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

[2022] SGHC 268

Companies Winding Up No 86 of 2019 (Summons No 1497 of 2022)

In the Matter of the Section 253(1) of the Companies Act (Cap 50)

And

In the Matter of Midas Holdings Limited

Between

Xu Wei Dong

… *Plaintiff*

And

Midas Holdings Limited

… *Defendant*

BRIEF REMARKS

[Insolvency Law — Administration of insolvent estates]

TABLE OF CONTENTS

Xu Wei Dong
v
Midas Holdings Ltd

[2022] SGHC 268

General Division of the High Court — Companies Winding Up No 86 of 2019 (Summons No 1497 of 2022)
Aedit Abdullah J
22 August 2022

31 October 2022 Judgment reserved

Aedit Abdullah J:

1 These are brief remarks, conveying my decision, which I will add to, if needed. Having considered the submissions and evidence, I am satisfied that the order sought by the liquidator of Midas Holding Ltd (in liquidation) (the "Company"), Mr Yit Chee Wah (the "Liquidator"), should be granted, namely, an order under s 285 of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") that the documents relating to audits carried out by Mazars LLP ("Mazars SG") and Mazars CPA Limited ("Mazars HK") on the Company for the financial years ("FYs") ended 2012 to 2017 be disclosed (the "Documents").

2 The application is brought by the Liquidator against Mazars SG and Mazars HK (collectively, the "Auditors"). Separate but largely aligned submissions were made by the Auditors.

Brief background

3 The Company is incorporated in Singapore and was formerly listed on the Singapore Stock Exchange, with a secondary listing on the Hong Kong Stock Exchange. It operates as a holding company of a group of companies (the "Midas Group"), some of which are incorporated in Singapore and others in the People's Republic of China (the "PRC").[1]

4 The Auditors are accounting and professional services firms. Mazars SG was appointed as the external auditor of the Company (and its respective Singapore-incorporated subsidiaries) on 26 November 2012 and remained so until the end of FY 2017.[2] For the FY 2012 to FY 2016, Mazars SG issued auditors' reports with unqualified opinions ("Audit Reports"). These audits were prepared with the assistance of Mazars HK, which performed the role of "component auditors" and audited the subsidiaries of the Midas Group incorporated in the PRC.[3]

5 Sometime in February 2018, the Company instructed Mazars SG to stop work on the audit for FY 2017. Mazars HK had discovered certain potential irregularities relating to the bank accounts of the subsidiaries incorporated in the PRC and informed the Company.[4] Further investigations into these irregularities were carried out.[5] On 26 April 2018, Mazars SG informed the

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1 Yit Chee Wah's affidavit dated 12 April 2022 ("YCW-1") at paras 7 to 10.

2 YCW-1 at para 12.

3 Ming Chiu Or's affidavit dated 15 August 2022 ("MCO-1") at para 13; see also Chan Hock Leong, Rick's affidavit dated 14 July 2022 ("CHL-1") at para 6.

4 CHL-1 at para 6.

5 MCO-1 at para 20.

Company that the Audit Reports could not be relied on due to certain discrepancies uncovered.[6]

6 Since then, there were various correspondences between Mazars SG and Mazars HK with the Accounting and Corporate Regulatory Authority of Singapore ("ACRA") and the Securities and Futures Commission of Hong Kong ("SFC") respectively. No action as of the date of the hearing has been taken by ACRA or SFC against the Auditors.[7]

7 Subsequently, on 24 June 2019, the Company was placed under liquidation.[8] Various requests were made of the Auditors to provide the Documents.[9] Mazars SG provided some documents to the Liquidator but resisted production of the remaining documents.[10] Mazars HK similarly resisted production of the documents.[11]

8 On 20 December 2021, the Liquidator instructed the Company's solicitors to file a Writ of Summons in HC/S 1036/2021 ("Suit 1036") against the Auditors.[12] In around January 2022, the Liquidator also obtained court approval for a funding arrangement with a third-party commercial litigation funder.[13]

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6 YCW-1 at paras 16 and 17; MCO-1 at para 20.

7 YCW-1 at paras 23 to 37; see also MCO-1 at paras 21 and 22.

8 YCW-1 at para 38.

9 YCW-1 at paras 42 to 48.

10 CHL-1 at para 8.

11 MCO-1 at para 27; YCW-1 at paras 49 and 50.

12 Affidavit of Yit Chee Wah dated 11 August 2022 ("YCW-2") at para 31.

13 YCW-1 at para 51.

Brief summary of parties' cases

The Liquidator's case

9 The Liquidator argues that the two-stage test outlined by the Court of Appeal in *PricewaterhouseCoopers LLP and others v Celestial Nutrifoods Ltd (in compulsory liquidation)* [2015] 3 SLR 665 ("*Celestial (CA)*") in respect of s 285 of the CA (described at [20] below) is fulfilled.[14] Emphasis was placed on the second stage of the test in *Celestial (CA)*. In particular, the Liquidator argues that a writ having been filed against the Auditors does not bar the grant of the application, and that the present application is neither oppressive nor an abuse of process. The Liquidator further contends that PRC law does not prohibit the Auditors from disclosing the Documents. Four points are made. One, PRC law does not apply to the Documents; two, the Documents are unlikely to contain any Chinese state secrets; three, the Auditors are not restricted by PRC law from disclosing the Documents; and four, the Auditors may have overstated the penalties that may be imposed if the Documents are disclosed.[15]

10 Additionally, with respect to Mazars HK, the Liquidator argues that s 285 of the CA has extra-territorial effect, that is, it may be exercised against a party based outside of Singapore.[16] The Liquidator highlights that the court in *In the Matter of the Companies Act Chapter 50 And In the Matter of Thye Nam Loong (Singapore) Pte Ltd (RC no 196500242G)* [1998] SGHC 27 ("*Thye Nam Loong*") rejected the argument that s 285 is limited territorially.[17] The Liquidator also highlights that while the position under s 236 of the Insolvency

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14 Liquidator's written submissions dated 15 August 2022 ("LWS") at paras 49 to 58.

15 LWS at paras 105 to 153.

16 LWS at para 61.

17 LWS at para 61.

Act 1986 (c 45) (UK) ("IA") (the English equivalent of s 285 of the CA) is equivocal, the English courts have shown a willingness to move away from the position that s 236 of the IA lacks extra-territorial effect in acknowledgment of the modern commercial environment.[18]

11 In oral submissions, the Liquidator highlighted that a low threshold is involved in the first stage of the *Celestial (CA)* test, and that insufficient documents have been provided to him to discharge his duties. As for the second stage of the test, the Liquidator submitted that the Court should adopt his proposed framework of analysis of PRC law, under which there would be no prohibition on the disclosure of the Documents.

Mazars SG's case

12 Mazars SG relies on three grounds to resist the application. First, the Documents sought are not reasonably required. This is evidenced by the fact that the Liquidator has already filed suit against the Auditors, and as such does not require the Documents to decide whether to do so.[19] Explanations and documents have also been provided to the Liquidator to account for the conduct of the audit, which the Liquidator has not shown are inadequate for his purposes.[20] Pertinently, the Liquidator has no basis for the view that Mazars SG was responsible for failing to discover the discrepancies in the Company's

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18 LWS at paras 62 to 65.

19 Mazars SG's written submissions dated 15 August 2022 ("Mazars SG") at paras 34 to 39.

20 Mazars SG at paras 40 to 49. Also see Mazars SG at paras 97 to 101.

accounts.[21] Even if the order is granted, Mazars SG does not possess all the documents sought to enable the Liquidator to reconstruct the accounts.[22]

13 Second, the grant of the application would be oppressive. Disclosure of the Documents would expose Mazars SG to a real risk of criminal sanction under the laws of the PRC.[23] The Documents may only be disclosed with the approval of the Ministry of Finance of the PRC ("MOF"). Till date, no approval has been granted by the MOF. Without such approval, Mazars SG would be in breach of PRC law.[24] Finally, the scope of the orders is too wide and unnecessary. Many of the categories of documents requested are also duplicative.[25]

14 In oral submissions, Mazars SG reiterated that the laws of the PRC prohibit the disclosure of the Documents. Additionally, its lawyers in the PRC have informed it that the MOF has not provided the necessary sanctions. There is thus a real risk of criminal penalties if the Documents are disclosed.

Mazars HK's case

15 Mazars HK argues that s 285 of the CA does not possess extra-territorial effect. The presumption against extra-territoriality operates in respect of s 285.[26] To find that it has extra-territorial effect would result in problems relating to

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21 Mazars SG at paras 50 to 90.

22 Mazars SG at paras 91 to 96.

23 Mazars SG at paras 103 to 104.

24 Mazars SG at para 105.

25 Mazars SG at paras 145 to 159.

26 Mazars HK's written submissions dated 15 August 2022 ("Mazars HK") at paras 38 to 47.

enforcement and international comity.[27] Additionally, the weight of the English authorities regarding s 236 of the IA (which s 285 of the CA bears similarity with) suggests that the provision lacks extra-territorial effect.[28]

16 Even if s 285 has extra-territorial effect, the balance of interests comes down against the grant of the application. Oppression is made out on the facts for two reasons. First, Mazars HK conducted audits on the Company's PRC subsidiaries and generated working papers that have to be stored within the PRC. They may not be removed without the approval of the MOF. To do so would result in breach of PRC law and expose Mazars HK to the real risk of severe sanctions.[29] Moreover, there are other means under PRC law to obtain the Documents.[30] Second, the application is an abuse of process. The Liquidator is not merely conducting general investigations but is using the application to strengthen his case against the Auditors.[31]

17 In oral submissions, Mazars HK maintained that s 285 of the CA does not have extra-territorial effect. Further, if s 285 of the CA has extra-territorial effect, it should be exercised only when there is a sufficiently strong connection between the subject of the order and Singapore. Mazars HK does not have such a connection with Singapore. It is a third party with no contractual relationship with the Company. The application is also an abuse of process, as evidenced by the writ filed in Suit 1036 as well as the liquidation funding obtained.

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27 Mazars HK at para 48.

28 Mazars HK at para 50.

29 Mazars HK at paras 66(a) and 68 to 101.

30 Mazars HK at paras 102 to 106.

31 Mazars HK at paras 107 to 118.

The issues

18 The application having been made under s 285 of the CA, the equivalent of which is s 244 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed), the issues to be determined are:

(a) Whether s 285 of the CA applies extra-territorially in respect of persons and documents located abroad.

(b) Whether the orders sought under s 285 of the CA should be granted. In particular, whether the grant of the orders would be oppressive, given the filing of the writ in Suit 1036 and the information already available to the Liquidator as well as the possible contravention of PRC law.

The requirements under s 285 of the Companies Act

19 Section 285(1) allows the court to summon a person to appear who may have information relating to the affairs of a company, who may be examined under oath under subsection (2), and who may be required under subsection (3) to produce books and papers in his custody or power. In practice, often what is desired is just the production of the books and papers, rather than an actual examination of persons, as is the case presently.

20 The principles governing the exercise of the power under s 285 were laid down in *Celestial (CA)* in a two-stage test: firstly, the establishment of a reasonable basis for the belief that the examinee can assist in providing information or documents, which are reasonably required (at [43(a)]); and secondly, a balancing of the interests of the liquidation, namely the liquidator's discharge of his functions on one hand, and on the other that the order is not unreasonable, unnecessary or oppressive (at [43(b)]).

Whether s 285 operates extra-territorially

21 I am satisfied that s 285 has extra-territorial effect, from the plain words of the section as well as from consideration of its objective and the application of local case law.

22 The Liquidator relies on both the local authority of *Thye Nam Loong*, and on English cases interpreting ss 236(2) and 236(3) of the IA as well as s 25(1) of the Bankruptcy Act 1914 (c 59) (UK) ("BA") which reached the same conclusion, that s 236 of the IA and s 258 of the CA have extra-territorial effect. Mazars HK, on the other hand, argues against the Liquidator's analysis of the English authorities, and relies also on the general presumption against extra-territoriality.[32]

The English position

23 Section 285 of the CA is phrased similarly to s 236 of the IA and s 25(1) of the BA.

24 The starting point is *In re Tucker (RC) (A bankrupt)* [1990] 1 Ch 148 ("*Re Tucker*"), which held that s 25(1) of the BA did not have extra-territorial effect. Firstly, s 25 was concerned with the summoning of persons before an English court to be examined on oath and to produce documents (at 158D). This was not consonant with the general practice of international law and the relevant English civil procedure rules (at 158D). Secondly, s 25(6) of the BA, which gave the court a power to order an examination out of England of "any person who if in England would be liable to be brought before [the English court] under

[32] Mazars HK at paras 37 to 65.

this section", showed that a person not in England would not be liable to be brought before the English court (at 158H).

25 *Re Tucker* was followed in *In re MF Global UK Ltd (in special administration) (No 7)* [2016] 2 WLR 588 ("*Re MF Global*") as well as *In re Akkurate Ltd (in liquidation)* [2020] 3 WLR 1077 ("*Re Akkurate*"). In both cases, the court held that s 236 of the IA lacked extra-territorial effect as *Re Tucker* was binding, since s 236 (as well as s 237(3)) of the IA was materially similar to s 25 of the BA. What is noteworthy is that in both cases, there were statements that if not for binding authority, there was much to be said for giving s 236 extra-territorial effect (at [53] of *Re Akkurate* and [32] of *Re MF Global*).

26 On the other hand, in *Official Receiver v Tristram Michael Norriss* [2015] EWHC 2697 (Ch) ("*Norriss*"), the court concluded that s 236 of the IA had extra-territorial effect, as unlike s 25 of the BA, s 236 conferred a freestanding power to order the production of documents (at [14]). On this basis, the court in *Norriss* declined to follow *Re Tucker*. Similarly, the court in *In re Carna Meats (UK) Ltd* [2020] 1 WLR 1176 ("*Re Carna Meats*") distinguished *Re Tucker* on the basis that it was primarily concerned with enforcing the attendance of persons before the court (at [54(i)]), while the applicant in *Re Carna Meats* only sought the production of documents (at [54(iii)]. The presumption against extra-territoriality, a rule of construction of English statutes, did not operate so strongly in such situations.

The Singapore position

27 In *Thye Nam Loong*, the court considered *Re Tucker*, noting that while s 25 of the BA was similar to s 285 of the CA, it was not *in pari materia* and declined to follow *Re Tucker* (at [22]). Additionally, the words "any person"

contained in s 285 were wide enough to extend to the examinee in that case, who was resident in Malaysia (at [13]). The court was thus not prepared to find that s 285 of the CA is limited territorially to Singapore (at [22]). The extra-territorial effect of s 285 was also tacitly considered in *BNY Corporate Trustee Services Ltd v Celestial Nutrifoods Ltd* [2014] 4 SLR 331 ("*Celestial (HC)*"). There, the liquidator's application involved three individuals in the PRC who were legal representatives of the company's subsidiaries. These persons did not appear at the hearing and the court granted the orders against them (at [3]). However, the issue was not fully argued in *Celestial (HC)*.

The determination of the issue

28 I am satisfied that the provision operates extra-territorially. While reliance was placed on the English authorities indicating that s 236 of the IA lacked such effect as well as the general presumption against extra-territoriality, the better view is that the provision does allow orders to be made in respect of overseas persons and documents.

29 Firstly, I have not been persuaded by the approach taken in the English cases starting with *Re Tucker* that have found s 236 of the IA to lack extra-territorial effect. *Re Tucker* is not persuasive. Section 25(6) of the BA was taken in that case as lacking extra-territorial effect (at 158H). There is, however, no equivalent of s 25(6) of the BA (or s 237(3) of the IA) in the CA. Moreover, the judgment in *Re Tucker* was primarily concerned with the difficulty of summoning a person abroad to appear before an English court to be examined on oath. Such a concern would not arise to an application seeking only the production of documents, as in the present case. Neither *Re MF Global* nor *Re Akkurate* added more in terms of principle to the position against extra-territorial effect; these cases were decided in the way they were due to the

doctrine of precedent. Both found themselves bound by *Re Tucker*. *Re Tucker*, however, is not binding on this court. Both *Re Akkurate* and *Re MF Global*, in fact, noted in *obiter* that in the absence of authority, which is understood to be *Re Tucker*, there would be good reason s 236 to have extra-territorial effect.

30 Secondly, the presumption against extra-territoriality is displaced. The presumption against extra-territoriality was endorsed by the Court of Appeal in *JIO Minerals FZC and others v Mineral Enterprises Ltd* [2011] 1 SLR 391 ("*JIO Minerals*"). Under the presumption, a statute is to only apply to activities in Singapore if it is silent on its geographical scope. It may be displaced if there is clear indication of Parliamentary intention that the statute should apply extra-territorially. The intention need not be stated expressly. On the face of it, the presumption of territoriality applies to s 285. It is silent on its geographical scope as compared to, for instance, s 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed), which was cited in *JIO Minerals* at [103] and which applies in respect of Singapore citizens "outside as well as within Singapore". It is, however, notable that the language of s 285 does not restrict its operation in any way. Section 285 is couched in sufficiently wide terms to cover a person or entity based in a foreign jurisdiction.

31 The strength of the presumption is not immutable. As observed by Tay Yong Kwang J in *Huang Danmin v Traditional Chinese Medicine Practitioners Board* [2010] 3 SLR 1108 ("*Huang Danmin*"), it would be "more accurate to speak of degrees of extra-territoriality than to think of extra-territoriality as a discrete category" (at [20]). In determining the strength of the presumption, this would depend on the extent to which the extra-territorial effect is claimed (at [20]). A similar observation was made by the Court of Appeal in *Burgundy Global Exploration Corp v Transocean Offshore International Ventures Ltd and another appeal* [2014] 3 SLR 381 ("*Burgundy Global*"). In responding to

the observations of the House of Lords in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90 that the presence of public interest was an appropriate basis to determine which laws should have extra-territorial effect, the Court of Appeal noted that while all penal statutes implicate public interests, the "presumption against extra-territoriality applies with particular force to criminal law" (at [91]). There are gradations in the strength of the presumption, albeit that it should not be based on the presence (or lack thereof) of public interest.

32 Here, the statute is said to operate extra-territorially because the documents come from an entity based overseas, as observed at [19] above. This is in contrast to an application for the attendance of a person abroad, as was the case in *Re Tucker*. The distinction between the two types of orders was noted in *Re Carna Meats* at [49], where it was noted that the presumption of territoriality would presumably be stronger in respect of applications requiring attendance before the court. The application here is also not made in the context of criminal proceedings, where the presumption ought to apply with extra force, as observed in *Burgundy Global*: the criminal law jurisdiction of the court is after all the epitome of territorial power. The strength of the presumption is thus not that strong.

33 In determining whether the presumption is rebutted, it is not enough to show, as Mazars HK asserts, that there is nothing in the parliamentary material to suggest that s 285 of the CA is to apply extra-territorially. As observed in *Burgundy Global*, which was similarly concerned with the presumption against extra-territoriality, the fact that "the rule-maker did not consider whether a rule would apply in a particular situation (even though the language of the rule might be wide enough to cover that situation) does not, without more, supply a basis for excluding it from the ambit of the rule" (at [90]). Instead, the "proper

approach is to consider the object of the rule and then decide whether its object would be promoted if it were interpreted to cover the situation at hand" (at [90]). This is consistent with the approach outlined at [102] of *JIO Minerals*.

34 The purpose of s 285 shows that it is meant to operate extra-territorially. Section 285 serves a "wider purpose in enabling liquidators to get documents and/or information for the purpose of determining the reasons for the company's demise": *Celestial (CA)* at [34]. The Court of Appeal observed that the scope of s 285 should be cast expansively, such that the power should be "invoked to assist in the accumulation of facts, information and knowledge that would enable or facilitate a liquidator to better discharge his statutory function" (at [42]). Section 285 therefore is intended to assist the liquidator in determining the events that led to a company's demise and to take steps to maximise returns to the company's creditors (at [1] of *Celestial (CA)*). That objective of s 285 of the CA would be served through extra-territorial application. It is doubtful that in this day and age, where commercial transactions are often international in nature, extra-territoriality must be stated expressly in all contexts. Groups of companies will span across borders, and listings, as is the case here, often involve foreign businesses and entities. The global nature of commerce, the presence of listed entities from overseas, and even data storage practices mean that information is often located elsewhere. Limiting the operation of s 285 to material and persons within the territory will hamper the proper operation of liquidation, whereby a liquidator's investigation into a company would be easily thwarted by the person removing himself from the jurisdiction. It is telling as well that in *Re Akkurate*, Sir Geoffrey Vos C acknowledged that there were "compelling reasons for thinking that section 236 ought, in the contemporary commercial environment, to have extraterritorial effect" (at [52]). Similarly, in *Re Carna Meats*, Mr Adam Johnson QC (sitting as a deputy High Court judge)

noted that "[i]n the modern world of cross-border business practices, it is natural to construe [s 236(3) of the IA] as extending to any of the categories of person identified, whether within or outside the jurisdiction" (at [54(iii)]).

35 The counterarguments against extra-territorial application, namely the need for comity, and the requirements of enforcement, do not have any traction.[33] In both *Thye Nam Loong* and *Celestial (HC)*, orders with extra-territorial effect were made, as elaborated at [27] above, without any apparent calamity. Additionally, as noted by Tay J in *Huang Danmin*, there are "different degrees of extra-territoriality and correspondingly varying degrees of problems with enforcement and comity issues" (at [27]). Mazars HK compares the present situation to that of *Huang Danmin*, where the mode of enforcement under the relevant statute could be effected unilaterally. *Huang Danmin*, however, is not an appropriate comparison. There, the issue was whether a penalty that was to be imposed on the party who had infringed the statute may be imposed effectively (at [27]). As for comity, Mazars HK highlights that s 285(5) of the CA empowers the court to cause a person to be apprehended and brought before the court for examination. This, however, is not the present situation. The Liquidator does not seek such an order.

36 Finally, the local case law is clear that the provision does indeed operate extra-territorially, as observed in *Thye Nam Loong* and *Celestial (HC)* at [27] above.

37 It is further argued by Mazars HK, if s 285 of the CA has extra-territorial effect, that there should be some clear connection to Singapore before an extra-territorial order is made. In my view, the fact of the matter is that the liquidation

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[33] Mazars HK at para 48.

and the potential litigation being in Singapore is enough to establish a connection and basis for the court to exercise its powers under s 285.

Whether the order under s 285 of the CA should be granted

38 Before an order under s 285 can be granted, the court should be satisfied that the documents were reasonably required and if there is a reasonable belief that they could be provided by the auditors, and that the balance of interest lies in favour of such an order. I am satisfied that these requirements have been met.

Whether the Documents were reasonably required, and whether there was a reasonable belief that the Auditors could provide them

39 The Documents are reasonably required by the Liquidator for the carrying out of his duties, namely, to understand how the audits were conducted and the Auditors' basis for issuing the Audit Reports. There is also a reasonable belief that the Auditors would be able to assist, given that Mazars SG was the Company's statutory auditor for the relevant period and prepared the Audit Reports with the assistance of Mazars HK.

40 Mazars SG raised several objections that were not persuasive. Broadly, Mazars SG claims to have already explained the basis of the audit and to have provided some of the Documents. Mazars SG also points to its correspondence with ACRA and, in particular, to the fact that ACRA has to-date not taken any action against Mazars SG.[34] The fact that ACRA has not taken any action against Mazars SG is, in itself, not an indication of Mazars SG's liability (or lack thereof) *vis-à-vis* the Company. The concerns of the Liquidator are distinct from that of ACRA. As for the contesting claims between Mazars SG and the

[34] Mazars SG at para 43.

Liquidator concerning the adequacy of documents, it is apposite to note the observation in *Celestial (CA)* that there is a "general predisposition in favour of the liquidator's views" (at [43(a)]). Even though Mazars SG has provided an explanation of how the audit was conducted and provided some of the Documents, the Liquidator remains entitled to test these claims.

41 Additionally, Mazars SG claims that it is not responsible for the various discrepancies in the Audit Reports. This is irrelevant at this juncture. Whether Mazars SG bears any responsibility for the state of the Audit Reports is something to be determined by the Liquidator upon receipt and review of the Documents.

42 As no valid objections have been raised against the Liquidator's arguments, the first stage of the test in *Celestial (CA)* is fulfilled.

Whether the balance of interests weighs in favour of the disclosure of Documents

43 The central disagreement at the second stage of the test of *Celestial (CA)* concerns whether the grant of the orders would result in oppression to the Auditors. The Auditors rely on two key grounds. First, the application is unnecessary. The Liquidator has enough documents in hand as evidenced by the filing of the writ (see [8] above). Second, the disclosure of the Documents would result in the contravention of PRC law and expose the Auditors to a real risk of sanctions.

44 Oppression is not established through either the application being unnecessary or the Auditors' possible contravention of PRC Law.

(1) Whether the application was unnecessary

45 Mazars HK argues that the application was unnecessary as the Liquidator has enough documents in hand and has formed a view concerning the misconduct of the Auditors, as evidenced by the litigation funding obtained and the filing of the writ in Suit 1036. The Liquidator argues though that the writ was only protective to preserve certain causes of action, and that the Documents are still required.[35] I am satisfied that the Documents remain reasonably required. Just because the Liquidator had obtained funding and filed the writ did not mean that he has everything required to pursue the claims. It is entirely consistent and reasonable to do both, on a preliminary understanding of the facts, especially in order to preserve the liquidated company's position. The present situation is different from that in *Re Sasea Finance Ltd (in liq)* [1998] Ch 103, a case Mazars HK relies on, in which the English court denied an application by liquidators of a company for interrogatories. A crucial reason was that the interrogatories, which comprised 100 questions, were clearly for the purpose of extracting damaging admissions for use in the prospective suit by the liquidators (at 113D). The clear inference in that case was that the liquidators there already had more than enough to go on. That is not the case here.

(2) Whether the disclosure of the Documents would contravene PRC law

46 Possible contravention of PRC law was established through expert opinion, but it was not shown that oppression would result.

47 Parties have provided expert opinions concerning PRC Law, namely prohibitions under the Provisions of the China Securities Regulatory

[35] YCW-2 at paras 31 and 34.

Commission, the State Secrecy Bureau and the State Archives Administration on Strengthening Confidentiality and Archives Administration Relating to Overseas Issuance and Listing of Securities (Regulation 29 of 2009) (PRC) ("Regulation 29") and the Interim Provisions on the Audit Services Provided by Accounting Firms for the Overseas Listing of Mainland Chinese Enterprises (No 9 of 2015) (PRC) ("Interim Provisions"). The Auditors also claim that they require the MOF's permission to disclose the Documents.

48 Mazars SG argues that Regulation 29 prohibits its disclosure of the Documents. This is on the basis that the Company falls under Article 11 of Regulation 29.[36] According to Article 11, an entity whose majority equity shareholding is held by a mainland Chinese national will be treated as a foreign listed Chinese-funded holding company (and thus be subject to the same rules regulating foreign listed companies). The Company is one such entity, as its controlling shareholder at the point of listing was a Chinese national.[37]

49 The Liquidator's expert disagrees. In his opinion, Article 11 is directed at the domestic entity which owns a controlling stake in foreign-incorporated companies which are listed outside of the PRC. It is not directed at the overseas listed company itself.[38] The Liquidator's analysis coheres better with the text of Article 11 of Regulation 29. A plain reading suggests that Article 11 is directed at PRC-incorporated entities with an overseas listing, and not the overseas-listed Chinese-controlled company. This is further consistent with the title of Regulation 29.

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36 Mazars SG at para 113.

37 Affidavit of Song Ying dated 7 July 2022 ("SY"), Exhibit SY-2 at paras 17 and 18.

38 Affidavit of Gary Gao dated 11 August 2022 ("GG"), Exhibit GG-1 at para 18.

50 In respect of Mazars HK, there is similarly doubt over whether Regulation 29 applies. Mazars HK's expert claims that Regulation 29 is brought into play by Article 12 of the Interim Provision.[39] Article 6 of Regulation 29, in turn, requires all archives, such as working papers, to be stored within mainland China.[40] It is equivocal whether Article 12 of the Interim Provision applies to Mazars HK. Article 12 extends the operation of Regulation 29 to "[m]ainland Chinese enterprises and accounting firms that provide audit services for overseas listing of Mainland Chinese enterprises".[41] Mazars HK, however, does not appear to be a mainland Chinese enterprise or accounting firm. As noted by the Liquidator,[42] Hong Kong is a separate legal jurisdiction and while part of the PRC, is not within the territory of mainland China. Moreover, as the Liquidator highlights, Article 10 of Regulation 29 suggests that Regulation 29 does not apply to the Company. Article 10 states that "overseas listed companies shall refer to domestic companies limited by shares that issue foreign shares listed overseas". The Company is not such an entity; it was incorporated in Singapore and is not a domestic company with an overseas listing.[43] A similar finding was made in *Celestial (HC)*, which was concerned with the self-same provision. The respondents there relied on Regulation 29 to resist production of documents *vis-à-vis* the company, which was incorporated in Bermuda. This was rejected by the court on the basis of Article 10 of Regulation 29 (see [54] of *Celestial (HC)*).

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39 Mazars HK at para 81(a).

40 Affidavit of Yanhua Lin dated 20 July 2022 ("YHL"), Exhibit YL-1 at para 21. See also Mazars HK at para 81.

41 SY, Exhibit SY-2, Appendix C.

42 GG, Exhibit GG-1 at para 28.

43 GG, Exhibit GG-1 at para 18.

51 The next objection raised by the Auditors concerns the absence of MOF sanction, without which the Auditors may not disclose any Documents. Mazars SG points to correspondence with the MOF, specifically, to the absence of express approval from the MOF.[44] Mazars HK relies on the self-same correspondence between Mazars SG and the MOF. Against this, the Liquidator points to several indications that the Documents do not contain state secrets.[45] The Auditors' claim founders on the basis that the correspondence they rely on is a memorandum provided to Mazars SG by its Chinese lawyers.[46] It is a report of what the MOF had allegedly informed Mazars SG's Chinese lawyers. It is not a formal communication from the MOF indicating that the Documents may contain state secrets. Mazars SG is not even able to produce the communications with the MOF because they were conducted verbally.

52 Turning finally to the Interim Provisions, I accept and prefer the Auditors' expert opinions over that of the Liquidator as to the scope of application of the Interim Provisions. The Auditors' experts have shown that the Interim Provisions would cover businesses listed outside the PRC. This was stated in the MOF's official press briefing detailing the scope of the Interim Provisions. Specifically, foreign entities registered outside of China with operations and administrative institutions predominantly located in mainland China, such as the Company, would be governed by the Interim Provisions.[47] However, it is questionable whether there was a breach here of the Interim Provisions. Reliance is placed on Article 5, which stipulates that "audit working papers generated within [mainland PRC] shall be kept in [mainland PRC] by

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44 Mazars SG at para 105.

45 GG, Exhibit GG-1 at paras 33 to 42.

46 SY, Exhibit SY-2, pp 91 to 92.

47 SY, Exhibit SY-2, Appendix D, pp 124 to 125.

the Mainland Chinese accounting firm".[48] No evidence has been provided to suggest that the working papers were generated in mainland PRC. The available evidence suggests that the papers created by Mazars SG were created in Singapore.[49] As for Mazars HK, it appears that its audit working papers were located in Hong Kong.[50] In so far as the Auditors wish to rely on Article 5 of the Interim Provisions, it is their burden to demonstrate that the audit working papers were generated in mainland PRC.

53 In any event, taking the Auditors' case at its highest that the disclosure would result in the contravention of the Interim Provisions, it has to be shown that oppression would result. The consequences of contravention have to be examined to see whether oppression is sufficiently made out, and if it outweighs the interest of ensuring that the liquidator is able to discharge his statutory functions. The second stage of the test in *Celestial (CA)* involves a balancing exercise. It would not be decided alone by the possible contravention of a law. Here, the Auditors have not shown the consequences of such a contravention. As observed, it is similarly not clear that state secrets are contained in the Documents, particularly given the reticence of the PRC authorities when queried by the lawyers acting for Mazars SG.

No other reason to bar the application

54 No other issues would bar the granting of the application. The scope of the documents asked for, which broadly relates to all documents received by the Auditors in connection with or for the purposes of the Audit Reports, was not beyond what was reasonably required. As observed in *Celestial (CA)*, it is not

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48 YHL, Exhibit YL-1 at para 20. SY, Exhibit SY-2, p 112.

49 SY, Exhibit SY-2, Annex C, p 96 (at Q5(a)).

50 SY, Exhibit SY-2, Annex C, p 97 (at Q5(b)).

uncommon for courts to grant orders requiring parties to disclose all documents in their possession, custody or control relating to the insolvent company in question (at [67]). This was the case in *Celestial (CA)*. In this regard, Mazars SG's complaint that it does not possess all the documents sought falls away. The Liquidator seeks what is in their custody, power or control. What they do not have is to be attested to by way of affidavit. It is not a bar to the grant of the application. No abuse of process is made out either. The application was not sought to gain undue advantages in the litigation process, as observed at [45] above.

Conclusion

55 The orders sought are accordingly granted. Cost directions will be given separately.

Aedit Abdullah
Judge of the High Court

Tay Kang-Rui Darius and Teo Zhiwei Derrick Maximillian (BlackOak LLC) for the liquidator;
Seah Yong Quan Terence, Ong Huijun Christine and Chong Xiu Bing Denise (Virtus Law LLP) for Mazars LLP (first non-party);
Prakash Pillai and Charis Toh Si Ying (Clasis LLC) for Mazars CPA Limited (second non-party).