Solvadis Commodity Chemicals Gmbh *v* Affert Resources Pte Ltd [2018] SGHC 210

Case Number : Companies Winding Up No 17 of 2017 (Summons No 1959 of 2018)

Decision Date : 28 September 2018

Tribunal/Court : High Court

Coram : Audrey Lim JC

Counsel Name(s) : Samuel Wee and Darrell Low (Yusarn Audrey) for the liquidators of Affert Resources Pte Ltd; Dominic Chan and Daniel Ng (Characterist LLC) for Solvadis Commodity Chemicals Gmbh; Joseph Lopez, Vanathi Eliora Ray and Intan Krishanty (Joseph Lopez LLP) for Jakhau Salt Company Pte Ltd; and Lee Ee Yang and Charis Wong (Covenant Chambers LLC) for Recovery Vehicle 1 Pte Ltd.

Parties : Solvadis Commodity Chemicals Gmbh — Affert Resources Pte Ltd

Contract – Illegality and Public Policy – Maintenance and champerty

Insolvency Law – Winding Up – Liquidator – Liquidator's statutory power of sale

28 September 2018

Audrey Lim JC:

Introduction

1 This case concerns a litigation funding arrangement. Specifically, it concerns an arrangement whereby a liquidator assigns the causes of action of a company undergoing liquidation to a third party litigation funder. Similar arrangements have been approved by our courts (see *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 ("*Re Vanguard*") in relation to the assignment of the fruits of a cause of action), and their advantages are immediately apparent from the perspective of liquidators, who would otherwise have to forego claims that a company might have because of a lack of funds (*Re Movitor Pty Ltd (rec and mgr apptd) (in liq) v Sims* (1996) 19 ACSR 440 ("*Re Movitor*") at 444). But such arrangements also raise a host of concerns that strikes fundamentally at the liquidator's duties to the court and to creditors.

2 How then should the court strike a balance between enabling liquidators to fully realise a company's assets and preventing undue trafficking in litigation? Under what circumstances should the court approve such arrangements under the Companies Act (Cap 50, 2006 Rev Ed) ("the Act")? These are the principal questions arising in this application under ss 273(3) and 272(2)(*c*) of the Act, which was brought by Affert Resources Pte Ltd ("the Company") via its liquidators ("the Liquidators").

Background facts

3 The Company was placed under compulsory liquidation on 18 September 2017, pursuant to an application by one of its creditors, Solvadis Commodity Chemicals Gmbh ("Solvadis"). The Liquidators seek the court's approval under s 273(3) of the Act to sell and assign certain properties and things in action of the Company to one Recovery Vehicle 1 Pte Ltd ("RV1") under s 272(2)(c) of the Act, pursuant to a draft Assignment Agreement between the Company and RV1 filed on 13 July 2018 ("the Agreement").

Terms of the Agreement

4 I begin by setting out the terms of the Agreement, under which the Company will assign two categories of rights ("Assigned Property") to RV1:

(a) The first is the Company's right of recovery of receivables that are due to it from a list of specified third parties ("Assigned Receivables"). [note: 1]

(b) The second captures all of the Company's causes of action against any person who has, *inter alia*, conspired with, assisted in or participated with the specified third parties relating to the Assigned Receivables and/or its non-collection ("Assigned Causes of Action"). [note: 2] At this juncture, it is noteworthy that this second category initially gave me some pause for concern because an earlier version of the Agreement included *all* of the Company's causes of action, instead of being limited to those in connection with the Assigned Receivables. This is a point that I will return to later.

5 In return for the Assigned Property (comprising the Assigned Receivables and Assigned Causes of Action), RV1 will pay to the Company an initial price of S$50,000. [note: 3] RV1 will thereafter pay the Company 40% of the first US$10m that it recovers, and 50% of any further sums recovered (less costs and expenses incurred for the recovery process). Such payment will take place within 30 days of RV1 receiving those sums (or part of the sums). [note: 4]

6 For present purposes, the other salient terms of the Agreement are as follows:

(a) The Agreement cannot be further assigned to another person. [note: 5]

(b) If no enforcement or recovery action has commenced, or if no settlement agreement has been reached pertaining to the Assigned Receivables within six months from the date that the Agreement is approved by the court, the Company can purchase the Assigned Receivables from RV1 for S$1. The same applies to the Assigned Causes of Action, save that the timeline is one year instead of six months. [note: 6]

(c) In its recovery process, RV1 cannot commence proceedings in the Company's name or join the Company as party to any proceedings. [note: 7]

(d) RV1 must provide the Company with reports on the progress of its recovery actions including a breakdown of the costs incurred by RV1. Such reports are to be made on a quarterly basis and at any other time as the Liquidators may require. [note: 8]

Facts leading up to the Agreement

7 I now set out the facts leading to the execution of the Agreement.

8 In November 2017, the Liquidators were introduced to Oxford Investments Limited Partnership ("Oxford") by Solvadis. Oxford proposed having the Assigned Property assigned to it (or to a special-purpose vehicle designated by Oxford) for it to take control of the recovery of the Assigned Property in return for a portion of any sums that it successfully recovers. [note: 9]

9 On 24 November 2017, at the Company's first creditors' meeting, the Liquidators informed the

creditors that any potential recovery action against the Company's debtors would be costly and that its current funds were insufficient to fund any potential action. The Liquidators also invited the creditors to provide funding for the Company's recovery actions and informed them about the possibility of third party litigation funding and Oxford's proposal. [note: 10] Several of the Companies' creditors rejected the proposal without providing any suggestions as to how the Company could otherwise procure funding. [note: 11] One of the Company's creditors, Jakhau Salt Company Pte Ltd ("Jakhau") eventually approached the Liquidators and informed them that it had identified a few alternative third party financiers. [note: 12]

10 In March 2018, Oxford incorporated RV1, [note: 13] and the Company and RV1 executed the Agreement on 3 April 2018. [note: 14] Shortly thereafter, the Liquidators were contacted by two companies, Burford Capital and Harbour Litigation Funding. These companies were in the business of providing third party litigation funding, and they were desirous of finding out more about the Company. But the Liquidators informed them that the Agreement had been executed, and the companies declined to pursue the matter further. As things turned out, it was Jakhau that had referred these companies to the Liquidators. [note: 15]

11 Subsequent to the execution of the Agreement, the Company took out this application (Summons 1959 of 2018) on 26 April 2018. Of the Company's ten creditors, [note: 16] only Solvadis expressed clear support of the application while three other creditors have not raised any objections. The remaining six creditors (including Jakhau) expressed objections to the Agreement, but only Jakhau attended the summons hearing before me to oppose the Company's application to approve the Agreement.

Parties' cases

Liquidators' case

12 In seeking the court's approval, the Liquidators acknowledged that their power to sell or assign a company's property is subject to the court's control by virtue of s 272(2)(*c*) read with s 272(3) of the Act. To that end, the Liquidators submitted that the applicable test is whether they have acted in good faith in agreeing to sell the Company's properties or choses in action. They also referred to the Australian case of *Van Der Velde (Liquidators), in the matter of Launcells Feedlot Systems Pty Ltd (in liq))* [2014] FCA 1309 ("*Re Van Der Velde*") [note: 17] which sets out the factors to consider in assessing the *bona fides* of such agreements. These factors broadly include the circumstances under which the agreement was reached, the extent to which the liquidators have taken into account the creditors' concerns and interests, and the degree of control over the company's litigation that the liquidators are relinquishing.

13 In this connection, the Liquidators argued that the Agreement had been reached in good faith, and that the factors in *Re Van Der Velde* are either satisfied in their favour or neutral at worst. They pointed out that the negotiations in reaching the Agreement took place at arms' length, [note: 18] and that other third party funders put forth by Jakhau have been unable to provide any concrete proposals. [note: 19] They also highlighted that the Agreement represented an improvement over the status quo without the Agreement, which is that the Company would otherwise recover nothing due to its insufficient resources to commence recovery actions. [note: 20]

14 The Liquidators submitted that the court should look at the amount of costs likely to be

incurred in the conduct of the action and the extent to which the funder is to contribute to the Company's and opponent's costs incurred in the recovery process, including the scenario where the action is unsuccessful. The Liquidators further submitted that because the Agreement amounts to an outright sale to RV1 of the Company's Assigned Property, RV1 will bear the costs of any recovery action. [note: 21] There will also be no prejudice to the creditors because anything recovered by RV1 will be distributed to the creditors "based on the percentages they hold" as creditors. [note: 22]

15 With respect to the amount of control that they will maintain over the Company's litigation, the Liquidators argued that they are entitled to relinquish control as a corollary of assigning the Company's causes of action because s 272(2)(*c*) of the Act allows them to do so. [note: 23] In any event, the Agreement enjoins RV1 to provide the Liquidators with quarterly updates and at any other time as the Liquidators may require. It also provides a limited period for RV1 to commence recovery efforts, failing which the Liquidators may buy back any Assigned Property for $1, for which no such recovery has been commenced. [note: 24]

Jakhau's case

16 Jakhau objected to the application. It submitted that the Agreement should not be approved because it contravenes the policy against maintenance and champerty, and pointed out that RV1 (a special purpose vehicle with no discernible assets to pursue the Company's causes of actions) [note: 25] will itself be maintained by Oxford. [note: 26] It also highlighted that the Agreement allows RV1 to assign the Assigned Property to third parties that may have no legitimate interest in the Company's litigation against its debtors, and thus enable RV1 to engage in "trafficking in litigation", which is contrary to public policy. [note: 27] However, this latter point turned out to be irrelevant as the final version of the Agreement was amended (with the Liquidators' and RV1's consent) to prevent further assignment of the Assigned Property by RV1 to third parties. [note: 28]

17 Additionally, Jakhau contended that it is impermissible for the Liquidators to completely relinquish control over the Company's litigation to RV1 because s 272(3) of the Act states that a liquidator's exercise of its powers under s 272 is subject to the court's control, [note: 29] and averred to serious concerns over RV1's means to pursue the Company's claims. [note: 30] It also claimed that the Liquidators' conduct had thus far been suspect, alleging that they had been concealing information from the creditors or other potential third party funders. [note: 31] It pointed out that while the Agreement does not prevent the Liquidators from providing updates on RV1's recovery efforts, it does not oblige the Liquidators to do so. [note: 32]

18 Further, Jakhau submitted that the Agreement prejudices the Company's creditors and will expose the Company to adverse costs orders and counterclaims. [note: 33] It also claimed that Solvadis (whose claims against the Company are being funded by Oxford) will benefit from the Agreement as it is likely that in return for RV1 getting 50% to 60% of any recovery effort under the Agreement, Solvadis will only pay a smaller percentage of its own recoveries from the Company to Oxford. [note: 34] Jakhau submitted that RV1 stands to make a grossly excessive profit on the Agreement. [note: 35] The total alleged value of the Company's receivables is about US$31.3m, and RV1 stands to gain about US$16.5m if full recovery were accomplished. However, if RV1's recovery efforts were unsuccessful, the Company would not gain anything from the Agreement.

Issues for consideration

19 The principal question is whether this court ought to approve the Agreement. This in turn entails the consideration of the following issues:

(a) Does s 272(2)(*c*) of the Act permit a sale of a company's right to the recovery of receivables due from its debtors as well as the company's causes of action?

(b) Does the doctrine of maintenance and champerty apply to a liquidator's exercise of its power under s 272(2)(*c*)?

(c) What is the appropriate test to be applied and what are the matters to be considered by the court in approving a liquidator's exercise of its power under s 272(2)(*c*)?

20 The first two issues can be regarded as threshold issues, while the third concerns the substantive question of the factors that this court should consider in determining whether to approve the Agreement. I will therefore address the threshold issues before examining the third.

Threshold issues

Ambit of s 272(2)(c) of the Act

21 I begin with the ambit of s 272(2)(*c*) of the Act, which permits a liquidator of a company to "sell the immovable and moveable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels".

22 In *Re Vanguard*, Chua Lee Ming JC (as he then was) held that the meaning of "property" under s 272(2)(*c*) of the Act is the same as that defined under the Bankruptcy Act (Cap 20, 2009 Rev Ed) (at [23]). He then held that s 272(2)(*c*) captures the sale of the proceeds from a company's causes of action, and observed that the provision also includes the sale of a company's causes of action (at [12(a)] and [24]).

23 I agree with and adopt Chua JC's observations. I note that *Re Vanguard* involved the sale of the *fruits* of a cause of action belonging to the company. In contrast, the present application pertains to the sale of the Company's present and future causes of action alongside the Company's right of recovery against third parties of receivables that are due to the Company (*ie*, the Assigned Property). Chua JC's observations are amply supported in the authorities demonstrating that a liquidator is statutorily empowered to assign a company's causes of actions because they form part of its property (*Cant*, *In the matter of Novaline Pty Ltd (in liq)* [2011] FCA 898 ("*Re Novaline*") at [17] and [21]; Edward Bailey & Hugo Groves, *Corporate Insolvency: Law and Practice* (LexisNexis, 4th ed, 2014) ("*Corporate Insolvency*") at paras 22.57 and 22.60).

24 That being said, where a liquidator exercises his power under s 272(2)(*c*) of the Act to sell the company's property, the subject-matter to be sold must be sufficiently identifiable (*Re Novaline* at [10]–[13]). If the subject-matter sought to be sold is insufficiently identified, the court cannot reasonably exercise its supervisory jurisdiction under s 272(3) of the Act over the liquidator's exercise of its statutory power of sale. As *Re Novaline* makes clear, where causes of action are being sold, the liquidator must identify them with reference to *eg*, extant proceedings, the parties being claimed against, or the offending conduct (at [11]–[12]):

> 11 Applications for Court approval of assignments of causes of action are often made after proceedings have been issued. Proceedings are confined by pleadings which specify the causes of

actions relied upon in the litigation. In those cases, the causes of action are defined by reference to extant proceedings…

12 In the present case, the deed of assignment defines the claims in several ways. Some claims are defined by reference to causes of action, such as breach of statutory duty. Some claims are defined by reference to the conduct of potential parties, such as banking money of the Company into a personal account. And some claims are defined as arising from matters address in the public examination of Mr and Mrs Adams…

25 As alluded to above at [4(b)], I raised a concern at the first hearing of this application in relation to the Assigned Causes of Action. Under the first draft of the Agreement, the Liquidators sought to dispose of "[a]ny and all causes of action". [note: 36] This is very wide, and the ambit of what was to be sold was not sufficiently identifiable. The Liquidators subsequently returned with a revised draft of the Assigned Causes of Action, whereby it sought to assign all causes of action pertaining to the receivables owed to the Company with reference to a defined list of third parties named under the list of Assigned Receivables. In my view, the revised Assigned Causes of Action is clear enough to identify the subject-matter of the assignment, and therefore satisfies the threshold of being sufficiently identifiable. For completeness, the (revised) clause setting out the Assigned Causes of Action provides as follows: [note: 37]

With respect to the receivables / advances owed to the Assignor by Senfer Investments Limited (Jersey), Senfer Investments Limited (Cyprus), Total Alliance Investments Limited and Industries Chimiques du Senegal to the Company [as named under the list of Assigned Receivables], any and all causes of action (including but not limited to conspiracy, fraud, knowing receipt, dishonest assistance, breach of fiduciary duties, restitution, trusts) against any and all parties (including but not limited to the relevant entities / related parties of the Archean Group and/or the relevant members of the Pendurthi family, as well as the directors of the Assignor) who or which have conspired, procured, orchestrated, directed, participated and/or assisted in the transactions (or lack thereof) resulting in / giving rise to the Receivables and/or its non-collection. For the avoidance of doubt, the power to admit / adjudicate the creditors' claims / proofs of debt remain with the Liquidators of the Assignor.

26 In any event, Jakhau did not dispute that an assignment of the Assigned Property is permissible under s 272(2)(*c*) of the Act. But it asserts that public policy dictates that such assignment should be disallowed because it offends the doctrine of maintenance and champerty. [note: 38] It is to this issue that I now turn.

Whether the doctrine of maintenance and champerty applies

27 The definition of maintenance and champerty was endorsed by the Court of Appeal in *Lim Lie Hoa and another v Ong Jane Rebecca* [1997] 1 SLR(R) 775 ("*Lim Lie Hoa*") at [23] (citing *Halsbury's Laws of England* vol 9 (4th Ed) at para 400) as follows:

Maintenance may be defined as the giving of assistance or encouragement to one of the parties to litigation by a person who has neither an interest in the litigation nor any other motive recognised by the law as justifying his interference. Champerty is a particular kind of maintenance, namely maintenance of an action in consideration of a promise to give the maintainer a share in the proceeds or subject matter of the action.

28 I agree with Chua JC in *Re Vanguard* that s 272(2)(*c*) of the Act is a statutory exception to the

doctrine of maintenance and champerty. Accordingly, to determine whether a liquidator's assignment of a cause of action infringes the doctrine of maintenance and champerty, the starting point is to determine the subject-matter of sale under s 272(2)(*c*). If the sale or assignment falls within the liquidator's statutory power of sale, then it follows that such sale is authorised by statute despite the rules as to maintenance and champerty (*Re Vanguard* at [27]–[29]). To hold otherwise would be to frustrate the object of the legislation if the doctrine of maintenance and champerty prevented a liquidator from discharging his statutory duty to realise the company's assets to advantage, and from exercising his statutory powers of sale to pursue meritorious claims that might otherwise go unpursued (*Re Movitor* at 444–445).

29 In this connection, I also agree with Chua JC in *Re Vanguard* (at [30]) that for the purposes of s 272(2)(*c*) of the Act, it matters not whether the assignee stands to make a profit from the sale of a company's property. Litigation funders would realistically and sensibly expect to be compensated for the risks that they take in funding an insolvent company's litigation. To expect that litigation funders should not seek a profit is commercially unrealistic and would stifle the ability for insolvent companies to pursue meritorious claims and thereby prejudice creditors. As Drummond J noted in *Re Movitor*, agreements such as the one in the present case "will often serve a good public purpose" (at 444).

30 That said, the liquidators' powers to sell the company's property is subject to the court's control by virtue of s 272(3) of the Act, and the court should take into account various factors in determining whether to permit a liquidator to exercise its statutory powers under s 272(2). This includes the level of profit that a litigation funder may expect to earn, a matter that I will return to. At this juncture, it suffices to note that the assignment of causes of action under s 272(2)(*c*) is a statutory exception to the doctrine of maintenance and champerty. To that extent, that RV1 can expect to turn a profit from the Agreement does not preclude the approval of such an agreement.

31 Before departing from this issue, I note that Jakhau contended that the doctrine of maintenance and champerty was also offended because RV1 is allegedly being funded by Oxford. I do not think that there is any merit in this contention. Putting aside the veracity of Jakhau's contention *vis-à-vis* RV1 and Oxford, the commercial arrangement between the latter two is not before this court. It would thus be improper for me to make any findings as between the two entities, much less rely on their relationship to impugn the propriety of the Agreement, which is between the Company and RV1 (*Lim Lie Hoa* at [55]).

Conclusion

32 To sum up, s 272(2)(*c*) of the Act permits liquidators to assign sufficiently identifiable causes of action to a third party for consideration. It is also a statutory exception to the doctrine of maintenance and champerty. In this case, the Assigned Property is sufficiently identifiable and falls within the ambit of s 272(2)(*c*). The Agreement therefore does not run afoul of the doctrine of maintenance and champerty.

33 I should also add that what the Liquidators sought to sell (*ie*, the Assigned Property) does not include causes of action that arise only in the event of a liquidation, and that can thus only be pursued by a liquidator pursuant to a statutory power conferred on him, such as the right to bring proceedings under avoidance law, *eg*, transactions at an undervalue. It has been held that rights of action vesting solely in a liquidator of a company in liquidation cannot be assigned or sold to a third party (see *Re Oasis Merchandising Services Ltd* [1998] Ch 170 at 186–187 and *Neo Corp Pte Ltd (in liquidation) v Neocorp Innovations Pte Ltd* [2006] 2 SLR(R) 717 at [24]; see also *Manharlal Trikamdas Mody and another v Sumikin Bussan International (HK) Ltd* [2014] 3 SLR 1161 at [54]–[56], albeit in the context of bankruptcy).

***Bona fides* of the Agreement**

Factors to be considered

34 Section 272(3) of the Act provides that a liquidator's power under s 272(2) is subject to the court's control. In determining whether a liquidator's exercise of its power under s 272(2) should be subject to the court's intervention, the overarching consideration should be whether the liquidator, in exercising those powers, is acting *bona fide* or in good faith.

35 I take as my starting point that the court does not readily interfere with a liquidator's discretion (*Corporate Insolvency* at para 4.38). In *Leon v York-O-Matic Ltd* [1966] 1 WLR 1450, the English High Court considered s 245(2)(*a*) of the Companies Act 1948 (c 38) (UK), which is materially similar to s 272(2)(*c*) of the Act. It held (at 1454–1455) that the court would not intervene with the liquidator's exercise of his power unless what he was doing was "so utterly unreasonable and absurd that no reasonable man would so act". The relevant question is whether the liquidator acted *bona fide* in exercising its discretion. This proposition was accepted by Woo Bih Li J in *MWA Capital Pte Ltd v Ivy Lee Realty Pte Ltd (in liquidation)* [2017] SGHC 216 at [37]. Similarly, in *Low Hua Kin v Kumagai-Zenecon Construction Pte Ltd (in liquidation) and another* [2000] 2 SLR(R) 689 ("*Kumagai-Zenecon*") at [48], the Court of Appeal emphasised that the court should be slow to intervene in a liquidator's commercial decision in circumstances where bad faith has not been shown:

> [T]he court must approach the matter on the basis that the provisional liquidators, being appointed by the court, are recognised as having both the qualifications and access to the multiplicity of information for making such a decision, and, except where *bad faith is established*, will treat the provisional liquidators' decision as a proper one, unless the court is satisfied that they *acted in a way which no reasonable provisional liquidator should have acted*... It is thus not proper for the court to intervene and substitute its own decision for that of the provisional liquidators. [emphasis added]

36 That the court does not readily interfere with a liquidator's commercial decisions and exercise of its powers can also be found in the Australian authorities. In *Re Addstone Pte Ltd (in liq)* (1998) 83 FCR 583 ("*Re Addstone*"), the Federal Court of Australia considered s 477(2)(c) of the Corporations Law 1989 (Cth) (which is materially similar to s 272(2)(*c*) of the Act) in relation to the liquidator's power to enter into transactions with a view to procuring funding for the conduct of certain proposed litigation on behalf of the companies under liquidation. Under the agreement in *Re Addstone*, the liquidator would obtain a loan facility from a bank to fund its legal and other expenses in pursuing various claims. The loan facility would be insured by the funder (in the event that the claims were unsuccessful) in return for the funder receiving a proportion of any successful recovery by the liquidator on the claims. In approving the proposed arrangement, the Federal Court held that its role was not to "second guess" the liquidator's judgment and to substitute its own views. Instead, the question is whether the liquidator is acting *bona fide* in entering into such arrangements (at 594).

37 As should be immediately apparent, the principle in *Re Addstone* is consonant with the principle as set out in *Kumagai-Zenecon* that the court ought to be slow in interfering with a liquidator's commercial decision where bad faith has not been established. *Re Addstone* has also been endorsed in subsequent cases including *Jones, Saker, Weaver and Stewart (Liquidators), in the matter of Great Southern Limited (in liq) (Receivers and Managers Appointed)* [2012] FCA 1072 ("*Re Great Southern*") and more recently in *Re Van Der Velde*.

38 Next, in ascertaining whether the liquidators have acted *bona fide* or in good faith, the Australian courts have enumerated a number of non-exhaustive and non-determinative factors to be

taken into account (*Re Great Southern* at [32]; *Re Van Der Velde* at [15]), namely:

(a) the nature and complexity of the matter and the risks involved in pursuing the claims;

(b) the prospects of success of the proposed action;

(c) the amount of costs likely to be incurred in the conduct of the action and the extent to which the funder is to contribute to the costs;

(d) the extent to which the funder will contribute towards the opponent's costs in the event that the action is not successful or towards any order for security for costs;

(e) the circumstances surrounding the making of the contract, including the ability of the funder to meet its obligations;

(f) the level of the funder's premium;

(g) the extent to which the liquidators have canvassed other funding options and consulted with the creditors of the company;

(h) the interests of the creditors and the effect that the funding agreement may have on the company's creditors;

(i) possible oppression to another party in the proceedings; and

(j) the extent to which the liquidators maintain control over the proceedings.

39 I find that the above factors serve as a useful guide in determining the *bona fides* of a liquidator's exercise of its powers under s 272(2)(*c*) of the Act. As noted in *Re Great Southern* at [31] and *Re Van der Velde* at [15]–[16], not every factor will be pertinent in every case. For example, the question of oppression to another party will not always arise. I will thus only refer to those factors in broad categories where relevant to the present case and at the same time address Jakhau's concerns in objecting to the Agreement.

Nature and complexity of matter and prospects of success

40 I considered at the outset the nature and complexity of the matters, the risks involved, and their prospects of success.

41 In this regard, the Liquidators submitted that they represent neutral factors because the Company lacked the resources to ascertain the complexity of the matters involved. [note: 39] On the facts, it was not disputed that at the first creditors' meeting in November 2017, the Liquidators informed the creditors that any potential recovery action against the Company's debtors would be costly and that the Company had insufficient funds to commence recovery actions. [note: 40] The Liquidators had also invited the Company's creditors to provide funding. But to date, no creditor has come forth to offer any funding. [note: 41]

42 I agreed with the Liquidators that these factors were neutral at best. I also add that the clause setting out the Assigned Causes of Action indicates that there are potential claims premised on causes of actions such as conspiracy and fraud (see [25] above). Such causes of actions can be complex and costly to investigate and pursue, which would be considerations in favour of approving

the Agreement given that the Company does not have the resources to pursue any potential claims. Nevertheless, given the current paucity of evidence in relation to these potential claims, I found that these factors did not assist me in determining the *bona fides* of the Agreement.

Amount of costs likely to be incurred

43 The next category of factors that I considered was the amount of costs likely to be incurred, and the extent to which RV1 would bear them. In this regard, the Liquidators submitted that because the Agreement entails an outright assignment and sale of the Assigned Property to RV1, RV1 will bear all the costs (including those arising from adverse costs orders) incurred in the course of the recovery actions. [note: 42]

44 As the Company is selling to RV1 its causes of action and its right to pursue various debtors, RV1 will be the party to any recovery action taken in relation to the Assigned Property. RV1 will therefore bear the costs of the recovery process. The Company will not have to bear any costs in the recovery process, unlike in the case where the fruits of a cause of action are sold to the litigation funder after such fruits have been recovered. Accordingly, there is no detriment to the Company in that it does not have to incur any costs in any recovery process which will be conducted by RV1. Further, in the event that any action pursued by RV1 is unsuccessful, RV1 would have to bear any adverse costs orders as it (and not the Company) would be a party to the action. In this regard, the Agreement expressly provides that RV1 cannot commence proceedings or enforcement or recovery actions in the Company's name or join the Company as a party to any proceedings. I was satisfied that in this way, the Company would not be affected by any adverse costs orders arising from recovery actions undertaken by RV1.

Circumstances surrounding the Agreement

45 Here, I consider the circumstances under which the Agreement was reached. In my view, this involves considering factors such as the extent to which the Liquidators have considered other potential funders, the degree to which the creditors' views had been taken into account and RV1's ability to meet its obligations under the Agreement.

46 In relation to the negotiations in reaching the Agreement, the Liquidators contended that their negotiations with Oxford were at arms' length and was a commercial decision on their part. They also pointed out that since the original version of the agreement, the Agreement has been amended to take into account the creditors' and this court's concerns. [note: 43] On the other hand, Jakhau cast a number of aspersions on the Liquidators' conduct, and argued that the Liquidators concealed information from the creditors and failed to engage with other potential third party litigation funders before entering into the Agreement with RV1. [note: 44]

47 I found that there was no merit in Jakhau's objections. It is not disputed that the Liquidators informed the Company's creditors as early as November 2017 that the Company had insufficient funds to pursue recovery actions. It is also not disputed that the Liquidators informed the creditors that they were exploring the possibility of third party litigation funding, and extended to them an invitation to fund the Company's litigation. [note: 45] Since April 2018, the Liquidators have also been in touch with some third party litigation funders, all of whom have either expressed no interest in providing funding or have not provided concrete proposals. [note: 46] In any event, the absence of alternative quotations for litigation funding does not preclude the court from approving the Agreement, as the court is able to make its own assessment of the reasonableness of the level of a funder's premium, a point which I will turn to next (see *Re ACN 076 673 875 Ltd* (2002) 42 ACSR 296). In the light of

these facts, I did not think that there was anything to impugn the propriety of the Liquidators' conduct.

48 In relation to RV1, Jakhau submitted that there were serious concerns about its ability to pursue recovery actions and to meet its obligations under the Agreement because RV1 has ostensibly no assets to its name. [note: 47] I noted that RV1 was specially incorporated for the purposes of the Agreement. [note: 48] Jakhau's concerns as to its abilities were therefore not wholly unwarranted. To alleviate those concerns, the Agreement was amended to include Oxford as a party, with Oxford agreeing to guarantee RV1's obligations under the Agreement. [note: 49] In my view, it may be difficult to enforce any guarantee or indemnity extended by Oxford given that it is based out of jurisdiction. [note: 50] Nevertheless, I bore in mind that any difficulty that RV1 encounters in its recovery actions is tempered by the fact that the Company may buy back any Assigned Receivables and Assigned Causes of Action for S$1 if RV1 fails to commence recovery within one year or six months, as the case may be. Hence, if RV1 does not pursue the Assigned Property for whatever reason, the Company is not completely shut out from so doing (assuming that it has the necessary resources to do so).

Level of funder's premium

49 Moving on to RV1's premium, Jakhau also submitted that the Agreement ought to be disallowed on the basis that RV1 stood to make a "grossly excessive profit" from the Agreement. To that end, it cited *Re Movitor* for the proposition that a liquidator's exercise of its power of sale might not be *bona fide* if the court finds that the purchaser is "likely to make a *grossly* excessive profit, *at the expense of the company*" (emphasis added). It argued that RV1 stands to gain approximately US$16.5m (which represented half of the Company's alleged receivables), and that the Company would not gain anything at all if RV1 fails to recover anything. [note: 51]

50 It must be reiterated that the ultimate bargain struck as between RV1 and the Company involves commercial considerations for which the court should not readily substitute its own opinion. Moreover, as the Liquidators pointed out, [note: 52] the UK and Australian courts have approved similar agreements under which the insolvent company was entitled to less than half of the recovered proceeds. In *Buiscex Ltd and Another v Panfida Foods Ltd (in liq)* (1998) 28 ACSR 357, the Supreme Court of New South Wales approved a litigation funding agreement for the fruits of causes of action, under which the funder would fund investigations by the liquidators into the company's affairs for a certain period and the funder would have an option to acquire 75% interest in the net amounts recovered on the company's behalf in any cause of action brought on behalf of the company. Although the proposed agreement would give only 25% of the net return of any proceedings to the company, the court did not find this to be unreasonable. In *Ramsey v Hartley and others* [1977] 2 All ER 673, a cause of action was assigned to the funder with the assignor being entitled to 35% of the recovery proceeds. The English Court of Appeal accepted that the promise by the assignee to pay the assignor 35% of the net proceeds of the action was good valuable consideration.

51 On our facts, the Company stood to gain 40% to 50% of whatever RV1 manages to recover. This is in stark contrast to the status quo, which is that *the Company recovers nothing*. Moreover, as I stated earlier, no other third party litigation funder has offered a better deal than the one captured in the Agreement. At the end of the day, there is no hard and fast rule on the appropriate level of the funder's premium and all relevant factors must be considered holistically. In the circumstances, I did not think that the profit that RV1 stands to gain was a reason not to approve the Agreement. Moreover, it was difficult to see how RV1 stands to make a grossly excessive profit *at the Company's expense*.

Degree of control

52 The consideration here is the degree of control that the Liquidators will have over RV1's conduct of the recovery actions. In this respect, Jakhau submitted that the Liquidators cannot completely relinquish control and oversight over the company's legal proceedings. [note: 53] The Liquidators, on the other hand, pointed out that relinquishing control is a necessary and permissible corollary to the fact that the Agreement entails an assignment of the Assigned Property (as opposed to the fruits of causes of action). [note: 54]

53 I agreed with the Liquidators that they are entitled to relinquish control over the proceedings once the Assigned Property has been assigned, as this would be a permissible corollary to an agreement which entails an assignment of a cause of action as opposed to the fruits of a cause of action (see also *Corporate Insolvency* at para 22.60). Further, RV1 has a vested interest in ensuring that any recovery by litigation or otherwise would be properly conducted. It would otherwise be expending costs and effort in futility.

54 Moreover, this is not a case where the Liquidators will be unable to monitor RV1's progress. The Agreement provides that RV1 is to provide quarterly updates to the Liquidators, who are also entitled to seek updates on a more frequent basis. As stated earlier, the Agreement, as amended, also prevents RV1 from further assigning the Assigned Property. Additionally, if RV1 does not commence recovery action in relation to the Assigned Receivables or Assigned Causes of Action within the stipulated six months or one year respectively, the Liquidators have the option to buy back the Assigned Receivables or Assigned Causes of Action (as the case may be) for a nominal sum of $1. I was therefore satisfied that there is nothing untoward about letting RV1 decide how it should go about conducting the recovery actions.

Other considerations and prejudice

55 As noted above at [38], the factors set out in *Re Great Southern* and *Re Van Der Velde* are not exhaustive. I thus move on to examine the other potential considerations. In this respect, I noted Jakhau's contention that the Agreement prejudices the Company's creditors in favour of Solvadis (whose claims against the Company are being funded by Oxford). [note: 55] But not only is that contention pure conjecture and baseless, it is also difficult to comprehend. Any amount eventually recovered by RV1 and paid to the Company would be distributed to the creditors in accordance with the insolvency laws and there is no evidence to suggest that the Liquidators would act otherwise.

56 As for Jakhau's allegation that the Agreement will expose the Company to counterclaims, [note: 56] I found that this objection had no merit. In this regard, I agreed with Solvadis' submission that a counterclaim is "merely a procedure to allow an action by way of cross-demand to be brought in the same proceedings" (Greg Tolhurst, *The Assignment of Contractual Rights* (Hart Publishing, 2nd Ed, 2016) at para 8.88). [note: 57] Put simply, any counterclaim brought by a third party against the Company in proceedings initiated by RV1 would be no different from a *claim* brought by a third party against the Company.

57 I make a final observation on public policy considerations, which were briefly alluded to by Chua JC in *Re Vanguard* at [46] in his discussion of the doctrine of maintenance and champerty, and of the circumstances under which assignments of bare causes of action (or of its fruits) will be struck down. As he noted, the relevant policy where assignments of bare causes of actions are concerned is "that of protecting the purity of justice and the interests of vulnerable litigants". In my view, neither of

these interests are contravened by the Agreement, and the Company is by no means a vulnerable litigant.

58 In any event, the court exercises a measure of control over such arrangements by considering a number of factors in determining whether liquidators have acted *bona fide*. In this regard, I have also ensured that safeguards were put in place in the Agreement to protect the interests of the Company's creditors and after taking into consideration Jakhau's concerns. This includes the following:

(a) The Agreement cannot be further assigned to another party by RV1.

(b) RV1 cannot commence proceedings in the Company's name or join the Company as a party to any proceedings. This also ensures that the Company is not subject to unnecessary risks and expenses in RV1's recovery process.

(c) RV1 may only enter into a settlement agreement with third parties (in any recovery action) on the recommendation of legal advisors. This also ensures that a certain level of check is undertaken by lawyers in regard to any settlement, as some of the benefit is ultimately to accrue to the Company.

(d) Any recovery proceeds, which the Company is entitled to, is paid over to the Company within a certain period. This also ensures that the Company will receive any fruits of a recovery action in a timely manner.

(e) The Company will have the option to repurchase the Assigned Property (at a nominal sum) if RV1 is not sufficiently expeditious in its conduct of the recovery actions. This enables the Company (assuming it has the resources) to take recovery action if RV1 does not do so.

(f) To enable the Liquidators to monitor RV1's recovery actions, RV1 has to provide quarterly updates to the Liquidators, who are also entitled to seek updates on a more frequent basis.

(g) The Agreement cannot be modified or amended without the approval of the creditors or the court.

Additionally, the Liquidators have also agreed to provide the creditors updates on the progress of RV1's recovery efforts on a quarterly basis, as per Jakhau's request, and I thus ordered accordingly.

Conclusion

59 In the round, agreements such as the present one must be balanced against the reality that an insolvent company may not have the ability to pursue meritorious claims on its own and recover potentially substantial assets which are for the ultimate benefit of its creditors. Indeed, in the present case, the Company stated that it did not have the resources to do so, and the creditors that objected to the application have similarly not provided any form of positive assistance in resources to pursue such recovery (unlike in the case of *Re Vanguard* where the shareholders of the Company were the assignees). Additionally, despite the amount of time and notice given by the Liquidators, the creditors have also not been able to procure another funder that was willing to provide a concrete alternative proposal.

60 The simple point is this: with the assignment, the Company stands to gain immediately with a S$50,000 upfront payment; without the assignment, the Company stands to gain nothing at all. At the end of the day, to prevent such arrangements would shut out a lot of insolvent companies from

pursuing legal remedies against its debtors (unless the contributories or creditors are prepared to fund such recovery process). Where a third party litigation funder is prepared to step in, one would obviously expect it to take a share in the recovery process for the risks that it takes. As I note above at [29] and [49]–[51], any profit that a third party funder may expect to make from such arrangements does not detract from the purity of justice if such profits do not come at the company's expense. In my view, allowing such arrangements serves a public interest so long as they are executed and negotiated in good faith. As observed in *Re Vanguard* at [46], it is "undeniable that litigation funding has an especially useful role to play in insolvency situations".

61 For the foregoing reasons, I approved the Agreement. With regard to costs, I ordered that they were to be borne by RV1 as provided for under the Agreement.

[note: 1] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at p 20.

[note: 2] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 21–22.

[note: 3] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at p 6.

[note: 4] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 6–7.

[note: 5] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at p 15.

[note: 6] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 7–8.

[note: 7] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 10–11.

[note: 8] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 11–12; Minute Sheet of 29 August 2018.

[note: 9] Abuthahir s/o Abdul Gafoor's 2nd Affidavit dated 26 April 2018 (Abuthahir's 2nd Affidavit) at paras 6–8 and pp 65–68.

[note: 10] Abuthahir's 2nd Affidavit para 9.

[note: 11] Abuthahir's 2nd Affidavit at paras 11–12.

[note: 12] Abuthahir's 2nd Affidavit at paras 21 and 24.

[note: 13] Abuthahir's 2nd Affidavit at para 25.

[note: 14] Abuthahir's 2nd Affidavit at para 31(a).

[note: 15] Abuthahir's 2nd Affidavit at para 31(b)–(c).

[note: 16] Liquidators' written submissions ("WS") at para 13.

[note: 17] Liquidators' WS at para 16.

[note: 18] Liquidators' WS at para 24; Abuthahir's 2nd Affidavit at paras 15, 17 and 19.

[note: 19] Liquidators' WS at para 33.

[note: 20] Liquidators' WS at para 38; Abuthahir's 2nd Affidavit at para 38.

[note: 21] Liquidators' WS at para 22.

[note: 22] Liquidators' WS at para 44(b).

[note: 23] Liquidators' WS at para 49(c).

[note: 24] Liquidators' WS at para 50; Abuthahir's 2nd Affidavit at para 39.

[note: 25] Jakhau's WS at para 61.

[note: 26] Jakhau's WS at paras 17–18.

[note: 27] Jakhau's WS, paras 21–29.

[note: 28] Minute sheet dated 2 July 2018.

[note: 29] Jakhau's WS at paras 30–39.

[note: 30] Jakhau's WS at paras 52–63.

[note: 31] Jakhau's WS at paras 82–87.

[note: 32] Jakhau's WS at paras 43–46 and 50.

[note: 33] Jakhau's WS at paras 64–71.

[note: 34] Jakhau's WS at paras 72–76.

[note: 35] Jakhau's WS at paras 78–81.

[note: 36] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at p 21.

[note: 37] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at p 22.

[note: 38] Minute sheet dated 2 July 2018.

[note: 39] Liquidators' WS at paras 18–19.

[note: 40] Abuthahir's 2nd Affidavit at para 9.

[note: 41] Abuthahir's 2nd Affidavit at para 40.

[note: 42] Liquidator's WS at paras 21–23.

[note: 43] Liquidators' WS at para 24; Abuthahir's 2nd affidavit at paras 15, 17 and 19.

[note: 44] Jakhau's WS at paras 82–87; Ranganathan's Affidavit at para 27.

[note: 45] Abuthahir's 2nd Affidavit at para 9.

[note: 46] Abuthahir's 3rd Affidavit dated 4 June 2018 at paras 16–24; Liquidators' Letter dated 13 July 2018; Liquidators' WS at para 33.

[note: 47] Jakhau's WS at paras 60–62.

[note: 48] Damien John Prentice's 2nd Affidavit dated 4 June 2018 ("Prentice's 2nd Affidavit") at para 6.

[note: 49] Draft Agreement in Annex C of Liquidators' Letter (13 July 2018) at pp 9–10.

[note: 50] Prentice's 2nd Affidavit at para 5.

[note: 51] Jakhau's WS at paras 78–81.

[note: 52] Liquidators' WS at para 28.

[note: 53] Jakhau's WS at para 35.

[note: 54] Liquidators' WS at para 47.

[note: 55] Jakhau's WS at paras 72–77.

[note: 56] Jakhau's WS at paras 64–71.

[note: 57] Solvadis' WS on Assignment, Set-Off and Counterclaims at para 8(4).