Ho Wing On Christopher and Others v ECRC Land Pte Ltd (in liquidation) [2006] SGCA 25

Case Number : CA 139/2005

Decision Date : 16 August 2006

Tribunal/Court : Court of Appeal

Coram : Chan Sek Keong CJ; Andrew Phang Boon Leong JA; Judith Prakash J

Counsel Name(s) : Francis Xavier and Lai Yew Fei (Rajah & Tann) for the appellants; Oommen Mathew (Haq & Selvam) for the respondent

Parties : Ho Wing On Christopher; Shum Sze Keong; Lee Yen Kee Ruby; Law Kwok Fai Paul; E-Zone (Plaza) Pte Ltd; The Grande Group Ltd; East Coast Works Pte Ltd; Hong Kong Aberdeen Seafood Restaurant Pte Ltd; Nakamichi Pte Ltd; Cafe Al Fresco Pte Ltd — ECRC Land Pte Ltd (in liquidation)

Insolvency Law – Winding up – Liquidators unsuccessfully bringing action in company's name – Company ordered to pay opposing party's costs – Company having insufficient assets to satisfy costs order because of liquidators' breach of estate costs rule – Scope of personal liability of liquidators for unpaid costs – Scope of court's power to exempt liquidators from liability for unpaid costs – Sections 283(3), 323(1), 328(1) Companies Act (Cap 50, 1994 Rev Ed)

16 August 2006 *Judgment reserved.*

Chan Sek Keong CJ (delivering the judgment of the court):

1 This was an appeal against the High Court decision in Summons in Chambers No 600611 of 2004 ("the application"). The judge dismissed the ten appellants' application for an order that the liquidators of the respondent company, ECRC Land Pte Ltd ("ECRC"), be held personally liable for the appellants' unpaid costs in successfully defending an action brought against them by ECRC.

Background facts

2 ECRC was placed in compulsory liquidation in 1999, with Chee Yoh Chuang and Lim Lee Meng appointed as liquidators (collectively referred to as "the liquidators"). The present appeal concerns the liquidators' liability for costs incurred by the appellants in defending Suit No 1210 of 2001 ("the main suit") and the appeal therefrom in Civil Appeal No 117 of 2003 ("the main appeal"). The essential facts are not in dispute, and are as follows.

3 The main suit and the main appeal were proceedings the liquidators commenced in ECRC's name, seeking to recover moneys from the appellants based on allegations of fraud, breach of fiduciary duty, constructive trust and conspiracy to injure ECRC. In the course of the proceedings, ECRC provided a total of $105,000 as security for costs, of which $60,000 was security for the appellants' costs in the main suit and $45,000 for their costs in the main appeal. Before the main suit was decided, the appellants had applied for additional security of $250,000 ("the first security application"), but the application had been opposed by ECRC. The assistant registrar ("the AR") dismissed the first security application, relying on the principle that where a defendant's alleged misconduct is the purported cause of a plaintiff company's impecuniosity, the court may refuse to award security for costs if the provision of security would stultify the claim: *Peng Ann Realty Pte Ltd v Liu Cho Chit* [1993] 1 SLR 630 ("*Peng Ann*") at 633, [15]. As there was no evidence of a third party providing funds to finance the litigation, the AR found that ECRC would have difficulty continuing with the action if the order of security was made.

4 ECRC's claims against the appellants were largely unsuccessful, and costs were ordered in favour of the appellants in both the main suit and main appeal. After the main appeal was dismissed, the appellants filed Summons in Chamber No 600479 of 2004, asking that their costs in the main suit and main appeal be paid in priority to all other claims against ECRC. The judge ordered that subject to the liquidators' costs of getting in, maintaining and realising ECRC's assets ("the realisation costs"), ECRC should pay the appellants' costs in the main suit and main appeal in priority to all other claims and expenses, *including the liquidators' remuneration and ECRC's legal costs for the same*.

5 After setting off the amounts provided as security for costs and other relevant deductions, ECRC found itself owing the appellants $208,179.32 ("the shortfall"). The present proceedings were commenced to recover the shortfall from the liquidators.

6 At present, ECRC has only a balance of $18,105.76 in its bank account. The shortfall has arisen because the liquidators paid themselves $108,754.04 as remuneration and paid ECRC's lawyers, M/s Arthur Loke & Partners ("ALP"), an even more sizable amount of $409,829.64 as ECRC's legal fees for the main suit and main appeal. The payments to ALP were made on various occasions after the main suit was commenced. The final two payments (totalling $26,391.85) were made in February and March 2004, whilst the main appeal was pending and *after* Tay J had ordered that ECRC pay 80% of the appellants' costs in the main suit. Before these two payments were made, the appellants had written to the liquidators twice (in December 2003 and January 2004), asking that they pay the appellants' costs in the main suit *in priority to all other claims*. It would appear that the liquidators had decided to ignore the appellants' letters. Furthermore, all the sums paid to ALP were not taxed. This was in breach of r 173 of the Companies (Winding up) Rules (Cap 50, R 1, 1990 Rev Ed) ("the CWU Rules"), which provides, *inter alia*, that "[n]o payment in respect of bills of costs, charges or expenses of solicitors … shall be allowed out of the assets of the company without proof that the same have been duly taxed".

7 As a result of ECRC's inability to pay the shortfall, the appellants filed the application, seeking two main orders:

(a) that the liquidators pay the appellants the balance of $18,105.76 currently standing to ECRC's credit as well as all sums previously paid to themselves as payment of the shortfall and the costs of the application; and

(b) that the liquidators be held personally liable for the costs of the application and any part of the shortfall outstanding after payment is made under prayer (a) ("the outstanding shortfall").

Proceedings in the High Court

8 In the High Court, the appellants relied on a rule of priority known as the estate costs rule to support their application for relief under both prayers (a) and (b). The judge granted prayer (a), but dismissed prayer (b). The exact quantum that the liquidators were liable to repay under prayer (a) would depend on how much of what they had paid themselves represented the realisation costs (see [4] above). This appeal concerns the judge's refusal to grant prayer (b). The issue under prayer (a), *ie*, whether the liquidators should be made to disgorge their remuneration, is not in contention before us.

9 The estate costs rule is a recognised common law rule of priority in the liquidation of companies. It was established in the 19th century by cases such as *In re Home Investment Society* (1880) 14 Ch D 167 ("*Home Investment*"), and has since been followed by courts in Singapore and other common law jurisdictions. The estate costs rule supplements s 328(1)(*a*) of the Companies Act

(Cap 50, 1994 Rev Ed) ("CA"), which provides that "the costs and expenses of the winding up" including the remuneration of the liquidator shall be paid in priority to all other unsecured debts. Whilst legislation has provided that liquidation expenses take first priority over *other categories* of unsecured claims, the estate costs rule clarifies the *relative* priority between the various types of liquidation expenses *inter se*. In particular, the rule states that a successful litigant against a company in liquidation is entitled to be paid his costs in priority to the other general expenses of the liquidation, including the costs and remuneration of the liquidator: see *eg*, *In re Pacific Coast Syndicate, Limited* [1913] 2 Ch 26 ("*Pacific Coast*") at 28; *In re London Metallurgical Company* [1895] 1 Ch 758 at 764 ("*LMC*"). As stated in *In re Trent and Humber Ship-Building Company* (1869) LR 8 Eq 94 ("*Trent and Humber*") at 97, the rationale for the estate costs rule lies in the fact that:

> [A] company in winding up ought to be dealt with as a matter of course like any other litigant, and if an action be brought or resisted for the benefit of the estate, and that action be brought fruitlessly, or defended fruitlessly, then *the estate, that is to say, the other creditors, ought, like everybody else, to be fixed with the costs to which they have improperly and unnecessarily put their opponent*. [emphasis added]

10 The appellants' case before the judge was fairly simple. It rested on the proposition that the liquidators had wrongfully caused the outstanding shortfall and therefore should have to remedy it. According to the appellants, the liquidators would have had sufficient assets in hand to pay the appellants' costs but for their breach of the estate costs rule by paying ALP's legal fees first. Thus, it was only fair that the liquidators should personally make good the resultant deficiency in the company's assets. If the liquidators were not made liable, future liquidators would be given the "green light" to flout the estate costs rule with impunity.

11 The judge refused to hold the liquidators personally liable for the outstanding shortfall, and found the appellants' proposition to be "as disingenuous … as it was novel": *Ho Wing On Christopher v ECRC Land Pte Ltd* [2006] 2 SLR 103 ("GD") at [21]. He affirmed the position by the English Court of Appeal in *Metalloy Supplies Ltd v MA (UK) Ltd* [1997] 1 WLR 1613 ("*Metalloy*"), and held that a liquidator who was a non-party to an action would only be held personally liable for costs in exceptional circumstances where impropriety on his part was proved: GD at [19] and [46].

12 The judge accepted counsel for ECRC's submission that the court should exercise considerable caution before ordering costs personally against liquidators. In his view (GD at [47]):

> There were powerful policy considerations in this regard, in particular, that office holders such as the liquidators should not be unduly restricted or held back in the honest and proper performance of their duties for fear of incurring personal liability for costs simply because they acted for an insolvent company with insufficient assets to pay the costs of a winning party. *Otherwise, the very purpose of the liquidator's role in realising as much of the company's assets as was possible would be subverted*. I concurred with Millett LJ's astute observation in *Metalloy* that *a liquidator was under no obligation to a defendant to protect his interest by ensuring that he had sufficient funds in hand to pay the defendant's costs as well as his own if the proceedings failed*. [emphasis added]

13 For all these reasons, the judge held that a breach of the estate costs rule, in itself, could not warrant the imposition of personal liability upon the liquidators: GD at [21] and [49]. According to the judge, the *only* costs consequences to be borne by a liquidator who unsuccessfully commenced an action for the company was that the payment of the liquidator's expenses and remuneration would enjoy lesser priority than the payment of the winning party's costs: GD at [44].

14 In reaching this conclusion, the judge considered a number of authorities which he held were either inapplicable or distinguishable: see, *eg*, GD at [35] and [39]. As we will be re-examining a number of these cases in our judgment, it would be apposite to mention them at this juncture by way of introduction. In our view, the key cases which merit this court's reconsideration are: (a) *Pacific Coast* ([9] *supra*); (b) *Hypec Electronics Pty Ltd v Mead* (2004) 185 FLR 76 ("*Hypec*"); (c) *In re Dominion of Canada Plumbago Company* (1884) 27 Ch D 33 ("*Dominion of Canada*"); and (d) *Deputy Commissioner of Taxation v Tideturn Pty Ltd* (2001) 37 ACSR 152 ("*Tideturn*").

The appeal

15 The sole issue in this appeal is whether the liquidators should have to make good the outstanding shortfall because they breached the estate costs rule. Counsel for the appellants, Mr Xavier, made four main submissions in support of their appeal:

(a) Where the liquidator of an insolvent company commences litigation with insufficient funds, he takes the risk of being made personally liable for the unpaid costs of the successful defendant if he also breaches the estate costs rule: *Pacific Coast* ([9] *supra*). If the law were otherwise, the estate costs rule would, for all effects and purposes, be nullified.

(b) It would not be inequitable to hold a liquidator who breaches the estate costs rule personally liable. Liquidators can easily "insure" themselves against that risk by getting a suitable indemnity from the creditors.

(c) In contrast, litigants such as the appellants have no means of protecting themselves against a company's insolvency, except by obtaining an order of security for costs. An order for security is however an inadequate remedy for a liquidator's breach of the priority rule(s). This is amply demonstrated by the present facts since the liquidators denied the appellants of this remedy by resisting the first security application.

(d) There is no principle which limits a liquidator's personal liability to instances where he has conducted *the litigation* improperly.

16 Mr Xavier also made the following subsidiary submissions regarding the *timing* of the liquidators' payments to ALP:

(a) The liquidators should be made personally liable for all sums paid to ALP, *regardless of when those payments were made.* The liquidators have been made to disgorge *all* their remuneration, including the sums paid before the main suit was decided and the adverse costs order made against ECRC. There is no basis for making a distinction between amounts paid in breach of the estate costs rule to: (i) a liquidator as his fees; and (ii) a third party.

(b) In any event, the liquidators paid out approximately $26,000 to ALP *after* the verdict in the main suit was delivered. Those sums are clearly sums for which the liquidators should be personally liable.

17 In response, Mr Mathew, counsel for ECRC, advanced the following arguments:

(a) The issue of costs is a matter entirely at the discretion of the court, and this court should therefore only interfere with the judge's decision if it was manifestly wrong or exercised on wrong principles.

(b) There is no authority which has held that a liquidator should be held personally liable for breaching the estate costs rule. When considering a liquidator's personal liability for costs, a distinction must be drawn between situations where the litigation is commenced in the *company's* name, and where it is brought in the *liquidator's* own name. The English and Australian authorities adopt the position that a liquidator who commences litigation *in the company's name* can only be made personally liable if he has been guilty of some impropriety or unreasonableness *in the conduct of the litigation*.

(c) Imposing personal liability upon the liquidators here would deter future liquidators from carrying out their duty to recover all the company's assets. It is impractical to expect liquidators to get an indemnity from creditors because creditors are rarely willing to fund litigation out of their own pockets.

(d) An order of security for costs is a *sufficient and adequate* safeguard against a liquidator's potential breach of the estate costs rule. There is therefore no reason to additionally visit personal liability upon the liquidators in question.

The basis for imposing liability on the liquidators

18 Before proceeding to assess the merits of the parties' respective arguments, it would be appropriate to first delineate the *exact* scope of the issue which falls for our determination. In the present proceedings, it is undisputed that the liquidators breached the estate costs rule by making the relevant payments to themselves and to ALP in priority to the appellants. Counsel for ECRC accepts that the estate costs rule applies to company liquidations in Singapore. That being the case, authorities cited by the appellants such as *Home Investment* ([9] *supra*) , *In re Wenborn & Co* [1905] 1 Ch 413 ("*Wenborn*") and *Trent and Humber* ([9] *supra*), which merely affirm the content of the estate costs rule, are of limited assistance to us.

19 In their written submissions, the appellants contend that the judge failed to appreciate the true basis upon which they had sought to hold the liquidators personally liable. According to them, the judge was under the erroneous impression that they were seeking to make the liquidators liable *over and above* the amounts paid in breach of the estate costs rule. In the judge's view, "the application of the estate costs rule was not in issue in the present proceedings *since the liquidators had already been ordered to make good those payments made in breach of the estate costs rule*" [emphasis added]: GD ([11] *supra*) at [30]. As a result, he perceived the issue as being "whether… [a] liquidator could be made to bear any shortfall in costs personally, *despite having returned moneys paid in breach of the estate costs rule*" [emphasis added]: GD at [25]. Notably, ECRC does not dispute that the judge erred in finding that the liquidators had fully repaid the moneys taken from ECRC, and relies instead on the proposition that there is no basis for requiring a liquidator to make good his breach of the estate costs rule.

20 In considering the basis upon which the appellants seek to make the liquidators personally liable, it is crucial to distinguish between two sets of breaches of the estate costs rule: (a) the liquidators' use of ECRC's funds to pay *their own* remuneration; and (b) their use of ECRC's funds to pay *ALP*. The judge's other order that the liquidators disgorge the sums paid to *themselves* only makes good the liquidators' *former* breach of the estate costs rule in paying their own remuneration before the appellants' costs. The effects of the liquidators' *latter* breach by paying *ALP* have not been mitigated or remedied in any way. That being the case, the judge erred in so far as he held that the liquidators had already *fully* remedied their breaches of the estate costs rule. It is the linchpin of the appellants' case that the liquidators have done *nothing* to remedy their wrongful payments to ALP.

21 The judge's misconception that the liquidators had *completely* "made good" their breach led to a misapprehension of the basis upon which the appellants seek to render the liquidators personally liable. Contrary to the judge's view, the appellants do not seek to render the liquidators personally liable "simply because" they have breached the estate costs rule: GD at [49]. The liquidators' supposed liability in fact rests on two *cumulative* grounds: (a) their breach of the estate costs rule by paying ALP; *and* (b) their failure to remedy the deficiency in ECRC's assets caused by this breach. The issue presently before us is therefore *not* whether the liquidators should be made liable *even after they have remedied their breach*, but instead whether they should be held personally liable for the outstanding shortfall *which has resulted from their breach of the estate costs rule*.

Competing considerations for and against personal liability

22 The issue in this appeal, as presently framed (see [21] above), can be approached on two varying levels of specificity. *On a more generic level*, there is the more abstract question of whether, *as a matter of general principle*, a liquidator who breaches the estate costs rule should be made to remedy the consequences of his breach. *On a more specific level*, there is also the issue of whether it would be justifiable to impose personal liability upon the liquidators given the *particular* circumstances attending *their* breach of the estate costs rule. Each of these questions attracts a host of divergent legal and policy concerns, which must be addressed before this court can reach a decision in these proceedings.

23 Turning first to the *general* question of how the courts should approach a breach of the estate costs rule, one starts with the concern, which the judge highlighted in his judgment, that the imposition of personal liability for breaching the estate costs rule will deter future liquidators from commencing actions to recover companies' assets. According to the judge, there is an element of public interest involved in allowing liquidators to perform their duties without the fear of personal liability: GD ([11] *supra*) at [47]. In addition, the *separate legal personality* of a company also suggests that a liquidator who sues in the name of the company is technically a non-party to the suit and, as such, should only be ordered to pay the opposing party's costs in *exceptional circumstances*: *Metalloy* ([11] *supra*) at 1620–1621. These considerations converge to support the proposition that a liquidator should not be liable for the legal costs of a successful defendant unless he has acted with impropriety.

24 These considerations must, however, be balanced against the need to uphold the efficacy of the estate costs rule, which would be rendered illusory if errant liquidators who breach it are not taken to task. Further, the law should refrain from placing too much emphasis on the consideration that a liquidator suing in the name of an insolvent company is a non-party. In our view, this is only a technical consideration. The strict adherence to the principle of the separate corporate personality of an insolvent company during a winding up is not necessarily in the public interest if it allows liquidators to hide behind an invisible shield to launch unmeritorious claims against defendants who ultimately emerge victorious but end up being the poorer for it. In any case, if the element of impropriety is a condition precedent to imposing personal liability on a liquidator, a breach of the estate costs rule would surely be such a form of impropriety. Ignorance of the rule would not make the breach any less improper.

25 The *specific factual matrix* in the present case also gives rise to the additional question of how a liquidator should *balance* the competing interests of the company and a defendant to an action brought in the company's name. In the present case, the breaches of the estate costs rule arose because the liquidators paid *ECRC's legal costs* in the main suit and the main appeal in priority to the appellants' legal costs. Most of these payments to ECRC's solicitors, ALP, took place whilst the main suit was *still ongoing* and *before* the costs order against ECRC had been made. The liquidators'

infringements of the estate costs rule were therefore a *direct consequence* of having to finance the suit from which the company's subsequent liability in costs to the appellants arose. As a result, the question of whether the liquidators should be held personally liable raises an inherent tension between the interest in maximising the recovery of an insolvent company's assets and the need to protect the interests of a successful defendant to an action brought by such a company.

26 In this regard, a number of cases appear to suggest that a liquidator's duty to recover the company's assets takes precedence over a defendant's interests. According to Millett LJ in *Metalloy* ([11] *supra*) at 1620, the liquidator of an insolvent company is under no duty to ensure that the company's assets would be sufficient to satisfy *both the company's as well as a successful defendant's legal costs*. In addition, as he subsequently held in another case, "[i]t is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it": *Abraham v Thompson* [1997] 4 All ER 362 at 377.

27 However, whilst there may be compelling reasons to facilitate a liquidator's recovery of corporate assets, equally, it may be said that a successful defendant has a right to be paid his legal costs. The need to protect a defendant against an unsatisfied costs order may be said to be *a fortiori* where the plaintiff is a company that is *already* in insolvent liquidation. Such a company is in effect little more than an empty shell. The emphasis placed on a liquidator's duty to recover the company's assets must also be reconciled with s 323(1) of the CA, which provides that a liquidator shall not be liable to incur any expense if the company does not have sufficient assets. Cases such as *Metalloy* therefore need to be re-evaluated to ensure that the credence accorded to the realisation of an insolvent company's assets is reconcilable with the general purport of the corporate insolvency regime.

28 These divergent considerations must be reconciled before this court can decide whether the liquidators should be held liable for the appellants' unpaid costs. The resolution of these competing factors will require an assessment of the policy concerns underpinning each of them in order to determine which of them are consonant with the statutory framework of our CA.

Personal liability for infringing the estate costs rule

29 To support the imposition of personal liability upon liquidators who breach the estate costs rule, the appellants cited a plethora of authority, including some cases where the liquidator was made liable for costs incurred in litigation that was commenced *in his own name*. These cases are inapplicable since the issue presently in contention concerns a liquidator's potential liability for the costs of proceedings brought *in the company's name*. Where a liquidator brings an action *in his own name*, he is himself a party to the proceedings and therefore "litigates at his own risk": *In re Wilson Lovatt & Sons Ltd* [1977] 1 All ER 274 at 285. That being the case, he will be held liable for the opposing party's costs even if the company's assets are inadequate to provide a complete indemnity: *In re Staffordshire Gas and Coke Company* [1893] 3 Ch 523 at 526. In contrast, where litigation is commenced *in the company's name*, the liquidator is a non-party, and an order of costs against him *would not follow as a matter of course*: *Project Construction & Development Pty Ltd v Ellison* [2002] NSWSC 372. But, as we will observe later, a liquidator's status as a non-party will not always be sufficient reason to shield him from personal liability, especially when he has other means at his behest to protect himself against an order for costs.

30 In our view, case law clearly requires a liquidator who makes payments in breach of the estate costs rule to remedy his breach. *Pacific Coast* ([9] *supra*) is direct authority for this proposition. In that case, the company in question went into voluntary liquidation. Following that, the

liquidator of the company commenced an action against B Ltd in the company's name. Judgment was entered for B Ltd with costs, which were taxed at £300. At the date of the judgment, the company still had assets amounting to about £500. However, the liquidator subsequently paid out £375 in legal fees to the solicitors who represented the company in the action, and made a few other disbursements. This left him with a balance of approximately £86, which he paid to B Ltd. B Ltd then applied for an order that the liquidator of the company pay the remainder of its unpaid costs of about £214. Neville J ordered the liquidator to pay B Ltd its outstanding costs and held (at 28–29):

> Here the liquidator had moneys in his hands which would now have been applicable to the payment of the taxed costs of the applicants had he not applied them in payment of his own solicitors' costs which were subject to the prior claim of the applicants [B Ltd]. I hold, therefore, that he must pay the applicants their taxed costs of the action, and he may repay himself out of any further assets that may come to his hands.

31 In its written submissions, ECRC contends that *Pacific Coast* merely emphasises the application of the estate costs rule, and is not authority for the proposition that a liquidator will be ordered to personally repay any sums paid out in breach of the estate costs rule. It submits that the *ratio* of the case was simply that where judgment with costs is ordered against a company in liquidation, the party entitled to costs is entitled to payment *before* the liquidator's costs are paid, regardless of whether the order is merely for costs, or for costs to be paid out of the company's assets. In his judgment, the judge concurred with ECRC on this point, and held that the issue of whether a liquidator could be made to personally bear any shortfall in costs did not arise for determination in *Pacific Coast*: GD ([11] *supra*) at [23]–[25].

32 With respect, both the judge and ECRC erred in their reading of *Pacific Coast*. Neville J's order (see [30] above) was clearly an order that entailed personal liability on the part of the liquidator in question. The company had no assets at the time the order was made. The ruling that the liquidator could subsequently avail himself of any additional assets coming into the company's hands did not immunise him from having to personally make good B Ltd's costs first. As a result of Neville J's order, it was the liquidator, and not B Ltd, who had to bear the risk of the company not having sufficient assets to pay *both* B Ltd and the company's solicitors.

33 During the hearing, counsel for ECRC additionally referred us to a passage in the Australian case of *Hypec* ([14] *supra*), which he contended supported his position. There, Campbell J stated (at 102):

> I am not aware of any case where a court has ordered a liquidator, in the exercise of its supervisory jurisdiction over liquidators, to pay the costs which have been ordered against the company as a result of litigation which was instigated and carried through by the liquidator.

Counsel further pointed out that Campbell J had referred to *Pacific Coast* ([9] *supra*) in his judgment and submitted that that was conclusive evidence that *Pacific Coast* did not decide that personal liability could be imposed on liquidators who breach the estate costs rule. This argument is devoid of substance. In our view, counsel misunderstood the purport of the passage above. The interpretation placed on Campbell J's *dictum* must be tempered by the fact that his attention in *Hypec* was directed towards a *completely different aspect* of the court's supervisory jurisdiction over liquidators. *Pacific Coast* and the estate costs rule were in fact only referred to *en passant* (at 103) as *another* distinct example of how the court's supervisory jurisdiction might be exercised. We will return to this point later in this judgment (see [51]–[53] below).

34 When confronted with the actual terms of the order in *Pacific Coast*, counsel for ECRC

conceded that Neville J's order did in fact result in the liquidator having to assume *personal liability* for the deficit caused by his breach of the estate costs rule. However, he then contended that the decision in *Pacific Coast* had been made erroneously, contrary to the decision in *In re R Bolton and Company* [1895] 1 Ch 333 ("*Re Bolton*"). In *Re Bolton*, a contributory brought an action *against the liquidator of a company*, seeking to have its name removed from the list of contributories. The claim succeeded on appeal, and the liquidator was ordered to pay the costs of the appeal and of the application out of the company's assets. The contributory sought to vary that order by directing the liquidator to personally pay its costs. The Court of Appeal rejected the contributory's attempt to hold the liquidator personally liable, holding that since the application had been taken out by the contributory against the liquidator and not *vice versa*, the contributory's costs would be paid out of the company's assets: *Re Bolton* at 334. Counsel for ECRC placed particular reliance on Lindley LJ's statement that "an order ought [not] to be made against the liquidator personally … unless the liquidator *has done something to make himself personally liable for the costs*" [emphasis added]: *Re Bolton* at 334.

35 In our opinion, *Re Bolton* does not assist ECRC. First, the case concerned litigation in which the *liquidator* of the company was the *defendant*, and is clearly distinguishable from the case before us where the *company* itself is the *plaintiff*. Second, Lindley LJ's statement of principle left unanswered the critical question of when a liquidator "has done something" to make himself personally liable. In our view, even if we were to apply Lindley LJ's statement of principle to the liquidators' conduct in the present case, the answer to this question has been provided by *Pacific Coast*, which illustrates that a liquidator does "something" to make himself liable when he breaches the estate costs rule.

Personal liability for breaching other priority rules

36 There are other authorities that in principle support the ruling in *Pacific Coast* ([9] *supra*). These are cases where liquidators have been held personally liable for breaches of *other* kinds of priority rules. In *Tideturn* ([14] *supra*), the Deputy Commissioner of Taxation sought to hold a liquidator personally liable for his failure to ensure the retention of moneys to pay group tax. The taxes were post-liquidation debts payable in priority to other creditors' claims. The Commissioner made no allegations of dishonesty, but instead contended that the liquidator's negligence in failing to ensure that all priority debts were paid proportionately sufficed to render him liable. The court held that the liquidator, in failing to follow the priority rules, was in breach of duty and was personally liable to pay the unpaid group tax as a condition to his release as a liquidator: *Tideturn* at 156.

3 7 *Tideturn* clearly supports the proposition that a liquidator who breaches a priority rule should be held personally liable. With respect, the judge erred in holding that *Tideturn* was "unhelpful" to the appellants' case: GD ([11] *supra*) at [32]. In the judge's own words:

> There, upon the application of the Deputy Commissioner of Taxation, *a liquidator was held personally responsible for his failure to retain moneys for tax purposes, and was made to cough up the moneys he had failed to hold back*. [emphasis added]

The analogy between *Tideturn* and the present case, where the appellants seek to hold the liquidators liable for *failing to withhold the company's assets* to pay their legal costs, is undeniable. The judge's rejection of *Tideturn* stemmed from his misapprehension that the appellants sought to hold the liquidators liable *simply because* they had failed in legal proceedings commenced on behalf of an insolvent estate: GD at [32].

38 ECRC sought to distinguish *Tideturn* on the ground that it concerned a breach of a *statutory*

priority rule whereas the estate costs rule is a *common law* rule. According to counsel for ECRC, it would be inequitable to hold insolvency practitioners liable for breaches of *common law* priority rules since they would not be aware of such rules. We find this submission to be wholly misconceived. Ignorance of the law is no excuse, even in civil matters. There is, or should be, no difference in principle between a statutory rule and a common law rule.

39 A liquidator's personal liability for breaches of *common law* priority rules was also upheld in *Dominion of Canada* ([14] *supra*). In that case, the liquidator's solicitor, Beall, sought an order that the company be ordered to pay his legal fees. The liquidator had earlier paid a successful litigant against the company, Kirby, his costs in the relevant action. The company was insolvent, and had insufficient assets to discharge *both* Kirby's and Beall's claims. Beall argued that the liquidator had breached a common law priority rule, established in the case of *In re Dronfield Silkstone Coal Company (No 2)* (1883) 23 Ch D 511, which required that the general costs of winding up be paid *pari passu* with the costs of internal litigation.

40 Pearson J's *dictum* in *Dominion of Canada* supports a finding of personal liability against a liquidator who applies the company's moneys in breach of *common law* priority rules. According to Pearson J (at 36):

> If … the liquidator were wrong in paying Mr Kirby, and if Mr Kirby ought to have been paid *pari passu* with the general costs of the liquidation, then *the liquidator ought to have, and must be deemed to have, a larger sum in his hands than he has accounted for*. [emphasis added]

Though the court ultimately found that the liquidator had been correct in paying Kirby in priority to Beall, the passage quoted above clearly suggests that if the liquidator had been in breach of a common law priority rule, he would have been held personally liable for the company's inability to pay Beall because of his wrongful prior payment to Kirby.

41 The judge failed to consider this aspect of Pearson J's judgment when he held that *Dominion of Canada* "merely affirmed the estate costs rule or showed how the rule was to be applied, *viz*, a liquidator having to subordinate the payment of his costs to the payment of the winning party's costs": GD ([11] *supra*) at [31]. The decision in *Dominion of Canada* did not stop at merely affirming the efficacy of the estate costs rule, but went on to stipulate the *consequences* that would follow from a breach thereof.

42 In our view, *Tideturn* and *Dominion of Canada* reinforce the correctness of the decision in *Pacific Coast*. These cases confirm that the imposition of personal liability for a breach of the estate costs rule is just a manifestation of the *general* approach towards breaches of priority rules in corporate liquidation.

The requirement of "impropriety" – adjudicatory versussupervisory jurisdiction

43 To support its argument that there is no general principle requiring a liquidator to be held personally liable for breaching the estate costs rule, ECRC additionally submits that established jurisprudence states that where a liquidator commences an action in the company's name, the court can *only* order the liquidator to pay costs where there has been *impropriety in his conduct of the action*. As authority for its proposition, ECRC cites the English Court of Appeal decision in *Metalloy* ([11] *supra*). This submission was accepted by the judge in the court below: GD ([11] *supra*) at [19].

44 The appellants' contention on this point is that the judge erred in accepting ECRC's submission. Counsel submitted that the impropriety of a liquidator's conduct in the litigation is not the

only instance when a liquidator may be visited with personal liability for a defendant's costs. When considering the circumstances in which a liquidator should be made personally liable for costs, a distinction must be drawn between: (a) the *adjudicatory* jurisdiction of the court *hearing the litigation* to order costs against a non-party; and (b) the *supervisory* jurisdiction of the court over liquidators. In the former, the court would be more concerned with the reasonableness and propriety of the liquidator's conduct of *the litigation*. No issue concerning the breach of priority rules would arise. Conversely, in the latter situation, it would not be necessary in all cases to show misconduct by the liquidator in his conduct of the litigation. According to the appellants, *Metalloy* was concerned with the court's *adjudicatory* jurisdiction to order costs against non-parties, and is not authority for the scope of the court's *supervisory* jurisdiction to order a liquidator to personally pay a defendant's costs.

45 In our view, the distinction which counsel for the appellants has drawn between the court's supervisory and adjudicatory jurisdictions is well-founded. The court's power to order costs against a non-party under O 59 r 2(2) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") is *ancillary* to its jurisdiction to adjudicate the merits of the case. Such an order is a "*consequential order* that *follows the principal decision* reached by the court with regard to the issues of the case" [emphasis added]: *Chin Yoke Choong Bobby v Hong Lam Marine Pte Ltd* [2000] 1 SLR 137 at [26]. As such, an order of costs made in exercise of this power would be *inextricably linked* with the main proceedings as a result of which the costs were incurred. Hence, when deciding whether to order costs against a non-party, the court would naturally be concerned with factors relating to the proceedings, and nothing else. As stated by Lindsay J in *Eastglen Ltd (in liquidation) v Grafton* [1996] 2 BCLC 279 at 289:

> [T]he bona fides of the proceedings and of the non-party's support for them are an important feature of the … discretion [to order costs against a non-party].

46 In contrast, the court's *supervisory* jurisdiction over liquidators is significantly broader and extends beyond the purview of the liquidator's conduct of the litigation in question. Section 313(2) of the CA provides that the court "shall take cognizance of the conduct of liquidators", and allows the court, *inter alia*, to inquire into any complaint made by a creditor regarding the liquidator's performance of his duties or observance of the prescribed requirements, and to "take such action as it thinks fit". In addition, s 315 of the CA allows any person aggrieved by *any act* of the liquidator to apply to court, and confers the court in question with the power to reverse or modify the act complained of and make such order "as it thinks just". These provisions confer a *broad* power on the courts to supervise *all* aspects of a liquidator's conduct of the winding up to ensure that his conduct accords with the statutory regime of liquidation dictated by the CA. Hence, the court would be justified, in exercising its supervisory jurisdiction under the CA, to order a liquidator to pay a defendant's costs *even if* he had conducted the proceedings properly, provided that there was some *other* aspect of his conduct that rendered such an order equitable.

47 In the present case, the appellants' application to render the liquidators personally liable is one which was made pursuant to this court's *supervisory*, and not adjudicatory, jurisdiction. The court's jurisdiction to order costs under O 59 of the Rules was already spent by the time the application was made. The application was made *after* costs orders in the main suit and in the main appeal had *already been made against ECRC*. Therefore, what is currently sought is an exercise of the court's *supervisory* jurisdiction over the liquidators under the CA to render them liable for failing to accord the appellant's *established* entitlement to costs with the requisite priority.

48 It follows from this conclusion that ECRC's reliance on *Metalloy* ([11] *supra*) is misplaced. In *Metalloy*, the liquidator of a company had commenced an action in the company's name. The

defendants successfully obtained an order of security for costs, which the company failed to satisfy. As a result, the action against the defendants was dismissed. The defendants then sought an order that the liquidator be made personally liable for the defendants' costs in the action. In our view, the English Court of Appeal was, in that case, dealing with the issue of whether the court should exercise *its adjudicatory jurisdiction to order costs against a non-party*. This is evident from the following passage in Waller LJ's judgment (at 1618):

> I think … that there is jurisdiction to order a liquidator *as a non-party* to pay the costs personally; but it will only be in exceptional cases that the jurisdiction will be exercised, and impropriety will be a necessary ingredient, particularly having regard to the fact that the normal remedy of obtaining an order for security for costs is available; the caution necessary *in all cases where an attempt is being made to render a non-party liable for costs* will be the greater in the case of a liquidator having regard to the public policy considerations. [emphasis added]

49 If ECRC's interpretation of *Metalloy* were correct, we would have to reconcile it with *Pacific Coast* ([9] *supra*), which clearly establishes that a liquidator can be made liable for costs even if his conduct *of the litigation* was not improper. In our view however, *Metalloy* and *Pacific Coast* are nothing more than *discrete examples* of how liquidators may find themselves being made personally liable for costs, and are not in conflict with each other.

Scope of court's supervisory jurisdiction over liquidators

50 Our findings as regards *Metalloy* do not completely dispose of ECRC's submissions on this point. ECRC's reliance on the requirement of impropriety *concerning the litigation* rests additionally on another authority, which cannot be similarly disposed of by relying on the distinction between the court's adjudicatory and supervisory jurisdictions. ECRC submits that even if this court is not minded to accept *Metalloy* as authority for the proposition which ECRC advances, we should in any event accept the principle adopted by the New South Wales Supreme Court in *Hypec* ([14] *supra*). In that case, the liquidator of a company was made personally liable for a defendant's costs because it was found that he had acted unreasonably in causing the company to commence the litigation. Campbell J held that the court would *only* exercise its *supervisory* jurisdiction over liquidators and hold a liquidator personally liable for a defendant's costs *if the liquidator had acted improperly in causing the defendant to incur the costs in question.* ECRC places particular reliance on the following statement from Campbell J's judgment (at 102):

> *I cannot identify any principle on which the Court would*, *in exercise of its supervisory jurisdiction*, order a liquidator to pay costs of litigation brought by a company in liquidation when those costs are properly incurred, in the Beddoe sense [*ie*, reasonably and honestly]. [emphasis added]

According to ECRC, Campbell J's statement supports the conclusion that even the court's *supervisory* jurisdiction over liquidators is limited to instances where the liquidator had acted with some unreasonableness *in the conduct of the litigation*.

51 To our minds, though *Hypec* was a case involving the court's supervisory, and not adjudicatory, jurisdiction, one must always ask the additional question: *Which act* of the liquidator was the court seeking to "supervise"? In *Hypec*, the issue was whether a liquidator should be made personally liable for litigation costs that were *unreasonably incurred* which, as a result, were not payable out of the company's assets under the Australian Corporations Act 2001. The case therefore involved the court's supervisory jurisdiction over the liquidator's decision *to commence and conduct litigation in the company's name*. One should not treat Campbell J's *dictum* as excluding the court's

supervisory jurisdiction over *other acts* of liquidators which may similarly render them personally liable for the costs of an action. In the present case, this court is being asked to exercise its supervisory jurisdiction over a different kind of conduct from that in *Hypec*, *ie*, a liquidator's decision *to make payments in breach of the estate costs rule*. For this reason, the decision in *Hypec* is not relevant to the exercise of our supervisory jurisdiction over this matter.

52 It is evident from *Hypec* itself that Campbell J did not intend the *sole* criterion of a liquidator's personal liability for costs to be that of whether the costs in question were "properly incurred". Immediately after the passage which ECRC has cited (see [33] above), Campbell J went on to observe (at 102):

> As well as this inherent jurisdiction, s 536 of the Corporations Act confers power on the Court with administrative control of the liquidation, in appropriate cases, *to order that a liquidator should personally pay the amount which the company has been ordered to pay under a costs order*. However, that power is dependent upon whether any of the circumstances identified in s 536 have arisen. *That, in turn, depends on questions of whether the liquidator has performed his or her duties*. [emphasis added]

53 Section 536(1)(b) of the Australian Corporations Act 2001 provides that:

> [W]here a complaint is made to the Court … by any person with respect to the conduct of a liquidator in connection with the performance of his or her duties, the Court … may inquire into the matter and … take such action as it thinks fit.

This provision is, in effect, no different from s 313(2) of our CA, which states that:

> [T]he Court shall take cognizance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties … or if any complaint is made to the Court by any creditor … in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit.

Accordingly, even in *Hypec* itself, Campbell J recognised that the court's supervisory jurisdiction over liquidators could extend to ordering a liquidator who has breached his duties (in our case, the estate costs rule) to pay costs, even if he is beyond reproach *vis-à-vis* the conduct of the litigation itself.

54 In the ultimate analysis, *Metalloy* and *Hypec* were really cases which dealt with a liquidator's liability for an opposing litigant's expenses *qua* costs. The courts' focus in these cases was accordingly directed to the liquidator's conduct in the litigation as a result of which these costs had been incurred. These cases have no bearing on the present case, which concerns a liquidator's liability for a successful defendant's litigation expenses *qua* a debt of the company. The issue which is presently before us is not whether the liquidators acted reasonably in causing the appellants to incur the costs in question (under the *Hypec* test) or whether the liquidators acted with impropriety in the conduct of the main suit and the main appeal (under the *Metalloy* test), but whether ECRC's debt to the appellants (for their costs in the main suit and the main appeal) has been accorded the proper treatment by the liquidators. On the authority of cases such as *Pacific Coast* ([9] *supra*), *Tideturn* ([14] *supra*) and *Dominion of Canada* ([14] *supra*), we find that an order of personal liability *should* be made against a liquidator if he has failed to accord a costs order against the company with the requisite degree of priority required under the estate costs rule.

Competing interests in collection of corporate assets

55 Our enquiry thus far has led us to the conclusion that imposing personal liability for infringing

the estate costs rule would accord with established principle and authority. However, an additional issue that needs to be addressed is whether the imposition of personal liability *on the present facts* would breach any broader principle of corporate insolvency law.

56 As we mentioned earlier, the moneys paid out in breach of the estate costs rule were applied towards satisfying ECRC's own legal costs for the main suit and main appeal. At the time when most of these payments were made, it was still a distinct possibility that ECRC might win the main suit and avoid any liability in costs to the appellants. To our minds, the issue is really as follows: When a company in liquidation commences an action with limited funds, is the liquidator entitled to use the funds available to sustain the litigation and risk irreparably prejudicing the defendant in the event that the company loses the action and a costs order against the company is made?

57 Based on our analysis above, where a liquidator has sufficient assets in his hands to fully discharge the defendant's legal costs, the estate costs rule clearly prohibits a liquidator from jeopardising a defendant's interest in this manner and requires the liquidator to preserve the company's assets to ensure that the company will be able to meet any costs order made against it. It may be argued that such a ruling could deter or impede insolvent companies from commencing litigation to recover their assets. In situations where a company's assets are inadequate to meet *both* its legal fees and the opposing litigant's costs, liquidators would, on pain of personal liability, have to preserve the company's assets unless and until the entire action is determined and the issue of entitlement to costs is decided. In these circumstances, a liquidator might be hard pressed to find continuing legal representation for the company. Few lawyers would be willing to hold their legal fees in abeyance or to agree to defer receiving payment thereof until: (a) the opposing litigant's potential entitlement to costs is resolved; and (b) if a costs order against the company is indeed made, the opposing litigant's costs are fully paid.

58 In our view, there are two possible considerations which might weigh against inhibiting corporate litigation in this manner. First, a liquidator has a *duty* to recover assets belonging to the company, and therefore should be allowed to take all necessary measures to do so. Second, this would create a *de facto* requirement that creditors should provide liquidators of insolvent companies with the requisite indemnities before commencing litigation. The difficulty in obtaining such indemnities would consequently prevent genuine claims from being ventilated. However, for the reasons that follow, it is our view that neither of these concerns is sufficiently important to overrule a strict application of the estate costs rule.

A liquidator's duty to recover the company's assets

59 In situations where a company would not be able to pay *both* the defendant's and its own legal costs, a liquidator's duty to adhere to the estate costs rule and his duty to recover assets rightfully belonging to the company may seem to pull him in opposing directions. In our view, this conflict is apparent rather than real. Whilst a liquidator has a duty to recover the company's assets, this duty is not absolute and is subject to the overriding question of whether the company's existing assets are sufficient to enable him to do so.

60 Section 323(1) of the CA, which applies to every mode of winding up, provides that:

> Unless expressly directed to do so by the Official Receiver, a liquidator *shall not be liable to incur any expense* in relation to the winding up of a company unless there are sufficient available assets. [emphasis added]

Accordingly, if a company does not have sufficient resources, the liquidator need not commence any

action on the company's behalf unless so directed by the Official Receiver. Similarly, if no lawyer will act for the company unless his legal fees are paid upfront and as the case proceeds, but the liquidator is unsure whether the company's existing assets would be sufficient to meet *both* the opposing litigant's potential costs and the company's own legal fees, the liquidator would be completely justified on the authority of s 323(1) in refraining from commencing the litigation.

61 In advocating the need to give credence to a liquidator's duty to get in assets, counsel for ECRC has placed much emphasis on the following passage from Millett LJ's judgment in *Metalloy* ([11] *supra*). Millett LJ held (at 1620) that:

> *Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings.* If he does so in his own name, he is personally liable for the costs in the ordinary way, though he may be entitled to an indemnity out of the assets of the company. *If he brings proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail.* [emphasis added]

62 This passage suggests that in situations such as the present, where the company's assets are inadequate to meet both the defendant's and its own legal costs, a liquidator should give precedence to his duty to recover the company's assets and may legitimately disregard any potential prejudice to the defendant if the claim should fail. However, we would point out that the Singapore position on liquidators' duties to recover corporate assets differs from the English position. Section 323(1) of our CA (see [60] above) appears to be absent from the Insolvency Act 1986 (c 45) (UK). Section 202 of the UK Insolvency Act allows the liquidator of a company to apply for an early dissolution of the company on the ground that the company's realisable assets are insufficient to cover the expenses of winding up. However, under s 202(4), the liquidator is only discharged from performing his duties *after* he gives the company's creditors and contributories notice of his intention to make such an application. These two sections, read together, suggest that the *default* position under the UK Act is that unless and until proceedings to obtain a dissolution order are commenced, a liquidator remains subject to the full extent of his statutory duties, regardless of whether the company has sufficient assets for him to do so. In contrast, s 323(1) of our CA *prima facie* allows a liquidator to abstain from taking *any* action where the company's assets are insufficient.

63 Millett LJ's *dictum* in *Metalloy* (see [61] above) is therefore inapplicable locally. A liquidator's duty to get in corporate assets is no excuse for him to pay the company's solicitors in breach of the estate costs rule. In light of s 323(1), a liquidator does not need to single-mindedly pursue the recovery of the company's assets. Where the company has insufficient assets, he may have to exercise prudence to hold in abeyance his duty to recover the company's assets. The estate costs rule therefore assumes primary importance. In our view, a Singapore liquidator *does* have a positive duty to avoid subjecting a defendant to the unfairness of an unsatisfied costs order.

The requirement of obtaining an indemnity

64 The practical effect of holding the liquidators personally liable would be to require liquidators to obtain an indemnity from the creditors if they wish to bring an action but the company has limited assets. In the future, when liquidators are faced with a situation where the company's existing assets are not sufficient to fund the legal costs of an unsuccessful suit, they should look to the creditors to fund the litigation. If no indemnity is forthcoming, they would have to decide whether to commence litigation for fear of being held personally liable for breaching the estate costs rule. In some cases, this might result in meritorious claims having to be abandoned. However, in our view, this is a

justifiable consequence of the creditors' refusal to provide an indemnity.

65 During the hearing, counsel for ECRC stressed that this *de facto* requirement of obtaining an indemnity would make it arduous for liquidators to sue since creditors are often reluctant to provide any form of indemnity. With respect, we do not consider that the difficulty of obtaining an indemnity is a relevant factor that should affect the outcome of the present appeal. The following passage from Vaughan Williams J's decision in *LMC* ([9] *supra*) unequivocally rejects any suggestion that the difficulty in obtaining an indemnity should be a reason not to enforce the estate costs rule. According to Williams J (at 768):

> It is said that if liquidators were bound at once to pay the costs of successful litigants, winding-up would soon come to an end. But that is not so. *If necessary, creditors in liquidations, as in bankruptcy, must provide an indemnity fund*. If the result of the rule of practice I am laying down is that, where liquidators now start proceedings knowing there is no estate on which the adverse litigant can come, creditors should find that liquidators will not go on without an indemnity fund, so much the better. *I am not to be deterred from laying down the rule because it is suggested that, where there is a doubt as to the sufficiency of the assets, liquidators will be deterred from commencing proceedings because those who have present claims may swallow up the assets*. [emphasis added]

66 The creation of a *de facto* requirement that liquidators seek an indemnity would not lead to any unjust consequences. Under sub-s (2) to s 323 of the CA, which section is titled "Expenses of winding up where assets insufficient", if the Official Receiver directs a liquidator to incur an expense, he may order that the liquidator be indemnified by *the contributory or the creditor who requested that that particular expense be incurred*. The Official Receiver will, perforce, order an indemnity if the company has insufficient assets to pay for the expense in question. In our view, s 323(2) is reflective of a broader underlying principle which should determine whether a liquidator should initiate an action on the company's behalf. The principle may be stated as follows: Where a company is insolvent and the liquidator has insufficient resources at his disposal to take a particular course of action, *the individual who reaps the fruit of that action should be the one to shoulder the risk of taking it*.

67 When a liquidator commences an action in the company's name to recover its assets, the potential beneficiaries are the company's creditors. It is the creditors who stand to gain the most if the company's assets are increased because their claims against the company will have a greater chance of being satisfied. In the passage from *Metalloy* cited at [61] above, Millett LJ expressed the view that where an insolvent company commences litigation, "*the company* is the real plaintiff" [emphasis added]. With respect, we disagree with this statement. Where a company has already entered into liquidation, the "real plaintiff[s]" are *the creditors*, and not the company. When winding up commences, the company ceases to be a going concern with distinct interests of its own and is, in effect, little more than a projection of its creditors' composite interests. The continued existence of the company following the commencement of liquidation is solely to ensure that the company's affairs are satisfactorily terminated and any outstanding claims against the company are resolved. The fruits of any successful litigation would accrue primarily for the creditors' benefit and be used to satisfy the company's outstanding debts owed to them.

68 Hence, if a liquidator believes that the company has a viable cause of action against someone, but the company's assets appear to be insufficient to sustain *both* the company's legal fees and the opposing party's costs, the proper course of action is for the liquidator to seek an indemnity from the creditors for the costs of the litigation. Since the creditors are the ultimate beneficiaries of any asset-swelling activities, it is only fair that they should shoulder the risk of litigating to increase the company's assets. If the creditors decide against incurring litigation expenses in the hope of

recovering more assets, the liquidator can either shoulder this burden himself, or refrain from bringing proceedings. His status as a liquidator does not entitle him to disregard a successful defendant's right to legal costs by unilaterally ignoring the estate costs rule and depleting the company's available resources.

69 As a cautionary note to insolvency practitioners, we should point out that given our statutory framework (see [60] above), this rationale for imposing personal liability should apply *equally* to situations where a liquidator commences proceedings though the company's coffers are *completely empty* and it has no assets to satisfy *either its own or the defendant's legal costs*. It may be necessary in future to revisit the English position in *Metalloy* ([11] *supra*) that a liquidator is not liable to pay costs personally in such situations unless he has acted improperly in commencing the suit in the name of the company. It may well be that where, as here, the law allows a liquidator to desist from taking action if the company does not have any or sufficient assets to meet the full costs of the litigation, and where, as here, he is entitled to an indemnity from the creditors in performing his duty to augment the pool of assets for their benefit, a liquidator who proceeds to commence litigation without an adequate indemnity will be liable personally for the unsatisfied costs of a successful defendant. In deciding to proceed without an indemnity covering potential liability for the defendant's costs, the liquidator would in effect be making *the defendants* bear the part of the risk of litigating, albeit for *the creditors'* benefit. Such a result would not be fair and a liquidator who chooses to sue knowing that the company will be unable to satisfy any costs order made against it should be held personally liable for a successful defendant's costs.

70 In reaching this conclusion, we are mindful of the over-arching principle that an impecunious claimant must not be denied access to the courts, even if this would result in injustice to a successful defendant who may be unable to recover his legal costs: *Hamilton v Al Fayed (No 2)* [2003] QB 1175 ("*Al Fayed*") at 1200, *per* Chadwick LJ. However, we do not feel that imposing personal liability on liquidators in the situations outlined above would contravene this principle. As explained above, where a company in liquidation commences litigation, the "real plaintiff[s]" are the creditors. If the creditors *themselves* decide against commencing litigation, it cannot be gainsaid that they have been denied access to the courts. It has always been an individual's prerogative to decide how and *whether* he wishes to enforce his legal rights.

71 In addition, we feel that the courts' approach to the principle expressed in *Al Fayed* must be sufficiently nuanced to discern between *different categories of impecunious claimants*. The balance between a claimant's right of access to the courts and a successful defendant's right to be reimbursed his legal costs needs to be struck *differently* depending on the type of claimant involved. The distinction that needs to be drawn between differing categories of claimants is illustrated by the principles governing security for costs. Whilst it is trite law that poverty is no bar to a litigant who is a *natural person* (*Cowell v Taylor* (1885) 31 Ch D 34 at 38), s 388(1) of the CA subjects all *companies* to the potential liability to furnish security for costs where "there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence". As Megarry VC stated in *Pearson v Naydler* [1977] 1 WLR 899 at 905, the rationale for this distinction between natural persons and companies is as follows:

> *A man may bring into being as many limited companies as he wishes*, with the privilege of limited liability; and section 447 [the equivalent of our s 388] provides some protection for the community against *litigious abuses by artificial persons manipulated by natural persons*. One should be as slow to whittle away this protection as one should be to whittle away a natural person's right to litigate despite poverty. [emphasis added]

72 In our view, the law on security for costs is express recognition that impecunious companies

do not have an unfettered freedom to commence legal actions against defendants who cannot be compensated in costs if they win. When one is dealing with a company rather than a natural person, public policy is in favour of *limiting*, rather than encouraging, uninhibited access to the courts. This is *a fortiori* where the company in question is already in insolvent liquidation. In such cases, the high likelihood that a successful defendant's costs will be unrecoverable requires the law to give greater protection to the defendant rather than the claimant company.

The sufficiency of security for costs

73 The availability of an order of security for costs against an impecunious company gives rise to the additional question of whether such an order provides a sufficient alternative to imposing personal liability upon liquidators. A number of decisions suggest that the availability of an order for security for costs provides sufficient protection for would-be defendants since public policy does not *per se* prohibit an insolvent company from commencing litigation. In *Metalloy* ([11] *supra*), Millett LJ aligned himself with this view, saying (at 1619):

> *It is not an abuse of process of the court or in any way improper or unreasonable for an impecunious plaintiff to bring proceedings which are otherwise proper and bona fide while lacking the means to pay the defendant's costs if they should fail.* Litigants do it every day, with or without legal aid. If the plaintiff is an individual, the defendant's only recourse is to threaten the plaintiff with bankruptcy. *If the plaintiff is a limited company, the defendant may apply for security for costs and have the proceedings dismissed if the plaintiff fails to provide whatever security is ordere*d. [emphasis added]

74 Similarly, in *Knight v FP Special Assets Limited* (1992) 174 CLR 178 ("*Knight*"), two of the five judges in the High Court of Australia expressed views similar to those of Millett LJ. In that case, the issue was whether the court should order costs against a receiver *qua* non-party to the litigation. According to McHugh J (at 217):

> As a matter of policy, provision for security for costs is a better remedy for protecting persons involved in litigation with insolvent companies than ordering a receiver to pay the costs of litigation after verdict. *Public policy does not preclude an insolvent company from bringing or defending an action. Where it does so, the ordinary remedy is to stay the action until security for costs is provided.* [emphasis added]

Dawson J agreed, and held (at 204) that an order of security for costs should ordinarily be the appropriate remedy where a receiver conducts litigation through a company that will be unable to pay the defendant's costs if the defendant is successful in the litigation.

75 Contrary to what these *dicta* suggest, for the reasons discussed above (at [66]–[72]), there is a real and tangible justification for deterring insolvent companies from commencing litigation without any real possibility of satisfying a successful defendant's costs. In addition, we are unable to align ourselves with the view that security for costs provides adequate protection for successful defendants who face the risk of bearing their own costs. McHugh and Dawson JJ's views in *Knight* should be contrasted with the joint judgment of the majority judges, Mason CJ and Deane J (at 190–191), with whom Gaudron J agreed:

> No doubt [an order for security for costs] is an appropriate remedy in many cases but there are limitations attaching to the availability of security for costs. *These limitations are such that security for costs is not a remedy in all cases in which justice calls for an order for the award of costs against a non-party*. … The amount awarded as security is no more than an estimate of the

future costs and it is not reasonable to expect a defendant to make further applications to the court at every stage when it appears that the costs are escalating so as to render the amount of security previously awarded insufficient. [emphasis added]

76 We agree with the majority judgment in *Knight* on this issue. First, an order for security is a *provisional* remedy provided at a preliminary stage of the proceedings where the merits of the litigation have not been decided upon. Thus, the court hearing a security application would invariably take a conservative approach in order to balance the interests of all the parties. For instance, the court may refuse to order security if the defendant's conduct is *prima facie* the cause of the company's insolvency: *Peng Ann* ([3] *supra*) at 633, [15].

77 Secondly, as was the situation here, where the defendant (here the appellants) applies for security but is *successfully* opposed by the liquidator, it cannot lie in the liquidator's mouth to subsequently contend that an order granting security for costs is an appropriate remedy when it is contradicted by the outcome of his own conduct.

78 Thirdly, a defendant cannot be expected, as ECRC has argued, to repeatedly apply for security for costs when more costs accrue as the litigation proceeds. As Mason CJ and Deane J pointed out in *Knight*, it is simply not practical for defendants to *continually* apply for security for costs at *every* stage in the litigation against the company.

79 Fourthly, it is unfair to make defendants bear the burden of applying for security. The liquidator is the person with full knowledge of the company's financial condition, and is therefore in the best position to know whether an indemnity from the creditors is needed. A defendant would not know whether the company has sufficient assets to pay his costs, but the liquidator would or should know. The onus should therefore fall on a liquidator to seek an indemnity from the creditors where necessary. It would place an overly onerous burden on defendants if they have to determine from time to time in the course of litigation whether the company is able to pay their costs if they succeed in their defence.

80 For these reasons, we disagree with the strong judicial statements by Millett LJ in *Metalloy* (see [73] above) and by the minority judges in *Knight* (see [74] above) that security for costs furnishes adequate protection against the possibility that an insolvent plaintiff company may be unable to satisfy the defendant's costs if it loses the action. None of the statements considered the availability of an indemnity from the creditors as an appropriate, and indeed the most equitable, means of balancing a liquidator's duties with a defendant's interests. In our view, this is the *best* form of protection for a liquidator when discharging his duty to recover the assets of the company for the benefit of the creditors.

The liquidators' liability for the outstanding shortfall

81 For the reasons considered above, we hold that the liquidators in the present case should be held personally liable for the secondary insolvency resulting from their breach of the estate costs rule. If this court were to refuse to hold the liquidators personally liable in the present case, it would lead to the wholly inequitable result of making the successful defendants, *ie*, the appellants, bear the burden of sustaining the company's litigation for the creditors' benefit. When the liquidators decided to pay ALP for their legal fees in the main suit and main appeal, they knew or ought to have known that ECRC's remaining assets would not be sufficient to meet the defendants' costs if they lost the case. As was correctly held in *In re Beni-Felkai Mining Company, Limited* [1934] Ch 406 ("*Beni-Felkai*") at 422, the liquidator is the "person who can see what the position is" and has the means to ascertain the company's financial position at any time. Yet, the liquidators decided to proceed

without an indemnity and exposed the appellants' to the risk of getting a Pyrrhic victory. It is therefore eminently reasonable that the liquidators, and not the appellants, should bear the consequences of deciding to proceed with the litigation despite the company's limited resources. As this court held in *Chee Kheong Mah Chaly v Liquidators of Baring Futures (Singapore) Pte Ltd* [2003] 2 SLR 571 at [46]:

> The rationale for the Estate Costs Rule is that where an action is taken by a liquidator for the benefit of the insolvent estate, it is only fair that the defendant's costs should rank in priority over the liquidator's expenses and remuneration and the claims of the unsecured creditors in general. *The liquidator should take the risk for his own actions*: see *In re Home Investment Society* (1880) 14 Ch D 167 at 169 to 170. [emphasis added]

82 Notably, in *Wenborn* ([18] *supra*), Buckley J held (at 417):

> When the voluntary liquidator, or the liquidator in a compulsory winding up, comes to the Court for leave to bring or defend an action by or against the company, and obtains this leave, *the judge in effect pledges the assets of the company for the costs of the action which he authorizes the liquidator to bring or adopt or defend*. [emphasis added]

83 Even though leave of court is no longer needed for a liquidator to commence litigation in the company's name, the principle in *Wenborn* still applies with equal force. When a liquidator commences an action on behalf of the company, he "pledges the assets of the company for the costs of the action" – in particular the defendant's costs, which would be entitled to first priority if the company is unsuccessful. The liquidator therefore cannot use these assets to pay claims of a lower priority before the outcome of the litigation is determined.

84 As Mr Xavier has highlighted, the liquidators have been ordered to disgorge all the sums that they had paid themselves as remuneration, even those paid *before* the main suit was commenced. Just as a liquidator should not pay *himself* until he is sure that the company will have sufficient assets to satisfy any potential claims of a higher priority under the estate costs rule, similarly, he should not pay *the company's legal fees* until he is sure of the same. If he is unsure, he should seek an indemnity from the creditors to meet any demand for legal fees by the company's lawyers.

The court's discretion to exempt liquidators from liability for costs

85 Section 283(3) of the CA confers the court with a discretionary power to override the application of the estate costs rule in appropriate circumstances. The section provides that where a company's assets are insufficient to satisfy its liabilities, *the court* may stipulate the order of priority in which "the costs, charges and expenses incurred in the winding up" should be paid. The court's power under s 283(3) allows it to retroactively reverse the order of priorities between liquidation expenses *inter se*, thereby absolving a liquidator, who is otherwise in breach of the common law priority rules, of personal liability. This discretion to reverse the erstwhile order of priorities will only be exercised in *exceptional* situations: *Re Linda Marie Ltd* [1989] BCLC 46.

86 The ambit of the court's power under s 283(3) is exemplified by the case of *Beni-Felkai* ([81] *supra*). In that case, the liquidator paid himself without first making provision for the other liquidation creditors. In doing so, he breached a general principle of corporate insolvency which dictates that the whole of the liquidation expenses are to be paid before a liquidator's remuneration: *Beni-Felkai* at 422. Notwithstanding this, Maugham J declared that the liquidator was entitled to retain the remuneration he had already paid himself. Maugham J held that the discretion under the UK equivalent of our s 283(3) should be exercised to reverse the order of priorities since the liquidator had taken his

remuneration at a time when the company was deemed to be completely solvent and "*he had no reason to suppose that there would be an insufficient amount* available for the payment of the costs, charges and expenses incurred in the winding up" [emphasis added]: *Beni-Felkai* at 422.

87 Similarly, where a liquidator pays the company's legal costs in the course of a trial, leaving the company with insufficient assets to satisfy a subsequent costs order made against it, the court might, in a sufficiently deserving case, be minded to exercise its discretion under s 283(3) to exempt the liquidator from liability for his breach of the estate costs rule. For instance, a liquidator might have paid the company's legal fees without first obtaining a creditors' indemnity because he was of the *reasonable, albeit erroneous,* view that the company's remaining assets would be sufficient to discharge any costs order made against it. We should, however, reiterate that the discretion under s 283(3) is one that will be exercised sparingly. If a liquidator turns a blind eye to the limited nature of the company's assets, and recklessly decides to proceed without an indemnity from the creditors, the court would undoubtedly uphold the general rules of priority and hold such a liquidator personally liable.

88 On the present facts, there is nothing to suggest that there were any unexpected or exceptional circumstances, such as in *Beni-Felkai*, which justified the liquidators' decision to pay ALP in priority to the appellants. In their affidavits, the liquidators never suggested that there was cause for them to believe, when they paid ALP, that there would nevertheless be sufficient funds to satisfy the appellants' costs. ECRC appears to accept that the liquidators will be liable once the appellants' general propositions are accepted, and has not called for this court to exercise its discretion under s 283(3) of the CA.

89 In addition to the absence of any extenuating circumstances to mitigate the liquidators' breach of the estate costs rule, their ignorance or denial, as the case may be, of this rule was made even less defensible by the fact that ALP's fees were paid without taxation, contrary to r 173 of the CWU Rules. Hence, not only did the liquidators prejudice the appellants' potential claims by first paying ALP, they compounded their breach by failing to ensure that the fees ALP claimed were not inflated. Given ECRC's precarious financial situation, the liquidators should have been especially careful to preserve its existing assets.

Conclusion

90 In the ultimate analysis, this court has been asked to strike a balance between: (a) the interests in facilitating liquidators' duties to recover insolvent companies' assets for the benefit of their creditors; and (b) the need to protect defendants from having to shoulder the legal costs of defending unmeritorious suits. In our opinion, the estate costs rule encapsulates the appropriate balance that should be struck between these two opposing tensions. One must always have regard to the fact that liquidators are in a far more advantageous position than defendants to suits commenced in the company's name. A liquidator is in the best position to know whether he will be able to comply with the estate costs rule. With this knowledge, he can then decide whether to limit his potential liability for the defendant's legal costs by availing himself of the other means at his disposal, such as by obtaining an indemnity from creditors. In the present case, there are no extenuating circumstances calling for an exercise of the court's discretion to relieve the liquidators from liability for the appellants' unpaid costs. The liquidators created the present state of affairs for which they must now be held accountable.

91 We expect that after our decision in this case, liquidators will be more mindful to protect themselves from potential liability for legal costs when discharging their duties for the benefit of creditors. Liquidators should at all times uphold the existing legal regime affecting corporate

insolvency, which includes the estate costs rule. Future liquidators who wish to commence litigation on the company's behalf may want to consider the following points before deciding whether to proceed:

(a) As a matter of general principle, a liquidator who breaches the estate costs rule will be held personally liable for any shortfall in the company's assets which results from his breach. An order of personal liability will usually follow from such a breach *regardless* of whether it is the liquidator himself or a third party who receives the money in breach of the rule.

(b) In the absence of extenuating circumstances, the courts will hold a liquidator liable for breaching the estate costs rule *even if* the company's moneys were used to pay the company's own costs of sustaining the litigation. Where a liquidator has insufficient assets at his disposal to satisfy *both* the company's legal costs of maintaining the litigation *as well as* any potential costs order made against the company, a liquidator would be well-advised to obtain an indemnity from the creditors. If such an indemnity is not forthcoming, a liquidator should only proceed with the litigation if he is prepared to be held personally liable for a successful defendant's costs in the event that he is found in breach of the estate costs rule.

(c) By way of analogy with the principle in (b), if a company is completely insolvent and therefore has *no prospects of satisfying any costs order made against it*, it would be advisable for a liquidator to refrain from commencing proceedings unless he has managed to obtain a creditors' indemnity. Whilst the position on this issue is not entirely settled, a liquidator who omits to do so in a future case may well be held personally liable for the defendant's costs if the company's claim is unmeritorious.

(d) In appropriate cases, the courts might exercise its power under s 283(3) of the CA to exempt a liquidator from personal liability for breaching the estate costs rule. In deciding whether to reverse the erstwhile rules of priority, the court will consider whether *the liquidator* in question is able to show that the company's inability to satisfy the opposing litigant's costs did not result from his disregard of that other party's interests.

92 For these reasons, the appeal against the judge's decision is allowed with costs. We find that the liquidators are liable to compensate the appellants for the outstanding shortfall, which will be payable following the determination of the quantum of the realisation costs.