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

Originating Summons No. 666 of 2020 (Summons No. 4317 of 2020)

Between

Ocean Tankers (Pte) Ltd
(under judicial management)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

Originating Summons No. 704 of 2020 (Summons No. 4318 of 2020)

Between

Hin Leong Trading (Pte) Ltd
(under judicial management)

… *Applicant*

And

Rajah & Tann Singapore LLP

… *Respondent*

GROUNDS OF DECISION

[Civil procedure] — [Pleadings] — [Striking out]

[Companies] — [Receiver and manager] — [Judicial management order]

[Companies] — [Directors] — [Powers]

TABLE OF CONTENTS

Ocean Tankers (Pte) Ltd (under judicial management)
v
Rajah & Tann Singapore LLP and another matter

[2021] SGHC 47

General Division of the High Court — Originating Summons No. 666 of 2020 (Summons No. 4317 of 2020) and Originating Summons No. 704 of 2020 (Summons No. 4318 of 2020)
Kannan Ramesh J
4 November 2020

25 February 2021

Kannan Ramesh J:

Introduction

1 In these proceedings, the applicants in Originating Summons Nos 666 and 704 of 2020 ("OS 666" and "OS 704" respectively and "the Injunction actions" collectively), Ocean Tankers (Pte) Ltd ("OTPL") and Hin Leong Trading (Pte) Ltd ("HLT") respectively, sought injunctions against the respondent Rajah & Tann Singapore LLP ("R&T"). The injunctions were to restrain R&T from:

(a) advising and acting for OTPL and HLT in Originating Summons Nos 452 and 417 of 2020 ("the JM applications"), which were applications for judicial management orders against the companies; and

(b) advising and acting for the interim judicial managers and the judicial managers of OTPL and HLT, if they were appointed.

2 Prior to the filing of the Injunction actions, interim judicial managers were appointed on the applications of OTPL and HLT. The interim judicial managers thereafter retained the services of R&T. It would appear that as a result, the Injunction actions were filed. The directors of OTPL and HLT, Mr Lim Chee Meng ("Mr Evan Lim") and Ms Lim Huey Ching ("the Lims" collectively), procured OTPL and HLT to file the Injunction actions. However, they did not procure OTPL and HLT to seek interim injunctions pending the disposal of the Injunction actions. The JM applications were subsequently granted and the interim judicial managers of OTPL and HLT were appointed the judicial managers of the companies. The judicial managers of OTPL and HLT also retained the services of R&T.

3 Subsequently, R&T applied in Summons Nos 4317 and 4318 of 2020 ("the Striking-Out applications") to strike out the Injunction actions under O 18 r 19(1)(*a*), (*b*) or (*d*) or alternatively, under O 92 r 4 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("Rules"). The applications were filed on the basis that:

(a) the Lims, as directors of OTPL and HLT, did not have the standing, power or authority to cause the companies to commence and proceed with the Injunction actions; and

(b) the Injunction actions disclosed no reasonable cause of action and/or were scandalous, frivolous or vexatious and/or were an abuse of the process of the court.

4 Shortly before the hearing of the Striking-Out applications, Mr Lim Oon Kuin ("Mr O K Lim") and the Lims applied in Summons Nos 4429 and 4417 of

2020 ("the Joinder applications") to add themselves as parties to the Injunction actions.

5 The Striking-Out applications and the Joinder applications were heard on 4 November 2020. I allowed the Striking-Out applications and struck out the Injunction actions on the basis the Lims did not have standing as directors of OTPL and HLT to cause the companies to bring them. Further, I disallowed the Joinder applications. OTPL and HLT have appealed against my decision on the Striking-Out applications. I set out the full grounds for my decision in respect of the Striking-Out applications. For completeness, I should mention that Mr O K Lim and the Lims sought leave to appeal my decision on the Joinder applications. The leave applications were heard on 8 February 2021 and I declined to grant leave.

Background

6 HLT is in the business of oil trading. OTPL is a ship chartering and management company. OTPL and HLT's businesses were deeply inter-dependent. The two companies were part of a group of companies with interlocking business interests that were owned and managed by the Lim Family. Mr O K Lim is the patriarch of the Lim Family. He and his two children, the Lims, are the sole shareholders of OTPL and HLT. At all material times, the Lims were also the directors of OTPL and HLT. Mr O K Lim was a director of both companies until he stepped down on 17 April 2020. In or around the first quarter of 2020, HLT encountered financial difficulties and as a result, was unable to meet its debt obligations. On 8 April 2020, HLT engaged R&T to advise on issues arising from its insolvency. HLT's financial woes in turn impacted OTPL's business and financial position given their interlocking interests. It too engaged R&T to advise on available restructuring options. As a

result, R&T filed, on behalf of OTPL and HLT, applications under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act") pending a proposed debt restructuring exercise ("the s 211B applications"). The s 211B applications were subsequently withdrawn with leave of court on 27 April 2020 (for HLT) and on 12 May 2020 (for OTPL) in the face of, amongst other things, significant creditor resistance to a debtor-in-possession restructuring. Such resistance was a consequence of certain admissions made by Mr O K Lim in the supporting affidavits for the s 211B applications. In place of the s 211B applications, the Lims procured OTPL and HLT to file the JM applications and applications for the appointment of interim judicial managers. These applications were again filed by R&T on behalf of the companies.

7 As stated at [2] above, I placed HLT and OTPL under interim judicial management on 27 April 2020 and 12 May 2020 respectively, and the interim judicial managers retained the services of R&T. Subsequently, the Lims procured OTPL and HLT to file the Injunction actions on 9 July 2020 (as regards OS 666) and 21 July 2020 (as regards OS 704). On 7 August 2020, I granted the JM applications and appointed the respective interim judicial managers as judicial managers.

8 It is relevant that despite the appointment of interim judicial managers over OTPL and HLT, the Lims did not seek their consent to bring the Injunction actions, either before or after they were filed. Similarly, they did not seek the consent of the judicial managers to proceed with the Injunction actions following their appointment. Instead, the Lims purported to unilaterally act on behalf of OTPL and HLT in filing and thereafter proceeding with the Injunction actions.

The parties' cases

OS 666 and OS 704

The Lims' case

9 The Lims argued that as directors of OTPL and HLT, they retained residuary powers to procure the companies to bring the Injunction actions. They submitted that if such powers were not recognised, there would be no one to restrain a "hopelessly conflicted" set of lawyers (referring to R&T) from acting for the judicial managers of the companies.

10 The Lims alleged that from the early 1990s, R&T acted for and/or advised the Lim Family and the group of companies that they owned including OTPL and HLT. As a result, they built relationships with the Lim Family and accumulated knowledge of their business affairs and the affairs of the companies in which the Lim Family had an interest. When OTPL and HLT faced financial difficulties, R&T were engaged by the companies and the Lim Family to advise on how their respective interests could be best protected, and what restructuring options were available to them. Pursuant to the engagement, R&T was provided with confidential information and documents relating to the Lim Family, OTPL and HLT. This included the companies' audited financial statements, management accounts and documents relating to OTPL's vessels and bareboat charterparties, and information relating to the Lim Family's interests. Such information was potentially relevant to the interim judicial managers and the judicial managers as regards: (a) any investigations they might undertake into the Lim Family's conduct in the management of OTPL and HLT; and/or (b) any adverse position they might take against the Lim Family and the management of OTPL and HLT. The Lims therefore argued, *inter alia*, that the Injunction actions ought to be granted to protect the confidentiality of the

information and documents disclosed to R&T by the Lim Family, OTPL and HLT.

11 The Lims argued in the alternative that:

(a) R&T owed an equitable duty of confidence arising from the confidential nature of the information and documents that were disclosed to them, that there was a "real and sensible possibility" of such information and documents being misused in breach of the duty of confidence, and that such a breach ought to be restrained by the grant of injunctive relief; and

(b) in any event, in the interests of the proper administration of justice, the court should exercise its supervisory jurisdiction to regulate the conduct of its officers, and restrain R&T from acting against their former clients about whom they had confidential information.

R&T's case

12 R&T contended that the Lims had no legal standing to procure OTPL and HLT to bring the Injunction actions as their powers had been displaced by the appointment of interim judicial managers and judicial managers pursuant to orders of court which, it was pointed out, were not appealed against. The orders of court appointing the interim judicial managers and the judicial managers (the "IJM Orders" and "JM Orders" respectively) expressly provided that the affairs, business and property of the applicants were to be managed by the interim judicial managers and the judicial managers, who had all the powers and entitlements of the directors. Thus, the Lims' power as directors to bring proceedings in the name and on behalf of the company had become vested in the interim judicial managers and the judicial managers.

13 R&T alternatively contended that the Injunction actions were unmeritorious as they were both factually and legally unsustainable. As to factual unsustainability, R&T contended that there was no global engagement of R&T by all the companies owned by the Lim Family for the purpose of a "group restructuring" as alleged. Nor did the Lim Family engage R&T to protect their personal interests as alleged. R&T were at all times retained only by OTPL and HLT. Further, no implied retainer with the Lim Family arose as R&T neither regarded nor conducted themselves as having been retained by the Lim Family. There was therefore no reasonable basis for the Lim Family to have regarded R&T as acting for them or for R&T to have regarded the Lim Family as their clients.

14 R&T also contended that the Injunction actions were legally unsustainable for the following reasons:

(a) The confidential information in issue in the Injunction actions belonged to OTPL and HLT and not to any other entity or person. As the information belonged to the companies, there was no basis for R&T to be restrained from sharing it with the interim judicial managers and the judicial managers of the companies.

(b) Mr Evan Lim was unable to particularise the confidential information in issue. He was also unable to identify the party to whom the information belonged.

(c) Even taking the Lims' case at its highest that R&T was jointly retained by the Lim Family, OTPL and HLT, the Lim Family was not entitled to assert that the information was confidential *vis-à-vis* OTPL and HLT as information disclosed pursuant to a joint retainer was not confidential as between the parties thereto.

(d) Any information which R&T received in their capacity as solicitors for OTPL and HLT from entities which they did not represent was not confidential as it was disclosed with the consent of those entities.

(e) Being retained by the interim judicial managers as well as the judicial managers of OTPL and HLT was a natural extension of R&T's original brief, *ie*, to file the JM applications and advise on restructuring solutions for the companies. OTPL and HLT must therefore be taken to have consented to R&T acting for the interim judicial managers and the judicial managers.

(f) OTPL and HLT's interests were not "adverse" to the interests of their respective interim judicial managers and judicial managers in any relevant sense. Instead, the interests of the companies, and the interim judicial managers and the judicial managers were aligned. In acting for the interim judicial managers and the judicial managers, R&T was therefore not acting against the interests of OTPL and HLT.

15 R&T further contended that they had put in place effective measures to prevent the improper disclosure of confidential information. For example, not acting in matters adverse to the personal rights and liabilities of the Lim Family, allocating separate teams of lawyers to handle the OTPL and HLT engagements, ensuring that there was no sharing of information between the teams, and not acting or advising on any contentious matter which would put them in a position of conflict of interest.

The Striking-Out applications

R&T's case

16 The Striking-Out applications were brought on the basis that the Lims did not have the standing to procure OTPL and HLT to commence and proceed with the Injunction actions once the interim judicial managers and the judicial managers were appointed (see [12] above). R&T relied on the terms of the IJM Orders, the JM Orders and ss 227G(2) to (4) read with paragraph (d) of the Eleventh Schedule of the Companies Act.

The Lims' case

17 The Lims' case was that as directors of OTPL and HLT, they had residuary powers to bring the Injunction actions on behalf of the companies (as set out at [9] above). They submitted that the Injunction actions were not an abuse of process and that it was instead R&T who abused the court's process by filing the Striking-Out applications.

Issues to be determined

18 From the parties' cases as set out above, it was clear that the principal hurdle that the Lims had to overcome was to establish that they had legal standing to procure OTPL and HLT to bring and proceed with the Injunction actions. If they did not, OS 666 and OS 704 ought to be struck out. This issue turned on the scope of the residuary powers of directors upon the appointment of insolvency officeholders such as provisional liquidators, interim judicial managers, liquidators and judicial managers. It is to this issue that I now turn.

My decision

The law on striking out

19 O 18 r 19 of the Rules states:

> **19.**—(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that —
>
> (a) it discloses no reasonable cause of action or defence, as the case may be;
>
> (b) it is scandalous, frivolous or vexatious;
>
> (c) it may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) it is otherwise an abuse of the process of the Court,
>
> and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> …
>
> (2) This Rule shall, as far as applicable, apply to an originating summons as if it were a pleading.

20 Thus, the absence of legal standing is a basis for striking out under O 18 r 19(1)(*b*).

Whether the Lims had the standing to bring OS 666 and OS 704

21 The key issue I had to consider in the Striking-Out applications was whether the Lims had legal standing to bring and proceed with the Injunction actions. In answering that question, it was relevant that the Injunction actions were filed after the appointment of interim judicial managers over OTPL and HLT. The issue requires consideration of the effect that the appointment of the interim judicial managers and the judicial managers over OTPL and HLT had on the powers of the Lims as directors. I first consider the effect of the appointment of the interim judicial managers.

The effect of the appointment of interim judicial managers and judicial managers

22 The salient provision is s 227B(10)(*b*) of the Companies Act. It states:

> (10) Nothing in this section shall preclude a Court —
>
> …
>
> (*b*) from appointing, after the making of an application for a judicial management order and on the application of the person applying for the judicial management order, an interim judicial manager, pending the making of a judicial management order, and such interim judicial manager may, if the Court sees fit, be the person nominated in the application for a judicial management order. *The interim judicial manager so appointed may exercise such functions, powers and duties as the Court may specify in the order.*
>
> [Emphasis added]

23 It is apparent from s 227B(10)(*b*) that the functions, powers and duties of the interim judicial managers are defined with reference to the terms of the order of court appointing them. The IJM Orders (which were in identical terms for both companies save for the difference in the interim judicial managers appointed thereunder) were therefore critical. The IJM Orders stated as follows:

> It is ordered that:
>
> …
>
> 2. The *affairs, business and property* of the Company [*ie*, HLT and OTPL] be managed by the Interim Judicial Managers during the period in which the Order for the appointment of the Interim Judicial Managers is in force;
>
> 3. *The Interim Judicial Managers be empowered and authorised to exercise all powers and entitlements of a judicial manager and all powers and entitlements of directors of the Company conferred by the Companies Act (Cap. 50) (the "Act")* and/or by the memorandum and articles of association of the Company, or by any other applicable law in force, but nothing in this Order shall require the Interim Judicial Managers to call any meetings of the Company;
>
> …

[Emphasis added]

24 The IJM Orders vested in the interim judicial managers of OTPL and HLT: (a) the power to manage the affairs, business and property of the companies; and (b) the powers and entitlements of the judicial managers and directors conferred by the Companies Act and the memorandum and articles of association of the companies. The powers conferred by the IJM Orders on the interim judicial managers were identical to the powers of judicial managers as set out at ss 227G(2) to (4) read with the Eleventh Schedule of the Companies Act. Sections 227G(2) to (4) provide as follows:

> (2) During the period for which a judicial management order is in force, *all powers conferred and duties imposed on the directors by this Act or by the constitution of the company shall be exercised and performed by the judicial manager and not by the directors; but nothing in this subsection shall require the judicial manager to call any meetings of the company.*
>
> (3) The judicial manager of a company –
>
> > (*a*) shall do all such things as may be necessary for the management of the affairs, business and property of the company; and
> >
> > (*b*) shall do all such other things as the Court may by order sanction.
>
> (4) Without prejudice to the generality of subsection (3)(*a*), the powers conferred by that subsection shall include the powers specified in the Eleventh Schedule.
>
> [Emphasis added]

25 Paragraphs (*d*) and (*e*) of the Eleventh Schedule to the Companies Act, which are salient for present purposes, state as follows:

> The judicial manager may exercise all or any of the following powers:
>
> > …
> >
> > (*d*) power to appoint a solicitor or accountant or other professionally qualified person to assist him in the performance of his functions;

> (*e*) power to bring or defend any action or other legal proceedings in the name and on behalf of the company;
>
> …

26 Accordingly, it is clear that pursuant to the IJM Orders, the interim judicial managers of OTPL and HLT were, upon their appointment, vested with all the powers and entitlements of judicial managers under the Companies Act, which included the powers vested in the directors. At the same time, the powers of the directors were divested by s 227G(2) of the Companies Act, read with the IJM Orders. As stated in *Petroships Investment Pte Ltd v Wealthplus Pte Ltd and others and another matter* [2016] 2 SLR 1022 at [65], citing with approval Tan Cheng Han SC (gen ed), *Walter Woon on Company Law* (Sweet & Maxwell, Revised 3rd Ed, 2009) at paras 9.6 to 9.7, upon the appointment of liquidators or judicial managers, the board of directors is "effectively *functus officio*". The interim judicial managers of OTPL and HLT were therefore empowered by the IJM Orders to exercise all the powers of the judicial managers and directors of the companies to the exclusion of the latter. One of the powers that was vested in the interim judicial managers was the power to, *inter alia,* appoint solicitors and to bring proceedings on behalf of the company (see paragraphs (*d*) and (*e*) of the Eleventh Schedule to the Companies Act, cited at [25] above).

27 Thus, the Lims' contention that they had the power *as directors* of OTPL and HLT to bring the Injunction actions in the name and on behalf of OTPL and HLT was a non-starter as long as the companies were under interim judicial management. I next turn to consider the effect of the JM Orders. This requires consideration of the effect of the appointment of the judicial managers over OTPL and HLT.

28 In the same way the IJM Orders vested the powers of judicial managers and the directors on the interim judicial managers of OTPL and HLT and divested the powers of the directors in the process, the judicial managers of the companies were vested with the powers prescribed in ss 227G(2) to (4) and the Eleventh Schedule of the Companies Act (set out at [24]–[25] above) upon their appointment pursuant to the JM Orders. As noted above, s 227G(2) divested the directors' powers and vested them in the judicial managers instead. This was also reflected in the terms of the JM Orders, which stated:

> 3. The affairs, business and property of the Company [*ie*, OTPL and HLT] shall be managed by the Judicial Managers during the period in which the Order for judicial management is in force;
>
> 4. The Judicial Managers are empowered and authorised to exercise all powers and entitlements of a judicial manager and all powers and entitlements of directors of the Company conferred by the [Companies] Act and/or by the memorandum and articles of association of the Company, or by any other applicable law in force;

29 As noted above at [25], the powers of the judicial managers included the power to retain solicitors and to, *inter alia*, bring proceedings in the name and on behalf of the company. Thus, the Lims' contention that they had the power *as directors* of OTPL and HLT to bring (in this sense, to proceed with) the Injunction actions in the name and on behalf of OTPL and HLT was again a non-starter as long as the companies were under judicial management.

The residuary powers of the directors

30 That leaves the question of whether notwithstanding the appointment of the interim judicial managers and the judicial managers of OTPL and HLT, the Lims had residuary powers as directors and if so, to what extent. The Lims cited *Re Union Accident Insurance Co. Ltd.* [1972] 1 WLR 640 ("*Union Accident*"). In *Union Accident*, provisional liquidators (who hold a position in relation to a

company in provisional liquidation similar to that of an interim judicial manager) were appointed over the company pursuant to an order of court. The directors instructed solicitors to apply to discharge the order. Plowman J dismissed the application on the basis that the appointment had been properly made. He then considered whether costs ought to be ordered against the directors' solicitors personally for bringing the application. This turned on whether the directors had any power to procure the filing of the application on behalf of the company. Plowman J held that costs ought *not* to be ordered against the directors' solicitors because the directors had residuary powers to procure the filing of the application. He held (at 642) as follows:

> It is of course well settled that on a winding up the board of directors of a company becomes *functus officio* and its powers are assumed by the liquidator … No doubt that is so, but it is common ground that notwithstanding the appointment of the provisional liquidator, *the board has some residuary powers, for example it can unquestionably instruct solicitors and counsel to oppose the current petition and, if a winding-up order is made, to appeal against that order.*
>
> *The issue is to the extent of those residuary powers, and in particular whether they extend to the launching of the present motion. I think that it may sometimes be helpful to test the matter by considering the other side of the coin, namely, to inquire whether the power which the board is said to have lost is one which can be said to have been assumed by the liquidator.* If the answer is that it cannot, that may be a good reason for saying that the board still retains it. *Clearly, for example, as I have already indicated, the power to instruct solicitors and counsel on the hearing of the winding-up petition is not a power which anyone could suggest has passed to the provisional liquidator and therefore the board retains it.*
>
> [Emphasis added]

31 It is clear from the passage cited above that Plowman J was of the view that the residuary powers of the directors should be defined with reference to the powers which the provisional liquidator *did not* or *could not* assume. Accordingly, it could not be said that the directors' residuary powers extended

to a specific power (which they previously had) that had become vested in the provisional liquidator. Conversely, it may be said that the directors only retained such powers as might not have become vested in the provisional liquidator. This goes back to the analysis above on the powers that were vested in the interim judicial managers and the judicial managers of OTPL and HLT upon their appointment under the IJM Orders and the JM Orders.

32 Plowman J's decision in *Union Accident* may be understood in light of the principles stated in the preceding paragraph. It would not be correct to say that the appointment of a provisional liquidator divests the directors of the power to challenge the validity of the appointment. A challenge by the directors to the appointment is not an attempt by them to impermissibly exercise powers of management over the affairs of the company. Rather, it is a challenge against the very basis of the insolvency officeholder's appointment and the source of his power. As the directors would have had in the first place the power to resist, on the company's behalf, the making of the order appointing the insolvency officeholder, they logically would have the power to challenge the order after it has been made. In other words, insofar as the validity of the appointment remains open for challenge, the directors surely must have the power to make that challenge on behalf of the company, either by way of a setting-aside application or an appeal.

33 Two other authorities relied on by the Lims followed the approach in *Union Accident*. In *Stephen, Petitioner* [2012] BCC 537 ("*Stephen*"), the petitioner, a director, commenced proceedings to challenge the appointment of administrators over the company by a creditor bank, on the basis that many, if not all, of the transactions executed by the bank were pursuant to a loan agreement that was invalid. The administrators relied on paragraph 64 of

Schedule B1 of the UK Insolvency Act 1986 (c 45) (UK) ("UKIA 1986"), which states:

> 64 (1) A company in administration or an officer of a company in administration may not exercise a management power without the consent of the administrator.
>
> (2) For the purpose of sub-paragraph (1) —
>
> (*a*) "management power" means a power which could be exercised so as to interfere with the exercise of the administrator's powers;
>
> (*b*) it is immaterial whether the power is conferred by an enactment or an instrument, and
>
> (*c*) consent may be general or specific.

34 Under this provision, a company in administration or its officers cannot exercise "management power" (defined as a power which could be exercised so as to interfere with the exercise of the administrator's powers) without the administrator's consent. The administrators argued that the provision prevented the company or its officers from bringing proceedings to challenge the appointment of the administrators. Lord Glennie disagreed with the argument, adopting the approach in *Union Accident*. He said at [4]–[5] that:

> [4] [W]hat is prohibited is the exercise of a power which, reading short, interferes with the exercise of the Administrators' powers. But an action which *calls into question whether the Administrators were validly appointed, and therefore whether they had any powers to exercise, is, to my mind, plainly not caught by his prohibition.*
>
> [5] Mr Sellar, Q.C., for the Administrators, and Mrs Wolffe, Q.C., for the Bank, brought to my attention the decision of Plowman J in *Re Union Accident Insurance Co Ltd* [1972] 1 WLR 640, in which it was held that, notwithstanding the appointment of a provisional liquidator, the board of directors of a company retained the residuary power to instruct solicitors and counsel to oppose the petition for winding up the company, and also to act in interlocutory proceedings including a motion to discharge the provisional liquidator … That reasoning is applicable here. I was also referred to some cases in which a

> company, acting at the instance of the board of directors, sought to reduce the appointment of a receiver: see e.g. *Elwick Bay Shipping Co Ltd v Royal Bank of Scotland Limited* 1982 SLT 62 and *Toynar Limited v Whitbread Limited* 1988 SLT 433. *Those cases appear to me consistent with the general proposition that the board of directors has a residual power to challenge the appointment of a provisional liquidator, receiver or Administrator as the case may be.* I see no reason why the case of an Administrator should be any different from that of a provisional liquidator or receiver in this respect.
>
> [Emphasis added]

35 The second authority was *Closegate Hotel Development (Durham) Ltd v McLean* [2014] Bus LR 405 ("*Closegate*") which concerned an application to declare as invalid the appointment of administrators over two companies by a creditor bank. The application was brought in the name and on behalf of the companies by two directors. An objection was raised by the creditor bank to the standing of the directors to cause the companies to bring the challenge. The objection was that: (a) the appointment of the administrators divested the directors of their authority; and (b) the directors' action breached paragraph 64 of Schedule B1 of the UKIA 1986 (referred to at [33] above). Richard Snowden QC (as he then was), sitting as a Deputy Judge in the English High Court, followed the approach in *Stephen* and rejected the creditor's objection: see *Closegate* at [6]. He also noted, citing *Union Accident*, that there was "long-standing authority to the effect that even after the appointment of a provisional liquidators [*sic*], the board of directors of a company retains a residuary power to instruct lawyers to challenge the appointment of the provisional liquidator, to oppose the petition and, if a winding up order is made, to appeal against the making of that order": see *Closegate* at [7].

36 In my view, the principle to be extracted from *Union Accident*, *Stephen* and *Closegate* is that the directors have at the very least residuary powers to, amongst other things, challenge the appointment of provisional liquidators,

liquidators, interim judicial managers or judicial managers on behalf of the company. It would not be correct to say that such a power is vested in these insolvency officeholders. I would venture to add that the residuary powers of the directors must also extend to having conduct of applications for judicial management or winding up brought by the company, even if a provisional liquidator or an interim judicial manager has been appointed. Ultimately, the issue is whether the directors are seeking to assert a power that is vested in the insolvency officeholder. As Plowman J noted in *Union Accident,* that issue is resolved by asking whether the insolvency officeholder has or could have assumed the power that the director seeks to assert.

37 In the present case, however, the Lims were not seeking to challenge the IJM Orders or the JM Orders in the Injunction actions. They were exercising powers that had been divested from them and vested in the interim judicial managers and the judicial managers, namely, the power to commence proceedings in the name and on behalf of OTPL and HLT and to retain solicitors to advise them. Indeed, it is difficult to see how the Lims could have challenged the IJM Orders and the JM Orders. After all, the IJM Orders and JM Orders were ordered in terms of the prayers in applications filed by the Lims themselves on behalf of OTPL and HLT, and they brought no appeals subsequently against the orders. *Union Accident*, *Stephen* and *Closegate* therefore did not assist the Lims' argument that they had the power to cause OTPL and HLT to bring the Injunction actions. In fact, the cases supported the position taken by R&T.

38 The Lims relied on two further authorities. The first was *Sri Hartamas Development Sdn Bhd v MBF Finance Bhd* [1991] 3 MLJ 325 ("*Sri Hartamas*"). In that case, solicitors for the company applied to stay an order for winding up pending appeal. A preliminary objection was raised by the respondent that the solicitors did not have standing under s 243(1) of the Malaysian Companies Act

1965 ("MCA 1965") to bring the application for a stay. The section provided that after a winding-up order had been made, an application for a stay could only be brought by a liquidator or any creditor or contributory. The Supreme Court of Kuala Lumpur upheld the objection. It, however, observed citing *Union Accident* that while a liquidator was the right party to act on behalf of the company after a winding up order had been made, the company nonetheless had a "right to be heard to say that the winding-up order is wrong and to appeal against the order". This right was expressly provided for under s 253(2) of the MCA 1965. The only question was "who should move the appeal on behalf of the company". The court did not express a view on this issue as it was not properly before the court.

39 In *Taman Sungai Dua Development Sdn Bhd (previously known as Supershine (M) Sdn Bhd) v Goh Boon Kim* [1997] 2 MLJ 526 ("*Taman Sungai*"), provisional liquidators had been appointed over a company by an order of court. The order was appealed against. The directors of the company applied for an order that the powers and duties of the provisional liquidators be stayed until the determination of the appeal. This was opposed solely on the basis that the company ceased to have any capacity to instruct solicitors to make the application once the provisional liquidators had been appointed. The Kuala Lumpur Court of Appeal, citing *Sri Hartamas* and *Union Accident*, granted the application, *inter alia,* on the basis that the directors retained the power to instruct solicitors to oppose the winding-up petition notwithstanding the appointment of the provisional liquidators.

40 Plainly, *Sri Hartamas* and *Taman Sungai* stood for the same principle as in *Union Accident*, *Stephen* and *Closegate*. They too did not assist the Lims.

41 Finally, I considered two further authorities cited by the Lims in support of their position: *Shanks v Central Regional Council* [1987] SLT 410 ("*Shanks*") and *Re Lehman Brothers Europe Ltd (In Administration)* [2018] Bus LR 439 ("*Lehman Brothers*").

42 In *Shanks*, the Outer House of the Scottish Court of Session observed that while the directors of a company under receivership could not interfere with the proper discharge of the receiver's function in gathering the assets of the company, "it is not inconceivable that a legitimate conflict of interests could arise making it appropriate or even necessary for the company through its directors to institute proceedings even although the company was subject to receivership". This case was in a receivership context, which differed in material respects from the judicial management regime under the Companies Act. As Lord Weir observed in *Shanks*, the "[Companies (Floating Charges and Receivers) (Scotland) Act 1972 (c 67) (UK)] does not provide that the powers of a company to raise proceedings cease upon the appointment of a receiver." This was material to his decision as to whether the directors of a company could commence proceedings in a receivership context. On the other hand, s 227G(2) of the Companies Act clearly provides for the powers of the directors to be vested in the judicial managers *to the exclusion of the directors*. In my view, *Shanks* was decided in a different context and did not assist the Lims.

43 In *Lehman Brothers*, the joint administrators of the company applied to court for the appointment of a director who would, together with the single member of the company, implement a distribution of company funds to that member: at [7]. The issue was whether the court ought to approve the distribution. Hildyard J noted, at [45], that:

> It is clear from paragraph 64 of Schedule B1 [of the UK Insolvency Act 1986] that directors and shareholders can do

> things which are not inconsistent with the administration, and may exercise "management powers" (defined by paragraph 64(2)(a) as "a power which could be exercised so as to interfere with the exercise of the administrator's powers"), *though only with the administrators' consent, and any residual powers which are not "management powers"*. …
>
> [Emphasis added]

44 The Lims argued that the passage from *Lehman Brothers* cited above meant that "directors and shareholders can do things which are not inconsistent with the administration, and may exercise any residuary powers which are not management powers". However, the argument ignored the context of the passage. As Hildyard J noted, the power of the directors and shareholders to do things which were not inconsistent with the administration arose from paragraph 64 of Schedule B1 of the UKIA 1986, set out at [33] above. There is no equivalent provision in the Companies Act. Further, the power to sue in the name and on behalf of the company was a management power which was specifically and exclusively arrogated to the interim judicial managers and the judicial managers by the IJM Orders and the JM Orders (see [25]–[28] above). *Lehman Brothers*, in my view, did not assist the Lims.

45 Accordingly, upon the making of the IJM Orders, the Lims did not have the legal standing to procure OTPL and HLT to bring the Injunction actions. Further, upon the appointment of the judicial managers, the Lims did not have the legal standing to procure OTPL and HLT to bring (in the sense of proceeding with) the Injunction actions. The Lims' residuary powers did not extend to bringing the Injunction actions in both instances.

Conclusion

46 For the reasons set out above, I allowed the Striking-Out applications and ordered that OS 666 and OS 704 (the Injunction actions) be struck out.

47 Costs followed the event. As R&T had succeeded in the Striking-Out application and the Lims had failed in the Injunction actions, I awarded costs of the applications and the actions to R&T save for the costs of the discovery applications in Summons No 4346 of 2020 (in OS 666) and Summons No 4347 of 2020 (in OS 704). This was because R&T had filed the Striking-Out applications shortly before the discovery applications were due to be filed. The costs awarded were to be decided by the court, if not agreed, within two weeks from the date of my order (4 November 2020). That deadline passed with no dispute as to quantum being placed before the court.

Kannan Ramesh
Judge of the High Court

Ong Ziying Clement and Khoo Shufen Joni (Damodara Ong LLC) for the applicant in OS 666;
Christopher Anand s/o Daniel and Eileen Yeo (Advocatus Law LLP) for the applicant in OS 704;
Toby Landau QC (Essex Court Chambers Duxton) (instructed) and Liew Wey-Ren Colin (Colin Liew LLC) for the respondent in OS 666 and OS 704.