

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

[2023] SGHC 250

Originating Application No 592 of 2023

Between

- (1) Majestica Enterprises Limited
- (2) The Challenger Trade Finance
Segregated Portfolio of the
South Africa Alpha SPC

... Applicants

And

Kams Singapore Pte Ltd (in
compulsory liquidation)

... Respondent

GROUND'S OF DECISION

[Insolvency Law — Winding up — Funding by creditors]

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Majestica Enterprises Ltd and another
v
Kams Singapore Pte Ltd (in compulsory liquidation)

[2023] SGHC 250

General Division of the High Court — Originating Application No 592 of 2023

Chua Lee Ming J
2 August 2023

7 September 2023

Chua Lee Ming J:

Introduction

1 The respondent is a company in compulsory liquidation (the “Company”). The applicants (who are creditors of the Company) made this application for an order pursuant to s 204(3) of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) (“IRDA”) that they be given an advantage over other creditors with respect to the distribution of assets/expenses recovered or assets protected or preserved as a result of funding provided by them.

2 I granted the application for the reasons set out below.

Facts

3 The Company was wound up in 2020 and a liquidator was appointed by the court (the “Liquidator”). The applicants were creditors of the Company and they filed their proofs of debt accordingly.

4 The Liquidator took steps to investigate the Company’s affairs but the Company and/or the liquidation estate ran out of funds for the Liquidator to continue his work.

5 At a creditors’ meeting, the Liquidator informed the Company’s creditors that he was unable to continue investigations into the Company’s affairs and pursue recovery of the Company’s assets due to a lack of funds. At the same meeting, a Committee of Inspection was formed.

6 The Liquidator and the applicants subsequently entered into a funding agreement (the “Funding Agreement”) for the purposes of pursuing recovery of the Company’s assets. The essential terms of the Funding Agreement were as follows:

(a) The applicants would provide funding for the Liquidator’s investigations into the Company’s accounts and prior transactions (“Phase 1”). Phase 1 would not involve any recovery of the Company’s assets.

(b) Upon completion of Phase 1, the Liquidator would inform the applicants if he wishes to proceed with any claim for which funding would be required. The applicants had the right but not the obligation to fund any of the claims.

(c) The Liquidator would have full control of any legal proceedings brought by the Company.

(d) Any moneys recovered from proceedings funded by the applicants (the “Recovered Assets”) would be applied, on a quarterly basis, as follows:

(i) The Recovered Assets would first be used to pay the applicants the amounts funded by them.

(ii) Thereafter, 75% of the Recovered Assets would go towards payment of the amounts adjudicated by the Liquidator to be owing to the applicants under their respective proofs of debt. The remaining 25% would go towards payment of the amounts adjudicated to be owing to the other creditors under their respective proofs of debt.

(iii) The Liquidator retained the discretion to pay the applicants less than 75% of the Recovered Assets in any quarter (but no less than 70%) where he reasonably believed that more funds were required for the purpose of the liquidation of the Company. When such concerns had been addressed and the Company had sufficient funds, the Liquidator would pay the applicants the amount withheld in addition to 75% of the Recovered Assets that would be payable in the next applicable quarter.

7 The Company’s other creditors were given the opportunity to provide the Liquidator with funding but declined to do so. They also did not object to the Funding Agreement.

The law

8 The application was made pursuant to s 204(3) of the IRDA. Section 204 of the IRDA states as follows:

Funding by creditors

204.—(1) Where in any winding up —

- (a) assets have been recovered under an indemnity for costs of litigation given by certain creditors;
- (b) assets have been protected or preserved by the payment of moneys or the giving of an indemnity by certain creditors; or
- (c) expenses in relation to which a creditor has indemnified a liquidator have been recovered,

the Court may make such order as it thinks just with respect to the distribution of those assets and the amount of those expenses so recovered, with a view to giving those creditors an advantage over others in consideration of the risks run by those creditors in giving those indemnities or paying those moneys.

(2) Any creditor may apply to the Court for an order under subsection (3) prior to —

- (a) giving an indemnity for costs of litigation for recovering any assets;
- (b) paying any moneys or giving an indemnity to protect or preserve any assets; or
- (c) indemnifying a liquidator in relation to the liquidator's expenses.

(3) On an application by a creditor under subsection (2), the Court may, for the purpose of giving the creditor an advantage over others in consideration of the risks to be run by that creditor in giving the indemnity or payment for the purposes mentioned in that subsection, grant an order with respect to the distribution of —

- (a) the assets mentioned in subsection (2)(a) that may be successfully recovered;
- (b) the assets mentioned in subsection (2)(b) that may be successfully protected or preserved; or

- (c) the amount of expenses mentioned in subsection (2)(c) that may be successfully recovered.

9 Section 204(1) of the IRDA is similar to s 328(10) of the Companies Act (Cap 50, 2006 Rev Ed), which has since been repealed by the IRDA. However, ss 204(2) and 204(3) of the IRDA are new. As the High Court noted in *Song Jianbo v Sunmax Global Capital Fund 1 Pte Ltd (in compulsory liquidation)* [2022] SGHC 312 (“*Song Jianbo*”) at [12]:

As can be observed, the main difference between s 204 of the IRDA and s 328(1) of the Companies Act is that the latter only provided for *retrospective* orders, in the sense that the court may make a relevant order only *after* the relevant assets had been recovered, protected, or preserved, or after the relevant expenses had been recovered. In contrast, s 204(2) of the IRDA now allows the court to make, in addition to retrospective orders, *prospective* orders prior to the giving of an indemnity by a creditor. This means that a court can make a relevant order *before* the relevant assets have been recovered, protected, or preserved, or before the relevant expenses have been recovered.
...

[emphasis in original]

Factors to be considered under s 204(3) of the IRDA

10 In *Song Jianbo*, the court set out the following general non-exhaustive list of factors to be considered in the grant of a prospective order under s 204(3) of the IRDA (at [23]):

- (a) the complexity and necessity of the proceedings in respect of which the funding or indemnity is given;
- (b) the extent of the funding or indemnity to be provided, and the level of risk to be undertaken and the costs to be borne by the funding creditor;

- (c) the failure of other creditors to provide funding or indemnity and whether the other creditors were given the opportunity to do so;
- (d) the emergence of other creditors between the making of the order and the date of a distribution under the order to the funding creditor;
- (e) the public interest in encouraging creditors to provide funding or indemnity to enable assets to be recovered; and
- (f) the presence or absence of any objections from the other creditors, the liquidator, or the Official Assignee.

11 With respect to factor (a), it is not clear that much can be said about the necessity of the intended proceedings. After all, the reason why the funding or indemnity is required in the first place is that the proceedings are necessary to recover moneys or assets due to the Company. As for the complexity of the proceedings, its relevance is that it is a good indication of the level of risk assumed by the funding creditor (which is dealt with under factor (b)). In general, the more complex the proceedings, the higher the risk.

12 Factor (b), *ie*, the extent of the funding or indemnity and the level of risk, is relevant to the question of the degree or extent of the advantage that the court should give to the funding creditor. This is clear from s 204(3) of the IRDA which refers to “giving the creditor an advantage over others *in consideration of the risks* to be run by that creditor” [emphasis added].

13 The court in *Song Jianbo* did not elaborate on factor (d) above, *ie*, the emergence of other creditors after the making of the order. It is not clear how this factor should be applied since it refers to matters arising *after* the order has

been made. In my view, this should not be a factor to be considered when the court is making a prospective order under s 204(3) of the IRDA.

14 As for factor (e), *ie*, the public interest in encouraging creditors to provide funding or indemnity, it seems to me that this merely explains the rationale behind s 204(3) of the IRDA.

15 In *Song Jianbo*, the court also decided (at [61]) that notwithstanding the order granted under s 204(3) of the IRDA, other creditors who may be prejudiced by the order should be given an opportunity to bring an appropriate challenge. However, in the present case, I agreed with the applicants that an order under s 204(3) of the IRDA should not be subject to such a term.

16 Section 204(2) of the IRDA was enacted to permit prospective orders because it was recognised that otherwise, at the point of providing the funds, the funding creditors would have no assurance that the court would make an order giving them an advantage over other creditors (see *Report of the Insolvency Law Review Committee: Final Report* (Chair: Lee Eng Beng SC) (2013) at p 74; *Singapore Parliamentary Debates, Official Report* (1 October 2018) vol 94 (Mr Edwin Tong Chun Fai, Senior Minister of State for Law)). Creditors would be less willing to provide the necessary funding or indemnity without any such assurance and, as the court recognised in *Song Jianbo* (at [16]), it is in the public interest to encourage creditors to provide funding or indemnity to enable assets to be recovered. Making an order under s 204(3) of the IRDA subject to the possibility of subsequent challenges by other creditors would be inconsistent with the purpose of the prospective order and unfair to the funding creditor.

17 Another factor to be considered is whether the proposed funding or indemnity requires the liquidator to cede control over the intended proceedings to the funding creditor: see, also, *Song Jianbo* at [60(a)]. The liquidator should retain control over the intended proceedings. Such control addresses the public policy concerns about the administration of justice: see *Lavrentiadis, Lavrentios v Dextra Partners Pte Ltd (in liquidation) and another matter* [2023] SGHC 131 (“*Lavrentiadis*”) at [30]. It is not necessary for the liquidator to have complete control of every single aspect of the legal proceedings; it would be reasonable for the funding creditor’s consent to be required with respect to the choice of solicitors, or any settlement or discontinuance of the proceedings: *Lavrentiadis* at [30].

18 In summary, in my view, the non-exhaustive factors to be considered in the grant of a prospective order under s 204(3) of the IRDA are as follows:

- (a) Whether the advantage to be given to the funding creditor is reasonable, taking into account the funding or indemnity to be provided and the level of risk to be undertaken. The complexity of the intended proceedings is a relevant factor in assessing the level of risk to be undertaken.
- (b) Whether the other creditors were given the opportunity to provide the funding or indemnity.
- (c) Whether there are any objections from the other creditors, the liquidator or the Official Assignee. It is unlikely though that there would be objections from the liquidator since any proposed funding or indemnity would have been negotiated and agreed upon with the liquidator first.

- (d) Whether the liquidator retains control over the intended proceedings.

My decision on the application

19 I granted the application and made an order under s 204(3) of the IRDA giving the applicants an advantage over other creditors on the terms set out in the Funding Agreement for the following reasons:

- (a) The advantage to be given to the applicants (see [6] above) was reasonable given the risk that the applicants would be undertaking. Clearly, there was no certainty of recovery.
- (b) The other creditors were given the opportunity to provide funding or indemnity but had declined to do so.
- (c) There were no objections from the other creditors, the Liquidator or the Official Assignee.
- (d) The Liquidator would retain full control of any legal proceedings brought by the Company.

Chua Lee Ming
Judge of the High Court

Baldev Singh Bhinder and Vaybhav Kumar Sharma s/o Thakor
Prasad Sharma (BlackStone & Gold LLC) for the first applicant;
Jamal Siddique Peer and Suresh Viswanath (Shook Lin & Bok LLP)
for the second applicant;
Muhammad Imran Bin Abdul Rahim and Kuek Zihui (Eldan Law
LLP) for the respondent.
