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

[2023] SGHC 122

Originating Application No 81 of 2023

Between

Point72 Ventures Investments LLC

… *Applicant*

And

FinLync Pte Ltd

… *Respondent*

And

(1) Peter Selig Klein
(2) Phillip Ashley Klein

… *Non-parties*

GROUNDS OF DECISION

[Companies — Receiver and manager — Judicial management order]

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Point72 Ventures Investments LLC
v
FinLync Pte Ltd (Klein, Peter Selig and another, non-parties)

[2023] SGHC 122

General Division of the High Court — Originating Application No 81 of 2023
Hri Kumar Nair J
8, 13 February, 13, 15 March 2023

5 May 2023

Hri Kumar Nair J:

1 These are my grounds of decision in respect of Point72 Ventures Investments LLC's ("**Point72**") application to place the respondent, FinLync Pte Ltd (the "**Company**"), in judicial management (the "**JM Application**"). On 15 March 2023, I allowed the JM Application and made my written brief remarks available to the parties the next day.

2 I was satisfied that the criteria for making a judicial management order (the "**JMO**") were met:

(a) On its own case, the Company would become unable to pay its debts by May 2023; and

(b) The making of the JMO would likely achieve one or more of the purposes of judicial management as set out in s 89(1) of the Insolvency, Restructuring and Dissolution Act 2018 (the "**IRDA**").

3 For completeness, I found that Point72 had standing to bring this application as it was not disputed that it was at least a contingent or prospective creditor under a US$3,249,990 convertible promissory note dated 14 April 2022. In any event, its standing was not disputed.

Facts

The parties

4 The Company is a financial technology company which offers products which aggregate global banking application interfaces to corporate finance and treasury offices. Point72, as one of its investors, was entitled to a seat on the board of the Company and is a creditor (or at least a contingent creditor) and shareholder of the Company. Mr Peter Selig Klein ("**PSK**") and his brother, Mr Phillip Ashley Klein ("**PAK**"), the founders and directors of the Company ("**the Founders**"), are the non-parties in this action.

5 The board of the Company (the "**Board**") comprised PSK, PAK, Mr Stephen Moore Ellis ("**Mr Ellis**") and Mr Richard Wayne Shriner III ("**Mr Shriner**"). Mr Ellis and Mr Shriner were nominees of Nyca Co-Invest Fund III ("**Nyca**"), another investor, and Point72 respectively (pursuant to the arrangement explained at [8] below).

Background to the dispute

6 Between the incorporation of the Company in 2015 and sometime in 2019, its sole shareholder and director was PSK. PAK initially consulted, and later joined the Company as a shareholder, director, and chief executive officer ("**CEO**").

7 The Company needed funding to expand its business. It therefore sought support from third-party investors, including Nyca and Point72. The Company raised a seed investment round in 2019 and a Series A investment round in 2021.

8 On 18 December 2020, the Company, the Founders as well as some of the investors in the Company entered a Shareholder's Deed, under which (a) Nyca Investment Fund III ("**Nyca Investment**") and Nyca, collectively; and (b) Point72, were each entitled to appoint a director to the Board. The parties did not dispute that the Founders had 1.5 votes each and the nominee directors had one vote each; accordingly, at all material times, the Founders had control of the Board.

9 Sometime in the third quarter of 2021, Point72 and Nyca, amongst other creditors, started to have concerns about the financial and operational performance of the Company – it had missed pipeline projections, key employees had left or been terminated, and the Company had a cash burn rate which outstripped its monthly revenue.

10 Around April 2022, the Company entered several convertible promissory notes with (a) Point72; (b) Workday, Inc; (c) Nyca Investment; and (d) Nyca.

11 In June 2022, PAK resigned as CEO. Mr Guido Schulz ("**Mr Schulz**") was identified as a possible CEO of the Company. Thereafter, Point72 and Nyca proposed a series of rescue package options necessitated by the Company's deteriorating cash position. These entailed the injection of fresh capital into the Company and conditioned on Mr Schulz's appointment as CEO. However, the said options were not accepted by PSK and PAK and were thus not implemented.

12 After further discussion, four options for the continuation of the business of the Company were proposed, which are summarised below (the "**Options**"):

(a) Option 1A provided for the Company to enter into a severance agreement pursuant to which Nyca and/or Point72 would purchase or procure the purchase of US$2.4m worth of shares from each of the Founders; the Founders would receive a severance payment comprising 12 months' salary, benefits and apartment rental reimbursement; Nyca and Point72 would contribute capital of US$5m; one of the Founders would resign as a director and the new Board would comprise one of the Founders, a director nominated by Nyca, a director nominated by Point72, a director nominated by Point72 or Nyca, and Mr Schulz; and Mr Schulz to be appointed CEO.

(b) Option 1B provided for one or more affiliates of Nyca and such other investors reasonably acceptable to Nyca and the Company to provide investment of up to US$10m; the Founders to resign as directors in exchange for the right to receive severance payments comprising of six months' salary, benefits and apartment rental reimbursement; the new Board to comprise a director nominated by Nyca, a director nominated by Point72, Mr Schulz, and two vacancies not controlled or filled by the Founders; and Mr Schulz to be appointed CEO.

(c) Option 2 provided for the assets or shares of the Company to be sold; 25% of the total sale price to be distributed to the following key employees in the following shares: 85% to PAK, 10% to Mr Nuno Jonet and 5% to Mr Andrew Jasen; and the Company to enter into a bridge loan with Point72 and Nyca in order to cover the funds required for the Company's operations for a period of three months.

(d) Option 3 provided for the Company to apply to be wound up pursuant to s 125(1) IRDA.

13 On 19 January 2023, Ms Evelyn Ang ("**Ms Ang**") of Dentons Rodyk & Davidson LLP, a legal counsel to the Company, emailed the Board to request that they vote for one of the four Options. On 22 January 2023, Ms Ang emailed the Board to provide the result of the vote, which is reproduced below:

> The votes received from [Nyca] and Point72 were in favour of Option 1B, and the votes from the Founder[s] were for Option 2. As the Founder[s] have 1.5 votes each, the resolution for Option 2 is passed. However, we understand that the investors do not have an agreement on the bridge financing and the allocation of 25% of sale proceeds from a trade sale to management. Therefore, even if Option 2 resolutions are passed, it is not a viable option.
>
> I will circulate board resolutions tomorrow for the appointment of a provisional liquidator and the convening of an EGM to commence voluntary liquidation.

14 In short, none of the Options 1A, 1B and 2, which were evidently proposed by the faction which voted in favour of them, could be implemented without the agreement of the other faction, which agreement was not, and would not be, forthcoming.

15 On 23 January 2023, Ms Ang sent an email which attached a board resolution for convening an extraordinary general meeting ("**EGM**") for the purposes of winding up the Company, as well as the notice of the EGM. This was, according to the Founders, not done with their consent and therefore, without the authority of, the Board.[1] The said resolution was never tabled for a vote or passed.

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[1] Peter Selig Klein's Affidavit dated 4 February 2023 at para 39.

16 On 30 January 2023, Point72 filed the JM Application, along with a summons for the appointment of an interim judicial manager.

17 On 13 February 2023, I dismissed Point72's summons to appoint an interim judicial manager. I saw no practical purpose in appointing one: there was, *inter alia*, no evidence of any risk of dissipation of the Company's assets pending the hearing of the JM Application, the Company appeared to have enough cash for its operations at least until May 2023, there was no management deadlock as far as its operations were concerned and there was a risk that the appointment of an interim judicial manager may cause the Company to be in breach of some of its existing contracts, which may in turn place it in a worse financial position. The more prudent option was therefore to maintain the status quo until the hearing of the JM Application.

18 The JM Application, however, required that I examine the Company's prospects in the longer term.

The parties' cases

The applicant's case

19 Point72's case was that the Company should be placed under judicial management, and Mr Luke Anthony Furler and Ms Ellyn Tan Huixian of Quantuma (Singapore) Pte Ltd should be appointed judicial managers ("**JMs**").

20 Point72 submitted that the Company was cash flow insolvent given that (a) by the Company's own estimates, its cash would run out by June 2023, or potentially as early as March 2023; (b) it had ongoing short term liabilities; and (c) it owed US$9,499,920 arising from various convertible promissory notes

(the "**Notes Debt**"), or such sums would become due and payable if the Company was put into liquidation when it ran out of cash.[2]

21 Point72 also argued that one or more of the statutory objectives of judicial management could be achieved. The Company had a viable business which could be resuscitated.[3]

22 Point72 averred that a JMO would achieve a more advantageous realisation of the Company's assets than a winding up action, since a JMO would allow for the implementation of a rescue package.[4] Point72 advanced a two-step plan to rescue the Company (the "**Rescue Package**")[5] which particulars are set out below:

> a. Step 1 Loan: Point72, Nyca and any other participating creditors (the "**Step 1 Creditors**") to advance a loan to FinLync for working capital purposes (the "**Step 1 Loan**").
>
> b. Amount:
>
> i. Initially, in an amount of US $400,000 minus the amount of cash which is available in the bank accounts of Finlync on the day of the appointment of the Proposed JMs (the "**Initial Loan**")…
>
> ii. At the one month [*sic*] anniversary of the initial draw down of the Step 1 Loan, the Step 1 Creditors to advance an additional loan of up to US $400,000 (the "**Incremental Loan**") … The availability of the Incremental Loan is subject to (i) a review by the Proposed JMs of Finlync's financial and operational condition and (ii) a presentation by the Proposed JMs of an updated action plan following their initial review of the business.
>
> iii. The Step 1 Creditors may increase the amount of the Step 1 Financing if required by the Proposed JMs,

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2 Applicant's Written Submissions at paras 22–24.

3 Applicant's Written Submissions at paras 36 and 40.

4 Applicant's Written Submissions at paras 45 and 46.

5 Applicant's Written Submissions at paras 43 and 44.

> subject to, *inter alia*, the Proposed JMs setting out the need for additional funding to the satisfaction of the Step 1 Creditors.
>
> …
>
> The Step 2 Financing will involve the injection of new funds into FinLync to ensure the long term [*sic*] stability of the business. The Step 2 Financing is premised on the exit of FinLync from judicial management. The specific terms of the Step 2 Financing will depend on and be subject to the following:
>
> a. a review by the Proposed JMs of Finlync's financial and operational condition;
>
> b. a viable long term financial and operational plan being put in place by the Proposed JMs in consultation with the creditors, shareholders, employees and other key stakeholders; and
>
> c. negotiation between key stakeholders, including the Founders, with regard to the long term financial and operational plan for FinLync.[6]

23 Finally, Point72 highlighted that the wishes and views of creditors should outweigh that of the Company and its shareholders, and pointed out that the JM Application had the support of creditors representing approximately 96.57% of the Notes Debt.[7]

The respondent's case[8]

24 The Company argued that the JM Application was taken out for the collateral purpose of ousting the Founders while retaining technologies created by the Founders, in order to benefit investors acting in concert with Point72.[9] It

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6 Unsworn affidavit of Peter Vincent Casella dated 6 March 2023 at paras 21 and 22.

7 Applicant's Written Submissions at paras 47 and 48.

8 The Non-parties' Written Submissions largely mirror the Company's submissions.

9 Respondent's Written Submissions at paras 9, 10, 16–22, 25–28 and 69; Non-parties' Written Submissions at para 39.

averred that the dispute between the parties was a shareholder dispute,[10] and accordingly a JMO should not be granted.[11] More specifically, it was the Company's case that this was a shareholder's dispute for the following reasons:

(a) The JM Application was commenced at Point72's initiative, without any of the non-shareholder investors who could have been joint applicants.[12]

(b) The JM Application was commenced for the purpose of resolving the deadlock between the shareholder-directors in relation to the implementation of Option 1B.[13]

(c) The dispute between the directors does not involve the non-shareholder investors, and the non-shareholder investors do not have a say on the decision on the Board. Thus, the deadlock between the directors concerning the Options is not a dispute among the entire body of investors.[14]

(d) Point72's argument that the JM Application was made in its capacity as a creditor of the Company and not a shareholder was spurious since a judicial management application was, in any event and regardless of Point72's capacity, not the proper mechanism to seek enforcement of its rights and entitlements as a shareholder.[15]

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10 Respondent's Written Submissions at para 38; Non-parties' Written Submissions at paras 44–54, 82 and 83.

11 Respondent's Written Submissions at paras 45–49.

12 Respondent's Written Submissions at para 53.

13 Respondent's Written Submissions at para 54.

14 Respondent's Written Submissions at paras 55–59.

15 Respondent's Written Submissions at para 60.

25 The Company also argued that the Rescue Package was neither a serious nor feasible solution, given that:[16]

(a) the Company was projected to still have cash in its bank accounts if JMs were appointed in mid-March 2023 and a month thereafter, meaning that neither the Initial nor Incremental Loan would be provided as part of the Step 1 Loan;[17]

(b) Point72 provided no indication of what the JMs' "action plan" was or would be;[18]

(c) as for the second step of the Rescue Package, there were no indications of interest from potential investors despite the facts that (i) Point72 had proposed for the injection of new funds into the Company; and (ii) the onus was on Point72 to prove that there were "real potential financing interests which will facilitate the survival of [the Company]";[19] and

(d) since the second step of the Rescue Package was premised on the Company's exit from judicial management, the problem of Board deadlock might arise again.[20]

26 The Company highlighted that if Point72's "intentions [were] indeed genuine", it could finance the Company with its Rescue Package without

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16 See also Non-parties' Written Submissions at paras 58–64.

17 Respondent's Written Submissions at paras 61(a)(i) and 61(a)(ii).

18 Respondent's Written Submissions at para 61(a)(iii).

19 Respondent's Written Submissions at paras 61(b)(i) and 63.

20 Respondent's Written Submissions at para 61(b)(ii).

needing a JMO.[21] It also pointed out that Point72's position that the Rescue Package did not demand the removal of the Founders called into question the necessity of a JMO.[22] In the circumstances, the Company reiterated that these showed that the JM Application had been taken out for the purpose of ousting the Founders from the Company.[23]

27 Further, the Company argued that the Founders were instrumental to the development and survival of the Company and that Point72 had not shown that the JMs would be able to run the Company better than the Founders. It pointed out that (a) the Founders had been running the Company's complex global operations since its incorporation; (b) PSK had been the creator of the products and technology marketed by the Company; (c) the employees certainly could not replace the Founders since most had been employed for less than two years; (d) the Founders had been maintaining the key client and investor relationships; and (e) prospective investors had looked to the Founders when exploring investment and partnership opportunities with the Company.[24]

28 Finally, the Company averred that a JMO would not achieve any of the statutory purposes of judicial management, for the following reasons:

(a) A JMO could have detrimental effect, even potentially fatal consequences, for the Company, since

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21 Respondent's Written Submissions at para 67.

22 Respondent's Written Submissions at para 66.

23 Respondent's Written Submissions at para 69.

24 Respondent's Written Submissions at paras 71–77; Non-parties' Written Submissions at paras 29 and 30.

(i) potential investors would likely be wary of financing the Company if it was under a JMO, and particularly without the Founders' involvement in the Company;

(ii) a JMO would lead to incurrence of additional costs; and

(iii) a JMO could also lead to the termination of contracts entered by the Company which could lead to a deterioration of its business, losses of at least around US$1m annually, claims against it for damages and reputational damage or loss of business relationships and goodwill with existing clients.[25]

(b) The JMs would not serve any practical purpose since there was no financing plan on the table for their consideration, they would be unlikely to do better than the existing Board and would add more costs to be borne by the Company.[26]

(c) This was a situation where a JMO would be a precursor to liquidation, so rescue will not be achieved by the JMs.[27]

29 Instead, the Company suggested that there were alternative solutions to the dispute between the parties, such as a buy-out by the Founders of Point72's interests in the Company or *vice versa*, or mediation.[28]

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25 Respondent's Written Submissions at para 78; Non-parties' Written Submissions at para 38.

26 Respondent's Written Submissions at para 84.

27 Respondent's Written Submissions at para 85.

28 Respondent's Written Submissions at para 87. See also Non-parties' Written Submissions at paras 16 and 17.

30 In response, Point72 disputed the Company's claim that the JM Application had been brought to oust the Founders from the Company. It argued that the Company falsely characterised the JM Application as a response to a shareholders' dispute.[29] Point72 further argued that a JMO would, rather than allow Point72 to seize control, instead mean that Point72 would lose any management control or oversight that it had over the Company, since the JMs would be appointed; further, there was no basis to suggest that the JMs would act as an extension of Point72.[30]

Issues to be determined

31 The issues I had to consider were whether:

(a) the Company was or was likely to become unable to pay its debts;

(b) a JMO was likely to achieve one or more of the statutory purposes of judicial management; and

(c) there was any reason to dismiss the JM Application even if both (a) and (b) were satisfied.

Issue 1: whether the Company was or was likely to become unable to pay its debts

32 It was the Company's own evidence that it would run out of cash by June 2023, even after executing cost-cutting measures. Indeed, that date appeared optimistic – the Company had expected to have between US$1.2m and

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29 Applicant's Written Submissions at paras 26 and 27.

30 Applicant's Written Submissions at paras 27–30.

US$1.4m in cash in mid-March 2023,[31] but its counsel confirmed at the hearing on 13 March 2023 that it only had about US$837,000. That meant that the Company would likely run out of cash in May 2023.

33 More importantly, no, or no concrete, plans were put forward by the Company to raise funds to make up the shortfall. The Company submitted that it was "securing new client contracts" which would add to its revenue.[32] I noted however that some of these contracts were unexecuted, and, in any case, these were unlikely to substantially improve the Company's cash position before it would become insolvent. The Company also did not point to any concrete offers from new investors: although the Company produced emails from "prospective investors",[33] these were merely expressions of interest and, as the Company itself recognised, "enquiries".[34] There was no evidence that any of these would likely materialise and improve the Company's financial situation in time. I also noted that the Company did not put on affidavit what it would do if it ran out of cash; instead, the Company largely left unaddressed the issue of its inability to pay its debts, whether existing or impending, in its submissions. Indeed, at the hearing, the Founders' counsel candidly accepted that the Company was likely headed towards liquidation. Both the Company and the Founders were agreed on this in their submissions.[35]

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31 Affidavit of Peter Selig Klein dated 9 February 2023 at pp 11 and 12.

32 Respondent's Written Submissions at para 80; Affidavit of Peter Selig Klein dated 24 February 2023 at paras 23–27, Tabs 8–11.

33 Peter Selig Klein's Affidavit dated 4 February 2023 at Tab 4.

34 Peter Selig Klein's Affidavit dated 4 February 2023 at para 13.

35 Non-parties' Written Submissions at para 17; Respondent's Written Submissions at para 85.

34 In the circumstances, the evidence was clear that the Company was likely to become unable to pay its debts.

Issue 2: whether a JMO was likely to achieve one or more of the statutory purposes of judicial management

35 I highlight that there was no allegation that the Company's financial predicament was on account of the conduct of Point72 or any other creditor. Likewise, there was no evidence that the Founders were mismanaging the Company, or otherwise putting its business in jeopardy. There was also no evidence of money being improperly or imprudently spent. On the contrary, the Founders had built the Company and made it a viable business. The Company and the Founders pointed out that the high cash burn rate was typical in start-ups[36] and that the parties did anticipate, even as late as September 2022, that further funding would be required.[37] Nonetheless, the fact remained that the Company had missed its milestones with its investors, was rapidly running out of cash and was facing imminent liquidation – the Company expressly recognised this last fact.[38] Significantly, all the parties accepted that the Company had a viable business. It was also in all the parties' interests that a viable plan was pursued to keep the Company alive. The key question was whether a JMO was the best way forward.

36 The Company and the Founders stressed that it was Point72's burden to show that placing the Company in judicial management had a real prospect of achieving one or more of the purposes of judicial management as set out in

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36 Respondent's Written Submissions at para 34; Non-parties' Written Submissions at para 7.

37 Affidavit of Peter Selig Klein dated 24 February 2023 at para 7; Non-parties' Written Submissions at paras 9–11.

38 Respondent's Written Submissions at para 85.

s 89(1) IRDA.[39] They relied on the decision in *Baltic House Development Ltd v Cheung and another* [2018] EWHC 1525 ("***Baltic***"), where the court held that there is no jurisdiction to make an administration order if a real prospect cannot be shown that the statutory purpose will be achieved (*Baltic* at [27]–[28]). A "real prospect" does not have to be established on the balance of probabilities (*Baltic* at [36]). Point72 does not have to show it is more likely than not that such a result will be achieved, but there must be some plan of substance and reality (*Baltic* at [36]). I make two observations:

(a) Whether the "real prospect" test is met undoubtedly turns on the facts and circumstances of the case. In *Baltic*, the court found that the two letters of interest by potential investors produced by the applicant were neither cogent nor compelling – no details had been given of funding or resources, and no commitment had been made to move the matter forward. But that was a case where two creditors had already petitioned for the winding up of the applicant; and the court found that the benefits of administration over liquidation were marginal, and also that administration would be more expensive than winding up and therefore damaging to the creditors' interests. This case presented very different circumstances, as I will elaborate below.

(b) I should also consider the relative merits of the alternative solutions to enable the Company to survive as a going concern. In *Baltic*, the creditors had wanted to wind-up the applicant and would have been worse off if an administration order had been made. The present case was different. All the parties agreed that the Company's business is viable and wished to maintain the Company as a going concern.

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[39] Respondent's Written Submissions at paras 43 and 44; Non-parties' Written Submissions at paras 34–37.

37 I was urged by the Company to consider the recent decision of *Yap Sze Kam v Yang Kee Logistics Pte Ltd* ("***Yap***") [2023] SGHC 43. The Company and the Founders submitted that *Yap* was authority for the proposition that where a purported purpose of a JMO was only "a possible, speculative, hoped for [*sic*] outcome, the likelihood of which … is low", then there was no real prospect of the purposes of judicial management being met.[40] Relying on that, the Company argued that Point72's "[m]ere bare and unsubstantiated assertions that the [JMs] will enhance the possibility of the [C]ompany's survival as a going concern will not suffice as they do not rise above" that threshold.[41] At the hearing, the Company's counsel further submitted that *Yap* stood for the proposition that the fact that the alternative to a JMO is liquidation should not by itself lead to the grant of a JMO.

38 I did not find *Yap* helpful to the Company. In *Yap*, the applicant applied for judicial management in the hope that judicial managers would secure a better and more "holistic" deal for the disposal of assets, compared to a deal entered into by the receiver and manager (appointed seven months prior to the application) for the sale of certain charged shares (*Yap* at [15]–[17]). The Court found that the receiver had acted professionally in securing the deal and that the sale would benefit the creditors generally; in contrast, the applicant presented no evidence that the appointment of the judicial managers would achieve a better outcome (*Yap* at [33]). The court there hence decided that there was no real prospect that the statutory purposes of judicial management would be achieved if a judicial management order was made (*Yap* at [37]).

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40 Respondent's Written Submissions at para 43; Non-parties' Written Submissions at para 36.

41 Respondent's Written Submissions at para 43.

39 On the facts before me, the avoidance of liquidation via a JMO was not a "possible, speculative, hoped for [*sic*] outcome" (*Yap* at [28]). More importantly, here, liquidation was almost a certainty if a JMO was not made and that was a result none of the parties wanted nor argued was a better alternative to a JMO. Further, *Yap* supports the factors I have considered, namely, the relative merits of the proposals put before me and the importance of the views of the creditors.

Viable alternatives to a JMO

40 Point72's case for judicial management was not an overwhelming one. As the Company pointed out (at [25(c)] above), there had been no offers, or even expressions of interests, from prospective investors, or even a financing plan which the proposed judicial managers would be able to consider and implement. To improve the prospects of the application, Point72 and Nyca offered the Rescue Package, which had been premised on the JMs being appointed. But I agree with the Company that the Rescue Package offered very little, if anything at all:

(a) the first step was an initial loan of US$400,000, less what cash the Company had on the day of appointment of the JMs. The Company confirmed that it had about US$800,000, hence, no initial loan would be extended; and

(b) the second step was a further loan of US$400,000 which would be furnished by Point72, Nyca or any other participating creditors a month after the JMO was made. But this was not unconditional; instead, it would depend on the outcome of a review of the Company by the JMs and the JMs' proposed plan of action.

41 However, even though the Company was facing imminent liquidation, the Company and its Founders offered no solution at all. While the Company referred to expressions of interests by various third parties to invest in the Company,[42] nothing firm or substantial had been disclosed (see above at [33]). The Company would have known for some time, and at least as soon as the JM Application was filed, that it was crucial that it secured funding; while it claims to have made attempts, it has not gotten anywhere with its efforts. As stated above, the Founders' counsel candidly accepted that the Company was likely headed towards liquidation.[43] Both the Company and the Founders argued that a solution could be found outside judicial management, but the primary (and in fact, only) solution they pointed to was a buy-out. I had no jurisdiction or power to facilitate such a solution. This was for the parties to agree on, and they (or some of them) were not prepared to do so. The Company and Founders argued that if the JM Application was dismissed, Point72 and the supporting creditors would have no option but to settle or find a solution acceptable to all the parties, given their desire for the Company to continue its business. I rejected that submission. The only issue before me was whether the appointment of judicial managers would advance the objectives set out in the IRDA – it was not my role to advance or improve the negotiating position of any of the parties. In any event, the appointment of JMs did not preclude the parties from agreeing an amicable solution. For the same reasons, I rejected the Company's argument that a JMO should not be made because mediation was an alternative solution available to the parties.

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42 Affidavit of Peter Selig Klein dated 24 February 2023 at para 47.

43 Non-parties' Written Submissions at para 17.

42 In short, there was no better, or indeed viable, alternative to judicial management. I now turn to consider the other arguments made by the parties on the suitability of a JMO.

Support of creditors

43 I recognised that the JM Application had the support of an overwhelming majority of the Company's creditors – see [23] above. Point72 and the supporting creditors no longer had any confidence in the Founders and were not prepared to support the Company so long as the Founders remained in charge.[44] Point72 and the supporting creditors had invested vast sums of money in the Company. Indeed, the Company had only been able to operate and grow in the last year or so on account of the funding provided by them. Further, Point72 and the supporting creditors had significant resources and had expressed their commitment to working with the JMs to keep the Company alive.

Detrimental effect of a JMO

44 For the Company to remain viable, it must be able to continue its business and keep its customers. The Company highlighted that the appointment of JMs may have potentially fatal consequences for the Company, since it would entitle its customers to terminate their contracts with the Company, thereby placing it in greater financial peril. Point72, however, correctly pointed out that the Company's insolvency, which was impending, would cause the same result.[45] Further, the Company would have better prospects keeping its customers if it could stabilize its operations and offer a viable plan to continue

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44 Affidavit of Peter Vincent Casella dated 13 February 2023 at para 13.

45 Applicant's Written Submissions at para 39(e).

servicing their contracts. A JMO would give the Company a better opportunity to deal constructively with its customers and offer some assurance that it would honour its commitments. I stress again that there was no viable alternative.

45 The Company also submitted that potential investors would likely be wary of investing in or financing the Company if it was under a JMO. I was unpersuaded by this argument because, given the cash flow position of the Company and the difficult relationship between the Founders and the current investors and within the Board, potential and current investors would have reason to be wary even without a JMO being made. I also rejected the Company's argument that a JMO is detrimental to the Company since it would incur additional costs – the parties agreed that the Company had a viable business, accordingly, costs incurred for a JMO, which presented the only plausible way to preserve the Company, should not be a barrier to the JM Application.

Relevant expertise

46 The Company submitted that the JMs will not be able to run the Company better than the Founders. I accepted that the JMs will not be as familiar with the Company as the Founders. Nonetheless, while I agreed that the Founders played important roles in the Company, the fact remained that it had been under their stewardship that the Company landed in such dire straits.

47 I also agreed with Point72's submission at the hearing that there was some prospect that the JMs would bring stability to the Company and access to funding through discussions with investors. This would be helpful to the Company, especially considering evidence that the Company had suffered

resignations of key personnel in the months leading up to the JM Application.[46] The stability that a JMO might afford was likely to be of benefit to the Company. Further, if the Founders genuinely want to keep the Company alive and sustain its business, they can co-operate with, and assist, the JMs.

48 I note in passing that the Company offered somewhat contradictory arguments to its own case that the Founders' expertise was invaluable and irreplaceable. The Company argued, in support of its case concerning Point72's alleged collateral purpose (see below), that Point72 and/or Nyca wanted to set up a competing company and pull away customers and employees. This suggested that the Founders were not as intrinsic to the business of the Company as the Company argued.

A dispute between shareholders

49 I also did not accept the Company and the Founders' submission that the JM Application was wrongly commenced as a solution to a shareholder's dispute. I make two comments: the Company's reliance on the fact that the JM Application was commenced without any of the non-shareholder investors was misplaced, as there is no obligation for non-shareholder creditors to join a judicial management application to give it legitimacy; what is necessary is that an applicant has standing to do so. Further, the mere fact that Point72 was a shareholder of the Company did not mean that it could not properly bring the JM Application as a creditor or contingent creditor of the Company. In addition, the mere fact that the failure of the Options preceded the JM Application did not make this a "shareholder dispute". The parties, as shareholders, were entitled to act in their own interests and reject any rescue option which they did

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46 Affidavit of Phillip Ashley Klein dated 9 March 2023 at paras 10–11, Tab 4 and Tab 5.

not find suitable. But where that left the Company with no viable solution other than liquidation, the creditors of the Company were entitled to bring the JM Application to protect their investment in the Company.

50 Having considered all the above, it was evident that a JMO offers a real prospect of achieving the survival of the Company as a going concern. The JMs are likely to bring stability to the Company and thereby be in a better position in negotiating with potential investors to obtain funding - the Company has thus far tried and failed to secure new funding[47] (see [41] above). The JMs will also be in a better position to deal with the Company's customers and maintain their service contracts. Furthermore, the JMs will have the support of at least the substantial majority of the Company's creditors.[48] In contrast, significant creditors such as Point72 and Nyca are no longer prepared to work with existing management of the Company, *ie*, the Founders.[49]

Issue 3: whether there was any other reason to dismiss the JM Application

51 The Company and the Founders argued that the JM Application had been filed for a collateral purpose, namely, to oust the Founders from the Company. They relied on an earlier attempt by Point72 and/or the supporting creditors to appoint Mr Schulz as CEO on the condition that the Founders cede control of the Board, and the fact that the promise of funding had been withdrawn when the Founders refused.[50] The Founders also highlighted that Point72 and Nyca threatened liquidation if their financing option was not

47 Applicant's Written Submissions at para 39.

48 Applicant's Written Submissions at para 47.

49 Applicant's Written Submissions at paras 40 and 41.

50 Affidavit of Peter Selig Klein dated 24 February 2023 at paras 5 and 8.

accepted and that the only option acceptable to them required the Founders' removal.[51]

52 I did not find a collateral purpose.

53 First, the evidence showed a breakdown of the working relationship between the Founders, on one side, and Point72 and Nyca's representatives on the Board, on the other. Point72 and Nyca were substantial creditors and were entitled to protect their interests, and the Founders were not entitled to their unconditional support regardless of the circumstances. Further, given the circumstances, there was little else one would expect Point72 and Nyca to do. As stated above, the Founders and the Company had not offered any solution to the Company's cash-flow problems and impending insolvency. They cannot have expected the creditors to sit back and do nothing.

54 Second, the appointment of JMs would place the management of the Company in the hands of officers who are accountable to the court and are bound to discharge their duties fairly and properly to fulfil the purposes under the IRDA. As Point72 pointed out, the JM Application, if granted, would result in Point72 ceding control over the Company.[52] There was no evidence that Point72 and the creditors would seize control of the Company through the JMs or that the JMs would act at their behest in disregard of their duties. If that should happen, there are legal avenues open to the Founders.

55 The Founders pointed to emails exchanged between various individuals, including one Mr Christopher Growney ("**Mr Growney**"), a representative or

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51 Non-parties' Written Submissions at para 73.

52 Applicant's Written Submissions at para 28.

nominee of Nyca[53] who had been appointed by the Company to advise it. At the time of the hearing, Mr Growney was no longer with Company. The emails evidenced these individuals discussing or making plans for the transfer of key technologies and customers of the Company to a new entity.[54] Point72 denied any involvement in these discussions and pointed out that they involved employees of the Company and not its own officers or agents. Nonetheless, Mr Growney's involvement raised some concerns given his association with Nyca. However, the fact remained that the JMs are independent and would be expected to discharge their duties in the best interests of the Company. Further, if Point72's plan was to seize the key assets of the Company, it would not make any sense to make the JM Application.

56 Finally, the Founders argued that Point72 and Nyca had engineered a situation to place the Company in judicial management.[55] In support of this, they explained that both Point72 and Nyca had always been aware of the Company's financial situation since they had nominee directors on the Board. I did not accept this argument. Point72's knowledge of the Company's cash burn did not amount to their "engineer[ing]" a situation where a JMO might be appropriate. It is not the Company's case that Point72, Nyca or any other creditor had done anything to prejudice its business or attempts to secure financing, or that the Company's current financial predicament was otherwise attributable to their conduct.

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53 Affidavit of Peter Selig Klein dated 24 February 2023 at para 8.

54 Affidavit of Phillip Ashley Klein dated 9 March 2023 at p 16.

55 Non-parties' Written Submissions paras 66–69.

Conclusion

57 The making of the JMO was the only viable solution to try and save what all the parties agreed was a viable and valuable business. I therefore allowed the JM Application.

Hri Kumar Nair
Judge of the High Court

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