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

**[2022] SGHC 312**

Originating Application No 670 of 2022

In the matter of Section 204 of the Insolvency, Restructuring and Dissolution Act 2018

And

In the matter of Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)

Between

Song Jianbo

… *Claimant*

And

Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)

… *Defendant*

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# GROUNDS OF DECISION

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# v
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13 December 2022

**Goh Yihan JC:**

1 The claimant was Mr Song Jianbo. This was his application to be given an advantage under s 204(3) of the Insolvency, Restructuring and Dissolution Act 2018 (Act 40 of 2018) ("IRDA"), subject to and conditional upon a creditor funding agreement to recover assets ("the Creditor's Funding Agreement") being entered into between the claimant and the liquidators from Alternative Advisors Pte Ltd ("the Liquidator") of the defendant, Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation) ("the Company").

2 The proposed salient terms of the Creditor's Funding Agreement between the claimant and the Liquidator were these:

(a) that the Liquidator distributes to the claimant:

(i) out of any assets in the Liquidator's hands, which assets the Liquidator has recovered ("the Recovered Assets") by reason of the indemnity given under the Creditor's Funding Agreement ("the Indemnity"); or

(ii) out of the expenses of the liquidation which the Liquidator may recover and for which expenses the claimant has indemnified the Liquidator under the Indemnity up to but no more than 100% of the sums which the claimant may pay under the Indemnity, with the claimant to rank for such distribution in priority to all other unsecured creditors of the Company, including any creditor of the Company who is conferred priority by s 203(1) of the IRDA; and

(b) the Liquidator shall distribute to the claimant out of any Recovered Assets up to, but no more than, 100% of the debt which the Liquidator duly adjudicates as owing by the Company to the claimant to rank for such distribution in priority to all other unsecured creditors of the Company, including any creditor of the Company who is conferred priority by s 203(1) of the IRDA.

3 At the end of the hearing before me on 3 November 2022, I allowed the claimant's application. Despite being served with the relevant papers and being notified of the hearing, the Company was not represented at that hearing. The claimant was represented by Mr Christopher Woo, Ms Wu Siyue, and Ms Nadine Neo from Quahe Woo & Palmer LLC. While probably knowing beforehand from the Company's lack of responses that it would not be turning up for the hearing, the claimant's solicitors tendered a very comprehensive set of written submissions. I found the submissions especially helpful since there

has not been a local reported decision dealing with s 204 of the IRDA. Accordingly, given the comprehensiveness of the claimant's submissions and the lack of relevant case law, I set out my reasons for allowing the claimant's application in these grounds. In doing so, I record my appreciation for the assistance of the claimant's solicitors through their written and oral submissions.

**Background facts**

4 To begin with, I considered the background facts of the claimant's application. The claimant is a judgment creditor of the Company. On 5 August 2022, upon the claimant's application, the Company was ordered to be wound up. After the Liquidator was appointed following this, the claimant informed the Liquidator of various suspicious transactions that had taken place prior to the Company being wound up. The Liquidator thereafter conducted preliminary investigations that included meetings with Mr Li Hua ("Mr Li"), a former director of the Company, on 4 September 2022 and 19 September 2022.

5 On 29 and 30 September 2022, the Liquidator wrote to the Company's creditors to set out the areas that required investigation or possible recovery action. The Liquidator highlighted that the Company had no moneys or assets that could be used to fund those investigative or recovery efforts. As such, the Liquidator requested the creditors of the Company to consider providing the necessary funds for him to do so.

6 On 6 and 10 October 2022, the claimant responded through his solicitors that he was willing to fund the Liquidator's investigative and recovery efforts. The claimant also indicated that he would be willing to provide an indemnity in

respect of the Liquidator's costs and expenses directly incurred as a result of these efforts.

7 On 11 October 2022, the Liquidator informed the claimant that, except for the claimant, none of the Company's other creditors had offered funding. In the circumstances, the Liquidator agreed to the claimant's provision of funding and request for an advantage under the provisions of the IRDA, but subject to the establishment of certain conditions and safeguards. Accordingly, the claimant and the Liquidator agreed to enter into the Creditor's Funding Agreement. Apart from the provision of funding and indemnification of the Liquidator's costs and expenses, this Creditor's Funding Agreement also contained certain safeguards requested by the Liquidator.

**The relevant issues**

8 Given the background facts outlined above, as well as the claimant's application, I considered the following to be the issues that I had to decide:

(a) Should an order under s 204(3) of the IRDA be granted to the claimant?

(b) What should be the terms of such an order under s 204(3) of the IRDA, such as the proportion of the award, and the extent of the claimant's advantage?

(c) What safeguards, if any, should be incorporated into the Creditor's Funding Agreement?

9 In my view, it is helpful to distinguish between (a) whether to grant an order under s 204(3) of the IRDA at all, and (b) the specific terms of such an order (such as the extent of a claimant's advantage), if granted. While the two

issues may overlap to the extent that the specific terms may affect the decision whether to grant an order in the first place, it is conceptually and practically neater to consider them separately.

## Whether an order under s 204(3) of the IRDA should be granted to the claimant

10 I turned then to the first issue, which is whether an order under s 204(3) of the IRDA should even be granted in favour of the claimant.

### *The applicable law*

*The relevant legislative provisions and their purposes*

11 In deciding this issue, I turned first to the applicable law. I began with s 204 of the IRDA, which provides as follows:

> **Funding by creditors**
>
> **204.**—(1) Where in any winding up —
>
> (*a*) assets have been recovered under an indemnity for costs of litigation given by certain creditors;
>
> (*b*) assets have been protected or preserved by the payment of moneys or the giving of an indemnity by certain creditors; or
>
> (*c*) expenses in relation to which a creditor has indemnified a liquidator have been recovered,
>
> the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered, with a view to giving those creditors an advantage over others in consideration of the risks run by those creditors in giving those indemnities or paying those moneys.
>
> (2) Any creditor may apply to the Court for an order under subsection (3) prior to —
>
> (*a*) giving an indemnity for costs of litigation for recovering any assets;

> (*b*) paying any moneys or giving an indemnity to protect or preserve any assets; or
>
> (*c*) indemnifying a liquidator in relation to the liquidator's expenses.
>
> (3) On an application by a creditor under subsection (2), the Court may, for the purpose of giving the creditor an advantage over others in consideration of the risks to be run by that creditor in giving the indemnity or payment for the purposes mentioned in that subsection, grant an order with respect to the distribution of —
>
> (*a*) the assets mentioned in subsection (2)(*a*) that may be successfully recovered;
>
> (*b*) the assets mentioned in subsection (2)(*b*) that may be successfully protected or preserved; or
>
> (*c*) the amount of expenses mentioned in subsection (2)(*c*) that may be successfully recovered.

The accompanying explanatory statement to the Insolvency, Restructuring and Dissolution Bill (Bill No 32/2018) neatly summarises the utility of the provision as such: "Clause 204 provides that the Court may make an order with respect to the distribution of assets recovered, protected or preserved to give an advantage to a creditor who runs certain risks for purposes of recovering, protecting or preserving those assets".

12 Section 204 of the IRDA was based on s 328(10) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act") (the section has since been repealed). This section had simply provided as follows:

> **Priorities**
>
> **328.**— …
>
> …
>
> (10) Where in any winding up assets have been recovered under an indemnity for costs of litigation given by certain creditors, or have been protected or preserved by the payment of moneys or the giving of indemnity by creditors, or where expenses in relation to which a creditor has indemnified a

> liquidator have been recovered, the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risks run by them in so doing.

As can be observed, the main difference between s 204 of the IRDA and s 328(10) of the Companies Act is that the latter only provided for *retrospective* orders, in the sense that the court may make a relevant order only *after* the relevant assets had been recovered, protected, or preserved, or after the relevant expenses had been recovered. In contrast, s 204(2) of the IRDA now allows the court to make, in addition to retrospective orders, *prospective* orders prior to the giving of an indemnity by a creditor. This means that a court can make a relevant order *before* the relevant assets have been recovered, protected, or preserved, or before the relevant expenses have been recovered. I will explain the reason for this difference below.

13 Taking a step back, the broad purpose behind s 204 of the IRDA and s 328(10) of the Companies Act is to cater for the situation where a company under liquidation may not have enough assets to fund the conduct of investigation and litigation for the recovery of assets that may have been improperly disposed of, or to pursue claims against the company's own officers or third parties (see *Report of the Insolvency Law Review Committee: Final Report* (Chair: Lee Eng Beng SC) (2013) at p 72 ("*Final Report*")). In such a situation, the liquidator may be driven by the circumstances to raise funds from creditors, contributories, or litigation funding parties. However, as is obvious, these parties will necessarily assume a significant amount of risk given the state of the company concerned. As such, it may not be sufficient for the funding to be provided merely on terms that the funding parties will be repaid in priority to the payment of any other debts or liabilities of the company. Rather, the funding party may, quite legitimately, seek a proportion of the fruits of recovery

as consideration for funding the investigative or recovery efforts (see *Final Report* at p 72).

14 Quite apart from the liquidator selling part of the fruits of recovery to a funding party pursuant to s 144(2)(*b*) of the IRDA (based on s 272(2)(*c*) of the Companies Act and discussed in the *Final Report* at pp 72–73), the liquidator may seek recourse to s 204 of the IRDA. As mentioned earlier, s 204 is an updated version from the predecessor version in s 328(10) of the Companies Act, which was in turn "based on Australian legislation" (see *Final Report* at p 74). For completeness, there is no counterpart in English legislation: "[t]his subsection enabling the court to give an advantage to such creditors, is not in the English legislation" (see *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2021, Issue 26) at para 5470).

15 In this regard, as noted by the High Court in *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Re Vanguard Energy*") at [54], s 328(10) of the Companies Act is *in pari materia* with s 564 of the Australian Corporations Act 2001 (Cth) ("the Australian Corporations Act") (there are also analogues found in the predecessor provision within s 292(10) of the Companies Act 1961 (No 6839 of 1961) (Aust) and other provisions such as s 450 of the Companies (New South Wales) Code ("the Companies (NSW) Code")). Section 564 of the Australian Corporations Act states as follows:

> **Power of Court to make orders in favour of certain creditors**
>
> Where in any winding up:
>
> (a) property has been recovered under an indemnity for costs of litigation given by certain creditors, or has been protected or preserved by the payment of money or the giving of indemnity by creditors; or
>
> (b) expenses in relation to which a creditor has indemnified a liquidator have been recovered;

> the Court may make such orders, as it deems just with respect to the distribution of that property and the amount of those expenses so recovered with a view to giving those creditors an advantage over others in consideration of the risk assumed by them.

This provision provides for an exception to the usual rule of *pari passu* treatment of unsecured creditors within the respective classes in the winding up and must be justified by strong policy objectives and clear public purposes. The Australian courts have recognised that the policy behind the Australian equivalent is to give the court "a broad and general discretion and one that is to be exercised having regard to the desirability in the public interest of encouraging creditors to indemnify liquidators who desire to pursue claims in the winding up of companies" (see *Re Ken Godfrey Pty Ltd (in liq)* (1994) 14 ACSR 610 at 612).

16 In the landmark decision of the New South Wales Court of Appeal in *State Bank of New South Wales and Another v Brown (as liq of Parkston Ltd (in liq)) and Others* (2001) 38 ACSR 715 ("*State Bank (NSW)*"), Hodgson JA sought to elaborate further upon the two public purposes involved in the encouragement of pursuit of claims by liquidators (at [91]). These were, first, to benefit creditors and shareholders generally (by enhancing the assets for distribution), and second, to recover property from wrongdoers and hence discourage misconduct in relation to companies. These objectives reflect the public interest dimension in proceedings by liquidators. Conversely, it is not the object of the section to encourage litigation for the sake of litigation (at [91]). In my view, Hodgson JA's sentiments also applied equally to the Singapore context.

17 However, as pointed out in the *Final Report* at p 74, the main drawback of s 328(10) of the Companies Act was that a court can make an order only *after*

the relevant assets have been recovered, protected, or preserved, or *after* the relevant expenses have been recovered. Thus, at the point of providing the funds or indemnity, the funding creditors would have no assurance that the court will make an order giving them an advantage over other creditors in consideration of the risks assumed by them. There was also no certainty as to the terms of such an order. This is the inherent weakness of a *retrospective* order. Indeed, this point was also elaborated upon in *Re Vanguard Energy* at [54]:

> … This interpretation of s 328(10) [*ie*, that the court has no jurisdiction to make an order in advance of recovery, protection or preservation] could reduce the usefulness of the provision since creditors might be reluctant to provide funding without first having comfort that the risks they are taking will result in a more advantageous distribution for them. The counter-argument is that it may be premature to make an order in advance as there may not be sufficient information available at that stage to enable [the] court to decide what is just. In any event, the language in s 328(10) is clear in this regard and any changes will have to be effected by Parliament.

Accordingly, the *Final Report* had proposed in Recommendation 5.5, and Parliament eventually accepted (see Second Reading of the Insolvency, Restructuring and Dissolution Bill (Bill No 32/2018), *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 (Edwin Tong Chun Fai, Senior Minister of State for Law)), that s 328(10) should be amended to allow creditors to apply to court for an order *in advance* of providing the funding or indemnity for a prospective order. This then resulted in the enactment of s 204 of the IRDA, and pertinently, the sub-provisions in ss 204(2) and 204(3) of the IRDA.

18 In particular, ss 204(2) and 204(3) of the IRDA now give the court a discretion, with respect to the distribution of assets that may successfully be recovered, protected, or preserved, to grant a creditor an advantage over others in consideration of the risks assumed by that creditor in giving an indemnity or

providing funding for the purposes of recovering, protecting, or preserving assets, or indemnifying a liquidator in respect to its expenses. Importantly, an order made under s 204(3) of the IRDA is a prospective order in that it can be sought before the relevant assets have been recovered, protected, or preserved, or before the relevant expenses have been recovered. The power to make a retrospective order under s 328(10) of the Companies Act is still preserved by s 204(1) of the IRDA.

*The relevant factors in the grant of a prospective order under s 204(3) of the IRDA*

19 Having set out the relevant legislative background, I turned to consider the relevant factors in the grant of a prospective order under s 204(3) of the IRDA.

20 I considered first a preliminary point. Apart from the fact that there are few local authorities which have discussed s 328(10) of the Companies Act (I note that the unreported decision of *Ladbroke Investments S.A. & 2 Ors v Agrosin Private Limited (in liquidation)* HC/OS 710/2019 (4 October 2019) is one of the rare cases in Singapore where the court gave an advantage under s 328(10)), the provision of a prospective order under s 204(3) of the IRDA is a relatively novel development that finds little similarity in other jurisdictions (apart from the Australian jurisdiction). As such, even the foreign cases which discussed the relevant factors would have done so in respect of the grant of a retrospective order and not be directly on point in relation to a prospective order under s 204(3) (in fact, the Australian court will only hear the applications after the successful outcome of the funded proceedings and has no jurisdiction to make an order in advance (see *Bell Group Ltd (in liq) v Westpac Banking Corporation* (1996) 18 WAR 21; *Deputy Commissioner of Taxation v*

*Currockbilly Pty Ltd* (2002) 172 FLR 99)). However, this was not a material difference in my view. As the claimant pointed out, the main differences between a prospective and retrospective order are (a) the information available to the creditors, and (b) the certainty of recovery of any assets. These differences are not so material as to render the factors discussed in respect of retrospective orders irrelevant to prospective orders. As such, I drew on foreign cases that discussed factors relevant to retrospective orders (in effect, based on s 328(10) of the Companies Act and now s 204(1) of the IRDA) and considered that those factors applied equally to the grant of a retrospective order under s 204(3) of the IRDA.

21 I turned to examine the Australian cases which are authoritative. The seminal decision in Australia is *Household Financial Services Pty Ltd v Chase Medical Centre Pty Ltd* (1995) 18 ACSR 294 ("*Household Financial Services*"). In interpreting the relevant provision, Brownie J laid down a non-exhaustive list of factors that the court should take into account when exercising its discretion (at 296–297):

> The last words of s 564 [of the Australian Corporations Act] provide for, and the authorities accent the need to assess the risk run by the indemnifying creditors, for whose benefit an application is made, but the authorities show that it is also appropriate to look to the sum recovered (or the value of the property recovered), the failure of other creditors to provide the indemnity, the proportions between the debts of the indemnifying creditors and the other debts, the public interest in encouraging creditors to provide indemnities so as to enable assets to be recovered, and, generally, the totality of the circumstances; and there has been a tendency in recent times to adopt a more liberal approach, in favour of indemnifying creditors. …

The guidance by Brownie J still remains relevant within the contemporary Australian jurisprudence (see, *eg*, the decision of the Federal Court of Australia

in *Hamilton, in the matter of Aquagenics Pty Ltd (in liq) v Tasmanian Water & Sewerage Corporation Pty Ltd* [2022] FCA 530 ("*Hamilton*") at [68]).

22 Notably the list of factors set out in *Household Financial Services* under s 564 of the Australian Corporations Act is also similarly applied in the context of bankruptcy under s 109(10) of the Australian Bankruptcy Act 1966 (Cth) ("the Australian Bankruptcy Act") – which is the analogue provision in a bankruptcy situation (see Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law and Practice* (Thomson Reuters, 10th Ed, 2018) at p 618). In addressing the relevant factors to be considered in the exercise of discretion conferred, Nicholas J said this in *Re Woodgate (in his capacity as trustee in bankruptcy of the bankrupt estate of Eaton)* [2010] FCA 550 ("*Re Woodgate*") at [5]:

> There are a number of matters that are of significance in an application of this kind which are weighed up when deciding whether to make an order under s 109(10). These include:
>
> - the risk run, and costs incurred, by the indemnifying creditor;
> - the complexity of the proceedings in respect of which the indemnity is given;
> - the sum recovered (or the value of the property recovered);
> - the opportunity afforded to other creditors to provide indemnity;
> - the failure of other creditors to provide indemnity;
> - the proportions between the debts of the indemnifying creditor and the other debts;
> - the opposition or support of other creditors to the application for priority; and
> - the public interest in encouraging creditors to provide indemnities so as to enable assets to be recovered.

23 Having regard then to those Australian cases, and with the appropriate modifications being made (some factors concerning the grant of retrospective orders that would not be applicable when granting a *prospective* order, such as assessing "the sum recovered (or the value of the property recovered)"), I agreed with the claimant that the following general non-exhaustive list of factors should be considered in the grant of a prospective order under s 204(3) of the IRDA:

> (a) the complexity and necessity of the proceedings in respect of which the funding or indemnity is given;
>
> (b) the extent of the funding or indemnity to be provided, and the level of risk to be undertaken and the costs to be borne by the funding creditor;
>
> (c) the failure of other creditors to provide funding or indemnity and whether the other creditors were given the opportunity to do so;
>
> (d) the emergence of other creditors between the making of the order and the date of a distribution under the order to the funding creditor;
>
> (e) the public interest in encouraging creditors to provide funding or indemnity to enable assets to be recovered; and
>
> (f) the presence or absence of any objections from the other creditors, the liquidator, or the Official Assignee.

24 I considered some of these factors in greater detail and elaborate on them further in the course of deciding to grant an order in favour of the claimant under s 204(3) of the IRDA.

***My decision: an order under s 204(3) should be granted in favour of the claimant***

25 In coming to my decision that an order under s 204(3) should be granted in favour of the claimant, I considered the following factors.

*The necessity of the proceedings for which the funding and indemnity are given*

26 First, I considered that the proceedings for which the claimant's funding and indemnity are given, which are the Liquidator's investigative and recovery efforts, were necessary in the present case. These efforts were necessary to drive the liquidation forward. Thus, I agreed with the claimant that there remained a number of outstanding matters for which investigations are required to progress the liquidation and realise the Company's assets.

27 In this regard, it is orthodox for a liquidator to seek funding from creditors with a view to meeting the costs and expenses associated with preliminary investigations into the affairs of the company. This is done to gather more information as the gathering of information is a precursor to progressing any recovery proceedings. In such cases, the indemnification by the creditor would enable the liquidator to further determine whether the company had viable claims to pursue (see the decision of the Federal Court of Australia in *Lombe, Re Babcock & Brown Ltd (in liq)* [2012] FCA 107 ("*Lombe, Re Babcock*") at [26]–[27], where the information garnered from the public examination enabled the liquidator to formulate a more advanced theory of the potential causes of action against certain directors and anticipate any recovery which might result). In my view, there were some grounds for investigation in the present case.

28 In particular, I was satisfied that there were a number of transactions which suggested that the former director, Mr Li, might have removed assets of the Company to place them beyond the reach of the creditors through a series of suspicious transactions, albeit, I emphasise that I was not making any substantive findings in respect of these transactions. But, I was satisfied that these transactions raised a sufficient degree of suspicion to warrant the Liquidator's further investigations. Also, there were ongoing proceedings involving the Company in the High Court for which the Liquidator required legal advice. Finally, the Liquidator had not obtained the Company's complete records, accounts, and bank statements. This hindered the Liquidator's efforts to identify the whereabouts of the Company's assets for distribution to the creditors.

29 These were all matters which the Liquidator needed to deal with so as to progress the Company's liquidation. Equally, these were all matters for which the Liquidator required funding to do. Accordingly, I concluded that proceedings for which the claimant's funding and indemnity were given, which were the Liquidator's investigative and recovery efforts, were necessary in the present case. Put differently, if the Liquidator did not have the funding to attend to these matters, the Company's liquidation would not progress and there would be no assets to be distributed to the creditors. This would not have been satisfactory. As such, the necessity of the Liquidator's investigative and recovery efforts comprised a strong factor in favour of granting the order under s 204(3) of the IRDA.

*The extent of funding and indemnity to be provided and level of risk undertaken by the funding creditor*

30 Second, I considered that the level of risk undertaken by the claimant, considering the extent of funding and indemnity to be provided, as well as other facts, was sufficiently high so as to justify the grant of an order under s 204(3) of the IRDA. The time at which to assess the risk undertaken should be "at the time a commitment is first made to fund that litigation and thereafter throughout the funding period" (see *Re Russell (in his capacity as official liquidator) Parkston Ltd (in liq)* (2000) 35 ACSR 114 at 123).

31 In assessing the level of risk undertaken by the claimant, I am conscious of Hodgson JA's statement in *State Bank (NSW)* (at [94]) that the words "risk assumed" in s 450 of the Companies (NSW) Code refer "primarily to the risk as reasonably perceived by the funding or indemnifying creditors at the time of making payments or giving indemnity". In the context of s 450, which related to a retrospective order, the learned judge also thought that the actual outcome (which would have become known) would be relevant in "assessing what risk would reasonably have been perceived when payments were actually made or when indemnities given" (see also, *Lombe, Re Babcock* at [48]). While the expression "risk assumed" is not found in s 204(3) of the IRDA, it is similar to the expression that does appear, which is "risks to be run". As such, I was of the view that Hodgson JA's view is equally applicable in the local context.

32 In furtherance of Hodgson JA's general guidance as to the "reasonable perception" of risk, I concluded further that the following non-exhaustive list of factors would be helpful in assessing such a reasonable perception in the present case.

33 First, I considered the complexity of the litigation contemplated. In this regard, the risk would be considered to be high where "litigation supported was complex and turned on issues of fact, inherently susceptible to the unpredicted hazards of litigation" (see *State Bank (NSW)* at [39]) or where the actions brought to recover, protect, or preserve the company's assets were "strenuously opposed" (see *Household Financial Services* at 297). In the present case, I was satisfied that the outstanding matters which the Liquidator had to attend to, including the investigations into Mr Li's possible removal of the Company's assets, would turn on issues of fact and which could be rather complex. While I did not know if Mr Li would strenuously oppose such investigative efforts, I was satisfied that Mr Li had not been entirely forthcoming and so a good deal of effort would be needed to uncover what had happened in any event. Accordingly, I assessed the claimant's reasonable perception of risk to be high in consideration of this first factor.

34 Second, I also considered the extent of funding to be provided, and whether the "monies advanced by an indemnifying creditor to fund (for example) speculative litigation may be lost" (see the Federal Court of Australia decision of *Low v Barnet (Trustee)* [2017] FCAFC 60 ("*Low v Barnet*") at [34]). There is a real risk for creditors that the amounts which they ventured would not be recovered when the liquidator had little information to support the potential claims and the creditors who contributed therefore "knew almost nothing" about the case against the company (see *Lombe, Re Babcock* at [49]). In the present case, while the claimant did not advance a precise figure of the funding he was going to provide the Liquidator with, it was clear to me that this figure was likely to be substantial, considering the extent of investigative and recovery efforts required. Moreover, I considered that there was real likelihood that the claimant could end up with nothing in return for his provision of

funding. I concluded thus because at the time of the application, the Company did not even have a bank account, let alone any assets. Accordingly, I assessed the claimant's reasonable perception of risk to be high in consideration of this second factor.

35 Third, I also considered the timing when the claimant provided the funding and indemnity to the Liquidator. In this regard, in the New South Wales Supreme Court decision of *Re Shepherds Producers Co-Operative Ltd (in liq)* [2012] NSWSC 390 ("*Re Shepherds*"), Black J granted an order for the funding creditors to be given an advantage pursuant to s 564 of the Australian Corporations Act because, among others, the "funding was provided by funding creditors at an early stage where success of the liquidators' investigation and subsequent proceedings was by no means assured … [such] that the funding provided to the liquidators would be at risk" and also that "the funding was provided at a time when it was critical" (at [11]). In the present case, the claimant had offered to provide the funding and indemnity at the beginning of the Company's winding up process, which was only ordered in August 2022, before any proper examination of the Company's affairs was done. As such, the claimant would be taking a high risk in providing the funding and indemnity at this early stage because not much was known about the eventual success of the Liquidator's investigative and recovery efforts. Accordingly, I assessed the claimant's reasonable perception of risk to be high in consideration of this third factor.

36 Taken in the round, and in consideration of these three specific factors, I concluded that the level of risk undertaken by the claimant was sufficiently high so as to justify the grant of an order under s 204(3) of the IRDA.

*The failure of other creditors to provide funding when given the opportunity to do so*

37 Third, I considered the failure of the other creditors to provide funding when given the opportunity to do so in the present case. In *Re Shepherds*, Black J considered (at [11]) that where creditors had an opportunity to provide funding but did not do so, that would be a factor in favour of conferring an advantage on the creditors who did provide funds. In the present case, despite the Liquidator having written to the Company's creditors about the provision of funding and an indemnity, only the claimant responded positively. As such, the claimant's willingness to provide funding and an indemnity, in contrast to the Company's other creditors, comprised a strong factor in favour of granting the order under s 204(3) of the IRDA.

38 In this connection, I would like to add that whether or not all creditors were offered an equal opportunity to provide funding is a relevant consideration when the court exercises its discretion (see *Re Glenisia Investments Pty Ltd (in liq)* (1995) 19 ACSR 84 at 87; *Allquip (WA) Pty Ltd (in liq) v Allan* (1997) 25 ACSR 765 at 767). Indeed, if some creditors were not notified of this opportunity to contribute, then it may not be "just" to make the order in favour of the indemnifying creditor only whilst excluding the rest from the process. As a general rule, all of the significant creditors, including those contingent creditors, should be given an opportunity to join in funding recovery claims (see *State Bank (NSW)* at [106]). But as this issue did not arise on the facts of the present case, I say no more about it.

*The public interest in encouraging creditors to provide funding or indemnity to enable assets to be recovered*

39 Fourth, there is a public interest in encouraging a creditor to provide funding when there is some allegation of misfeasance by the former director of the company. Advantage over other creditors has been granted to a creditor in situations involving a case where the creditor's indemnification was provided to support a liquidator in pursuing misfeasance claims against directors such as insolvent trading claims (see the Supreme Court of New South Wales decision in *Jarbin Pty Ltd v Clutha Ltd (In liq)* (2004) 208 ALR 242 ("*Jarbin Pty Ltd*")) or for the recovery of company funds used to discharge the director's personal debt (see the Supreme Court of New South Wales decision in *Re Proficient Building Company Pty Ltd* (2011) 87 ACSR 183). This would go toward the objective of discouraging misconduct in relation to companies (see above at [16]).

40 As I had alluded to above at [28] (without making any substantive findings in respect of these), in the present case, there were a number of alleged suspicious transactions by the former director which took place prior to the winding up of the Company that warranted further investigation. These transactions included the following: (a) from the period between 7 May 2021 and 22 September 2021, Mr Li appeared to have withdrawn or received large sums of money from the Company, and (b) between the period of 2019 and August 2021, the substantial assets and moneys of the Company were transferred to Mr Li's ex-wife through the disposal of a number of properties. Thus, there were a number of alleged transactions which raised a sufficient degree of suspicion that Mr Li, the then-director of the Company, had removed and siphoned assets of the Company in order to place them beyond the reach of the creditors. This was a matter of public importance that the Liquidator needed

to investigate and was a factor in favour of granting the order under s 204(3) of the IRDA.

*The absence of any objections from the other creditors, the Liquidator, or the Official Assignee*

41 Finally, I also considered that there were no objections from the other creditors, the Liquidator or the Official Assignee (see *Lombe, Re Babcock* at [53]: " no one has expressed opposition to the proposed orders. In all of the circumstances, I consider that it is appropriate to accede to the Liquidator's application"; *Re Shepherds* at [12]). In fact, the Liquidator had indicated his support for the claimant's present application.

*Summary*

42 In summary, having regard to (a) the necessity of the proceedings for which the claimant's funding and indemnity were to be given, (b) the high level of risk undertaken by the claimant in providing such funding and indemnity, (c) the failure of the Company's other creditors to provide funding when given the opportunity to do so, (d) the public interest involved, and (e) the absence of objections to the claimant's present application, I concluded that this was an appropriate case to make an order under s 204(3) of the IRDA in favour of the claimant. More specifically, I was satisfied that the claimant should be given an advantage over other creditors in consideration of the risks to be run by him in giving the funding and indemnity for the purposes of recovering, protecting, or preserving the Company's assets.

43 However, this was only part of the issues contemplated by s 204(3) of the IRDA. I next had to consider *how* the assets that may be recovered,

protected, or preserved were to be distributed. This relates to the terms of the order under s 204(3), which I come to next.

**What should be the terms of such an order under s 204(3) of the IRDA**

44 Section 204(3) of the IRDA allows me, for the purpose of giving a funding creditor an advantage over others, to grant an order with respect to the distribution of the assets that may be successfully recovered, protected, or preserved, and also with respect to the amount of expenses that may be successfully recovered. However, s 204(3) is otherwise silent on *how* this order, which is generally to confer an advantage on the funding creditor, should be framed. This is the general question that I explain in this section. There were two issues that I considered at the hearing, namely (a) the extent of the award out of the assets successfully recovered, protected, or preserved that was due to the claimant, and (b) the extent of the claimant's advantage over the other creditors, including over the statutory rights of preferential creditors under s 203(1) of the IRDA.

***The extent of the award***

*The applicable law*

45 The starting point is that the power of the court to grant an advantage to the funding creditor in distribution is limited to the assets that have been protected, recovered, or preserved as a result of the funding from the creditor. Thus, in the Supreme Court of Western Australia decision of *Re Kyra Nominees Pty Ltd (in liq)* (1987) 11 ACLR 767 at 773, Franklyn J, in applying s 290(10) of the Companies Act 1961 (WA) (which is similar to s 204(1) of the IRDA), said this (at 773):

> … In my view it is quite clear from the sub-section that the giving of an indemnity or the payment of money which results in assets being protected or preserved does not give the creditor giving or paying the same any right to an advantage in distribution out of assets other than those so protected or preserved, and that, if such assets, having been recovered in whole or part, are then otherwise expended or distributed by the liquidator the court cannot make up for that fact by ordering a distribution of other assets to give those creditors an advantage over other creditors in consideration of the risk taken by them. A further complication exists in that the funds paid were not entirely applied toward the protection and preservation of the assets the subject of the two actions and to the extent that they were not so applied they cannot be said to have been moneys which protected or preserved the assets in question. …

It has thus been held in Australia that to come within the scope of the section, all that is needed is that the property which has been recovered, protected, or preserved be property which is ultimately distributable in the liquidation of the company (see *Hamilton* at [65] citing *Jarbin Pty Ltd* at [58]). In the local context, the meaning of the relevant "assets" is self-evident from the terms of s 204(3), which refer specifically to the assets mentioned in ss 204(2)(*a*) and 204(2)(*b*), and the expenses mentioned in s 204(2)(*c*).

46 Also, an order to award 100% of assets protected, recovered, or preserved by the liquidator would relate to the debt owed by the company to a funding creditor but not anything beyond that. Thus, in *Low v Barnet*, the appellant, who had funded the trustee's successful recovery of property during the bankruptcy, was paid in full from the proceeds of the recovery proceedings. The appellant was reimbursed the money she had advanced to the trustee to commence the recovery proceedings. However, her claim for payment from the remaining proceeds of the recovery proceedings as a reward for the "personal and financial" assistance she provided was rejected. In the context of s 109(10) of the the Australian Bankruptcy Act, which is the bankruptcy equivalent to

s 204(1) of the IRDA, the Federal Court of Australia held that s 109(10) was not intended to confer an advantage upon the indemnifying creditor beyond the risk assumed. In particular, the court held (at [36]) that the indemnifying creditor should not be conferred a "'windfall' … beyond that which is necessary to give effect to the 'advantage' of the indemnifying creditor over other creditors" and that the payment to her of more than 100% of her proven debt would not be just and equitable (at [94]).

47 In relation to whether it should be the norm for the indemnifying creditors to obtain 100% of the assets potentially recovered, that would depend on the facts and circumstances of each case, though it has been recognised that there is a "very significant evidentiary and persuasive onus which needs to be discharged before an award of 100% of the amount recovered will be appropriate" (see *Jarbin Pty Ltd* at [71]). The court must strive to achieve a just result which offers sufficient incentive to funding creditors, whilst not being punitive to the other non-funding creditors (as the recovered assets ultimately belonged to the insolvent company and its stakeholders as a whole).

48 On some occasions, the court may conclude that the risk assumed by the indemnifying creditor was modest at best. In the Supreme Court of New South Wales decision of *Re Home Corp Projects* [2002] NSWSC 879, the amount contributed by the indemnifying creditor constituted 10% of the costs incurred by the liquidator in the recovery action. The action was eventually settled and the court determined that the liquidator would be justified in paying the indemnifying creditor 10% of its debt with the remaining 90% going to back to the pool for unsecured creditors (at [18]):

> This case is not, in my judgment, one in which priority could be given as to 100% of [the indemnifying creditor's] debt. It provided roughly 10% of the funds needed by the liquidator. It was at risk to that extent, but will recover the sum outlaid. [The

> indemnifying creditor's] encouragement of the liquidator to pursue recovery was minor compared with whatever other factor encouraged him to incur the remaining 90% of the legal costs. I consider that some recognition should be afforded to [the indemnifying creditor] by way of priority. That should, however, be limited to payment of 100 cents in the dollar in respect of 10% of [the indemnifying creditor's] debt, with the remaining 90% ranking for dividend *pari passu* with the debts of other unsecured creditors.

On the other hand, there have been multiple occasions where the indemnifying creditor had to expend large sums of money with all the attendant risks that go with complex factual and legal disputes, or that the indemnifying creditor was the only creditor to respond to the liquidator's urgent call for assistance. In these occasions, the court found it just to award 100% of the net recovery proceedings to the indemnifying creditor (see, *eg*, *Household Financial Services* at 297; *State Bank (NSW)* at [92] and [112] (dismissing the appeal where 100% recovery was granted at first instance); *Re Shepherds* at [11]–[13]).

*My decision: the claimant is entitled to 100% of his debt out of the assets recovered by reason of his funding or indemnity*

49 In the present case, the claimant sought distribution by way of a priority, out of any assets recovered, 100% of the debt which the Liquidator duly adjudicates as owing by the Company to the claimant. I agreed to this request. To begin with, the claimant was not claiming anything beyond the debt which the Liquidator adjudges to be owing to him. This is therefore quite unlike the situation in *Low v Barnet* where the creditor had sought in essence an additional reward for her assistance.

50 Also, the claimant is entitled to be repaid 100% of his debt in priority over the other creditors because the other creditors did not provide funding or an indemnity when offered the chance to do so. I also agreed to this request. In the Federal Court of Australia decision of *Re Woodgate*, albeit in a bankruptcy

context under s 109(10) of the Australian Bankruptcy Act, the indemnifying creditor was granted the entirety of the proceeds of the liquidator's claim against the wrongdoer. This was notwithstanding the fact that the other creditors would receive nothing in satisfaction of their debts. Nicholas J had said this (at [13]):

> … despite being given the opportunity to do so, all other creditors declined to provide any measure of indemnity to the trustee. I am also satisfied that without the indemnity provided by [the indemnifying creditor] the trustee would not have been able to commence the proceedings he brought against [the wrong doer] which resulted in the settlement.

51 In the present case, it was clear that the claimant was the only creditor who was willing to provide funding and an indemnity, and responded to the liquidator's urgent call for assistance. The creditor would likely need to expend large sums of money given the complex factual issues which may arise given the multiple transfers of company assets. Accordingly, I agreed that the claimant is entitled to be repaid 100% of his debt in priority over the other creditors. The next issue I considered then was the extent of the claimant's advantage, in particular over the statutory rights of preferential creditors under s 203(1) of the IRDA.

### *The extent of the claimant's advantage*

#### *The applicable law*

52 In the present case, the claimant not only sought an advantage over the other creditors, but also sought to extend this advantage under s 204(3) of the IRDA in priority to the rights of preferential creditors under s 203(1) of the IRDA. I agreed to this request.

53 To begin with, s 203 of the IRDA, which is derived from s 328 of the Companies Act, sets out the order of priority in which proved debts are to be

paid in a winding up. Section 203(1) prioritises payments to certain preferential creditors. The question before me was whether I had the power to confer an advantage under s 204(3) of the IRDA over the statutory rights of preferred creditors under s 203(1) of the IRDA.

54 I found that I had the power to do so. I reasoned that s 203(1) of the IRDA, similar to its counterpart in Australia (such as s 556(1) of the Australian Corporations Act), is expressed to be "[s]ubject to the provisions of [the IRDA]". Thus, in the Australian context, the Supreme Court of New South Wales in *Australia and New Zealand Banking Group Ltd v TJF EBC Pty Ltd* [2006] NSWSC 25 ("*ANZ*") said this (at [8]):

> I am satisfied that, as a matter of power, the court may, under s 564, make an order that causes the creditor chosen for preferred treatment to rank ahead of any one or more of the creditors having claims within the s 556(1) categories. This is because s 556(1) is expressed to operate "Subject to this Division", that is Div 6 of Pt 5.6. Section 564 is within Div 6. The priorities created by s 556(1) are thus susceptible to inroads made by or pursuant to other Div 6 provisions, including s 564. …

55 I accepted that the reasoning in *ANZ* should apply in the present case. This is because s 203(1) of the IRDA is similarly worded to s 556(1) of the Australian Corporations Act, in that both provisions contain the opening phrase "[s]ubject to the provisions of this [Act/Division]". Accordingly, adopting the words used in *ANZ* (at [9]), I took the view that I had "complete discretion regarding positioning of the whole or any part of the debts of the assisting or indemnifying creditors on the scale of priorities in the winding up and the opening words of s [203(1) of the IRDA] cause any such positioning ordered by the court to have effect despite what would otherwise be the order of priority under s [203(1) of the IRDA]". In other words, the court can confer an advantage under s 204(3) (and s 204(1)) of the IRDA over the statutory rights

of preferred creditors under s 203(1) of the IRDA. Indeed, the Australian courts have gone so far as to make an order under s 564 of the Australian Corporations Act to confer priority on the indemnifying creditor even over the liquidator's own cost and expenses (who ranks first on the list of preferential creditors) (see the Federal Court of Australia decision of *Deputy Commissioner of Taxation v Vintage Gold Investments Pty Ltd (in liq)* [2009] FCA 967).

*My decision: the claimant should be granted an advantage over the statutory rights of preferred creditors under s 203(1) of the IRDA*

56 While I had the power to confer an advantage to the claimant under s 204(3) of the IRDA over the statutory rights of preferred creditors under s 203(1) of the IRDA, there was the separate question of whether I *should* do so. I concluded that I should because the discretion conferred by s 204(3) is wide and, drawing from the statutory language in s 204(1), I needed to make such order as is "just". I noted that while the word "just" does not appear in s 204(3), it must be self-evident that the order which is contemplated by s 204(3) must be made pursuant to such similar considerations of whether it is "just". Were it otherwise, this would result in an inexplicable incongruence between ss 204(1) and 204(3).

57 In considering a "just" order under s 204(3) of the IRDA, I accepted the guidance in *ANZ* (at [14]) that while the relative priorities created and prescribed by the Australian equivalent of s 203(1) of the IRDA will be taken into account as one of the factors going to the question of what is "just", the existence of the scale of priorities does not give rise to any special onus to be overcome. In that case, the court eventually granted the indemnifying creditor an advantage over the Commonwealth (which was the statutorily preferred creditor) because,

among others, the Commonwealth declined to provide funds for the liquidator's recovery efforts when invited to do so.

58 This was similar to the present case. Indeed, the Company's other creditors did not provide funding or an indemnity when given the opportunity to do so. I considered this to be an important fact which led me to decide that it would be "just" to order the claimant should be granted an advantage over the statutory rights of preferred creditors under s 203(1) of the IRDA. Indeed, at bottom, without the claimant's funding and indemnity, the Liquidator would not be able to progress the Company's liquidation at all. There would not be any assets to distribute to the other creditors in that case.

**What safeguards, if any, should be incorporated into the Creditor's Funding Agreement**

59 Finally, I come to the necessary safeguards that should be incorporated into the Creditor's Funding Agreement to balance the interests between the claimant as the funding creditor and the other creditors. The type of safeguards will necessarily differ from case to case, but the parties in the present case had helpfully crafted the necessary safeguards with some general considerations in mind.

60 First, no one creditor, especially the claimant as the funding creditor, should be given the power to dictate how the Liquidator is to exercise his powers in the recovery actions or any settlement claims to the detriment of the other creditors. As such, provisions were made in the Creditor's Funding Agreement for the following consequences:

(a) that the Liquidator is to have full and complete control of the investigations and any recovery action that may be brought; and

(b) that the Liquidator shall retain the sole discretion in respect of decisions to make, accept and/or reject any settlement offer(s) in connection with any recovery actions.

61 Second, notwithstanding the order granted in favour of the claimant under s 204(3) of the IRDA, the other creditors who may be prejudiced by the order should be given an opportunity to bring an appropriate challenge. As such, the prayers sought provided for the claimant, the Liquidator, and/or any other person who is or may be affected by the order to have liberty to have the order reviewed, set aside, or varied.

62 With these safeguards in place, I was further satisfied that it was appropriate to make the order in the terms sought by the claimant pursuant to s 204(3) of the IRDA.

**Conclusion**

63 For the reasons given above, I granted the claimant's application in the present case, with costs of this application to be paid out of the assets of the Company.

64 Once again, I record my appreciation to the claimant's solicitors for their very helpful submissions despite the absence of the Company in the hearing before me.

Goh Yihan
Judicial Commissioner

Woo Yin Loong Christopher, Wu Siyue and Nadine Victoria Neo Su Hui (Quahe Woo & Palmer LLC) for the claimant;
The defendant absent and unrepresented.

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