Dalnyaya Step* at [87]–[88].

130 The respondents argued, in the alternative, that even if *Garuda* was correct in identifying bad faith and material non-disclosure as a circumstance that could trigger the public policy exception, no allegation of non-disclosure could be levelled against them because the duty to provide full and frank disclosure only applied to *ex parte* applications where the court had to decide

the application based only on hearing the applicant. In this case, while OA 116 was initially filed by the respondents as an Originating Application (Without Notice), the appellant was subsequently notified and given the opportunity to present his evidence and arguments in opposition. Any duty of full and frank disclosure owed by the respondents did not extend to the appellant.

131 In our judgment, this submission missed the point. It is no doubt correct that the duty of full and frank disclosure has been developed in the case law as a response to a problem which is most acute in an *ex parte* application. But it does not follow that once there is someone before the court to oppose the application, the applicant would be at liberty to withhold material facts and evidence from the court. As Mr Sreenivasan pointed out, there may be an asymmetry in information between the applicant and the opposing party. We agreed. In the context of recognition applications, it is not difficult to imagine a situation where certain information resides exclusively with a foreign representative and is unknown to an outsider who may be affected by certain orders that may be made or subsequently sought by the foreign representative. In such circumstances, we think it difficult to accept that the foreign representative may rely on the legalistic argument that no duty of full and frank disclosure arises in the strict sense to seemingly justify an entitlement to suppress material information based on there being another party before the court who is not privy to that information. The logic in that does not follow.

132 In support of their submission that the foreign representatives' duty of disclosure should be limited to the context of *ex parte* or unopposed applications, the respondents relied on the following formulation of a foreign representative's duty of disclosure in a recognition application set out in *Dalnyaya Step* (at [86]):

> … When seeking recognition, full and frank disclosure must be made to the court in relation to the consequences for third parties that are not before the court that may flow from the recognition of the foreign proceeding, including from intended future applications enabled by the recognition order.

We were not persuaded by this. We have already made the point above that statements in judicial decisions should not be read as if they are the words of a statute (see [51] above). That point also applies here. It is unsurprising that the proposition in *Dalnyaya Step* was framed in terms of the conventional duty of full and frank disclosure and focused on third parties who were not before the court because that was the factual matrix in that case. Indeed, the respondents appeared to overlook that, right before laying down this formulation, Sir Geoffrey Vos C (as he then was) had made this precise point when he said that a different formulation of the extent of disclosure set out by Snowden J in *OGX Petróleo* should not be construed "as a deed": *Dalnyaya Step* at [86]. We do not think that either Snowden J or Vos C intended their statements, which were made in the orthodox case of an *ex parte* application, to be interpreted as a charter for foreign representatives to suppress material information from the court that was within their exclusive knowledge.

133 In our view, the overarching principle that applies regardless of whether the matter is being heard *ex parte* or *inter partes* is that all parties before the court are under a duty not to mislead the court: see the decision of the English High Court in *Boreh v Republic of Djibouti and others* [2015] 2 All ER (Comm) 669 at [249]; see also, Adrian Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice* (Sweet & Maxwell, 4th Ed, 2021) at para 10.239; Steven Gee, *Commercial Injunctions* (Sweet & Maxwell, 7th Ed, 2020) at para 9-014. The duty of full and frank disclosure is merely an application of this general principle in the specific context of *ex parte* proceedings where the risk of the court being misled is greater; it is therefore not exhaustive of the entire scope of

the principle. As we see it, what taints a foreign representative's conduct with the colour of abuse of process, and thereby engages the public policy exception, is not a breach of the duty of full and frank disclosure *per se* but a breach of the general principle against misleading the court. For this reason, although the existing case law such as the English authorities above and the SICC at [96(c)] of *Garuda* have tended to cast the scope of the public policy exception with reference to the duty of full and frank disclosure, we think that it would be more precise to say that it is material non-disclosure – which is not confined to *ex parte* proceedings – that can engage the public policy exception. This will dispel the misimpression that the public policy exception can only be triggered by non-disclosure in *ex parte* proceedings.

134 On the question of what facts need to be disclosed in order for a party to not fall foul of either its duty to not mislead the court or, where applicable, its duty of full and frank disclosure, it is impossible to make any prescription given that the circumstances of each case would be different. What constitutes material non-disclosure or bad faith is necessarily a fact-sensitive inquiry. However, to the extent that it may provide a broad guideline, we would say that any fact that may reasonably be relevant to the court's assessment of whether to grant the application or relief sought should be brought to the court's attention. We see no reason why a foreign representative who approaches this guideline in good faith would run into any real difficulty.

The public policy exception was not engaged in this case

135 Although we agreed with the appellant on the legal position, we were satisfied that the respondents were neither guilty of bad faith nor material non-disclosure. Consequently, the public policy exception under Art 6 of the SG Model Law was not engaged.

(1) There was no bad faith

136 The crux of the appellant's charge of bad faith against the respondents was that the respondents were acting at DKI's behest and had brought OA 116 for the sole purpose of extracting documents and information from him and routing it back to DKI, thereby giving DKI an advantage over the appellant in Suit 435. The appellant's case of bad faith essentially came down to two key facts: (a) first, the fact that the respondents had accepted liability on Fullerton's part to pay DKI's costs for the BVI Restoration Application despite the BVI High Court having adjourned the issue of costs indefinitely; and (b) second, the fact that DKI had provided funding to the respondents. At the hearing, Mr Sreenivasan relied on these two points to paint the narrative that the respondents were beholden to DKI and were bound to act in DKI's interests in order to continue receiving funding from DKI.

137 In examining the propriety of the respondents' decision to accept liability to pay DKI's costs for the BVI Restoration Application, we agreed with Mr Yam that it was crucial to understand how and why the costs for the BVI Restoration Application came to be incurred in the first place:

(a) On 28 March 2022, Fullerton's board of directors initiated a voluntary solvent liquidation despite being aware that there was a pending suit against Fullerton in Suit 435 which had been commenced almost three years earlier on 26 April 2019 (see [15] above).

(b) As a result, Fullerton was struck off the BVI Register of Companies and its dissolution was finalised on 20 April 2022 (see [16] above). Evidently, the initiation of the voluntary solvent liquidation and dissolution of Fullerton was improper to say the least given the pending status of Suit 435.

(c) Following Fullerton's dissolution, Ms Zhang, the liquidator who had been appointed by resolution of Fullerton's directors, wrote to PDLegal, Fullerton's Singapore solicitors, instructing PDLegal to cease acting for Fullerton in Suit 435 as Fullerton "ha[d] now been dissolved" (see [16] above). The intention behind the improper voluntary solvent liquidation was transparent. It was done to stymie the pursuit of Suit 435 by DKI.

(d) It was therefore to be expected that, when DKI took out the BVI Restoration Application, the BVI High Court swiftly declared void the dissolution of Fullerton and ordered Fullerton to be restored to the BVI Register of Companies so that Suit 435 could continue against it. It was in this context that the respondents came to be appointed under the BVI Restoration Order (see [17]–[18] above).

138 Once the context of the BVI Restoration Application was properly appreciated, it was apparent that the BVI Restoration Application had only come about because of the improper voluntary liquidation of Fullerton when Suit 435 was ongoing. The reality was that DKI had *no choice* but to commence the BVI Restoration Application to restore Fullerton to the BVI Register of Companies in order to continue its pursuit of Suit 435.

139 DKI's claim for the costs of the BVI Restoration Application was therefore not, as Mr Sreenivasan characterised it, some "contrived" expenditure. Instead, it had been claimed by DKI from the outset in the BVI Restoration Application. Although the BVI High Court had ordered that the costs of the BVI Restoration Application be adjourned *sine die*, this did not alter the fact that DKI was put to the expense of undoing the improper dissolution of Fullerton

which it had played no part in, and these costs formed the basis of a legitimate claim against Fullerton.

140 Furthermore, DKI had made two claims against Fullerton in its proof of debt submitted to the respondents – one in relation to the costs of the BVI Restoration Application in the sum of US$67,303.29 and the other in relation to its substantive claim in Suit 435 in the sum of CAD 69,724,843.20. In our judgment, the respondents as Fullerton's liquidators were entitled to take a view on the claims made by creditors. They decided in the interest of Fullerton that it was reasonable to compromise the claim for costs in light of the 15% discount offered by DKI off its actual costs of US$78,215.04, which DKI had substantiated through a comprehensive itemised costs schedule.

141 Given the context in which the costs for the BVI Restoration Application were incurred, we found that it was not unreasonable for the respondents to have accepted DKI's claim for these costs at a discount. In contrast, Mr Sreenivasan's submission ignored the plain fact that the only reason why the BVI Restoration Application had come about was that Fullerton's controllers at the time had procured Fullerton's dissolution and striking off from the BVI Register of Companies. The Judge was correct when she expressed the view that the respondents' assessment that the costs of the BVI Restoration Application should follow the event (such that Fullerton ought to bear them) was a "reasonable view to take": GD at [50].

142 It was also significant that the respondents only accepted DKI's costs claim, a claim which was in an amount that was significantly less than DKI's substantive claim. As Mr Yam pointed out, if the respondents were truly beholden to DKI as the appellant suspected, the straightforward thing for them to do would have been to accept both claims on first sight.

143 As far as the funding agreement between DKI and the respondents was concerned, this did not bear the weight which the appellant placed on it to mount his allegation of bad faith. As the appellant conceded, creditor funding agreements were not uncommon in insolvencies as the debtor's impecuniosity may otherwise pose a challenge in pursuing what may be legitimate claims that could enlarge the company's estate. Correlatively, our courts have observed when sanctioning creditor funding arrangements that because an insolvent company can be a hotbed of misfeasance and fraud, there is a public interest in encouraging creditor funding such that allegations of wrongdoing may be investigated and redressed: *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2023] 4 SLR 1575 at [39]; *Re Mingda Holding Pte Ltd and another matter* [2024] SGHC 130 at [117].

144 Thus, the mere fact that the respondents had received funding from DKI was, without more, unremarkable. The appellant attempted to get past this by suggesting that the ill lay in the fact that having received such funding, the respondents were placed in a position of a conflict of interest between advancing the interests of DKI or Fullerton. However, this was flawed because it assumed in the first place that Fullerton's and DKI's interests were necessarily at odds in all respects, when it has been recognised by this court that a liquidator is duty-bound to maximise recovery for the company's creditors and the fact that these creditors may include creditors who have provided funding for the liquidator to investigate and pursue potential claims is irrelevant: *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 ("*Celestial Nutrifoods*") at [52]. Put a different way, DKI is a member of a class of stakeholders (*ie*, creditors) who, in the eyes of the law, are the main economic stakeholders of Fullerton as a company in insolvent liquidation: *Foo Kian Beng v OP3 International Pte Ltd (in liquidation)* [2024]

1 SLR 361 at [72]; *Group Lease Holdings Pte Ltd (in liquidation) and another v Group Lease Public Co Ltd* [2024] SGHC 302 at [190]–[191]. To this extent, there would naturally be some alignment between Fullerton's and DKI's interests. This was even more so given that DKI was not merely *a* creditor but *the sole* creditor of Fullerton.

145 It also appeared to us that the appellant's perception of the position that Fullerton ought to be taking was informed by a misconception on his part that *his* interests were aligned with Fullerton's interests given their status as co-defendants in Suit 435. This was most clearly borne out in the appellant's scepticism on affidavit at the respondents' professed intention to investigate Fullerton's affairs for the purpose of determining what position to take in Suit 435 as, in his view, the correct thing for the respondents to do was "to align [Fullerton's] defence with [his] defence and [his] evidence".

146 This assumption on the appellant's part was clearly misconceived. As the respondents explained, investigations into Fullerton's affairs may reveal misfeasance and wrongdoing on the part of Fullerton's officers, including the appellant, such that even if Fullerton is liable in Suit 435 because of its errant officers' actions, it could claim a contribution from or otherwise pursue its own claims against these wrongdoers. There was no basis for the appellant to treat his and Fullerton's interests as one and the same.

147 Accordingly, we found that there was no bad faith on the part of the respondents to engage the public policy exception.

(2) There was no material non-disclosure

148 The appellant's allegations of non-disclosure generally flowed from the same fount of suspicion of the respondents as his allegation of bad faith. To

summarise, the appellant submitted that the respondents had not apprised the Judge of the following:

> (a) One, the purpose of the BVI Restoration Application – *viz*, to enable DKI to continue Suit 435 – was inconsistent with the recognition of the BVI Liquidation as a foreign main proceeding in OA 116, as such recognition would have resulted in an automatic stay of Suit 435 pursuant to Art 20 of the SG Model Law. Relatedly, the respondents did not disclose that, having obtained funding from DKI, they would be in a position of conflict of interest on the issues of: (i) whether the automatic stay should be lifted for Suit 435 to proceed; and (ii) the conduct of Fullerton's defence to DKI's claim in Suit 435.
>
> (b) Two, the BVI Liquidation had come to proceed as an insolvent liquidation based on the respondents' acceptance of liability to pay DKI's costs for the BVI Restoration Application despite the BVI High Court having adjourned the issue of costs instead of making any costs order against Fullerton.
>
> (c) Three, the contents of the funding agreement between DKI and Fullerton, including the amount of funding extended by DKI to the respondents.

Given their common basis, we rejected these contentions for very much the same reasons as we rejected the appellant's case on bad faith. We shall thus deal with them in short order.

149 The alleged inconsistency between the BVI Restoration Application and the respondents' recognition application in OA 116 was nothing to the point. The former was an application taken out by DKI for its own purposes – *viz*, to

continue Suit 435 against Fullerton – whereas the latter was brought by the respondents to advance their investigations into Fullerton's affairs. It was unsurprising that these two different proceedings taken out by two different actors – who, it may be added, were opposing parties in Suit 435 – may be inconsistent in terms of aim and outcome. We also did not see how the appellant could maintain that the fact that Suit 435 would be automatically stayed had not been disclosed to the Judge because not only did the respondents confirm to the Judge their position that Suit 435 should be stayed pending their investigations, DKI's counsel had attended the hearing before the Judge and confirmed that DKI had no objections to the stay but reserved the right to apply for a variation in the future should it reconsider its position. We have already dismissed the allegation of conflict of interest as misconceived at [144] above.

150 Next, the allegation pertaining to the respondents' acceptance of DKI's costs claim was also unfounded. In the first place, the Judge was made aware of the issue as she even commented that the respondents' decision was "a reasonable view to take": GD at [50]. Although the appellant objected to this on appeal on the basis that the respondents' explanation had been put forward to the Judge as evidence from the bar, we considered that given the context of how DKI's costs claim came about (see [137]–[142] above), there was nothing untoward in it.

151 Lastly, there was no basis for the allegation concerning the funding agreement. The respondents had disclosed the fact that they had received funding from DKI to the Judge, and we did not see any reason why the specific terms of the funding agreement had to be disclosed. While the appellant vaguely gestured that the terms if disclosed may reveal that the amount extended by DKI was more than DKI's costs claim and would thus infer that DKI's focus was on

its substantive claim, we did not think there was anything amiss with DKI extending funding with an ultimate view to recovering on its substantive claim.

152 For these reasons, there was also no material non-disclosure on the respondents' part to engage the public policy exception.

Whether the Disclosure and Examination Order against the appellant should be set aside

153 In light of our decision to affirm the Judge's finding that the presumption under Art 16(3) of the SG Model Law had not been rebutted and that the public policy exception was not engaged to deny recognition, it followed that the respondents would be permitted to seek reliefs to fulfil their duties as Fullerton's liquidators. In this vein, the respondents successfully obtained the Disclosure and Examination Order against the appellant below which required the appellant to:

(a) submit an affidavit containing information relating to his dealings with Fullerton, the Contract and/or the Pledged Stock;

(b) produce any books, papers or other records in his possession, power or control pertaining to Fullerton's affairs, including but not limited to his dealings with Fullerton, the Contract and/or the Pledged Stock; and

(c) appear before the court to be examined orally on oath concerning his dealings with Fullerton, the Contract and/or the Pledged Stock.

154 The appellant conceded that the Judge did not misdirect herself on the law, as she correctly referred at [83] of the GD to the two-stage test set out in our decision in *Celestial Nutrifoods* (at [43]):

(a) First, the liquidator must show that there is some reasonable basis for his belief that the person can assist him in obtaining relevant information and/or documents, and they are reasonably (and not absolutely) required. In determining whether this threshold is met, there is a general predisposition in favour of the liquidator's view because he, being an officer of the court, is presumed to be neutral, independent and acting in the best interest of the company.

(b) Second, once the first stage is satisfied, the court will have to decide if the order should be granted by balancing the conflicting interests of the liquidator and the intended respondent to the order. Although the liquidator's interest in obtaining information necessary for him to discharge his functions is important, the court must be careful not to make an order that is wholly unreasonable, unnecessary or oppressive to the person concerned.

155 The appellant did not assert that the Judge had erred in her decision that the first stage of the test was made out. Instead, his contentions were confined to the second stage of the test. The only question that remained was thus whether the order made by the Judge was wholly unreasonable, unnecessary or oppressive to the appellant.

The order was rightly granted against the appellant

156 The starting position, as we reminded Mr Sreenivasan, was that the making of the order against the appellant was an exercise of discretion by the Judge. It was therefore not something with which an appellate court would intervene unless it could be demonstrated that the Judge's decision was awry in principle or plainly wrong (see [107] above). In our judgment, none of the arguments which the appellant raised came close to meeting this high threshold.

157 The first basis on which the appellant attacked the Judge's decision was that the Judge had failed to consider or give adequate weight to (a) the greater risk of oppression arising from the element of oral examination as compared to the other components of the order; and (b) the need for the court to guard against attempts to gain an undue advantage in potential litigation against him.

158 Neither of these points persuaded. These were the natural consequences of the making of such orders. It therefore had to be shown that there was some circumstance in the appellant's case that would occasion greater prejudice or oppression than what would ordinarily ensue to satisfy us that the Judge's conclusion was unsustainable. Nothing of the sort was forthcoming from the appellant. Furthermore, we considered that there was an additional factor that did not feature in the Judge's analysis which tilted the balance further in favour of making an order against the appellant. This was that the appellant was, unlike some of the other Relevant Persons, an insider to Fullerton's affairs as a former director and therefore quite literally under a statutory duty to cooperate with and assist the respondents in their investigations: see s 243(1) of the IRDA. This distinction has been cited as justification for a general inclination towards the making of orders of this type against officers and former officers of a company as compared to third parties, even if doing so may potentially expose them to personal liability: *Cloverbay Ltd (joint administrators) v Bank of Credit and Commerce International SA* [1991] BCLC 135 at 142.

159 The appellant's second line of argument was that the Judge failed to appreciate that while the respondents had claimed that the disclosure and examination orders would help them to assess what position Fullerton should take in Suit 435 and investigate if Fullerton had any claims against wrongdoers, these purposes would not have been achieved by the making of an order against him. This was because: (a) the respondents could (or would) not take an adverse

position to DKI in Suit 435 given DKI's funding; and (b) in any event, any claim Fullerton may have against the appellant overlapped completely with DKI's claim in Suit 435 such that there was no utility in Fullerton pursuing the appellant separately.

160 The first point was a rehash of the appellant's underlying suspicion of the respondents which formed the basis of his public policy objection and we have already disposed of it in that context. We would only emphasise that the fact that the respondents had not accepted DKI's proof of debt for its substantive claim in Suit 435 and their position that DKI should be restrained from pursuing Suit 435 in the meantime cut against the appellant's allegation that the respondents were mere catspaws of DKI.

161 The second point on the overlap between DKI's and Fullerton's potential claims against the appellant also cut no ice as it was based on the incorrect premise that the only claim that Fullerton could have against the appellant related to the matters which Suit 435 was concerned with. But, as the Judge correctly noted, there could be other instances of misfeasance or wrongdoing by the appellant that did not overlap with DKI's claim in Suit 435: GD at [90].

162 The last shot taken by the appellant against the Judge's decision was that the Undertaking constituted an inadequate safeguard of his interests. There was no merit in this submission. It hardly lay in the appellant's mouth to complain that the Undertaking was insufficient as it had been proposed by the appellant's own counsel before the Judge. Further, it was unarguable that the Undertaking did directly target and remove the appellant's concern regarding potential information leakage from the respondents to DKI. Finally, the reality was that the appellant's challenge against the efficacy of the Undertaking did not relate

to its scope or extent, but his anxiety that the respondents would not abide by it. There was however nothing before us that suggested that the respondents had breached or intended to breach the Undertaking especially given the serious consequences of a breach.

Conclusion

163 For the foregoing reasons, we held that: (a) Fullerton's COMI was in the BVI as the presumption under Art 16(3) of the SG Model Law had not been rebutted; (b) the public policy exception under Art 6 of the SG Model Law was not engaged as there was no bad faith or material non-disclosure by the respondents; and (c) the Judge was correct in granting the Disclosure and Examination Order against the appellant subject to the Undertaking. The appeal was accordingly dismissed.

164 As the appeal raised some unsettled points of law on the nature of the presumption and the public policy exception under the SG Model Law, we fixed the costs of the appeal and the appellant's unsuccessful application to adduce further evidence in the aggregate sum of $80,000 (all-in) to be paid by the appellant to the respondents.

Steven Chong
Justice of the Court of Appeal

Kannan Ramesh
Judge of the Appellate Division

Judith Prakash
Senior Judge

Narayanan Sreenivasan SC, Muralli Rajaram and Sathya Justin Narayanan (Sreenivasan Chambers LLC) for the appellant;
Yam Wern Jhien and Mah Hao Ran Ian (Setia Law LLC) for the respondents.
