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

[2022] SGHC 239

Originating Application No 370 of 2022

In the matter of Section 124(2)(*a*) of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Offshore Holding Company Pte Ltd

Between

Adip Mittal

… *Claimant*

And

Offshore Holding Company Pte Ltd

… *Defendant*

GROUNDS OF DECISION

[Insolvency Law — Winding up — Grounds for petition]
[Insolvency Law — Winding up — Prima facie case for winding up]
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Goh Yihan JC:

1 The claimant, Mr Adip Mittal, is one of two directors of the defendant company, Offshore Holding Company Pte Ltd ("the Company"). The claimant applied for (a) permission to commence winding up proceedings against the Company, pursuant to s 124(1)(*b*) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA"), and (b) an order that any winding up application made pursuant to permission so granted is to be notified to the Company's shareholders.[1] The claimant confirmed that he has the other director's authorisation to make this application.[2]

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1 Plaintiff's Written Submissions filed on 14 September 2022 ("PWS") at paras 1(a) and 1(b).

2 Affidavit of Adip Mittal dated 21 July 2022 ("AM Affidavit") at para 1.

2 At the end of the hearing before me, I granted the claimant permission to commence winding up proceedings against the Company and order that any winding up application made pursuant to permission so granted is to be notified to the Company's shareholders. Because there has not been any reported decision on the application of s 124(1)(*b*) of the IRDA ("s 124(1)(*b*)"), I now set out the grounds for my decision.

Background

3 The Company was incorporated on 24 February 2009.[3] Its principal activities are as a shipping company which carries out chartering of ships and boats with crew and freight. It was originally incorporated as a wholly-owned subsidiary of Mercator Lines Limited, which is a company incorporated in India. Mercator Lines Limited is now known as "Mercator Limited" ("ML") and is a publicly listed company in India.[4]

4 The Company has two shareholders. The first of these shareholders is ML. [5] ML is presently under a Corporate Insolvency Resolution Process initiated under Indian laws. A Resolution Professional has been appointed by the National Company Law Tribunal Mumbai Branch.[6] The second shareholder is Mercator International Pte Ltd ("MIPL"). MIPL is a company incorporated in Singapore on 16 January 2007. It was ordered to be wound up on 9 April 2021, with Messrs Tee Wey Lih and Lim Soh Yen appointed as liquidators.[7]

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3 AM Affidavit at para 4.

4 AM Affidavit at para 5.

5 AM Affidavit at para 6.

6 AM Affidavit at para 7.

7 AM Affidavit at para 8.

5 The claimant has deposed to the insolvency of the Company. He and his co-director believed it was in the best interests of the Company to be compulsorily wound up. They had considered initiating a creditors' voluntary liquidation process for the Company. However, one of the requirements for this process is that the Company must pass a special resolution to this effect. The claimant did not believe that a quorum of shareholders could be achieved for such a special resolution to be passed.[8] Accordingly, he brought the present application for permission to commence winding up proceedings against the Company pursuant to s 124(1)(*b*) of the IRDA.

The generally applicable law

6 I considered first the generally applicable law, leaving the specific principles for discussion later at the appropriate junctures. The starting point is s 124(1)(*b*) of the IRDA, which provides as follows:

> **Application for winding up**
>
> **124.** —(1) A company, whether or not it is being wound up voluntarily, may be wound up under an order of the Court on the application of one or more of the following:
>
> …
>
> (*b*) any director of the company;
>
> …

Section 124(1)(*b*) must in turn be read with s 124(2)(*a*) of the IRDA ("s 124(2)(*a*)"), which provides that:

> **124.** — …
>
> (2) Despite subsection (1), the following apply:
>
> (*a*) a person mentioned in subsection (1)(*b*) may not make a winding up application unless a prima facie case

[8] AM Affidavit at para 13.

> for winding up is established to the satisfaction of the Court, and the Court grants that person permission to bring the winding up application.
>
> …

7 Prior to the IRDA, a director of a company did not have legal standing under Singapore law to apply to wind up the company. The absence of any statutory provision prescribing such a ground of winding up has, in turn, created difficulties in certain situations where it might be necessary for a director to file an application to wind up the company. For example, this could be where the shareholders and other directors of the company have abandoned the company, and the locally resident director becomes subject to liability for insolvent or fraudulent trading or failure to file annual returns (see *Report of the Insolvency Law Review Committee: Final Report* (Chair: Lee Eng Beng SC) (2013) at p 74 ("*Final Report*")). Thus, s 459P(2)(c) of the Australian Corporations Act 2001 (Cth) ("the Corporations Act 2001"), which similarly provides that an application for a court-ordered winding up by a director requires the leave of court (see [19] below), is likewise justified by the concern about the director's liability for insolvent trading.

8 Given the practical benefits of allowing a director standing to commence a winding up application, and the lacuna in the law providing for this, it appears that the practice in some jurisdictions was to tolerate what would otherwise be irregular winding up applications. For example, in England, the irregular practice of allowing a company to present a winding up petition on the strength of a resolution from directors was tolerated for many years (see *Re Emmadart Ltd* [1979] 1 All ER 599 at 605). This remained the case in England until the problem was resolved by the passage of the Insolvency Act 1986 which expressly confers on directors the standing to petition (see *Woon's Corporations*

Law 2019 Desk Edition (Walter Woon SC gen ed) (LexisNexis, 2019, April 2021 release) at para 354).

9 Section 124(1)(*b*) was introduced in the IRDA to give a director of a company the legal standing to apply to wind up the company. However, while this solves the problems associated with a director not having standing to commence winding up applications, it can also lead to abuse by such a director. This may occur where there are disputes among the directors and/or shareholders of a company, and a single director is able to use an application for winding up as "a pressure tactic or to secure a strategic advantage" (see *Final Report* at p 74). Accordingly, the Insolvency Law Review Committee in its *Final Report* – which informs the purpose of the IRDA – proposed that appropriate safeguards had to be put in place.

10 These safeguards eventually manifested in s 124(2)(*a*), which is expressly applicable only to s 124(1)(*b*). In this regard, the Insolvency Law Review Committee expressed the following views on the necessary safeguards (see *Final Report* at p 75):

> The Committee is of the view that a single director ought to be given the right to commence winding up proceedings against the company, but only where the director is able to show that there is a *prima facie* case that the company ought to be wound up, and where leave of court is obtained to do so (in a manner similar to the derivative actions commenced in the name of the company pursuant to section 216A of the Companies Act. *The application for leave of the court will allow the court to satisfy itself that the winding up application is being made by the director for a legitimate reason, and not an improper purpose.*
>
> [emphasis added]

11 Accordingly, on a plain reading of s 124(2)(*a*), as informed by the views expressed in the *Final Report*, I was of the view that an application, under s 124(1)(*b*) read with s 124(2)(*a*) for permission to be given to a director to

commence a winding up application against a company, should be analysed in the following manner:

(a) First, the director must be able to show that there is a *prima facie* case that the company ought to be wound up.

(b) Second, if the director can show such a *prima facie* case, the court may grant permission for the director to commence a winding up application, if it is satisfied that, among other considerations, the winding up application is being made for a legitimate reason and not for an improper purpose.

12 I derived support for this manner of analysing an application under s 124(1)(*b*) read with s 124(2)(*a*) from the Federal Court of Australia decision of *International Entertainment Corp Pty Ltd v Soccer Australia Ltd* [2002] FCA 879 ("*International Entertainment*"). In that case, Emmett J had to consider an application under s 459P(2) of the Corporations Act 2001. Section 459P(2) refers to an application by persons, including a director, for leave to apply to court for a company to be wound up. Pursuant to s 459P(3), the court may only give leave if it is satisfied that there is a *prima facie* case that the company is insolvent. As such, the application contemplated by s 459P(2) is similar to that under s 124(1)(*b*) read with s 124(2)(*a*). Emmett J held that an application for leave under s 459P(2) raises three issues (at [5]):

> [5] … The first is whether an applicant can be said to be a creditor, albeit a contingent or prospective creditor. The second is whether the applicant can satisfy the Court that there is a prima facie case that the Company is insolvent. The third issue is whether the Court should exercise the discretion to give leave, even if satisfied that there is a prima facie case that the Company is insolvent.

13 Apart from the first issue, which is required as s 459P(2) refers to persons other than just a director, the other two issues mirror those I have identified above. Further, I should add that, in considering whether to grant permission, the court should consider the facts set out in the affidavits tendered in support of the application for permission.

14 With these applicable principles in mind, I proceeded to consider the present application. The first question was whether the claimant had shown a *prima facie* case that the Company ought to be wound up.

Whether the claimant has shown a *prima facie* case that the Company ought to be wound up

The applicable law: a prima facie *case*

15 In determining this first question, I considered what a "*prima facie* case" in the context of s 124(2)(*a*) of the IRDA means. In this regard, the Insolvency Law Review Committee in the *Final Report* had stated that permission should be granted "only where the director is able to show that there is a *prima facie* case that the company ought to be wound up, and where leave of court is obtained to do so (in a manner similar to the derivative actions commenced in the name of the company pursuant to s 216A of the Companies Act" (see *Final Report* at p 75). Given the Committee's reference to s 216A of the Companies Act 1967 (2020 Rev Ed) ("s 216A"), which prescribes the statutory requirements for commencing a statutory derivative action, it might appear logical to refer to case law on s 216A of the Companies Act to infer what a "*prima facie* case" means in the context of s 124(2)(*a*) of the IRDA. In my view, this would be incorrect for two reasons.

16 First, a contextual reading of the Committee's statement quoted above suggests that it had intended only to analogise the *nature* of the application for leave to commence a winding up application (and not the *prima facie* standard) with the application under s 216A for leave to commence a statutory derivative action. As such, I did not think that the Committee intended the *prima facie* standard, as it has been developed in relation to s 216A, to be applicable to establishing a "*prima facie* case" under s 124(2)(*a*) of the IRDA.

17 Second, how the "*prima facie*" standard is referred to under s 124(2)(*a*) of the IRDA and s 216A(3)(*c*) of the Companies Act are quite different. Whereas s 124(2)(*a*) refers to the director needing to establish a "*prima facie* case", s 216A provides, amongst others, that the applicant needs to show that "it appears to be prima facie in the interests of the company" that the statutory derivative action is brought (see s 216A(3)(*c*)). The courts have recognised that there is a difference between a *prima facie* case, and what *appears* to be a *prima facie* case (see Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at p 462). The latter standard, that of an *apparent prima facie* case, is a lower standard than a *prima facie* case. This relatively lower standard is presumably to recognise that a minority shareholder, in the context of s 216A, is usually not able to obtain sufficient evidence at the leave stage to establish a *prima facie* case (see the High Court decision of *Fong Wai Lyn Carolyn v Airtrust (Singapore) Pte Ltd and another* [2011] 3 SLR 980 at [28]). This concern is not as apparent in relation to a director seeking permission to commence a winding up application under s 124(1)(*b*) read with s 124(2)(*a*) of the IRDA. This is because the director here would presumably have more access to the relevant evidence to establish a *prima facie* case for winding up as compared to a minority shareholder in the context of s 216A. Indeed, the Court of Appeal in *Mukherjee Amitava v DyStar Global Holdings (Singapore) Pte Ltd*

and others [2018] 2 SLR 1054 has held (at [25]) that a director has an almost-presumptive right to inspect the documents of a company to the extent that these fall within s 199 of the Companies Act.

18 As such, I did not think that the cases discussing the apparent *prima facie* standard under s 216A of the Companies Act are of assistance in interpreting the *prima facie* case standard under s 124(2)(*a*) of the IRDA. Instead, I turned to cases that have defined "*prima facie* case" in deriving its meaning in s 124(2)(*a*). Thus, in *Phosagro Asia Pte Ltd v Piattchanine, Iouri* [2016] 5 SLR 1052 ("*Phosagro Asia*"), the Court of Appeal had to consider the meaning of a "*prima facie* case" in the context of s 108 of the Evidence Act (Cap 97, 1997 Rev Ed). The court explained the meaning as follows (at [72]):

> 72 … The concept of a "*prima facie* case" was explained by Wee Chong Jin CJ in the decision of the Federal Court of Malaysia in *Gan Soo Swee v Ramoo* [1968–1970] SLR(R) 324 (at [21]), where he clarified that in order to establish a *prima facie* case, a plaintiff had to "prove facts from which in the absence of an explanation liability could properly be inferred". This definition was cited with approval by Chan Sek Keong CJ in the Singapore High Court decision of *Re Nalpon Zero Geraldo Mario* [2012] 3 SLR 440 at [7].

As can be seen, deriving support from previous cases, the court defined a "*prima facie* case" to mean that a claimant has to "prove facts from which in the absence of an explanation liability could properly be inferred". In other words, when applied to the slightly different context of a *prima facie* case for winding up, the claimant must adduce evidence on affidavit which, on its own and without rebuttal, would be sufficient to prove a case for winding up.

19 I derived support for this interpretation of a *prima facie* case in the context of s 124(2)(*a*) of the IRDA from the Supreme Court of Victoria decision of *Sharda v Bansal* [2018] VSC 701 ("*Sharda v Bansal*"). In that case,

Hetyey JR had to consider s 459P(1)(d) read with ss 459P(2)(c) and 459P(3) of the Corporations Act 2001, which provides as follows:

> **459P Who may apply for order under section 459A**
>
> (1) Any one or more of the following may apply to the Court for a company to be wound up in insolvency:
>
> (d) a director;
>
> …
>
> (2) An application for any of the following, or by persons including any of the following, may only be made with the leave of the Court:
>
> (c) a director;
>
> …
>
> (3) The Court may give leave if satisfied that there is a prima facie case that the company is insolvent, but not otherwise.

20 It can be seen that s 459P(1)(d) read with ss 459P(2)(c) and 459P(3) of the Corporations Act 2001 is substantively similar in content to s 124(1)(*b*) read with s 124(2)(*a*) of the IRDA. In essence, both sets of provisions provide that the court may give permission for a director to commence a winding up application against the company if the court is satisfied that the director has established a *prima facie* case for winding up. In *Sharda v Bansal*, Hetyey JR provided clear guidance on what a "*prima facie* case" meant in this context (at [41] and [42]):

> [41] Section 459P(3) makes clear that the Court may give leave if satisfied there is a *prima facie* case that the Company is insolvent. Even if the Court is satisfied that the required threshold is met, it retains a residual discretion whether to grant leave.
>
> [42] In my view, there is a clear *prima facie* case that the Company is insolvent in the sense that there is *a probability a winding up order would be granted on the available evidence.*
>
> [emphasis added]

21 As can be seen, the learned judge defined a "*prima facie* case" in the context of the Corporations Act 2001 as "there is a probability a winding up order would be granted on the available evidence".

22 Similarly, in *International Entertainment*, Emmett J, in considering an application by a creditor with a contingent or prospective debt under s 459P(2) of the Corporations Act 2001, explained what it meant to prove a *prima facie* case that the company concerned is insolvent, as required by s 459P(3) (at [40]):

> [40] The question is whether the Court is satisfied that there is a prima facie case that the Company is insolvent. The evidence is not in a satisfactory state to enable me to reach a firm conclusion. The question, though, is whether there is a prima facie case, *in the sense that, if the evidence remains as it is, there is a probability that, at the trial, the applicant would establish that the Company is insolvent*. It is not appropriate for the Court to undertake a preliminary trial of that issue in an application such as this. It is sufficient if the applicant has a fair chance of success. What will be required, of course, will vary from case to case. Insolvency is not something to be inferred lightly and a finding of insolvency is one that could have grave consequences for the Company.
>
> [emphasis added]

23 Apart from the italicised part of the passage, which mirrors Hetyey JR's views in *Sharda v Bansal*, it is also important to take note of Emmett J's observation (at [40]) that "[i]t is not appropriate for the Court to undertake a preliminary trial of that issue [of insolvency] in an application such as this" and that "[i]t is sufficient if the applicant has a fair chance of success". I found that these Australian cases supported my view expressed above that the "*prima facie* case" for winding up referred to by s 124(2)(*a*) of the IRDA means that the claimant must adduce evidence on affidavit which, on its own and without rebuttal, would be sufficient to prove a case for winding up. Without intending to provide an exhaustive list of such evidence, I was of the view that such

evidence, if unrebutted, must satisfy one of the grounds under s 125(1) of the IRDA.

My decision: the claimant has established a* prima facie *case for winding up

24 I was satisfied that the claimant has established a *prima facie* case for winding, as required by s 124(2)(*a*) of the IRDA.

25 The claimant has deposed that the Company's operations have ceased and its net liabilities have remained at no less than US$1.298 million across the financial years ending on 31 March 2020 and 31 March 2021, being a period of not less than 24 months.[9] More specifically, the Company's statement of financial statement as of 31 March 2021 reflects total assets of US$10,766.70 and total liabilities of US$1,303,564.39, with a net liability position of US$1,292,797.69. This is not sufficient to meet the Company's repayment obligations to MIPL of US$1,298,297.35. Moreover, the Company was also insolvent in the preceding year.[10] Its financial position as of 31 March 2020 reflects total assets of US$1,310,245.46. This is not sufficient to meet total liabilities of US$2,684,827.48, with a resulting net liability position of US$1,374,582.02. The Company's available cash assets of US$1,833.78 as of 31 March 2020 was insufficient to meet its repayment of loans of US$1,320,172.59 and other payables of US$56,243.03.[11]

26 This evidence deposed by the claimant in his affidavit would, on its own and without rebuttal, be sufficient to prove a case for winding up under s 125(1)(*e*) read with s 125(2)(*c*) of the IRDA. Section 125(1)(*e*) provides that

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9 PWS at para 18.

10 AM Affidavit at para 10.

11 AM Affidavit at para 11.

the court may order a company to be wound up if the company is unable to pay its debts, whereas s 125(2)(*c*) deems a company to be unable to pay its debts if it is proved to the court's satisfaction that the company is unable to pay its debts, considering the contingent and prospective liabilities of the company. The Court of Appeal has held in *Sun Electric Power Pte Ltd v RCMA Asia Pte Ltd (formerly known as Tong Teik Pte Ltd)* [2021] 2 SLR 478 (at [65]) that the cash flow test is the "sole applicable test" to be used to determine insolvency under s 254(2)(*c*) of the Companies Act (Cap 50, 2006 Rev Ed), which is the predecessor provision to s 125(2)(*c*). Applying this test, I was satisfied that the Company's current liabilities exceeded its current assets (both measured within a 12-month timeframe) such that it was not able to meet all debts as and when they fall due. Accordingly, in the absence of any rebuttal, I found that the claimant has established a *prima facie* case for winding up as required by s 124(2)(*a*) of the IRDA.

Whether the court should grant permission for the claimant to commence a winding up application

Relevant considerations in deciding to grant permission

27 I turned next to the second question under s 124(2)(*a*), which was whether the court should grant permission for the director to commence a winding up application. While the section is silent on the relevant considerations in deciding to grant such permission, I was of the view that those considerations include whether the winding up application is being made for a legitimate reason and not for an improper purpose. This follows from the Insolvency Law Review Committee's views in the *Final Report* in relation to the purpose of requiring the director to seek the court's permission. Indeed, given the Committee's concern to avoid a single director's use of a winding up application to pressure other directors and/or shareholders in a dispute (see *Final Report* at

pp 74–75), the consideration that the director is not in fact doing so must be the primary consideration for a court in deciding whether to grant permission under s 124(2)(*a*).

28 There can, of course, be other relevant considerations. In *Sharda v Bansal*, Hetyey JR had to interpret s 459P(1)(d) read with ss 459P(2)(c) and 459P(3) of the Corporations Act 2001, which are also silent on the relevant considerations. He pointed to the following considerations he took into account to grant leave (at [43]):

> [43] In addition, the following discretionary factors militate in favour of leave being granted:
>
> > (a) the evidence reveals a fundamental breakdown in the relationship between Mr Sharda and his fellow director, Mr Bansal. That being the case, it appears unlikely that the directors will agree on the appointment of a voluntary administrator if the Company is insolvent. Moreover, Mr Bansal is not in a position to appoint a voluntary administrator himself;
> >
> > (b) Mr Bansal's winding up application does not appear to be "mischievous or harmful" and it was not suggested that it was intended to be so;
> >
> > (c) there is a clear policy found in Part 5.4 of the *Corporations Act* that an insolvent company should be promptly wound-up as a matter of public interest. The fact the Company is no longer trading is not an adequate answer to this concern. The Company has no present means to satisfy its liabilities, including future liabilities which continue to arise under the Loan Agreement; and
> >
> > (d) Mr Sharda's allegations regarding diversion of cash receipts and the under-recording of sales are matters which Mr Sharda in his capacity as director and creditor may properly raise with a liquidator for further investigation.

29 In *International Entertainment*, Emmett J also identified (at [42]) the consequences of winding up as a relevant to the court exercising its discretion to grant leave under s 459P(3) of the Corporations Act 2001. In that case, the

company had argued that if it were wound up, there would be widespread consequences involving the state of soccer in Australia, such as the cancellation of matches in the National Soccer League and the removal of FIFA's endorsement, which would prohibit Australia's national teams from competing internationally (at [41]). The learned judge also identified the existence of a genuine dispute between the parties as to the grounds for winding up as another relevant consideration (at [43]).

30 As such, Hetyey JR's and Emmett J's judgments reveal a few relevant considerations that may also be applicable in our legislative regime:

(a) The first consideration concerns the circumstances in which the application for permission is brought. For instance, if the director cannot bring about the winding up of the company in another way, then the director would well be justified to apply for permission to commence a winding up application. This will also go towards showing that the director's application for permission is not for an improper purpose.

(b) The second consideration concerns the presence of any collateral purpose for bringing the winding up application. This would address squarely the primary factor for a court in deciding whether to grant permission under s 124(2)(*a*) of the IRDA.

(c) The third consideration concerns the presence of any allegation of wrongdoing to the company which a director in his or her capacity would be well-placed to raise with the liquidator for further investigation.

(d) The fourth consideration is the consequences of winding up if an order were eventually made.

(e) The fifth consideration is the existence of a genuine dispute between the parties as to the grounds for winding up.

(f) Finally, the sixth consideration concerns the general policy that an insolvent company should be promptly wound up as a matter of public interest.

My decision: the relevant considerations in the present case favour the grant of permission

31 In my judgment, having regard to the relevant considerations as set out above, I granted permission for the claimant to commence the winding up application against the Company. Two reasons underlie my decision.

32 First, I found that the claimant was almost compelled to apply for permission under s 124(1)(*b*) read with s 124(2)(*a*) of the IRDA to commence a winding up application against the Company. I accepted the claimant's explanation that it would be impossible or difficult to achieve a quorum of shareholders necessary to pass a special resolution for a voluntary winding up. In particular, the claimant and his co-director have been unable to confirm that ML, as one of the two shareholders of the Company, was prepared to attend and vote at a meeting of the Company's shareholders to pass a special resolution in favour of initiating the voluntary winding up procedure. I was satisfied that the claimant had made repeated attempts since October 2021 to obtain a definite response from ML on this matter. However, ML has never said definitively whether they were amenable to supporting the passage of such a special resolution. In fact, ML has not responded even after being served with the relevant papers on 1 August 2022, 7 September 2022, and 12 September for the

present application.[12] In the circumstances, it was unlikely that a special resolution for the voluntary winding up of the Company can be obtained.

33 Second, and following from the above reason, I found that the claimant's present application was brought for a legitimate reason and not for an improper purpose. That legitimate reason was that the claimant was compelled to take out the winding application in his capacity as director due to the difficulties he faced with obtaining a definite response from ML on the passage of a special resolution. I was also satisfied that there was no improper purpose in connection with the application. There does not appear to be any dispute between the directors and the shareholders which may warrant a finding that the winding up application was being brought to pressure the shareholders into acting in a certain way.

34 Accordingly, for these reasons, I granted permission for the claimant to commence the winding up application against the Company.

Conclusion

35 For all these reasons, I made the following orders:

(a) Permission was granted to the claimant to commence winding up proceedings against the Company, pursuant to s 124(1)(*b*) read with s 124(2)(*a*) of the IRDA.

(b) Any winding up application made pursuant to permission so granted is to be notified to the Company's shareholders.

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12 PWS at para 11.

(c) There is no order as to the costs of this application.

Goh Yihan
Judicial Commissioner

Nigel Desmond Pereira and Kwek Yuan Justin (JWS Asia Law Corporation) for the claimant;
The respondent unrepresented and absent.